

# ESSAY

## WHAT'S WRONG WITH POLICE UNIONS?

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*In an era of declining labor power, police unions stand as a success story for worker organizing—they exert political clout and negotiate favorable terms for their members. Yet, despite support for unionization on the political left, police unions have become public enemy number one for commentators concerned about race and police violence. Much criticism of police unions focuses on their obstructionism and their prioritization of members' interests over the interests of the communities they police. These critiques are compelling. But, taken seriously, they often sound like critiques of unions in general, not just police unions. If public-sector unionism remains a social good, wholeheartedly embracing these critiques seems like a risky proposition.*

*This Essay examines the strange case of police unions and asks how they are (and are not) representative of U.S. unionism. More pointedly, this Essay asks what critiques of police unions should mean for policing reform and the future of public-sector unionism. How are police unions different from other public-sector unions, and how might critiques of police unions apply to other public-sector unions?*

*Ultimately, I argue that the challenge in articulating a theory of what makes police unions different highlights both the problem with police and the problem with how scholars think about unions. If police unions are objectionable because of their views and police conduct, this concern speaks to a problem with police—full stop. The problems with unions are only issues by extension. If the unions are objectionable because they*

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*prioritize their members' interests, the critiques are properly understood as undercutting public-sector unions generally.*

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## INTRODUCTION

Union power in the United States has hit a nadir. Less than eleven percent of the labor force is unionized—a lower percentage than at any point since World War II.<sup>1</sup> Twenty-eight states (including six since 2000) have passed “right to work” laws that restrict the ability of unions to collect dues from workers and reach exclusive agreements with employers.<sup>2</sup> Recent years have seen union opponents aggressively (and often successfully) litigate claims that would make it much more difficult for unions to organize

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1. See, e.g., Jake Rosenfeld, *What Unions No Longer Do* 1 (2014); Kate Andrias, *The New Labor Law*, 126 *Yale L.J.* 2, 5 (2016) [hereinafter Andrias, *The New Labor Law*] (“American labor unions have collapsed. While they once bargained for more than a third of American workers, unions now represent only about a tenth of the labor market and even less of the private sector.”); Press Release, Bureau of Labor Statistics, *Union Members—2019* (Jan. 22, 2020), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/TM8P-86WU>].

2. See *Right to Work States Timeline*, Nat’l Right to Work Comm., <http://www.nrtw.org/right-to-work-states> [<https://perma.cc/CR5B-XVG2>] (last visited Feb. 7, 2020).

workers and raise money.<sup>3</sup> At the same time, “gig economy” companies, globalization, and the forces of neoliberalism have undermined worker solidarity and the logic of labor law.<sup>4</sup> Despite significant donations to Democratic political campaigns, unions have had limited success in convincing politicians on either side of the aisle to prioritize positions or push for legislation that specifically benefits organized labor and its members.<sup>5</sup>

But not all unions are similarly situated, and not all have floundered. As private-sector unions have struggled, some public-sector unions remain powerful political forces, extracting concessions from government employers and steering policies to benefit their members.<sup>6</sup> Enter an incongruous manifestation of contemporary labor’s power: the police union.

In many ways, police unions flout both traditional assumptions about organized labor and contemporary framings of the new labor movement.<sup>7</sup> Where unions often swing left, police unions swing right.<sup>8</sup> Where much

3. See, e.g., *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018); *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083, 1083 (2016) (mem.) (per curiam); *Harris v. Quinn*, 573 U.S. 616, 655–56 (2014); *Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 83 (2013) (mem.) (per curiam); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 321–23 (2012).

4. See, e.g., David Graeber, *The Globalization Movement: Some Points of Clarification*, in *The Anthropology of Development and Globalization: From Classical Political Economy to Contemporary Neoliberalism* 169, 169–70 (Marc Edelman & Angelique Haugerud eds., 2005); Raphael Kaplinsky, *Globalization, Poverty and Inequality: Between a Rock and a Hard Place* 163–232 (2005); Roberto Mangabeira Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* 193–98 (2007); V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, and Labor Advocacy in San Francisco’s Taxi and Uber Economies*, 38 *Berkeley J. Emp. & Lab. L.* 73, 76 (2017); Jennifer Gordon, *Regulating the Human Supply Chain*, 102 *Iowa L. Rev.* 445, 454–55 (2017); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 *Harv. L. & Pol’y Rev.* 479, 480–81 (2016); Noah D. Zatz, *Does Work Law Have a Future if the Labor Market Does Not?*, 91 *Chi.-Kent L. Rev.* 1081, 1111–14 (2016).

5. See, e.g., William R. Corbett, “The More Things Change, . . .”: Reflections on the Stasis of Labor Law in the United States, 56 *Vill. L. Rev.* 227, 227–28 (2011) (recounting the failure of Democratic administrations to advance the legislative interests of organized labor); Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 *Hastings L.J.* 695, 698 (2012) (“[L]abor law reform has been a failed promise under the previous two Democratic administrations, and likely will be under the current one as well.”).

6. See Andrias, *The New Labor Law*, supra note 1, at 5 n.2, 21; Jon D. Michaels, *Privatization’s Progeny*, 101 *Geo. L.J.* 1023, 1045 (2013) (“Government employees have fared far better than their counterparts in the private sector, where effective unionization has long been in a state of free fall. But . . . [l]abor scholars urge observers not to be misled by the comparatively rosy picture that stable public-sector union membership seems to paint.”).

7. But see Richard B. Freeman & Casey Ichniowski, *The Public Sector Look of American Unionism*, in *When Public Sector Workers Unionize* 1, 1 (Richard B. Freeman & Casey Ichniowski eds., 1988) (“Unions of fire fighters and police were well-established as exemplars of the craft-type organizations that once dominated American labor.”).

8. See infra section II.B.

modern labor organizing focuses on low-wage workers, police unions protect higher-wage professionals.<sup>9</sup> Where unionism and antiracism sometimes have travelled hand-in-hand,<sup>10</sup> police unions still represent predominantly white workers and frequently take public stands that are hostile to racial justice or that express outright racism.<sup>11</sup> Indeed, after decades of disinterest, scholars recently have begun to study police unions because of their role in hampering criminal justice reform, shielding officers accused of violence against people of color, and defending racially disparate policing practices.<sup>12</sup> In a moment when labor law scholarship tends to treat the interests of unions and the political left as inextricably linked,<sup>13</sup> police unions provide a powerful counterexample. Or do they?

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9. See *infra* section III.D.

10. See Eric Schickler, *Racial Realignment: The Transformation of American Liberalism, 1932–1965*, at 1–13 (2016) (“The CIO and its allies fused ‘class’ and ‘race’ in an alignment that was forged amid the vast social and ideological turmoil of the 1930s and early 1940s.”); *infra* section III.D. But see Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* 1–12 (2015) (introducing the collapse of the alliance between civil rights groups and labor unions in the San Francisco Bay Area in the 1960s).

11. See Paul Butler, *The Fraternal Order of Police Must Go*, *Nation* (Oct. 11, 2017), <https://www.thenation.com/article/the-fraternal-order-of-police-must-go> [<https://perma.cc/SRD9-6GB4>] [hereinafter Butler, *The Fraternal Order of Police*] (“The FOP’s national leadership consists of seven white men . . . [This] is striking in an organization that claims that 30 percent of its members are officers of color. And many local chapters appear to be run by white cops—even in cities with police forces that are predominantly of color.”).

12. See, e.g., Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 *Geo. Wash. L. Rev.* 712, 713–22 (2017); Rachel A. Harmon, *The Problem of Policing*, 110 *Mich. L. Rev.* 761, 813–15 (2012) [hereinafter Harmon, *Problem of Policing*]; Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 *U. Chi. Legal Forum* 213, 238–39; Kate Levine, *Police Suspects*, 116 *Colum. L. Rev.* 1197, 1222 (2016) [hereinafter Levine, *Police Suspects*]; Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 *St. Louis U. Pub. L. Rev.* 47, 54–63 (2015); Stephen Rushin, *Police Disciplinary Appeals*, 167 *U. Pa. L. Rev.* 545, 557–61 (2019); Stephen Rushin, *Police Union Contracts*, 66 *Duke L.J.* 1191, 1222–39 (2017) [hereinafter Rushin, *Police Union Contracts*]; Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 *Minn. L. Rev.* 1343, 1404–05 (2015) [hereinafter Rushin, *Structural Reform Litigation*]; Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. Rev.* 885, 938–47 (2014); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 *Minn. L. Rev.* 2179, 2206 (2014) [hereinafter Stoughton, *Incidental Regulation of Policing*]; Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining and Police Misconduct: Evidence from Florida* 2–3 (Univ. of Chi. Coase-Sandor Institute for Law & Econ., Research Paper No. 831, 2018), <https://ssrn.com/abstract=3095217> [<https://perma.cc/VTN3-6JVC>]; Maybell Romero, *Prosecutors and Police: An Unholy Union* 7–16 (Sept. 7, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3447669> [<https://perma.cc/4SBH-XVPC>].

13. See, e.g., Andrias, *The New Labor Law*, *supra* note 1, at 32–37; Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *Yale L.J.* 148, 168–71 (2013) [hereinafter Sachs, *Unbundled Union*]. But see generally Thaddeus Russell, *Out of the Jungle: Jimmy Hoffa and the Remaking of the American Working Class* (2003) [hereinafter Russell, *Out of the Jungle*] (critiquing left labor historians and arguing that the labor movement should be understood in terms of worker self-interest).

This Essay examines the strange case of police unions and asks how they are (and are not) representative of U.S. unionism. More pointedly, this Essay asks what increasingly common critiques of police unions should mean for policing reform *and* the future of public-sector unionism. In an effort to construct a more nuanced picture of police unions' functions, this Essay situates the role of police unions within two disparate scholarly debates: (1) the literature on policing reform and (2) the literature on public-sector unions. How are police unions different from other public-sector unions, and how might critiques and defenses of public-sector unions apply to police unions? Can scholars of policing avoid questions that plague (or define) the literature on the rights and social power of workers? Can labor law scholars continue to speak of "labor" as a monolith without grappling with the problematic aspects of police unions? And, perhaps more pointedly, how much does scholarly and political discomfort with police unions reflect a deeper discomfort with unions that *are* powerful and with collective action by workers other than the most marginalized?

In tackling organized labor's place in law enforcement, this Essay engages with an emerging literature that takes police unions seriously as a significant component of the modern criminal system.<sup>14</sup> For decades, criminal procedure scholars have focused on judicial opinions as defining and shaping police practices.<sup>15</sup> They framed the law of policing in terms of constitutional decisions rendered by appellate judges.<sup>16</sup> Formal and informal rules crafted outside of the courtroom by municipalities, police unions, and police departments had little place in the scholarly discourse surrounding and critiquing police misconduct.<sup>17</sup> But, spurred by the rise of the

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14. See *supra* note 12.

15. See, e.g., Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 *Stan. L. Rev.* 1133, 1134–36 (1982); Yale Kamisar, *Looking Back on the "Stone Age" of Criminal Procedure*, 13 *Ohio St. J. Crim. L.* 471, 472 (2016); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 *Vand. L. Rev.* 1467, 1488–95 (2001).

16. See, e.g., Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *Geo. L.J.* 185, 189–95 (1983); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153, 1158 (1998) (noting the Supreme Court's strategy not to confront race directly but instead confront it with "general constitutional standards that d[o] not explicitly address race"); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 3 (1997) (finding that the scholarly literature on the rules of criminal procedure focuses largely on constitutional debates and judicial glosses, providing only a limited picture of a larger system that doesn't play by the rules). But see Rachel Harmon, *Reconsidering Criminal Procedure: Teaching the Law of the Police*, 60 *St. Louis U. L.J.* 391, 392–96 (2016) (emphasizing how much of the regulation of police comes from nonconstitutional sources, such as state legislatures, labor and employment law, common law doctrines of entrapment, and local ordinances).

17. But see Stephen C. Halpern, *Police Employee Organizations and Accountability Procedures in Three Cities: Some Reflections on Police Policy-Making*, 8 *Law & Soc'y Rev.* 561, 561–77 (1973) ("Through litigation and the threat of litigation, such civil liberties as the right to criticize department policy or superiors, to join unorthodox organizations and to participate in political affairs, are being developed."); David Alan Sklansky, *Police and Democracy*, 103 *Mich. L. Rev.* 1699, 1752–53 (2005) (describing the limited discussion

Movement for Black Lives<sup>18</sup> and greater public access to police union contracts,<sup>19</sup> police unions and their collective bargaining agreements (CBAs) are becoming a bigger part of the conversation.<sup>20</sup>

Although commentators focused on police unions may have different approaches and political commitments, they tend to articulate similar critiques. Much criticism of police unions focuses on their obstructionist nature and how they prioritize the interests of their members over the interests of the public at large and the communities they police.<sup>21</sup> These critiques are compelling—police unions shield officers and block outsider intervention in the regulation of policing. But, taken seriously, they sound like critiques of unions in general, *not just police unions*.<sup>22</sup> To the extent that public-sector unionism remains a social good because of concerns for economic inequality and worker power,<sup>23</sup> wholeheartedly embracing these critiques seems like a risky proposition. To the extent that the critiques of police unions ring true, are these critiques of unions, police, or local government decisionmaking? How we answer this question is not simply a matter of theoretical consistency;<sup>24</sup> it should be an essential component of determining what “police reform” should look like and also of understanding

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surrounding reform of police departments). See generally Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, 9 *Police Prac. & Res.* 95, 103 (2008) [hereinafter Walker, *The Neglect of Police Unions*] (“The related issues of the police subculture and of organizational cultures within police departments have not received sufficient scholarly attention.”).

18. See generally About Us, Movement for Black Lives, <https://policy.m4bl.org> [<https://perma.cc/J5ER-YDE7>] (last visited Mar. 9, 2020) (“In response to the sustained and increasingly visible violence against Black communities in the U.S. and globally, . . . more than 50 organizations . . . have come together with renewed energy and purpose to articulate a common vision and agenda.”).

19. See, e.g., Police Union Contract Project, Check the Police, <http://www.checkthepolice.org/#project> [<https://perma.cc/S693-R3KL>] (last visited Feb. 7, 2020); see also Stephen Cohen, *The Next Fight for Racial Justice: Police Union Reform*, *New Republic* (Dec. 2, 2015), <https://newrepublic.com/article/124811/next-fight-racial-justice-police-union-reform> [<https://perma.cc/76NN-B7TY>].

20. See *supra* note 12.

21. See *infra* Part I.

22. See *infra* Part II.

23. See, e.g., Richard Michael Fischl, “Running the Government Like A Business”: Wisconsin and the Assault on Workplace Democracy, 121 *Yale L.J. Online* 39, 67 (2011) [hereinafter Fischl, *Running the Government*] (“[S]o long as we live in a world in which corporate contributors enjoy a considerable capacity to shape the scope and direction of our politics, it seems . . . that the countervailing voice provided by public and private-sector unions on behalf of working people is a necessary and undeniable good.”); Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 *Hofstra Lab. & Emp. L.J.* 301, 308 (2011) (“[U]nions, including public-sector unions, are vital to a well-functioning democracy and therefore should be protected.”).

24. See Rick Hills, *How Enthusiastically Should the Left Support Laws and Doctrines Protecting Public Employee Unions?*, *PrawfsBlawg* (Sept. 2, 2018), <http://prawfsblawg.blogs.com/prawfsblawg/2018/09/how-enthusiastically-should-the-left-support-laws-and-doctrines-protecting-public-employee-unions.html#more> [<https://perma.cc/7YPP-EF3F>].

the role of police, unions, and the state in the criminal system and its attendant race- and class-based hierarchies.

In addressing these questions, my argument unfolds in four Parts. Part I describes the dominant critique of police unions. This Part focuses on the image of the union as unaccountable, obstructionist, and conservative.<sup>25</sup> Further, this Part situates these critiques within a broader set of concerns about police violence against people of color and other marginalized communities. Part II resituates police unions (and such critiques) within a different set of scholarly and political debates—those regarding the role of public-sector unions. In this Part, I argue that the critiques articulated in Part I resonate with the work of anti-union forces on the political right and among technocratic or neoliberal voices on the left. By way of analogy, in this Part I focus on teachers' unions and other controversial public-sector unions. Part III seeks to test this analogy by examining a range of ways in which we might distinguish police unions from other public-sector unions. This Part asks whether critiques of police unions could be accurate, while not sweeping in other public-sector unionism or implicitly supporting a broader anti-union agenda. Perhaps police unions are just different from other unions for some reason—for example, the ability to use force against civilians, the social dynamics and power imbalances that make even rank-and-file officers more like managers (*vis-à-vis* civilians), the amount of bargaining power they can exercise, or the political affiliations of the unions and their members.

Finally, Part IV steps back to identify the weaknesses in these distinctions. Ultimately, I argue that the challenge in articulating a theory of what makes police unions *different* highlights the problem with police, the problem with the way scholars think about unions, and the problems with the critiques of police unions. If what makes police unions objectionable is their views and/or the conduct of police, this speaks to a problem with police—full stop. (The problems with the unions are only issues by extension.) Adopting this understanding of the critiques would speak to a radical vision of police reform—the problem is not that police are unionized but that they have so much power by virtue of constitutional doctrine, their monopoly on state violence, and so forth. This is a critique that resonates with the growing literature on police abolition and is properly understood as a critique of police as an institution. If what makes the unions and their conduct objectionable is the commitment to their members' interests over those of the public at large, though, then the critiques are properly understood as critiques of unions, or of public-sector unions. Adopting this understanding would make these critiques resonate troublingly with calls for “civil service reform” and dismantling of the union as

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25. I use “conservative” here in the small “c” sense (i.e., the unions operate to protect existing structures and institutions while hampering change). That said, as discussed in section I.B, *infra*, critics also focus on the large “C” Conservatism of police unions (i.e., their affinity or support for Republican politicians and policies favored by the political right).

a social, political, and economic institution. At the very least, this approach might suggest that support for unions rests on an image of workers' collectives as relatively powerless.

## I. CRITIQUING POLICE UNIONS

Generally speaking, critiques of police unions reflect two focal points: the obstructionist concern and the ideological concern. Critics treat these unions as a problem either because (1) they operate as impediment to reform by opposing specific policies and shielding officer misconduct; or (2) they provide political voice to a range of conservative or reactionary politics that stand in opposition to some desired set of values (e.g., racial equality, egalitarian democratic movements, etc.). These two critiques occasionally overlap and can have much in common. But, to provide a clear articulation of the conventional account in the literature and in contemporary policy debates, this Part teases the two critiques apart and addresses them in turn.<sup>26</sup> Critically, though, both of these strands in the literature reflect a general view that police unions operate to the detriment of society and stand as guardians of the criminal system's abuses.<sup>27</sup>

### A. *The Obstructionist Critique*

The first general line of criticism leveled at police unions sounds in the language of obstruction.<sup>28</sup> Advocates and academics are concerned about police violence and the policing of marginalized communities, and police unions stand in the way of addressing those concerns.<sup>29</sup> This obstruction

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26. This Part (and this Essay, more generally) addresses both legal scholarship as well as more popular commentary that I take to be a part of the broader criminal justice reform conversation. For similar approaches, see, e.g., Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 406 (2018); Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 Alb. L. Rev. 559, 568 (2012) [hereinafter Levin, *Blue-Collar Crime*]; Mariana Valverde, "Miserology": A New Look at the History of Criminology, in *The New Criminal Justice Thinking* 325–27 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

27. While police unions have received scant attention from labor law academics, Marcia McCormick has briefly begun to trace the contours of police union critiques from a labor-centric standpoint. See McCormick, *supra* note 12, at 54–59. This Essay adopts a different frame, but McCormick's account is an important contribution to this otherwise thin literature on police unions as unions.

28. See, e.g., David Alan Sklansky, *Democracy and the Police* 175–83 (2008) [hereinafter Sklansky, *Democracy and the Police*] (examining the difficulties presented by a self-regulating police force and exploring the idea that "giving rank-and-file officers more say in how policing is carried out" may achieve results more consistent with the "rule of law"); Wesley G. Skogan, *Why Reform Fails*, in *Police Reform from the Bottom Up: Officers and Their Unions as Agents of Change* 144, 149 (Monique Marks & David Sklansky eds., 2012).

29. This critique resonates with a common theme in public discourse, mass culture, and some legal scholarship of the "blue wall of silence" (i.e., police officers and members of the law enforcement community are perceived as displaying extreme solidarity with their coworkers, raising questions of perjury or cover-ups). See, e.g., *Brandon v. Holt*, 469 U.S.



occurs at the macro level (i.e., unions and CBAs prevent the implementation of policies that might increase accountability or oversight)<sup>30</sup> and at the micro level (i.e., unions assist officers charged with misconduct, often making it harder for oversight organizations or prosecutors to investigate or prosecute).<sup>31</sup>

Policing scholar Rachel Harmon describes CBAs as “deter[ring] department-wide changes intended to prevent constitutional violations . . . dramatically.”<sup>32</sup> Police officer-turned law professor Seth Stoughton suggests that one of the three primary functions of police collective bargaining agreements is to produce “grievance procedures that are often a central part of collective bargaining agreements [that] both discourage and frustrate attempts to discipline individual officers.”<sup>33</sup> The Movement for Black Lives and a growing chorus of scholars and activists have emphasized the lack of police accountability for misconduct.<sup>34</sup> Increasingly, commentators concerned with this lack of accountability have turned their gaze to unions and the collective bargaining agreements that provide officer-friendly procedural rules.<sup>35</sup> Certainly, a range of other actors and institutions (e.g.,

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464, 467 (1985) (“Due to a code of silence induced by peer pressure among the rank-and-file officers and among some police supervisors, few—if any—formal complaints were ever filed by police personnel.”); Radley Balko, *Rise of the Warrior Cop: The Militarization of America’s Police Forces* 329 (2013) (“Police unions also help enforce the ‘Blue Code of Silence,’ the unwritten rule that police officers never rat out or testify against other police officers.”); Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 *U. Pitt. L. Rev.* 233, 237 (1998) (“Police officers also sometimes lie under oath because of the ‘blue wall of silence[]’ . . . .”); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 *Harv. C.R.-C.L. L. Rev.* 465, 481 n.60 (1992) (“The code of silence has been recognized and documented in litigation and studies of police culture.”).

30. See Stephen Rushin, *A Response to When Police Kill*, *Berkeley J. Crim. L.*, Fall 2018, at 96, 98 n.15 (collecting sources).

31. See Eleanor Heard, *Are New York Police Officers Safely Playing or Playing It Safe? Eliminating the Forty-Eight Hour Rule*, 57 *N.Y.U. Ann. Surv. Am. L.* 133, 157 (2000).

32. Harmon, *Problem of Policing*, *supra* note 12, at 799.

33. Stoughton, *Incidental Regulation of Policing*, *supra* note 12, at 2211.

34. See, e.g., DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie & Brittany Packnett, *Campaign Zero, Police Union Contracts and Police Bill of Rights Analysis 1* (2016), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdf e28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf> [<https://perma.cc/7D89-L999>] (“Police unions across the country have used the collective bargaining process to circumvent basic tenets of accountability, transparency, and fairness.”); Stephen Rushin & Allison Garnett, *State Labor Law and Federal Police Reform*, 51 *Ga. L. Rev.* 1209, 1217 n.43 (2017); Kyle Jaeger, *The Black Lives Matter Activists Have a Plan: Campaign Zero*, *ATTN*: (Aug. 26, 2015), <http://www.atn.com/stories/2906/what-is-campaign-zero-black-lives-matter> [<https://perma.cc/MCM7-45K5>] (“In order to restore trust between the public and police, it is crucially important that we impose civilian oversight structures to hold law enforcement officials accountable.”).

35. See, e.g., Gilbert Rivera, *Armed Not Militarized: Achieving Real Police Militarization*, 20 *Berkeley J. Crim. L.* 227, 235 (2015) (describing “the problem with police unions” as involving barriers to accountability and a prioritization of job security over other values); Rushin, *Structural Reform Litigation*, *supra* note 12, at 1376 (“[P]olice

courts, politicians, and media) might interfere with efforts to police the police,<sup>36</sup> but critics increasingly have identified unions as erecting particularly high barriers to public oversight.<sup>37</sup> (It also may well be that CBAs are an easier point of entry for reformers than, for example, constitutional criminal procedure doctrine, which rests on a large body of decisions by politically unaccountable judges.)

In important recent work, policing scholars have collected and analyzed a range of police CBAs, helping reformers and scholars appreciate the ways in which these CBAs lay the groundwork for policing and shield police from public accountability.<sup>38</sup> Campaign Zero, a policing reform organization affiliated with Black Lives Matter,<sup>39</sup> has produced extensive reports outlining police union contracts and law enforcement officer bills of rights.<sup>40</sup> In looking at police CBAs in “81 of the largest U.S. cities,” Campaign Zero concluded:

Police unions have used their influence to establish unfair protections for police officers in their contracts with local, state and federal government and in statewide Law Enforcement Officers’ Bills of Rights. These provisions create one set of rules

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unions commonly attempt to intervene in settlement negotiations with the intent of blocking reforms that may increase oversight or otherwise burden frontline police officers.”); Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. Chi. Legal Forum 615, 617 (“The emergence of police unions, and the collective bargaining agreements they have won, have become a major factor in the governance of the police.”).

36. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (describing the deferential standard courts should use in assessing officers’ use of force); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *Geo. Wash. L. Rev.* 453, 469 (2004) (“[C]ourts evaluating the officer’s beliefs and action are not to engage in 20–20 hindsight, but to give the benefit of the doubt in close cases to the police.”); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 *Am. Crim. L. Rev.* 743, 745–46 (1995) (discussing the cultural framing of criminal law that treats defendants as “villains” and law enforcement and prosecutors as heroic).

37. See, e.g., *Fair Police Contracts*, Campaign Zero, <https://www.joincampaignzero.org/contracts> [<https://perma.cc/Y4EF-LAV8>] (last visited Jan. 30, 2020).

38. See Kate Levine, *Discipline and Policing*, 68 *Duke L.J.* 839, 846, 856–67 (2019) [hereinafter Levine, *Discipline and Policing*]; Rushin, *Police Union Contracts*, *supra* note 12, at 1198–200. While such work on police union contracts remains a novel development, scholars have done some similar work on state laws regulating police conduct. See Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 *B.U. Pub. Int. L.J.* 185, 203–41 (2005) (cataloguing provisions in law officers’ bills of rights).

39. See, e.g., *Black Lives Matter Publishes ‘Campaign Zero’ Plan to Reduce Police Violence*, NPR: All Things Considered (Aug. 26, 2015), <https://www.npr.org/2015/08/26/434975505/black-lives-matter-publishes-campaign-zero-plan-to-reduce-police-violence> [<https://perma.cc/AV2C-XT4M>]; Jon Swaine, Lauren Gambino & Oliver Laughland, *Protesters Unveil Demands for Stricter US Policing Laws as Political Reach Grows*, *Guardian* (Aug. 21, 2015), <https://www.theguardian.com/us-news/2015/aug/21/protesters-unveil-police-policy-proposals> [<https://perma.cc/HH82-AS4E>].

40. See *supra* note 37 and accompanying text.

for police and another for civilians, and make it difficult for Police Chiefs or civilian oversight structures to punish police officers who are unfit to serve.<sup>41</sup>

That is, the toothlessness of police oversight is not simply the product of rights-restricting judicial decisions.<sup>42</sup> Rather, feeble accountability mechanisms are the direct result of concerted action by police and a host of “incidental” regulatory structures.<sup>43</sup>

Indeed, recognizing this dynamic, some civil rights plaintiffs have even sought to use CBAs as evidence of unconstitutional departmental policies.<sup>44</sup> For example, in one suit against the city of Chicago, the plaintiff claimed that “the CBAs between the police unions and the City have essentially turned the code of silence into an official policy.”<sup>45</sup> Similarly, the city’s Police Accountability Task Force concluded:

[T]he code of silence is not just an unwritten rule, or an unfortunate element of police culture past and present. The code of silence is institutionalized and reinforced by [Chicago Police Department] rules and policies that are also baked into the labor agreements between the various police unions and the City.<sup>46</sup>

The union and CBAs, then, operate as markers or structural guarantors of obstruction and unaccountable policing, particularly as they affect communities of color, poor people, and other marginalized groups.<sup>47</sup>

41. See *supra* note 37 and accompanying text.

42. This court-centric (or, more accurately, Supreme Court-centric) account has long been a staple of liberal-legalist criminal procedure scholarship. See, e.g., Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 *Stan. L. Rev.* 525, 525 (1975); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *Yale L.J.* 153, 214 (2002); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 *U. Chi. L. Rev.* 1, 5, 9–12 (1994); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 *Mich. L. Rev.* 2466, 2468 (1996).

43. See Stoughton, *Incidental Regulation of Policing*, *supra* note 12, at 2205–16 (tracking the role of CBAs as “incidental regulation of policing”).

44. See, e.g., *Johnson v. City of Chicago*, No. 05 C 6545, 2009 WL 1657547, at \*9 (N.D. Ill. June 9, 2009) (describing a CBA as “undermin[ing] the ability of the police department to hold its employees accountable for their behavior”).

45. *Shields v. City of Chicago*, No. 17 C 6689, 2018 WL 1138553, at \*3 (N.D. Ill. Mar. 2, 2018); see also *Taylor v. City of Chicago*, No. 17-CV-03642, 2018 WL 4075402, at \*1 (N.D. Ill. Aug. 27, 2018) (“[T]he existence of this code of silence has been corroborated by the United States Department of Justice and acknowledged by the president of Chicago’s police officers union.”).

46. *Cazares v. Frugoli*, No. 13 C 5626, 2017 WL 1196978, at \*3 (N.D. Ill. Mar. 31, 2017); see also *LaPorta v. City of Chicago*, 277 F. Supp. 3d 969, 981 (N.D. Ill. 2017) (“The entities of accountability, according to the DOJ report, accept the cover-up culture as an immutable fact rather than something to root out.” (internal quotation marks omitted)).

47. See Letter from United Auto Workers Local 2865 to AFL-CIO (July 25, 2015), <http://inthesetimes.com/working/entry/18240/afl-cio-police-unions-racism-black-lives-matter> (on file with the *Columbia Law Review*) (“By unconditionally insulating officers accused of brutality from facing consequences, police unions maintain the status quo of

The conflict between Philadelphia's Fraternal Order of Police (FOP) Local 5 and the city's reformist District Attorney (DA), Larry Krasner, provides a particularly noteworthy example of this obstructionist dynamic. Krasner, a former criminal defense and civil rights attorney, was elected DA on a radical platform, explicitly designed to tackle mass incarceration and issues of racial justice.<sup>48</sup> As Krasner introduced new policies and sought to prosecute officers who used excessive force, he frequently butted heads with the union, which he described as "frankly racist and white-dominated."<sup>49</sup> In a particularly controversial move, Krasner's office established a "do-not-call list" of police officers: If officers had an extensive history of misconduct, they would be placed on the list, alerting prosecutors that they would make risky witnesses (i.e., they might lie on the stand or be impeached with their history of misconduct).<sup>50</sup>

The move to establish the list was framed not only in terms of ensuring successful prosecutions, but also in terms of working toward greater transparency and accountability. The message was clear: The police were no longer off limits from official criticism, and "bad apples" did not deserve the sort of respect and deference that they previously had received.<sup>51</sup> Philadelphia's FOP responded swiftly and strongly by suing Krasner.<sup>52</sup> As one commentator argued, "Krasner's tiny list [sixty-six out of 6,500 officers] actually supports the union's claim that it's just a handful of 'bad apples' in law enforcement who are the problem. And yet the union is still suing the city for trying to keep these apples from 'spoiling' their court cases."<sup>53</sup> To union critics, then, the FOP was putting the interests of testifying officers ahead of the public interest.

Krasner has not been alone in adopting this approach, as other reformist DAs nationwide have sought to use do-not-call lists as a way of

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racial violence that upholds the exploitation of Black communities in particular, as well as other communities of color.").

48. See, e.g., Maura Ewing, *The Progressive Civil-Rights Lawyer Philadelphia Wants for District Attorney*, *Atlantic* (May 16, 2017), <https://www.theatlantic.com/politics/archive/2017/05/philadelphia-district-attorney-election-reform/526812> [<https://perma.cc/984H-B7SY>]; Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, *New Yorker* (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/4Q5F-3NRR>].

49. Gonnerman, *supra* note 48.

50. See Mensah M. Dean & Mark Fazlollah, *FOP Sues Kenney, Krasner, Ross over Police 'Do-Not-Call' List*, *Phila. Inquirer*, <http://www2.philly.com/philly/news/breaking/fop-lawsuit-kenney-krasner-ross-police-do-not-call-list-philadelphia-20181113.html> [<https://perma.cc/9HLA-E5C3>] (last updated Nov. 13, 2018).

51. See Mark Fazlollah & Chris Palmer, *Philly DA Larry Krasner Seeking to Develop Comprehensive List of Tainted Cops*, *Phila. Inquirer* (June 4, 2018), <https://www.inquirer.com/philly/news/crime/philly-da-larry-krasner-seeking-to-develop-comprehensive-list-of-tainted-cops-20180604.html> [<https://perma.cc/CN8J-AAYC>].

52. See Dean & Fazlollah, *supra* note 50.

53. Scott Shackford, *Philly Police Union Sues over Attempts to Keep Bad Cops off the Stand*, *Reason* (Nov. 21, 2018), <https://reason.com/blog/2018/11/21/philly-police-union-sues-over-attempts-t> [<https://perma.cc/F93D-KGCR>].

signaling disapproval for police misconduct.<sup>54</sup> Many (including police leadership) view these lists as a second-best alternative necessitated by union-backed protections.<sup>55</sup> As Tucson, Arizona Police Chief Chris Magnus puts it, “If I had my way, officers who lie wouldn’t just be put on a list, they’d be fired, and also not allowed to work in any other jurisdiction as a police officer ever again . . . . But unfortunately, we have to allow them back into the workplace [due to union contracts].”<sup>56</sup>

Whether through pushing for “law enforcement officers’ bills of rights”<sup>57</sup> at the legislative level or contractual provisions, unions act to shield officers from public view and from accountability for alleged misconduct.<sup>58</sup> If society recognizes that CBAs are a major component of policing regulation,<sup>59</sup> this argument goes, then police unions become a primary force in

54. See Justin George & Eli Hager, *One Way to Deal with Cops Who Lie? Blacklist Them, Some DAs Say*, Marshall Project (Jan. 17, 2019), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [<https://perma.cc/GJJ9-JKR8>]. This focus on “bad apples” is frequently critiqued as a means of legitimating police practices and deflecting structural criticism. See Kristian Williams, *Our Enemies in Blue: Police and Power in America* 23 (2015) [hereinafter Williams, *Our Enemies in Blue*] (“This [‘Rotten Apple’ theory] is a handy tool for diverting attention away from the institution, its structure, practices, and social role, pushing the blame, instead, onto some few of its agents. It is, in other words, a means of protecting the organization from scrutiny and of avoiding change.”). The distinction between individual bad actors and structural defects carries particular significance in the policing context, where civil rights suits must assert a broader policy if the plaintiff wishes to obtain relief from the municipality, state, or governmental entity. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978).

55. See George & Hager, *supra* note 54 (“Ronald Serpas, executive director of Law Enforcement Leaders to Reduce Crime & Incarceration, . . . said a better solution than blacklists would be for district attorneys to urge police leaders to implement ‘one and done’ policies. Such rules would require immediate firing for any work-related lie.”).

56. *Id.* He goes on to note that “[i]t frustrates the hell out of me . . . that we have employees receiving full pay but who can’t really function as full police officers.” *Id.*

57. These provisions—creatures of state statute—provide officers with procedural rights, often relating to disciplinary investigations after uses of force. See, e.g., Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 *J. Crim. L. & Criminology* 489, 522 (2008).

58. See, e.g., Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 *Calif. L. Rev.* 263, 307–08 (2017) (discussing union-bargained-for restrictions on access to police disciplinary records); Robin G. Steinberg, *Police Power and the Scaring of America: A Personal Journey*, 34 *Yale L. & Pol’y Rev.* 131, 133 & n.7 (2015) (“Police unions are quick to speak out against any criticism of police behavior, contributing to the ‘hero cop’ narrative of police who are under siege.”); Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 *Yale L.J.* 1156, 1196 (1974) (describing “[d]emands by policemen for disciplinary procedures which effectively foreclose use of a public review board”).

59. See Stoughton, *Incidental Regulation of Policing*, *supra* note 12, at 2205–17 (arguing that union contracts are one of many non-court-created regulatory regimes that structure contemporary policing); Dharmapala et al., *supra* note 12, at 30 (presenting findings indicating that CBA terms affect rates of police violence); cf. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 *Calif. L. Rev.* 205, 212–18 (2015)

the construction of policing and police accountability.<sup>60</sup> Rather than throwing up their hands at the capriciousness of courts, activists and academics adopting this critique come to see unions and the collective bargaining process as a major lever of power, a lever that might become the proper target for pressure to shift the rules and practices of law enforcement.<sup>61</sup>

### B. *The Political Critique*

The second line of critique increasingly prevalent in the policing literature focuses less on the structural impediments presented by unions than on the public (or, perhaps, public relations) role of unions.<sup>62</sup> Police unions often represent a conservative or reactionary vision of the criminal system and race relations in the United States.<sup>63</sup> Where a range of politicians, scholars, and activists have expressed concern about the realities of

[hereinafter Rappaport, Second-Order Regulation] (distinguishing between “first-order” and “second-order” modes of regulating law enforcement).

60. In one particularly noteworthy report, investigative journalists for *The Washington Post* showed that “[s]ince 2006, the nation’s largest police departments have fired at least 1,881 officers for misconduct that betrayed the public’s trust, from cheating on overtime to unjustified shootings. But . . . departments have been forced to reinstate more than 450 officers after appeals required by union contracts.” Kimbriell Kelly, Wesley Lowery & Steven Rich, *FIRE/REHIRED*, *Wash. Post* (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired> (on file with the *Columbia Law Review*).

61. See, e.g., Rachel Moran, *In Police We Trust*, 62 *Vill. L. Rev.* 953, 997 (2017) (calling for reforms that might come via CBAs); Rushin & Garnett, *supra* note 34, at 1226 (arguing that the federal government should “pressure[] municipalities to renegotiate” problematic aspects of CBAs).

62. As one guide for police union leaders puts it, “[T]he media requires you use it or it will use you . . . . Second to political involvement, dealing with the media is the next most distasteful activity for almost all union officials . . . . The battle is always in the Court of Public Opinion, and if you forget that, your union will get into trouble.” Ron DeLord & Ron York, *Law Enforcement, Police Unions, and the Future: Educating Police Management and Unions About the Challenges Ahead* 83 (2017) (emphasis omitted).

63. See, e.g., Williams, *Our Enemies in Blue*, *supra* note 54, at 77–177 (tracking the rise of professionalized policing as inherently intertwined with social control of marginalized and less powerful groups); Fisk & Richardson, *supra* note 12, at 745 (“Police unions also actively opposed reform-oriented chiefs and civilian review boards, both for reasons of conservative and sometimes racist ideology and to protect police officers’ bread-and-butter interests, like pay, benefits, and job security.”); Shawn Gude, *The Bad Kind of Unionism*, *Jacobin* (Jan. 12, 2014), <https://www.jacobinmag.com/2014/01/the-bad-kind-of-unionism> [<https://perma.cc/YJ7B-5HJ7>] [hereinafter Gude, *The Bad Kind of Unionism*] (“The cop who rallies for collective bargaining today will be protecting Goldman Sachs tomorrow.”); Catherine S. Manegold, *Rally Puts Police Under New Scrutiny*, *N.Y. Times* (Sept. 27, 1992), <https://www.nytimes.com/1992/09/27/nyregion/rally-puts-police-under-new-scrutiny.html> (on file with the *Columbia Law Review*) (“Officials with the Patrolmen’s Benevolent Association, which organized and promoted the rally . . . did [not] . . . appear to discourage protesters from displaying obscene and inflammatory signs, like those depicting the Mayor with a large Afro-style haircut and swollen lips or another making reference to Mr. Dinkins as a ‘washroom attendant.’”).

modern policing,<sup>64</sup> police unions have resisted and have been quick to throw their weight behind politics and policies that appear to exacerbate racial tensions and the likelihood of violence. Faced with public concern about race and policing, the unions have given no quarter, adopting a confrontational and, at times, threatening posture.<sup>65</sup> Police unions, to politically focused critics, represent a pernicious force, a force that should be excluded from the labor movement and perhaps eliminated altogether.

In July 2015, the Black Interests Coordinating Committee, a subgroup of United Auto Workers Local 2865, the union representing 13,000 University of California graduate instructors and student workers, passed a resolution asking the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) to “end its affiliation” with the International Union of Police Associations.<sup>66</sup> The resolution situates police unions firmly within a framework of white supremacy and institutionalized subordination:

Historically and contemporarily, police unions serve the interests of police forces as an arm of the state, and not the interests of police as laborers. Instead, their “unionization” allows police to masquerade as members of the working-class and obfuscates their role in enforcing racism, capitalism, colonialism, and the oppression of the working-class.<sup>67</sup>

According to the language of the open letter to the AFL-CIO, police unions “channel resources towards upholding racist practices” in three particular ways: (1) “[l]obbying to oppose independent oversight by civilians and other governmental entities,” (2) “[c]ampaigining for political actors

64. See, e.g., Office of Cmty. Oriented Policing Servs., President’s Task Force on 21st Century Policing, Final Report of the President’s Task Force on 21st Century Policing 1 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/Q965-9X4N>] (explaining that President Obama created the 21st Century Policing Task Force because “of recent events that have exposed rifts in the relationships between local police and the communities they protect and serve”).

65. See, e.g., Shawn Gude, Why We Can’t Support Police Unions, *Jacobin* (July 31, 2015), <https://www.jacobinmag.com/2015/07/black-lives-matter-patrick-lynch-ferguson> [<https://perma.cc/L2US-DLWV>] [hereinafter Gude, Support Police Unions] (“Police unions . . . have . . . behaved deplorably . . . Ferguson[’s union] raised money online for Michael Brown’s killer. Baltimore’s did the same for the officers charged in connection with Freddie Gray’s death. And the Cleveland . . . Union raffled off a Glock as a fundraiser for the cop accused of killing eighteen-year-old Brandon Jones.”); Editorial, Offensive Tweet Shows Why St. Louis Police Officers Association Is Part of the Problem, *St. Louis Post-Dispatch* (Sept. 30, 2017), [https://www.stltoday.com/opinion/editorial/editorial-offensive-tweet-shows-why-st-louis-police-officers-association/article\\_791eaa5b-1697-5b7a-8727-3218b305ea4f.html](https://www.stltoday.com/opinion/editorial/editorial-offensive-tweet-shows-why-st-louis-police-officers-association/article_791eaa5b-1697-5b7a-8727-3218b305ea4f.html) [<https://perma.cc/A57U-ZLJH>] (“The clear signal was that police officers should know who their enemies are. Take whatever action necessary. Don’t feel terribly compelled to render quick assistance if these businesses call for help.”).

66. Mario Vasquez, Univ. of California Academic Workers’ Union Calls on AFL-CIO to Terminate Police Union’s Membership, *In These Times* (July 27, 2015), <http://inthesetimes.com/working/entry/18240/afl-cio-police-unions-racism-black-lives-matter> [<https://perma.cc/WP9P-MSEY>].

67. Letter from United Auto Workers Local 2865 to AFL-CIO, *supra* note 47.

who support limited police accountability,” and (3) “[d]efending officers’ crimes of racist brutality in court.”<sup>68</sup> In this account, police are disassociated from any status as labor,<sup>69</sup> and the union simply becomes a tool to advance a set of politically objectionable ends.<sup>70</sup>

To the extent that the expression of a collective voice is a generally recognized union function,<sup>71</sup> police unions take full advantage of this function. “[P]olice unions have a strong voice at the state and local levels” and are seen by critics as embodying a deeply problematic voice or collective opinion.<sup>72</sup> Indeed, U.S. police unions differ from police unions in other countries in large part because of this political role or function.<sup>73</sup> While “[t]he police forces in Canada, Australia, New Zealand, and the United Kingdom are unionized,” they “are generally restrained or prohibited from being involved in election campaigns of individual candidates or political parties.”<sup>74</sup> That approach stands in marked contrast to the U.S. model, where “the overwhelming majority of . . . police unions are politically active in the campaigns of those persons elected to control the police themselves.”<sup>75</sup>

Police unions’ role as “major players in the ‘Court of Public Opinion’”<sup>76</sup> has become a flashpoint as police accountability has become a matter of greater public concern.<sup>77</sup> In the wake of highly publicized deaths of black

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68. *Id.*

69. *But see id.* (“Black lives are considered less important than job protection for police.”).

70. Lurking here is or may be an important distinction between “workers” as an imagined class of people and “labor” as an imagined subclass of workers. That is, perhaps the claim in the above quote accepts police officers’ status as workers, but rejects their status as labor. Presumably, labor, then, is conceived not in terms of class status, but class solidarity. Or, perhaps “labor” excludes workers whose status and interests are too closely aligned with those of management or capital. See *infra* sections III.B–C.

71. See, e.g., Rosenfeld, *supra* note 1, at 163, 181 (explaining how unions have historically united people under a collective voice); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 *Mich. L. Rev.* 1155, 1156–69 (1991) (“[L]abor unions can be an effective, central tool in a feminist agenda targeting the gendered structure of wage labor. Collective action is the most powerful and expedient route to female empowerment; further, it is the only feasible means of transforming our deeply gendered market and family structure.”); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *Colum. L. Rev.* 1527, 1556 (2002) [hereinafter Estlund, *The Ossification of American Labor Law*] (noting how the prospect of tort liability might deter some employers from suppressing the efforts of their employees to organize a collective voice).

72. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 *N.Y.U. L. Rev.* 1827, 1879 (2015).

73. See Ron DeLord, John Burpo, Michael Shannon & Jim Spearing, *Police Union Power, Politics, and Confrontation in the 21st Century: New Challenges, New Issues* 239–40 (2d ed. 2008).

74. *Id.* at 239.

75. *Id.*

76. *Id.* at 240.

77. See, e.g., Debo P. Adegbile, *Policing Through an American Prism*, 126 *Yale L.J.* 2222, 2224 (2017) (describing an “intense focus on policing in America,” precipitated by



civilians at the hands of police, union leaders were quick not only to stand up for the officers involved but also to affirmatively reject any stated concerns about police violence, police–civilian interactions, or race relations.<sup>78</sup> That is, the voice or, more crassly, the “public relations” function of police unions tends to reflect a hard line—either endorsing unreconstructed tough-on-crime responses to debates about criminal justice policy or ignoring concerns outright.<sup>79</sup>

As one glaring example, take the union response to the killing of Tamir Rice.<sup>80</sup> On November 22, 2014, Cleveland police received a dispatch call about a black male with a “probably fake” gun sitting on a swing at a neighborhood park.<sup>81</sup> Two officers responded to the call and arrived at the park.<sup>82</sup> Within seconds, rookie officer Timothy Loehmann fired two shots at the black male—twelve-year-old Tamir Rice.<sup>83</sup> As in a number of other high-profile police shootings, a Cuyahoga County grand jury declined to indict Loehmann.<sup>84</sup> But the city of Cleveland ultimately reached a \$6 million civil settlement with Rice’s family.<sup>85</sup>

Public outcry in the wake of Rice’s shooting came fast and furiously.<sup>86</sup> The fall of 2014 saw growing attention paid to police violence and the use

publicized killings of civilians of color); Samuel Walker, “Not Dead Yet”: The National Police Crisis, a New Conversation About Policing, and the Prospects for Accountability-Related Police Reform, 2018 U. Ill. L. Rev. 1777, 1784–90 (describing the “national police crisis”).

78. See, e.g., McCormick, *supra* note 12, at 48–50.

79. See Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke & Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* 38–39 (1978) (discussing the role of police in shaping public narrative).

80. Police union leaders frequently take similar approaches in police shooting cases, adopting an aggressive stance in the media as defenders of the officers involved. See McCormick, *supra* note 12, at 47–48 (discussing the union response to the Michael Brown shooting).

81. See Cory Shaffer, *Cleveland Police Officer Shoots 12-year-old Boy Carrying BB Gun*, *Cleveland.com* (Nov. 22, 2014), [https://www.cleveland.com/metro/index.ssf/2014/11/cleveland\\_police\\_officer\\_shoot\\_6.html](https://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officer_shoot_6.html) [<https://perma.cc/2HK5-NK5C>]; see also Tom McCarthy, *Tamir Rice: Video Shows Boy, 12, Shot ‘Seconds’ After Police Confronted Child*, *Guardian* (Nov. 26, 2014), <https://www.theguardian.com/us-news/2014/nov/26/tamir-rice-video-shows-boy-shot-police-cleveland> [<https://perma.cc/FRQ4-S2NP>].

82. See Shaffer, *supra* note 81.

83. See McCarthy, *supra* note 81; Shaffer, *supra* note 81.

84. See Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, *N.Y. Times* (Dec. 28, 2015), <https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> (on file with the *Columbia Law Review*).

85. See Mark Berman & Wesley Lowery, *Cleveland Agrees to Pay \$6 Million to Settle Tamir Rice Lawsuit, Won’t Admit Any Wrongdoing*, *Wash. Post* (Apr. 25, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/04/25/cleveland-agrees-to-pay-6-million-to-settle-tamir-rice-lawsuit/?utm\\_term=.ffc5d5697b35](https://www.washingtonpost.com/news/post-nation/wp/2016/04/25/cleveland-agrees-to-pay-6-million-to-settle-tamir-rice-lawsuit/?utm_term=.ffc5d5697b35) (on file with the *Columbia Law Review*).

86. See Bryan Adamson, *Reconsidering Pre-Indictment Publicity: Racialized Crime News, Grand Juries and Tamir Rice*, 8 *Ala. C.R. & C.L. L. Rev.* 1, 9 nn.41–43 (2017) (collecting sources).

of lethal force against people of color, particularly black men.<sup>87</sup> Cell phone videos showing deadly police confrontations went viral on social media, and protesters rallied around the slogan “Black Lives Matter.”<sup>88</sup> Rice’s death added fuel to the fire, feeding the perception that police were too quick to resort to deadly force in confrontations with black civilians.<sup>89</sup> As with the death of Michael Brown in Ferguson, Missouri, the failure to indict the shooting officer led to even greater outrage.<sup>90</sup> At the same time, Cleveland’s police union (like unions in other police shootings) stood behind Loehmann and offered strong support for the officers involved.<sup>91</sup>

There’s nothing remarkable about the fact that the union here would support its member.<sup>92</sup> As I argue in Part II, that is a core function of unions. More noteworthy is the Cleveland Police Patrolman Association’s aggressive approach once the family settled its suit.<sup>93</sup> Rather than remaining silent, issuing a carefully worded release about loss of life, or even taking the opportunity to remind the public that no officer had been charged with a crime, the union went on the offensive. In an open letter to the media, union president Stephen Loomis wrote: “[W]e can only hope that the Rice family and their attorneys will use a portion of this settlement to help educate the youth of Cleveland in the dangers associated with the mishandling of both real and facsimile firearms.”<sup>94</sup> Faced with widespread public outrage, the union had doubled down by implying once again that Rice’s death was his own fault and that his family, not the police, had work to do going forward. The Patrolman’s Association, in this account, wasn’t simply being obstructionist by shielding Loehmann from accountability. It also was using its power to operate as a public vehicle for a set of defensive, hostile sentiments.

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87. See, e.g., *Considering Police Body Cameras*, 128 *Harv. L. Rev.* 1794, 1794–96 (2015); Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: Social Dominance, Implicit Bias, Criminality, and Race, 46 *Wash. U. J.L. & Pol’y* 23, 24 (2014); Adamson, *supra* note 86, at 9 nn.41–43.

88. See generally Jocelyn Simonson, *Copwatching*, 104 *Calif. L. Rev.* 391, 393–94 (2016) (discussing the phenomenon of organized copwatching by local communities as a means to hold police departments accountable).

89. See Williams & Smith, *supra* note 84.

90. See generally Kate Levine, *How We Prosecute the Police*, 104 *Geo. L.J.* 745 (2016) [hereinafter Levine, *How We Prosecute*] (describing responses to grand jury decisions in officer shooting cases).

91. See Eric Heisig, *Tamir Rice Settlement Should Help Educate Kids on Guns, Cleveland Police Union President Says*, *Cleveland.com* (Apr. 25, 2016), [https://www.cleveland.com/court-justice/index.ssf/2016/04/tamir\\_rice\\_settlement\\_should\\_h.html](https://www.cleveland.com/court-justice/index.ssf/2016/04/tamir_rice_settlement_should_h.html) [https://perma.cc/YCZ8-NFEC] (last updated Jan. 11, 2019).

92. *Why Is This Happening? With Chris Hayes: Ending Mass Incarceration with Larry Krasner*, *NBC News: Think* (Jul. 10, 2018), <https://www.nbcnews.com/think/opinion/how-prosecutors-can-help-end-mass-incarceration-larry-krasner-podcast-ncna890126> [https://perma.cc/422E-M2WU] (“[T]he job of a union head to some extent is to avoid accountability on the part of its members.”).

93. See Heisig, *supra* note 91.

94. *Id.*

A look at the official social media accounts of many police unions reveals a similar approach. When Brooklyn DA Eric Gonzalez released an adverse credibility list in November 2019 (similar to the list released by Krasner, discussed above),<sup>95</sup> New York City Police Benevolent Association President Patrick Lynch released a statement decrying Gonzalez as a traitor to his role in law enforcement:

It is clear that . . . Gonzalez has abandoned his prosecutorial role. He sides with the criminals, not crime victims. He knows that truthful police testimony gets thrown out every day in our courts, often based on a judge's whims and biases. He knows that publicizing this information will destroy the careers of honest police officers and torpedo the cases against violent, gun-toting criminals—assuming his office bothers to prosecute them at all. He could have and should have fought the request to release these records. He chose not to do so. In northern Brooklyn alone, 218 people have been shot this year, an 11.2% increase over last year. If the victims and their families want someone to answer for this violence, they should head to Gonzalez's office. They might well find an “out of business” sign on the door.<sup>96</sup>

As framed by the union, challenging police violence or misconduct is tantamount to abetting “gun-toting criminals.” And providing oversight is implicitly linked to violent crime rates. The voice of the union, then, is one that brooks no compromise and is open to no critique. It is that voice or role that has so riled many scholars and activists.

“Law enforcement unions,” one commentator argues, “are not simply barriers to criminal justice reform and decarceration because of economic concerns for their members . . . . [T]heir commitment is not only to mass incarceration as a job provider, but to the system of racist oppression and unjust societal organization that these jobs uphold.”<sup>97</sup> In this account, white supremacy and the violent suppression of marginalized populations is not an unintended byproduct of police unions' political positions.<sup>98</sup> Rather, there is some core structural flaw with police unions that makes

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95. See Joseph Goldstein, *Why 7 Police Officers Were Blacklisted in Brooklyn, N.Y.* Times (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/nyregion/police-credibility-brooklyn-district-attorney.html> (on file with the *Columbia Law Review*); supra notes 48–54 and accompanying text.

96. The Police Benevolent Association of N.Y.C. (@NYCPBA), Twitter (Nov. 6, 2019), <https://twitter.com/NYCPBA/status/1192217524550717440> [<https://perma.cc/94ZW-YDEA>].

97. Natasha Lennard, *Police Unions' Opposition to Prison Reform Is About More Than Jobs—It's About Racism*, Intercept (Aug. 14, 2018), <https://theintercept.com/2018/08/14/police-unions-prison-reform> [<https://perma.cc/DB75-GX4Z>].

98. See Vasquez, supra note 66 (“Police unions in particular emerge out of a long history of police intervention in labor politics and its complicity in racial violence . . . .” (internal quotation marks omitted) (quoting Letter from United Auto Workers Local 2865 to AFL-CIO, supra note 47)).

them direct defenders or proponents of a particular brand of policing that is inextricably linked to a history of racial subordination.<sup>99</sup>

Perhaps the biggest target for this line of critique has been the FOP. As police–civilian tensions have attracted increasing attention, the FOP (both on the national level and among locals) has taken a hard line—actively opposing reformist initiatives and vocally supporting politicians and policies hostile to criminal justice reform and racial justice.<sup>100</sup> Particularly notable has been the FOP’s warm relationship with Donald Trump, both in the lead-up to his election and once he took office.<sup>101</sup> The union’s decision to endorse then-candidate Trump was hardly an anomaly—police unions play an active role in the political sphere, and police union endorsements have played significant roles in recent elections.<sup>102</sup> But the decision, coupled with the fraught racial politics of the election, did not go unnoticed, generating even greater outrage from police union critics.<sup>103</sup>

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99. Cf. Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 *Nw. U. L. Rev.* 1597, 1604–05 (2017) (“[Criminal legal] institutions enforce an undemocratic racial caste system originating in slavery.”). It is not unreasonable to read these critiques as fundamentally claims about police or policing, rather than police unions. That said, commentators have chosen to identify the unions, rather than the police themselves, as the inheritors of a specific white supremacist and hierarchical agenda. And, I think that choice matters. See *infra* section IV.B.

100. See, e.g., Butler, *The Fraternal Order of Police*, *supra* note 11; Letter from Chuck Canterbury, Nat’l President, Nat’l Fraternal Order of Police, to Donald J. Trump, President, U.S. (Feb. 15, 2018), <https://fop.net/CmsDocument/Doc/POTUS%20on%20S.%201917-%20sentencing.pdf> (on file with the *Columbia Law Review*) (urging the President to oppose the Sentencing Reform and Corrections Act). But see Press Release, Nat’l Fraternal Order of Police, FOP Partners with President Trump on Criminal Justice Reform (Nov. 9, 2018), <https://fop.net/CmsDocument/Doc/FOP%20on%20First%20Step%20Act.pdf> (on file with the *Columbia Law Review*) (announcing support for the First Step Act and the risk assessment tools and sentencing reforms it establishes).

101. See, e.g., Press Release, Nat’l Fraternal Order of Police, Fraternal Order of Police Endorses Trump!!! (Sept. 16, 2016), [https://fop.net/CmsDocument/Doc/pr\\_2016-0916.pdf](https://fop.net/CmsDocument/Doc/pr_2016-0916.pdf) (on file with the *Columbia Law Review*); see also, e.g., Nathalie Baptiste, *Here’s What the Biggest Police Union Wants from Trump*, *Mother Jones* (Dec. 13, 2016), <https://www.motherjones.com/politics/2016/12/heres-what-biggest-police-union-wants-trump-his-first-100-days> [<https://perma.cc/X6CC-B636>]; Tom Jackman, *Fraternal Order of Police Union Endorses Trump*, *Wash. Post* (Sept. 16, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/09/16/fraternal-order-of-police-union-endorses-trump/?utm\\_term=.d8c22265f2b0](https://www.washingtonpost.com/news/true-crime/wp/2016/09/16/fraternal-order-of-police-union-endorses-trump/?utm_term=.d8c22265f2b0) (on file with the *Columbia Law Review*) (quoting a union leader as stating that Trump “made commitments to us that he would support law enforcement if he was elected, and keep our views in mind as he undertook to uphold the threshold responsibility of a president, which is to protect public safety”).

102. See Michael Zoorob, *Blue Endorsements Matter: How the Fraternal Order of Police Contributed to Donald Trump’s Victory*, 52 *PS: Pol. Sci. & Pol.* 243, 247–49 (2019) (“For Trump in 2016, blue endorsements mattered precisely because police are so widely organized across communities. When hundreds of thousands of men and women in blue proclaimed Trump their candidate, many other Americans got the message.”).

103. See Butler, *The Fraternal Order of Police*, *supra* note 11.

In one particularly striking op-ed, policing scholar Paul Butler argues that it is time to abolish the FOP.<sup>104</sup> While Butler recognizes a range of legal impediments to this proposal, he contends that the organization has come to operate as an organ of white supremacy.<sup>105</sup> According to Butler, the FOP “consistently take[s] stances against the safety and rights of black Americans. As a result, the organization serves as a union cum fraternity for white cops and has a retrograde effect on policing, especially as it relates to civil rights.”<sup>106</sup> In this rendering, the union operates as a vehicle for politically reactionary goals. Where reformers seek to improve police–civilian relations or to advance goals of racial justice, the FOP operates as a vehicle of white supremacy.<sup>107</sup> As Butler puts it, “The FOP, as currently constituted, should be relegated to the same historical dustbin as organizations like the Sons of the Confederacy and the White Citizens Council.”<sup>108</sup> And, indeed, other scholars have traced modern policing to British colonial practices designed to “manag[e] disorder and protect[] the propertied classes from the rabble.”<sup>109</sup>

To Butler and those other critics, police unions operate as a means of reinforcing and consolidating police power. Historically, police have served as “protectors of privilege,” and—according to critics—police

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104. See *id.* Other critics of police unions do not necessarily call for their complete eradication. See, e.g., Moran, *supra* note 61, at 997 (“I certainly do not call for the abolition of police unions . . . .”); Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 *Stan. L. & Pol’y Rev.* 109, 112–13 (2017) (“These criticisms do not call for the elimination of police unions.”).

105. See Butler, *The Fraternal Order of Police*, *supra* note 11.

106. *Id.*

107. Different reformers have very different goals. On the one hand, advocates of procedural justice may prioritize police relationships with the communities they patrol. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054, 2073, 2081–83 (2017) (describing and critiquing this position); Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 *Wm. & Mary L. Rev.* 1865, 1875–79, 1879 fig.1 (2013) (discussing “rightful policing,” the extent to which people defer to police authority, and how that impacts procedural justice); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 *U. Chi. Legal Forum* 295, 352–53 (describing and critiquing procedural justice as overly focused on obedience). On the other hand, police abolitionists and other more radical commentators may seek to advance substantive ends often at odds with any (or at least the contemporary) vision of policing. See generally Alex S. Vitale, *The End of Policing* 29 (2017) [hereinafter Vitale, *The End of Policing*] (“Any real agenda for police reform must replace police with empowered communities working to solve their own problems.”); Derecka Purnell, *What Does Police Abolition Mean?*, *Bos. Rev.* (Aug. 23, 2017), <http://bostonreview.net/law-justice/derecka-purnell-what-does-police-abolition-mean> [<https://perma.cc/D87J-NWEG>] (arguing that reforms “will not save” law enforcement that “arbitrarily enforces laws according to demographics and maintains order according to each officer’s subjective notion of peace”).

108. Butler, *The Fraternal Order of Police*, *supra* note 11.

109. Vitale, *The End of Policing*, *supra* note 107, at 35.

unions serve as the unreconstructed voice of that regressive impulse.<sup>110</sup> If we accept the critiques of criminal policy as reinforcing white supremacy,<sup>111</sup> and of expansive police power as extending the governance model of the Jim Crow South,<sup>112</sup> then it's not hard to see why police unions would be deeply objectionable.<sup>113</sup>

Having laid out these two primary lines of critique, the next Part seeks to resituate police unions within the literature on public-sector unions. In doing so, I hope to highlight the limitations of viewing police unions only through the lens of criminal law.

## II. POLICE UNIONS AS UNIONS

As a descriptive matter, the critiques outlined in the previous Part are fair as far as they go. Police unions have served as a significant impediment to many reformist and transformative efforts. Police unions have stood behind many officers accused of violence and racism. And police unions have undoubtedly taken political positions that might trouble many critics and commentators on the left (broadly conceived). But, as I argue in this Part, these critiques can't and shouldn't be divorced from longstanding critiques of other public-sector unions. The legal academic literature on police unions has focused largely on the policing aspect, rather than the union aspect, of police unions.<sup>114</sup> Most scholarly attention has come from the world of criminal justice scholars, rather than academics focused on

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110. See generally Frank Donner, *Protectors of Privilege: Red Squads and Police Repression in Urban America* (1990) (examining the history of repressive police practices in U.S. cities).

111. See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012 ed. 2010) (arguing that criminal policies have created a new "racial caste system" in the United States); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1425 (2016) [hereinafter Butler, *The System Is Working*] (arguing that the problems identified by critics of discriminatory policing are actually "integral features of policing and punishment in the United States"); 13th (Kandoo Films 2016) (documenting the impact of mass incarceration).

112. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. Crim. L. & Criminology* 775, 788 (1999) (tracing the roots of contemporary antiloitering statutes to Black Codes passed in southern states following the Civil War); Letter from United Auto Workers Local 2865 to AFL-CIO, *supra* note 47 ("The modern U.S. institution of the police has roots in the repressive demands of powerful white capitalists. Overseers and slave patrols in the South evolved alongside the growing need to maintain 'order' in early urban areas in the North.").

113. See *supra* note 99 and accompanying text.

114. See Sklansky, *Democracy and the Police*, *supra* note 28, at 180–93 (examining the role of police unions in giving rank-and-file officers greater say in how policing is carried out); McCormick, *supra* note 12, at 51–53 ("While there has been significant study of the use of force by police officers, there has been virtually no study of police unions."). But see generally Fisk & Richardson, *supra* note 12 (proposing structural reforms to police union representation to help enable policy reforms).

labor law.<sup>115</sup> In these accounts, police unions are treated as a feature of the criminal legal landscape and players in the design of criminal policy but not necessarily a major player in the design of contemporary labor markets. To the extent that labor law has a role to play, it is in better understanding police;<sup>116</sup> historically, scholars have not treated police unions as a vehicle or case study for better understanding labor law or the labor movement.<sup>117</sup>

Such a criminal law-centric account provides a useful corrective to traditional, court-focused criminal justice scholarship,<sup>118</sup> recognizing that the “law on the ground” relies on a range of different sources and actors.<sup>119</sup> Yet, even this realist approach often suffers from a broader pathology of criminal law scholarship (and legal scholarship generally):<sup>120</sup> the tendency to silo or exceptionalize criminal law.<sup>121</sup> Additionally, this

115. But see generally Fisk & Richardson, *supra* note 12 (exploring “how public sector law might be changed . . . to support reforms” within police departments); McCormick, *supra* note 12 (applying labor law concepts to critique police unions).

116. See generally Rushin & Garnett, *supra* note 34 (analyzing the relationship between state labor law and federal efforts to regulate police); Stoughton, *Incidental Regulation of Policing*, *supra* note 12, at 2205–17 (providing a detailed discussion of the importance of CBAs in regulating policing and shaping departmental culture).

117. In their discussion of state labor law’s interaction with structural litigation by the DOJ, Rushin and Garnett do note that similar dynamics might be at play in other public sector union contexts. Rushin & Garnett, *supra* note 34, at 1227; see also Fisk & Richardson, *supra* note 12, at 716.

118. See *supra* notes 15–20 and accompanying text; see also Aziz Z. Huq, *Fourth Amendment Gloss*, 113 Nw. U. L. Rev. 701, 742–53 (2019) (describing police unions’ role in shaping police practices); cf. Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 Mich. L. Rev. 1, 4 (1997) (“*The Constitution* is, in American popular and legal culture, an authoritative paramount norm—hierarchically superior to any other legal or political authority . . .”).

119. Issa Kohler-Hausman, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *The New Criminal Justice Thinking*, *supra* note 26, at 246, 246–47 (arguing that “the law” is the law in action, not the law on the books).

120. See, e.g., Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 Yale L.J. 616, 622 (2019) [hereinafter Andrias, *An American Approach*] (critiquing the labor–employment law divide); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 Berkeley J. Emp. & Lab. L. 163, 165–66 (2007) (critiquing the distinction among labor law, employment law, and employment discrimination as failing to paint an accurate picture of the laws that govern the workplace); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am. J. Comp. L. 753, 756 (2010) (noting that the very existence of “family law” as a distinct category in the social and legal order produces ideological and political meaning and does “concrete distributional work”); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 Yale J.L. & Human. 1, 5 (2011) (critiquing the move to exceptionalize “family law” as a distinct area of study).

121. See Benjamin Levin, *Rethinking the Boundaries of ‘Criminal Justice’*, 15 Ohio St. J. Crim. L. 619, 633 (2018) (“Put simply, the siloing of legal areas is a major obstacle to a necessarily holistic and sweeping critique, not to mention a more expansive vision of what reform could look like.”).

approach plays into a broader narrative in which police unions are clearly distinguishable from any other corner of organized labor. “Police unions,” some labor leaders suggest, “are the duck-billed platypus of the labor movement.”<sup>122</sup>

In one of the rare, and critically important, labor-centric accounts of police unions, labor law scholar Catherine Fisk and policing scholar Song Richardson stress a different frame for studying law enforcement.<sup>123</sup> “The debates over police unions are part of a larger legal and policy debate over whether public employee unions are agents of or obstacles to government reform.”<sup>124</sup> This frame for discussing police unions is critically important “because local government employees (including police) are among the most densely unionized in the country.”<sup>125</sup> Questions of policing are inherently questions of governance, which in turn rely on understanding how power and decisionmaking authority are allocated at the governmental level.<sup>126</sup> Conversations about policing and police unions, viewed in this light, are inherently conversations about governance, but also about work.

This Part first provides a brief overview of the law governing police unions and police unions’ relationship to common theoretical justifications for unionization. While I don’t aim to provide an exhaustive account of state public-sector labor law, it is useful to recognize the legal architecture that underpins police unions’ power. Or, at the very least, it is worth recognizing what aspects of police unions are common features of other unions. Next, this Part describes the potential parallels between the critiques traced in Part I and the discourse surrounding other public-sector unions. Ultimately, I argue, despite some obvious legal and structural differences between the relevant unions and labor markets, police union critiques sound an awful lot like critiques leveled at other public-sector organizing.

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122. DeLord & York, *supra* note 62, at 11. DeLord and York go on to argue that—despite police unions’ ostensible similarity to other unions—organized officers are “the square peg in a round hole.” *Id.*

123. See Fisk & Richardson, *supra* note 12, at 716.

124. *Id.*

125. *Id.*

126. See, e.g., Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 66 (2005) (describing the U.S. embrace of police as a “mode of governance”); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 114 (2001) (describing shifts in modes of policing minority communities); Trevor George Gardner, *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*, 119 *Colum. L. Rev.* 1, 14 (2019) (“The criminal literature . . . tends to situate police federalism in a binary schematic: The federal government directs federal law enforcement . . . while the states hold authority over state police . . . despite conveying most of their authority over municipal police to the respective internal municipalities.”).



A. *Police Unions*

“Police unions on the surface look like every other labor union,” observe police labor advocates Ron DeLord and Ron York.<sup>127</sup> Police unions “organize around mutual protection, improving wages, benefits and working conditions, gaining collective bargaining rights and obtaining professional standards.”<sup>128</sup> When it comes to state labor law, police unions often look quite similar to other public-sector unions. Five states—Virginia, Georgia, North Carolina, South Carolina, and Tennessee—explicitly forbid police from bargaining collectively.<sup>129</sup> But those same states also forbid public school teachers and (with the exception of Georgia) firefighters from bargaining collectively.<sup>130</sup> Similarly, forty-eight states treat police and teachers the same when it comes to the legality of collective wage negotiation.<sup>131</sup> There are exceptions: Texas, for example, forbids public-sector workers from bargaining collectively, but makes an exception for police officers.<sup>132</sup>

More importantly, though, in a number of recent, high-profile efforts to strip public-sector unions of legal protections, police unions (along with other first responders) have been excepted.<sup>133</sup> For example, when Wisconsin Governor Scott Walker drew national attention for seeking to balance the state’s budget by chipping away at public pensions and public-sector unions, police were treated differently.<sup>134</sup> Labor law scholars generally view the differential treatment of police unions as reflecting a political calculus rooted in the voting patterns of union members.<sup>135</sup>

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127. DeLord & York, *supra* note 62, at 11.

128. *Id.*

129. See Milla Sanes & John Schmitt, Ctr. for Econ. Policy Research, Regulation of Public Sector Collective Bargaining in the States 5 (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/SM53-2TXN>] (collecting statutes).

130. See *id.* (collecting statutes).

131. See *id.* at 7.

132. See Tex. Loc. Gov’t Code § 174.002 (2019); Sanes & Schmitt, *supra* note 129, at 4.

133. See William E. Forbath, The Distributive Constitution and Workers’ Rights, 72 Ohio St. L.J. 1115, 1140 n.98 (2011) [hereinafter Forbath, *Distributive Constitution*] (“[M]ost of the laws exempt some powerful public sector unions—police and firefighters—from the stripping away of collective bargaining rights.”).

134. See Karen Kasler, Union Changes Make Headway in Ohio, NPR (Mar. 7, 2011), [https://www.npr.org/2011/03/07/134331339/union-changes-make-headway-in-ohio?utm\\_source=https://perma.cc/8AGQ-32TV](https://www.npr.org/2011/03/07/134331339/union-changes-make-headway-in-ohio?utm_source=https://perma.cc/8AGQ-32TV); Noam Scheiber, Public Pension Cuts Exempt Police and Firefighters, N.Y. Times (Mar. 19, 2015), <https://www.nytimes.com/2015/03/20/business/economy/police-officers-and-firefighters-are-exceptions-to-new-public-sector-rules.html> (on file with the *Columbia Law Review*) (noting that while Governor Scott exempted police officers and firefighters from a bill that would roll back collective bargaining rights, Governor John Kasich of Ohio did not exempt public safety employees and “saw his efforts undone by voters in a referendum within eight months”).

135. See, e.g., Forbath, *Distributive Constitution*, *supra* note 133, at 1140; Kasler, *supra* note 134 (noting that Governor Kasich’s anti-state-workers-union bill may have been designed to affect employees such as teachers whose union supported Kasich’s opponent and campaigned against him).

William Forbath has argued that “today’s anti-public-sector-collective-bargaining laws . . . are designed to enfeeble public sector unionism not for the asserted rationale of relieving the budget crises, but for the purpose of depriving progressive lawmakers and progressive legislation of powerful support.”<sup>136</sup> And perhaps lending credence to this argument, in states where police unions were not singled out from other public-sector unions, Republican politicians were much more hesitant to back anti-union bills.<sup>137</sup>

Outside of these political calculations, though, the most significant legal difference between the treatment of police unions and other public-sector unions has to do with the right to strike. Public-sector unions generally face many more restrictions on striking than their private-sector analogs.<sup>138</sup> But the most dramatic restrictions tend to affect police and other public employees treated as “essential to public safety.”<sup>139</sup> Indeed, despite contemporary support from conservative and otherwise-anti-union politicians, organizing police officers historically have been met with opposition because of fears that they might strike, leading to lawlessness and crime spikes.<sup>140</sup> That is, the specter of striking—a major concern for any public-sector unionization project or union activity that touches the “public interest”—remains an animating feature of the legal architecture of police unions.<sup>141</sup>

These state laws cannot begin to tell the entire story of police unions and their legal, social, and political standing. But they provide some

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136. Forbath, *Distributive Constitution*, supra note 133, at 1140.

137. See Kasler, supra note 134 (quoting law professor Benjamin Sachs as noting that “[t]he opposition that we’re seeing among the Republican Party in Ohio, which we’re not seeing in Wisconsin, may well have to do with the fact that police and fire are not exempted in Ohio and are in Wisconsin” (internal quotation marks omitted)).

138. See, e.g., *Potts v. Hay*, 318 S.W.2d 826, 827 (Ark. 1958) (“[E]very judicial decision on the subject holds that there is no right to strike against the government.”); *Cty. Sanitation Dist. No. 2 v. L.A. Cty. Emps. Ass’n, Local 660*, 699 P.2d 835, 838 (Cal. 1985) (“A strike by employees of the United States government may still be treated as a crime, and strikes by state and local employees have been explicitly allowed by courts or statute in only 11 states.” (footnote omitted)).

139. See Sanes & Schmitt, supra note 129, at 34–35 (collecting statutes).

140. See Fisk & Richardson, supra note 12, at 735 (“[B]usiness and anti-labor groups feared that unionized police would strike and, more important, would not stop other employees from striking and picketing.”).

141. See, e.g., *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 222 (1993) (describing a “10-year no-strike commitment” in a labor agreement governing a public construction project); *Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 431 F.3d 277, 281 (7th Cir. 2005) (“The County does not require its contractors to negotiate no-strike clauses in collective bargaining agreements with their unionized workers, common as such clauses are.”); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 *Yale L.J.* 689, 718–19 (1990) (discussing evidence suggesting that the costs of strikes by public employees may be exaggerated).

scaffolding for a more nuanced discussion of police labor.<sup>142</sup> Perhaps more important, though, are some general governing principles that relate to all labor unions, including police unions—most notably, the duty of fair representation. In the private sector, the duty of fair representation was first articulated by the Supreme Court in two 1944 cases, *Steele v. Louisville and Nashville Railroad Co.*<sup>143</sup> and *Wallace Corp. v. NLRB*.<sup>144</sup> The cases, both decided on December 18, 1944, “established the principle that a union must protect the interests of all workers in the bargaining unit it represented regardless of union membership.”<sup>145</sup> Both cases involved a disfavored subset of the workers—either a racial or political minority.<sup>146</sup> And, in both cases, the Court concluded that the union could not penalize dissidents and must continue to represent all the workers in the bargaining unit.<sup>147</sup> This duty extends to public-sector unions.<sup>148</sup>

While accounts of police unions focused on policing policy emphasize the unions’ obstructionist tendencies,<sup>149</sup> it’s important to recognize that the “obstruction” at the heart of the critiques is central to the function of unions. That is, the duty of fair representation speaks the language of obstruction—it is the union’s job to represent and protect the rights of its members.<sup>150</sup> Unions provide friction in the workplace, operating as a barrier to employers who might otherwise run roughshod over workers in an attempt to maximize profits. In their influential economic analysis, *What Do Unions Do?*, Richard Freeman and James Medoff argue that unions have two roles or “faces” in society and in the workplace: the “monopoly

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142. For more on state labor law and its relationship to police unions, see Rushin & Garnett, *supra* note 34, at 1217–37 (describing how state labor laws can complicate federal intervention in local police practices).

143. 323 U.S. 192, 202–03 (1944).

144. 323 U.S. 248, 255 (1944).

145. Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *Berkeley J. Emp. & Lab. L.* 1, 24 (1999).

146. See *id.* at 41–42 (discussing the cases).

147. See *id.*

148. See Jack R. Clary, Joel A. D’Alba & Parker Denaco, *State and Local Government Bargaining*, 5 *Lab. L.* 434, 463 (1989) (“In states with public sector unions, [the duty of fair representation] has been imposed by state statutes, administrative regulations or case law that have been liberally influenced by their federal antecedents.”).

149. See *supra* Part I.

150. The duty in the police context (as in other contexts) certainly is not absolute. See, e.g., *Casanova v. City of Chicago*, 793 N.E.2d 907, 916 (Ill. App. Ct. 2003) (“[T]he Union did not breach its duty of fair representation to Casanova when it declined to bring a challenge to the arbitral award in the circuit court.”); *Ramsey v. City of Pontiac*, 417 N.W.2d 489, 494 (Mich. Ct. App. 1987) (holding that the duty of fair representation did not require the union to investigate an officer’s claim, which clearly violated the bargaining agreement); *Tchida v. Police Officers’ Fed’n of Minneapolis*, 375 N.W.2d 856, 858–59 (Minn. Ct. App. 1985) (holding that “the duty of fair representation applies only to matters where the union serves as the *exclusive* representative,” not to disciplinary hearings in which the officer has other representation).

face” and the “collective voice/institutional response face.”<sup>151</sup> The monopoly face (a clear analog to the obstructionist role so heavily critiqued in the policing context) is described as the union’s ability to bargain collectively and to raise wages for workers.<sup>152</sup> Unions, according to this classic account, serve a critical role in aggregating worker power and preference:<sup>153</sup> “At their best, unions use [their] power to bring to the workplace not only improved wages and working conditions but also a level of industrial democracy and human dignity that is impossible to measure in dollars and cents.”<sup>154</sup>

To many scholars, these functions or structural benefits extend well beyond the confines of the workplace.<sup>155</sup> If we accept this view of worker collective action as constitutive both of individual identity and solidarity or group identity,<sup>156</sup> then the two functions identified by Freeman and Medoff operate in tandem as essential components of strengthening an engaged polity. Unions provide power to individual workers by both standing as an obstacle to employer power and giving voice to the worker as a political and social agent.<sup>157</sup>

The two critiques articulated in Part I neatly map onto the two generally recognized functions of the union: to protect its members’ interests and to advance broader politics, policies, or political goals that its

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151. Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 5–6, 13 (1984). While hugely influential in the literature, the two faces identified by Freeman and Medoff certainly are not the only functions that unions serve. That said, other accounts of unions’ functions tend to sound in similar registers. See, e.g., Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 *Yale L.J.* 1107, 1112–13 (1969) (focusing on unions’ role in providing monopoly bargaining power and individual political representation in the context of industrial democracy).

152. See Freeman & Medoff, *supra* note 151, at 5–6, 13.

153. *Id.* at 10.

154. Michael J. Goldberg, *Cleaning Labor’s House: Institutional Reform Litigation in the Labor Movement*, 1989 *Duke L.J.* 903, 915.

155. See Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* 177 (2003) (“‘Reciprocal action’ through collective activity [in the workplace] not only fosters particular relationships and usable ties but also more diffuse and generalized feelings of empathy and understanding, of connectedness and being-in-this-togetherness among citizens.”).

156. See, e.g., Brishen Rogers, *Passion and Reason in Labor Law*, 47 *Harv. C.R.-C.L. L. Rev.* 313, 363 (2012) [hereinafter Rogers, *Passion and Reason in Labor Law*] (“[W]orkers’ collective action is neither aberrational nor a threat to workers’ autonomy—rather, it is partially constitutive of workers’ autonomy . . . .”); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 *U. Chi. L. Rev.* 73, 84 (1988) (“To the extent that the unfair labor practices can thus be understood as protecting formation of an autonomous group identity, they comprise the constitutive aspect of the [National Labor Relations Act (NLRA)].”).

157. Cf. Pierre Bourdieu & Loïc J.D. Wacquant, *An Invitation to Reflexive Sociology* 14 (1992) (“Classes and other antagonistic social collectives are continually engaged in a struggle to impose the definition of the world that is most congruent with their particular interests.”).

members support.<sup>158</sup> As Part IV outlines, opposition to police unions might demonstrate the false promise (or, at least, the narrow scope) of these two union functions. But the core recognized roles of unions are to protect workers from their bosses and to serve as political advocates for their members. Police union critics have identified those functions and they have framed those functions as fundamentally objectionable.<sup>159</sup>

#### B. *Other Unpopular Unions*

One of the primary goals of this Essay is to stress the ways in which common critiques of police unions sound uncomfortably like anti-union arguments in other sectors.<sup>160</sup> This section identifies those parallels. Despite their strength relative to private-sector unions,<sup>161</sup> public-sector unions have been under increasing attack over the course of the past decade.<sup>162</sup> States have passed “right to work” laws that prevent unions from requiring that all represented workers pay dues.<sup>163</sup> Union opponents have pursued a range of creative litigation strategies geared at diminishing the power of public-sector unions.<sup>164</sup> Many of these attacks have come from the political

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158. Some scholars have offered a slightly different account of police unions’ functions: “Police unions also have two functions of specific significance, on working conditions and on discipline cases. It is the second function that places the police unions apart from conventional unions.” Jan Berry, Greg O’Connor, Maurice Punch & Paul Wilson, *Strange Union: Changing Patterns of Reform, Representation, and Unionization in Policing*, 9 *Police Prac. & Res.* 113, 114 (2008).

159. See *supra* Part I.

160. Cf. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 *Cornell L. Rev.* 1023, 1076 (2013) (“Left-wing critics of police and prison guards’ unions criticize these unions’ support for punitive incarceration policies, just as right-wing critics of teachers’ unions blame them for the failures of the public schools.”).

161. Forbath, *Distributive Constitution*, *supra* note 133, at 1140 (“While private sector union density has plummeted, public sector unionism has grown—to roughly 40% of the public workforce.”).

162. See Tabatha Abu El-Haj, *Public Unions Under First Amendment Fire*, 95 *Wash. U. L. Rev.* 1291, 1292–93 (2018).

163. See Courtlyn G. Roser-Jones, *Reconciling Agency Fee Doctrine, the First Amendment, and the Modern Public Sector Union*, 112 *Nw. U. L. Rev.* 597, 635 (2018) (“Aside from ‘right to work’ states, which prohibit all agency fee agreements in both the private and public sectors, states have limited agency fee rights and their influence on political activity through a variety of other statutory forms.”); *Right to Work States*, Nat’l Right to Work Legal Def. Found., <http://www.nrtw.org/right-to-work-states> [<https://perma.cc/M8JK-EX4D>] (last visited Feb. 26, 2020) (collecting state statutes).

164. See, e.g., *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2461 (2018) (“[Petitioner] Janus refused to join the Union because he opposes ‘many of the public policies that [it] advocates,’ including the positions it takes in collective bargaining.” (second alteration in original) (quoting *Petition for Writ of Certiorari app. at 18a, Janus*, 138 S. Ct. 2448 (2018) (No. 16-466))); *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (mem.) (per curiam).

right.<sup>165</sup> Wisconsin Governor Scott Walker, Ohio Governor John Kasich, and a range of other Republican politicians pushed “right to work” laws and other regulations that they identified as both addressing state budget crises and protecting the rights of anti-union workers.<sup>166</sup>

These recent moves are far from unprecedented. “Civil service reform” and fights between public-sector employers and their workers have recurred historically as defining features of public discourse regarding unions and their social function.<sup>167</sup> The specter of highly compensated or powerful workers thwarting the public interest has long made public-sector unions both controversial and distinct from private-sector unions. As President Franklin Delano Roosevelt argued in a 1937 letter, “A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable.”<sup>168</sup> To what extent Roosevelt actually opposed public-sector organizing remains a point of historical debate,<sup>169</sup> but skepticism about public-sector unions has remained widespread.<sup>170</sup> Given that “[p]ublic sector unionism had become *the* vibrant component of the American labor movement,”<sup>171</sup> this skepticism takes on a major role in the discourse surrounding contemporary labor policy.

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165. See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1079 (2014) (describing “a burgeoning Republican ‘right to work’ movement”).

166. See, e.g., Patrick Marley, *State Workers Willing to Bend on Concessions, Not Bargaining Rights*, *Milwaukee J. Sentinel* (Feb. 14, 2011), <http://archive.jsonline.com/news/statepolitics/116162704.html> [<https://perma.cc/2AP8-9G42>]; Jim Provance, *Gov. Kasich Delivers Statehouse Speech to Lawmakers, Hecklers, Blade* (Mar. 8, 2011), available at 2011 WLNR 4535449 (on file with the *Columbia Law Review*).

167. See, e.g., Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900–1962*, at 17 (2004).

168. Isadore Vogel, *What About the Rights of the Public Employee?*, 1 *Lab. L.J.* 604, 612 (1950) (internal quotation marks omitted) (quoting Letter from Franklin D. Roosevelt to L.C. Stewart, President, Nat’l Fed’n of Fed. Emps. (Aug. 16, 1937)).

169. Fischl, *Running the Government*, *supra* note 23, at 65 (“As I read the letter, Roosevelt is indeed quite clear about his opposition to strikes by public employees, but his position on collective bargaining seems to me to be more nuanced than the sound-bite version suggests.”).

170. See, e.g., Joseph A. McCartin, *Unexpected Convergence: Values, Assumptions, and the Right to Strike in Public and Private Sectors, 1945–2005*, 57 *Buff. L. Rev.* 727, 733 (2009) (“In the immediate aftermath of World War II there was no sign that this broad animus toward public sector unionization or strikes would abate any time soon.”); Joseph Slater, *Homeland Security vs. Workers’ Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 *U. Pa. J. Lab. & Emp. L.* 295, 327 (2004) (noting widespread resistance toward public-sector collective bargaining during the 1940s and 1950s).

171. Freeman & Ichniowski, *supra* note 7, at 1.

While more recent strikes by teachers' unions have met with greater support from some corners of the U.S. left,<sup>172</sup> it is important to recognize the widespread hostility to teachers' unions that—up until quite recently—had become mainstream within center-left, Democratic, and some progressive circles.<sup>173</sup> The 1990s and early part of the twenty-first century saw a growing narrative about education reform that stressed bad teachers and an absence of teacher accountability as key obstacles to reform.<sup>174</sup> Failing schools often were framed as victimizing children from poor communities of color; teachers and administrators were the villains—protected by unions and unaccountable to parents.<sup>175</sup> Despite the fact that teachers' unions often consisted of heavily female membership (often, in large cities, with a heavy population of women of color),<sup>176</sup> fighting teachers' unions was framed as a civil rights and racial justice cause.<sup>177</sup> Indeed, the growing popularity of Teach for America among liberals and progressives signaled a move to undercut teacher tenure, seniority, and the types of job protections associated with teachers' unions.<sup>178</sup> A technocratic preference

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172. See, e.g., Nick French, A Different Kind of Teachers' Strike Wave, *Jacobin* (Mar. 12, 2019), <https://www.jacobinmag.com/2019/03/a-different-kind-of-teachers-strike-wave> [<https://perma.cc/G4NU-5CY7>]; Sarah Jaffe, The Radical Organizing that Paved the Way for LA's Teachers' Strike, *Nation* (Jan. 19, 2019), <https://www.thenation.com/article/los-angeles-teachers-strike-utla-organizing-solidarity> [<https://perma.cc/VV3R-4WZ8>].

173. See *infra* notes 174–175.

174. See, e.g., Michelle Rhee, What It Takes to Fix Our Schools: Lessons Learned in Washington, D.C., 6 *Harv. L. & Pol'y Rev.* 39, 52 (2012) (“[Education] reforms all rest on the creation of sound, rigorous evaluation systems, and providing constructive and reliable feedback is absolutely necessary if we are going to value teachers as professionals and increase teacher effectiveness.”); Bill Turque, District Teachers Approve Contract; Agreement Expands Rhee's Power to Fire and Bases Pay on Results, Not Seniority, *Wash. Post*, June 3, 2010 (on file with the *Columbia Law Review*).

175. See, e.g., Levin, Blue-Collar Crime, *supra* note 26, at 629; *Waiting for Superman* (Paramount Pictures 2010) (portraying parent activists fighting to help their children in an underfunded public school).

176. Megan Dunn & James Walker, U.S. Bureau of Labor Statistics, Union Membership in the United States 12 (2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> [<https://perma.cc/6DLT-YASA>] (“In local government, women accounted for roughly 6 in 10 union members, partially reflecting the large number of women employed as public-school teachers, a highly unionized occupation.”).

177. See, e.g., Timothy DeLoache Edmonds, Note, Contracting Away Success: The Way Teacher Collective Bargaining Agreements Are Undermining the Education of America's Children, 2 *Colum. J. Race & L.* 199, 238 (2012) (“The effects [of union CBAs] on the country's poor and minority children have been particularly devastating, as they have often been subject to the worst that an already strained system has to offer.”); cf. Jonna Perillo, *Uncivil Rights: Teachers, Unions, and Race in the Battle for School Equity* 115 (2012) (“[In the 1960s, the] question of whether schools existed for the benefit of students or teachers would be all the more relevant, and the relationships between black students and white teachers even more central to public discussions of school reform and teacher unionism.”).

178. See, e.g., Gloria Ladson-Billings, Race . . . to the Top, Again: Comments on the Genealogy of Critical Race Theory, 43 *Conn. L. Rev.* 1439, 1456 & n.96 (2011) (describing

for recent college students with elite credentials was viewed as a means of addressing the structural flaws brought about by the unions.<sup>179</sup>

Certainly, an explicitly neoliberal strand in the post-Clinton Democratic coalition caused some of that hostility.<sup>180</sup> But the hostility also sounds in a language of accountability that might have much more to do with an older model of good-government liberalism than an explicitly pro-market or privatization ethos.<sup>181</sup> One nationwide poll from September, 2018, found that despite broad support for striking public school teachers, teachers' unions were viewed relatively negatively and were seen as a vehicle for keeping bad teachers in classrooms: "[S]ix of 10 [Democrats] said teachers' unions make it harder to fire bad teachers. So did three of four Republicans."<sup>182</sup>

The literature on public-sector unionism reflects a view—resonant with critiques of police unions—that organized public-sector workers are able to exert an unusually great amount of pressure in bargaining.<sup>183</sup> Part of this view stems from the suggestion that public-sector unions have “two types of clout”: “While they usually cannot threaten a strike, they can at least threaten discontent and noncooperation; and, in addition, they can threaten retribution at the polls.”<sup>184</sup> Politicians being responsive to voters is generally viewed as a democratic good—indeed, that responsiveness is at the heart of many of the accountability-based critiques of public-sector

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“Teach For America” as a “neoliberal approach[] to management” and a means of avoiding union power); Briana Sprick Schuster, Note, *Highly Qualified Teachers: Moving Forward from Renee v. Duncan*, 49 Harv. J. on Legis. 151, 156 & n.38 (2012) (collecting sources).

179. See, e.g., Ladson-Billings, *supra* note 178, at 1456 & n.96; Schuster, *supra* note 178, at 156 & n.38.

180. See, e.g., David Harvey, *Spaces of Global Capitalism* 33 (2006) (describing the rise of neoliberalism in the 1990s); Monica Teixeira de Sousa, *The State of Our Unions: How President Obama's Education Reforms Threaten the Working Class*, 50 U. Louisville L. Rev. 201, 202 (2011) (“President Obama has unleashed, through his education policies, a conservative assault on unionized teachers that has very little to do with improving education and everything to do with seeking the demise of this nation's public sector unions . . .”).

181. But cf. Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* 50 (2015) (“[T]he norms and principles of neoliberal rationality do not dictate precise economic policy, but rather set out novel ways of conceiving and relating state, society, economy, and subject and also inaugurate a new ‘economization’ of heretofore noneconomic spheres and endeavors.”).

182. Susan Page, Merdie Nzanga & Caroline Simon, *Even When Teachers Strike, Americans Give Them High Grades, Poll Shows. Unions Fare Worse.*, USA Today (Sept. 12, 2018), <https://www.usatoday.com/story/news/2018/09/12/teachers-union-strike-pay/1227089002> [<https://perma.cc/C8SN-5V5S>].

183. See, e.g., Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. Ill. L. Rev. 245, 260 (“Wellington and Winter argue that economic conditions in the public sector . . . give public sector unions the opportunity to exert undue influence over the budget-making process.”).

184. Forbath, *Distributive Constitution*, *supra* note 133, at 1146.



unionism.<sup>185</sup> But, in this account, responsiveness to public-sector workers is not necessarily a good: These workers represent an “interest group[]” that is subverting the proper functioning of democracy.<sup>186</sup>

Of course, one commentator’s corrupting “interest group” may well be another commentator’s example of Tocquevillian civil society.<sup>187</sup> To the union sympathizer, “Democratic regimes . . . require some rough sort of material and economic equality among their citizens if they are to survive as democracies. By moderating the dispersion of earnings and affecting the distribution of incomes, unions can assist in maintaining the sorts of material conditions necessary to democratic regimes.”<sup>188</sup> That is, the very properties that make the union an interest group—the pooling of voices and the advocacy for a shared, common goal—may well be the very characteristics that make it socially desirable.

Notably, and to this end, a concern about the loss of worker voice has been a staple of the sympathetic literature on public-sector unionism. For example, in decrying the move to strip power from public-sector unions, Michael Fischl argues that the role of worker voice in the public sector is essential to preserving the potential for more democratic (private and public) workplaces:

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185. See, e.g., Ronald N. Johnson & Gary D. Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 *Ariz. L. Rev.* 791, 792 (1995) (“The political power of public sector unions makes it unlikely that important changes in civil service rules will be adopted . . .”); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 *Harv. L. Rev.* 1422, 1442 (2003) (arguing that the existence of public sector unions encourages interest group participation in politics).

186. See Trebilcock & Iacobucci, *supra* note 185, at 1423 (“[T]here is a danger that public actors, even if potentially more successful at pursuing a particular end, will pursue socially undesirable ends because of political self-interest.”). Central to such a claim, of course, remains the idea that “the public interest” is a thing that is unique and distinct from the collected interests of groups of voters. But cf. Morton J. Horwitz, *The Transformation of American Law 1780–1860*, at 51–52, 63–66 (1977) (recounting the ways in which public takings served private interests); Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 *Harv. C.R.-C.L. L. Rev.* 105, 107 (2013) [hereinafter Levin, *American Gangsters*] (discussing the private interests advanced by public prosecutions). While a discussion of this concept of the “public” falls largely outside of the scope of this Essay, the distinction itself strikes me as highly suspect and—significantly for purposes of this discussion—fundamentally at odds with a vision of unions as an important democratic institution. That is, if unions serve to conglomerate the opinions of individual workers, they are inherently advancing some set of private interests. If one believes that this particular set of amassed private interests (as opposed to, say, other collections of private interests, such as corporations) in fact constitutes “the public interest,” then the public interest simply becomes a concept contingent upon a certain set of normative preferences.

187. See *supra* note 186; see also Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 *B.C. L. Rev.* 279, 300 (1995) (“[U]nions and the institution of collective bargaining can act to reduce the sort of unreflective and ultimately enervating dependence on the state and the other large institutions of contemporary life that Tocqueville warned would erode the habits a democracy requires.”).

188. Kohler, *supra* note 187, at 301.

[U]nions give American workers something that markets and employers seldom afford them and that contemporary American law does not otherwise provide: a genuine voice in important decisions about their work lives and the power to make that voice heard. The attack on public-sector unions thus threatens to exacerbate what is already a breathtaking “democracy deficit” in U.S. labor relations and—should the effort gain traction and succeed—to cut American workers altogether out of a role in workplace governance.<sup>189</sup>

To the extent that calls for accountability bleed into greater demands for workplace discipline and more powerful employers,<sup>190</sup> “accountability” necessarily undermines a normative preference for worker power. If accountability to the public comes via employer discipline, then these arguments become arguments to empower bosses vis-à-vis their workers.<sup>191</sup> In turn, such a move depends on a belief that those bosses—here, higher ranking police and other state actors—will (1) be effective in disciplining police and (2) share the values and commitments of activists seeking to achieve greater accountability.<sup>192</sup>

Interestingly, even though there certainly are other state actors on the other side of the bargaining table, the obstructionist accounts or critiques section I.A describes tend to focus exclusively on police unions as the source of objectionable contractual provisions. Implicitly, there appears to be an assumption that were it not for police unions, activists would have achieved the desired reforms. Whether that counterfactual is true remains an unanswerable empirical question.<sup>193</sup> But notably absent from this discussion or these critiques tends to be an acknowledgement of the role of “management” (e.g., legislators, mayors, etc.) in these labor negotiations. Ignoring management’s place in the bargaining process risks letting actual elected officials pass the buck and suggests that it is the job of the union—not the elected officials—to look out for the public interest.<sup>194</sup>

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189. Fischl, *Running the Government*, supra note 23, at 40.

190. See Benjamin Levin, *Criminal Employment Law*, 39 *Cardozo L. Rev.* 2265, 2268 (2018) [hereinafter Levin, *Criminal Employment Law*] (examining how public support for worker accountability and discipline empowers employers and hurts workers).

191. See *id.*; cf. Ahmed A. White, *My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII*, 63 *Buff. L. Rev.* 1061, 1063 (2015) (arguing that Title VII has been interpreted in a way that “enhances employers authoritarian control of the workplace” as employers are tasked with policing worker misconduct).

192. Cf. Levin, *Criminal Employment Law*, supra note 190, at 2316–18 (arguing that employers might have different values and incentives than other members of the public).

193. It is conceivable that we might be able to examine the policies in jurisdictions without police unions to see if there were different rules in place. But any such comparison would need to account for a range of variables—local politics, the relevant history of police violence and police–civilian interactions, and so forth.

194. Indeed, some critical accounts of police unions suggest that they have “bullied” politicians into enacting pro-police policies or shying away from greater oversight. See, e.g., David Firestone, *The NYC Police Union Has a Long History of Bullying City Hall*, Quartz

(Relatedly, such simplified accounts obscure the fact that government actors might make concessions on CBA provisions relating to oversight as a means of avoiding police demands regarding wages, hours, and benefits.)

By way of analogy, imagine a municipality with a unionized sanitation department. The sanitation workers' CBA is about to expire, so the union and the municipal government enter into collective bargaining. Union representatives ask for increased pay and that trash collection days fall only once a month, rather than once a week. The government representatives are concerned about the municipality's budget and conclude that the pay increase is out of the question. When the union representatives threaten a strike or slowdown, the government decides to cave to the union's demand regarding trash collection (because that demand wouldn't have a direct budgetary effect). As one could imagine, the populace would be extremely upset with once-monthly trash collection (and there might be a public health emergency).

Whose fault is the limited trash collection? On the one hand, perhaps it's the union's fault: Certainly, the workers were upset about not getting paid more, but the once-a-month demand was unreasonable and ran counter to the public interest. Additionally, perhaps sanitation workers have expertise that would make them better positioned to appreciate just how much trash the municipality produced and how harmful a single-day collection would be.<sup>195</sup> On the other hand, perhaps it's the government's fault: Politicians, unlike the workers or union representatives, were elected to serve the public interest. Balancing imperfect outcomes is a politician's job, and when politicians choose wrong, the buck stops with them.

Critiques of teachers' unions and other public-sector unions often sound in the language of democratic failures: Because of union politics and the outsized influence of organized labor, democracy has been subverted.<sup>196</sup> Rather than serving the interests of the community, the argument goes, some corner of the public sector has been captured and has come to serve the interest of organized labor.<sup>197</sup> But this is a highly

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(Dec. 23, 2014), <https://qz.com/317338/the-nyc-police-union-has-a-long-history-of-bullying-city-hall> [<https://perma.cc/EQ9L-4GD5>].

195. While scholars contest just how much expertise police have, judges and legislators tend to invoke police expertise when deferring to officer decisionmaking. See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 *Harv. L. Rev.* 1995, 1997 (2017); Josh Segal, Note, 'All of the Mysticism of Police Expertise': Legalizing Stop-and-Frisk in New York, 1961–1968, 47 *Harv. C.R.-C.L. L. Rev.* 573, 575 (2012).

196. See *supra* Part I.

197. See, e.g., Walker Bragman, *The Union Fight that Defined Beto O'Rourke's City Council Days*, *Intercept* (Jan. 13, 2019), <https://theintercept.com/2019/01/13/beto-orourke-public-sector-unions> [<https://perma.cc/T3KM-CX4U>] ("At the height of the conflict, O'Rourke publicly mused about disbanding the police union, calling it 'out of control' and lamenting his colleagues' unwillingness to stand up to the powerful political force.").

selective application of capture theory<sup>198</sup>—in other words, it appears to rest on a belief that elected officials, absent union pressure, would “do the right thing” and be responsive to otherwise powerless constituents. Of course, this an empirical question, but the argument seems dubious when the constituents in question lack major political clout. If we are willing to concede that democracy isn’t pure and that elected officials are influenced by powerful interests (a shocking concession, to be sure, but please bear with me), then removing public-sector unions would simply mean removing one of many powerful interest groups. Maybe that would yield good outcomes. But the argument driving “education reform” and other anti-public-sector union efforts appears to rest on a view that the unions, not the government actors, are getting it wrong. If the problem truly is a democratic one (i.e., poor people, people of color, and others from marginalized communities lack meaningful political representation), why would that problem evaporate in a world without police unions?

I return to this relationship among government, union, and polity in section IV.B. For the time being, though, I simply wish to stress the ways in which the prevalent critiques of police unions sound much like critiques of other disfavored or controversial public-sector unions. In the next Part, I examine a range of distinctions that might explain why police unions could be viewed as exceptional in discussions of organized labor.

### III. WHY IS THIS UNION UNLIKE ALL OTHER UNIONS?

For union supporters who find themselves embracing critiques of police unions, the analysis in the previous Part might be unsettling. Are those of us worried about policing actually advancing a set of arguments and policy proposals that undercut unionism, particularly public-sector unionism? Why don’t arguments for whittling away procedural and employment protections for police apply to teachers or other public-sector workers?

Certainly, some readers might enthusiastically say, “They do!” To those readers, police unions might operate as a particularly egregious example of an otherwise corrupt and objectionable phenomenon—the public-sector union. Those readers would embrace the police union critiques if applied elsewhere, arguing that the logic of the National Labor Relations Act (NLRA) simply does not extend to workers who are supposed to serve the public interest. Some of those readers—perhaps, adherents to a neoclassical or Chicago School economic model—might reject unionization across the board as a form of cartelization hostile to

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198. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *Colum. L. Rev.* 1260, 1284 (2006) (describing “capture theory”); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. Rev.* 543, 555 n.33 (2000) (examining “how government can use market mechanisms to solve problems”).

efficient markets.<sup>199</sup> Others might be more sympathetic to organized labor in the private sector, but may view unions as a bad fit in public-sector workplaces.<sup>200</sup>

But what about scholars who consider themselves supportive of the unionization project? Is it possible to embrace the critiques articulated in Part I while still retaining a principled justification for public-sector unionism?<sup>201</sup> And, even if it is, can the critiques themselves be cabined neatly, such that they don't easily migrate to debates about other public-sector unions?<sup>202</sup> As a formal, doctrinal matter, there certainly are differences between police unions and many other public-sector unions.<sup>203</sup> But, as discussed above, those differences are generally limited in scope and, if anything, restrict the rights of police unions as compared to other unions.<sup>204</sup>

This Part traces a few possible distinguishing features that might set police unions apart and allay fears of an unintended endorsement of the anti-union playbook. As I argue at greater length in the next Part, it is not clear that any of these distinctions does the necessary work. Or, maybe more importantly, the distinctions might tell us much more about policing (and objections to it) than about unions.

#### A. *Use of Force*

Perhaps the most obvious and intuitively appealing distinction rests on police officers' ability to use force.<sup>205</sup> As one police-union critic puts it, “[s]ocial workers and teachers don't fire bullets into the hearts and heads of unarmed people, or impose brute order when social unrest proves too

199. See, e.g., Samuel Issacharoff, *Reconstructing Employment*, 104 *Harv. L. Rev.* 607, 624 (1990) (“[N]eoclassicists welcome the precipitous decline of unions because they consider unions the most significant interference with the freely operating labor market. For the neoclassicists, unions are cartels that capture monopoly rents for a privileged sector at the expense of both consumer welfare and the remainder of the labor market.”); Richard A. Posner, *Some Economics of Labor Law*, 51 *U. Chi. L. Rev.* 988, 1011 (1984).

200. See, e.g., Fischl, *Running the Government*, *supra* note 23, at 63–65 (describing Franklin D. Roosevelt's views on the incompatibility of unions with public service).

201. See John Pfaff (@JohnPfaff), Twitter (Jan. 13, 2019), <https://twitter.com/JohnFPfaff/status/1084558610498310144> [<https://perma.cc/T56D-VZ27>] (“I understand the challenge the left feels in opposing [police] unions in a time of general attack on union[s], public sector unions in particular. But they remain fierce opponents of reform, and generally back policies/candidates whose views don't align [with] traditional union views.”).

202. Cf. Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 *Colum. L. Rev.* 1193, 1195–97 (2010) (tracking the migration, or co-optation, of feminist trauma discourse into the basis for antifeminist court decisions restricting reproductive rights).

203. See *supra* notes 133–137 and accompanying text.

204. See *supra* section II.A.

205. See Firestone, *supra* note 194 (“The members of no other union carry guns in public, or are responsible for public safety. Police unions carry a special burden to act in the highest interest of the city, but over many decades, no other union has acted less responsibly.”).

acute for less coercive pacification.”<sup>206</sup> Certainly, force is central to the role and power of police officers in the United States.<sup>207</sup> To the extent we conceive of the role of police as preserving or ensuring “order,” “there should be little doubt that police secure order through threats of superior physical force, and at least sometimes, actual exercises of it.”<sup>208</sup> Critically, the Supreme Court has consistently condoned the use of force, up to and including deadly force, in the context of lawful arrests.<sup>209</sup> Put simply, every police–civilian encounter carries with it the risk of an officer’s resorting to lethal force.<sup>210</sup> As agents of the state empowered to act out the official monopoly on violence,<sup>211</sup> police appear very different from the teacher or the bus driver. Because of this monopoly on violence, the reasoning would go, police are *sui generis* (or, at least, fall into a special category with other armed agents of the state).

This distinction is descriptively accurate.<sup>212</sup> Police officers go to work armed and are told by their superiors and every branch of the government that they can use lethal force. The vast majority of other workers have no such authority or directive. But is this a distinction without a difference?<sup>213</sup>

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206. Gude, *Support Police Unions*, *supra* note 65.

207. See, e.g., Williams, *Our Enemies in Blue*, *supra* note 54, at 27 (“Police brutality is pervasive, systemic, and inherent to the institution.”); Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 *J. Crim. L. & Criminology* 305, 306 (2018) (“Force is always at the background of police action, so much so that classic sociological descriptions of the police focus on their authority and readiness to use physical force.”).

208. Ristroph, *supra* note 207, at 306; see also Rachel A. Harmon, *Why Arrest?*, 115 *Mich. L. Rev.* 307, 308 (2016) (“It is no exaggeration to say that handcuffing a suspect and taking him to jail is the paradigmatic police activity.”).

209. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” (citing *Terry v. Ohio*, 392 U.S. 1, 22–27 (1968))); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (“Where [an] officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”).

210. See, e.g., Stephen L. Carter, *Opinion, Law Puts Us All in Same Danger as Eric Garner*, *Bloomberg* (Dec. 4, 2014), <https://www.bloomberg.com/opinion/articles/2014-12-04/law-puts-us-all-in-same-danger-as-eric-garner> [<https://perma.cc/97MX-LX3N>] (emphasizing the role of overcriminalization in the pervasive nature of police violence).

211. See, e.g., Zanita E. Fenton, *Disarming State Action; Discharging State Responsibility*, 52 *Harv. C.R.-C.L. L. Rev.* 47, 47–48 (2017) (noting the state’s monopoly on power and including law enforcement within that monopoly).

212. That said, there certainly are many tasks involved in policing or undertaken by police that do not involve use of force and do not resemble the functions that are the topic of much policing scholarship. See Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 *U. Ill. L. Rev.* 1847, 1849–51.

213. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1349, 1349 (1982) (“Success for a legal distinction has two facets. First, it must be possible to make the distinction . . . . Second, the distinction must make a difference . . . . Making a difference means that it seems plain that situations should be treated differently depending on which category of the distinction they fall into.”).

The best case to be made rests on some form of forfeiture analysis: Because police are granted a range of unique powers in society, they must give up certain rights in exchange, and society should hold them to a higher standard.<sup>214</sup> Qualified immunity and constitutional doctrines protect police decisionmaking,<sup>215</sup> this argument goes, so officers shouldn't be entitled to further protections. Or, in more familiar terms, "with great power comes great responsibility."<sup>216</sup> As a practical matter, though, too often courts and legislatures appear to take the opposite approach—holding police officers to a lower standard than they would hold civilians.<sup>217</sup>

But operationalizing the forfeiture logic is easier said than done. What rights should police give up, and how closely related should those rights be to their authorization to use force? Should wealthier, stronger, or otherwise more privileged workers be stripped of bargaining rights? Or, put differently, is our defense of unionization rooted in a vision of an otherwise powerless proletariat? There's certainly a lot of space to reduce police powers and to make their legal rights and liabilities more closely resemble those of their civilian counterparts. But at what point does stripping rights remedy concerns about abusive policing?<sup>218</sup>

If the priority in crafting legal rules is reducing police uses of force, it's not clear why eliminating organizing rights is directly responsive. Indeed, if we wished to equalize the status of police and other workers, it would make much more sense to attempt to chip away at the use of force authorization or the other rights that set police above other workers. This could be done via qualified immunity reform (an increasingly popular intervention),<sup>219</sup> by disarming police, or by dramatically reducing their

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214. Scholars and courts have deployed analogous forfeiture-style arguments in other treatments of policing. See, e.g., Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. Irvine L. Rev. 735, 749 (2015) ("The officer in uniform is thus disabled from insisting on respect in the sorts of ways she could were she a layperson.").

215. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

216. *Spider-Man* (Columbia Pictures 2002).

217. See Balko, *supra* note 29, at 336 ("[L]egislatures rarely if ever pass new laws to hold police more accountable, to restrict their powers, or to make them more transparent.").

218. Kate Levine has argued that such a general approach—depriving police of rights—does little to remedy structural flaws in the criminal system. See generally Levine, *How We Prosecute*, *supra* note 90 (arguing that police are treated more favorably than civilians when they are the subject of criminal prosecutions, particularly in the form of receiving a special precharge and preindictment process); Levine, *Police Suspects*, *supra* note 12 (arguing that police have special procedural protections that civilians do not have when they are the subject of criminal investigations).

219. See, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (critiquing the Court's expansive application of qualified immunity); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 88 (2018) (arguing that qualified immunity has no constitutional basis and that the Supreme Court should dial back the

rights to use force or arrest.<sup>220</sup> That police officers retain these rights and advantages might be troubling and might lessen the sense that they need the sort of empowerment that union representation affords. But if that's the case, then restricting organizing and bargaining rights simply becomes a second-order mechanism for regulating the first-order problem (i.e., violence).<sup>221</sup>

This observation isn't to contest the important point that police unions influence policy. Unionization strengthens the political power of police, and because police are a more powerful lobby, politicians are more likely to support pro-police policies that hamper accountability. Since politicians support such policies, it becomes increasingly difficult for heavily policed communities to have their voices heard and hold officers accountable.<sup>222</sup> That said, many other second-order regulations might also diminish officers' ability to shape policy: more heavily restricting speech rights, diminishing pay, or even gerrymandering to dilute votes in neighborhoods with larger police populations.<sup>223</sup> Yet there might be reasons to worry about each of those policy proposals. They would harm police, but they also drift further away from the first-order problem/regulatory goal while potentially diminishing other democratic values.

Finally, one additionally might argue that the authorization of force also should affect the analysis because of what it does to power relationships. While this claim rests on a power analysis (much like the

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doctrinal protections); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *Yale L.J.* 2, 9 (2017) (arguing that the qualified immunity doctrine is ineffective); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 *Harv. L. Rev.* 2283, 2305 (2018) ("Collectively, then, academic literature in the field of federal jurisdiction is calling for a new round of remedial calibration with respect to immunities in constitutional litigation.").

220. Such proposals are not unheard of in the literature on police use of force. See, e.g., James Jacobs, *Disarming the Police Would Make Gun Control Effective*, in *Gun Control* 42, 43 (Charles P. Cozic ed., 1992) (arguing that disarming police might contribute to a broader disarmament); Vitale, *The End of Policing*, *supra* note 107, at 25–27 (critiquing police reliance on guns); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 *U. Ill. L. Rev.* 629, 636 n.17 (collecting sources); Matthew Walther, *Opinion, Police Officers Do Not Need Guns*, *Week* (Sept. 13, 2018), <https://theweek.com/articles/795599/police-officers-not-needguns> [<https://perma.cc/X87J-X9QH>] ("I think we should consider the possibility of a return to a style of policing in which officers do not, under ordinary circumstances, carry guns or wear black body armor.").

221. I borrow here from John Rappaport's description of first- and second-order police regulatory approaches. See Rappaport, *Second-Order Regulation*, *supra* note 59, at 210.

222. See *supra* Part I.

223. That's not to mention regulations involving insurance, indemnification, and other second-order and subconstitutional mechanisms for altering police behavior. See generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 *Harv. L. Rev.* 1539 (2017) (assessing the effects of liability insurance on police behavior and how legal reforms within the insurance liability market could reduce police misconduct); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 *UCLA L. Rev.* 1144 (2016) (examining the impact of lawsuits, particularly budgetary arrangements to pay settlements and judgments, on police reform efforts).



forfeiture argument does), the argument is slightly different: To the extent that unionization is justified in terms of evening out the power imbalances of capitalism, perhaps the use of force already takes care of that imbalance. It's an interesting argument that might intersect with (or, perhaps, subvert) a larger literature on gun ownership and inequality,<sup>224</sup> but it doesn't do much work. Police are authorized to use force against civilians in a range of contexts. But the relevant imbalance of power for assessing the need for collective bargaining is not the imbalance between police and civilians; rather, from a contractual perspective, the "inequality of bargaining power" stems from or defines the *relationship between workers and their bosses*.<sup>225</sup> So, for force to have significant purchase in a labor analysis, that force would need to counteract the inherent power that bosses enjoy over workers. While police certainly are granted significant leeway in their use of force,<sup>226</sup> courts and legislatures hardly have blessed some sort of labor violence. Indeed, courts and legislatures are hostile to the suggestion that police unions can even strike (i.e., use nonviolent economic coercion): Forty-two states and the District of Columbia explicitly outlaw police strikes, and only two states allow police union strikes.<sup>227</sup>

The authorization to use force certainly is a distinguishing feature of U.S. police and differentiates them from other workers and other members of society. But that authorization ultimately has little to do with

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224. See, e.g., Nicholas Johnson, *Negroes and the Gun: The Black Tradition of Arms* 13 (2014) ("The black tradition of arms has been submerged because it seems hard to reconcile with the dominant narrative of nonviolence in the modern civil-rights movement."); Akinyele Omowale Umoja, *We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement* 254–59 (2013) (summarizing historical developments in armed resistance among Black Americans); Robert F. Williams, *Negroes with Guns* 110–25 (Marc Schleifer ed., 2013) (1962) (reconciling a movement toward self-defense among Black Americans and contemporary nonviolent discourse).

225. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) ("No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances."); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 470–71 (1923) ("[T]he systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom . . . out of conformity with any formula of 'equal opportunity' or of 'preserving the rights of others.'"); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 *Legal Stud. Forum* 327, 327 (1991) (synthesizing the views of Hale and Foucault to develop an approach for evaluating the "role of law in the reproduction of social injustice in late capitalist societies").

226. See *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

227. See Sanes & Schmitt, *supra* note 129, at 8 chart 3 (summarizing the legality of strikes across the states); cf. *Potts v. Hay*, 318 S.W.2d 826, 827 (Ark. 1958) ("We are not convinced that . . . union membership on the part of police officers presents such a threat to the public welfare that an implied exception must be written into the unqualified language of [a state constitutional amendment declaring that police unionization runs counter to the nature of their employment].").

labor organizing or the relative power of labor and management in collective bargaining.

B. *Police as Bosses or Managers?*

Perhaps another way of distinguishing police unions from other unions is the social status of the unionized workers. Unions are heterogeneous in politics, interests, and approach, and perhaps the arguments raised in Part II suffer from a flattening out of class; that is, just because police are workers and police unions are unions doesn't necessarily mean that one need accept that every union or every worker should receive the same treatment or bundle of rights.<sup>228</sup> If the project at the heart of unionization is class consciousness, how do we delineate class or determine how to advance solidarity?<sup>229</sup> Put simply, class is not so simple; the "working class was never the singular social and historical entity suggested by the phrase."<sup>230</sup>

In his writings on class consciousness, Marxist theorist Georg Lukács recognizes the challenge inherent in such a project:

[I]s the problem of class consciousness a 'general' sociological problem or does it mean one thing for the proletariat and another for every other class to have emerged hitherto? . . . [I]s class consciousness homogeneous in nature and function or can we discern different gradations and levels in it? And if so, what are their practical implications for the class struggle of the proletariat?<sup>231</sup>

One response would be that such divisions are hostile to the broader project of solidarity and worker empowerment. These divisions, the argument

228. See *infra* section IV.A.2.

229. The question of how to address challenges to workplace and worker solidarity remains a pressing one in the literature on labor law and class. See, e.g., Rick Fantasia, *Cultures of Solidarity: Consciousness, Action, and Contemporary American Workers* 26, 36, 45, 54–59 (1988) (detailing the impact of federal labor relations legislation on unionization); Marion Crain, *Feminism, Labor, and Power*, 65 S. Cal. L. Rev. 1819, 1867 (1992) ("[U]nions sacrificed the solidarity that once served as the source of workers' empowerment. Lacking a sense of connection and empathy with other workers in the union, members lost trust; lacking the feeling of empowerment that comes with the experience of directly effecting change, members lost faith."); Patricia Ewick, *Postmodern Melancholia*, 26 L. & Soc'y Rev. 755, 760 (1992) ("Class-consciousness is understood to be not a form of revealed wisdom but something that is constructed through social interaction."); Martha R. Mahoney, *What's Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 Buff. L. Rev. 1515, 1563 (2009) ("Class-conscious mutuality, solidarity, and group action are not always protected under federal labor law . . . Legal constraints become part of the culture within which people live and work, and therefore part of the way people understand the world and act within it."); White, *supra* note 191, at 1064 (arguing that Title VII and its enforcement have impeded worker solidarity).

230. Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* 42 (Univ. of N.C. Press 2000) (1983).

231. Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* 46 (Rodney Livingstone trans., Merlin Press 1971) (1923).

goes, “are pure and simple illusions or, worse, pure and simple impostures, milked for all they are worth in the capitalist class struggle against the workers’ class struggle for the purpose of maintaining workers in the condition of the exploited.”<sup>232</sup> Class, in this view, operates as a sort of shorthand. Of course, there are differences among workers with the same income or the same education, but by invoking the concept of “class,” scholars and union advocates are necessarily smoothing out those distinctions.<sup>233</sup>

The inter- and intra-industry challenge of addressing heterogeneity is not simply a theoretical problem; rather, it stands at the heart of the workplace’s legal architecture. U.S. labor and employment laws distinguish among classes of workers,<sup>234</sup> affording different rights and causes of action to different groups depending on their status in labor markets or production chains.<sup>235</sup> While these legal frameworks may fail to protect the interests of particularly marginalized workers (e.g., temporary workers or contractors),<sup>236</sup> they generally protect the rights of lower wage/status workers, rather than the rights of bosses, managers, or some professional workers.<sup>237</sup>

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232. Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* 35–36 (G.M. Goshgarian trans., Verso 2014) (1971); see also Robinson, *supra* note 230, at 42 (“[T]he dialectic of proletarianization disciplined the working classes to the importance of distinctions . . . . The persistence and creation of such oppositions within the working classes were a critical aspect of the triumph of capitalism in the nineteenth century.”).

233. Cf. Flora Tristan, *The Workers’ Union* 39–41 (Beverly Livingston trans., Univ. of Ill. Press 1983) (1843) (advocating for a more capacious class solidarity via sweeping unionization).

234. See, e.g., *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 123 (1944) (distinguishing “employees” and “independent contractors” as different classes of workers); *Frito-Lay, Inc.*, 202 N.L.R.B. 1011, 1013 (1973) (identifying geographic and control–autonomy distinctions).

235. See generally Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 *Berkeley J. Emp. & Lab. L.* 251 (2006) (describing legal approaches to regulating precarious and liminal labor markets).

236. See, e.g., V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 *Calif. L. Rev.* 65, 89–95 (2017) (describing the legal hurdles facing workers who don’t fall easily into specific categories); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *Cardozo L. Rev.* 2685, 2698–99 (2008) (describing how the NLRA fails to cover independent contractors).

237. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (concluding that the NLRA does not cover managerial employees); Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 *Minn. L. Rev.* 953, 959 (1990) (noting “the exclusion of middle-level employees from NLRA coverage”); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 *Harv. L. Rev.* 937, 943 (2007) (“[C]ourts issued decisions defining the scope of the bargaining unit to exclude ‘managerial employees.’” (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980))); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 *Colum. L. Rev.* 1775, 1794–96 (1989) (discussing the managerial exclusions derived from ambiguous Taft–

In the legal academic literature and public debates on policing, there is a troubling tendency to erase institutional hierarchies and elide all classes of police, such that the beat cop is the same as the detective, is the same as the investigator, is the same as the chief.<sup>238</sup> This flattening is a problem because it erases the workplace realities of policing: Everyone is not similarly situated, orders are given and taken, and some law enforcement actors are more responsible for policy and institutional decisionmaking than others.<sup>239</sup> From the perspective of a union proponent, such a flattening might be beneficial as a means of building class consciousness or a “culture of solidarity” across internal institutional divisions.<sup>240</sup> For union critics, though, precision should be important in diagnosing who or what is so problematic about police unions: Who are the actors responsible for enacting problematic policies, who are the actors most likely to have working relationships with civilians, and who are the actors best positioned to impose internal discipline and accountability?<sup>241</sup>

Even accepting that police departments are fiercely hierarchical, police (even those with the lowest departmental status) might still be viewed as representing the interests of bosses—i.e., the forces of capital—rather than labor. In other words, the concern at the heart of police union critiques is not focused on internal labor dynamics at all; instead, the focus is on the broader place of police in the U.S. political economy. In the resolution seeking the expulsion of police unions from the AFL-CIO, this critique rears its head:

While it is true that police are workers, and thus hypothetically subject to the same kinds of exploitation as other laborers, they are also the militarized, coercive arm of the state. It is the job of the police to protect capital and, consequently, maintain class

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Hartley provisions); Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C. L. Rev. 987, 992–93 (1989) (discussing “the complexities of drawing distinctions among individuals eligible and ineligible for [NLRA] coverage”).

238. But cf. Tracy Meares & Tom Tyler, *Policing: A Model for the Twenty-First Century*, in *Policing the Black Man: Arrest, Prosecution, and Imprisonment* 161, 173 (Angela J. Davis ed., 2017) (“[P]olice officers want from their commanders the same sort of fairness that the public wants from them. And . . . officers often feel they do not receive their due even in their own station houses. Hence, it is also important to rethink the organization of police forces . . .” (footnote omitted)).

239. See Fisk & Richardson, *supra* note 12, at 722 (“Police departments are hierarchical, with a chain of command as in the military and a sharp division between the leadership and the rank-and-file.” (footnote omitted)).

240. See generally Fantasia, *supra* note 229, at 24 (“The location of, and the possibilities for, worker mobilization and collective action today have been profoundly shaped by previous struggles, processes, and initiatives, and it is by understanding this changing terrain that contemporary cultures of solidarity can be properly situated.”).

241. Such a nuanced approach would be responsive to the growing critique that accounts of criminal justice policy suffer from “insufficient concentration on diverse actors and conflict.” Philip Goodman, Joshua Page & Michelle Phelps, *Breaking the Pendulum: The Long Struggle over Criminal Justice* 7 (2017).

society. How can there ever be solidarity between law enforcement and the working class when elites call upon police and their organizations to quell mass resistance to poverty and inequality? The police force exists solely to uphold the status quo. Their material survival depends on it, and they hold a vested interest in the preservation and expansion of the most deplorable practices of the state.<sup>242</sup>

In seeking to disown police unions or expel them from the labor movement, critics have argued that police unions *never were* a part of the labor movement: Historically, organized police served to brutalize and impede the progress of workers.<sup>243</sup> Or, as a *Jacobin* editor argues, the “inherent defect of law enforcement unionism” remains that “[i]t’s peopled by those with a material interest in maintaining and enlarging the state’s most indefensible practices.”<sup>244</sup> The claim isn’t that officers are bosses in the sense of the literal boss–worker dialectic. Rather, it’s that police are the tools of capital, of bosses, and of antiworker structures of power.<sup>245</sup>

Some sort of claim that police unions are inextricable from the violence of capitalism (or, capital’s violence against labor) gets us closer to an argument for police abolition.<sup>246</sup> I will put a pin in that discussion—the broader question of whether policing is a desirable social institution—for the moment and return to it in the next Part.<sup>247</sup> But I worry about this framing of police unions in which the unions represent capital and hierarchy, while (apparently) all other unions represent labor and a resistance to hierarchy.

First, as discussed above,<sup>248</sup> such a move flattens out internal police hierarchies and seems to take for granted that because an institution or industry (here, the police) is hierarchical or politically problematic, then internal hierarchies or abuses *within the institution* shouldn’t be concerning.<sup>249</sup> That is, does adopting an abolitionist approach necessarily mean

242. Letter from United Auto Workers Local 2865 to AFL-CIO, *supra* note 47.

243. See *id.* (“Police unions in particular emerge out of a long history of police intervention in labor politics and its complicity in racial violence.”).

244. Gude, *The Bad Kind of Unionism*, *supra* note 63; see also Jon Ben-Menachem (@jbenmenachem), Twitter (Jan. 13, 2019), <https://twitter.com/jbenmenachem/status/1084490021950902273> [<https://perma.cc/U9QV-D35Q>] (“I’d argue that police unions shouldn’t be considered ‘public sector unions,’ because they perpetuate class inequity.”).

245. Contrary to this narrative of police unions as inherently hostile to other forms of organized labor, it is worth noting that early police unionization efforts met with substantial resistance because “business and anti-labor groups feared that unionized police would strike and, more important, would not stop other employees from striking and picketing.” Fisk & Richardson, *supra* note 12, at 735.

246. See Vitale, *The End of Policing*, *supra* note 107, at 228 (describing police as a key feature and defender of “intertwined systems of oppression”).

247. See *infra* section IV.B.

248. See *supra* notes 238–239 and accompanying text.

249. Notably, while the contemporary discourse on police unions tends to focus on public oversight, unionization initially stemmed from concerns about internal hierarchy. See Fisk & Richardson, *supra* note 12, at 734 (“Police officers in many cities began joining

rejecting concerns about internal, institutional mistreatment? Does embracing abolition mean concluding that beat cops shouldn't be able to file a Title VII claim against their employers or grieve if they aren't paid for overtime? By way of analogy, one certainly could adopt a prison abolitionist ethic,<sup>250</sup> while recognizing that correctional officers might be treated poorly by their superiors. It strikes me as logically defensible to argue that there should be no prison guards, but that as long as there are prison guards, they should earn a decent wage, receive decent health insurance, or receive protection from abuse at the hands of their employers.<sup>251</sup> (As Part IV demonstrates, though, this observation certainly isn't meant to suggest that abolitionists or, for that matter, reformers, should be prioritizing the interests of police or correctional officers.)<sup>252</sup>

Additionally, this framing of police and focus on relative power understates the ways in which other workers—particularly public-sector workers—may exercise power or retain various hierarchical advantages over other workers or other members of the polity. Take the example of teachers' unions. To sympathetic commentators, the teachers' union might be a necessary vehicle for underpaid, overworked public servants to retain some dignity and advocate for their interests.<sup>253</sup> Those accounts might stress low teacher salaries or the demographics of public school teachers, with an eye to race and gender.<sup>254</sup> In these accounts, teachers are invaluable public servants who have been undervalued and mistreated. To unsympathetic commentators on the left and right, though, the teachers'

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unions in the late nineteenth and early twentieth centuries when workers in every industry unionized, and for the same reasons—to improve pay and working conditions and to gain some measure of control over their work lives.”).

250. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. Rev.* 1156, 1161–62 (2015) [hereinafter *McLeod, Prison Abolition*] (“By a ‘prison abolitionist ethic,’ I . . . invoke . . . a moral orientation elaborated in an existing body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through . . . threatened police use of violent force.”).

251. There remains, of course, a question of political capital, resources, etc. Scholars, advocates, and politicians can't cure all of the world's ills and do not have the capacity to take on and remedy every injustice. In a universe of scarce resources, then, why advocate for the rights of the relatively powerful? That's a fair question, and one that I have begun to address elsewhere. See Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 *J. Crim. L. & Criminology* 491, 545–46 (2019); see also *supra* note 218 and accompanying text. But whether advancing police labor rights is a worthwhile goal is a very different question from whether police should have labor rights at all. I take most scholarly and popular commentary to be focusing much more on the latter than the former.

252. See *infra* notes 345–351.

253. See Marion C. Crain & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 *Emp. Rts. & Emp. Pol'y J.* 259, 291–94 (2018) (collecting sources).

254. See, e.g., Laura Meckler, 2 in 3 Americans Say Public School Teachers Are Underpaid, *Wash. Post* (Aug. 27, 2018), [https://www.washingtonpost.com/local/education/two-in-three-americans-say-public-school-teachers-are-underpaid/2018/08/27/cddf5b6a-a953-11e8-b1da-f7faa680710\\_story.html?utm\\_term=.64b2d14d917e](https://www.washingtonpost.com/local/education/two-in-three-americans-say-public-school-teachers-are-underpaid/2018/08/27/cddf5b6a-a953-11e8-b1da-f7faa680710_story.html?utm_term=.64b2d14d917e) (on file with the *Columbia Law Review*); Page et al., *supra* note 182.

union starts to look more like a management union.<sup>255</sup> If students (particularly students from underserved or marginalized communities) are the primary point of empathy, identification, or concern, then teachers are only meaningful in that they advance the interests of the student. To the extent they don't, then they are yet another set of (relatively) powerful actors complicit in the subordination of powerless young people. As a cog in a dysfunctional education system and—perhaps—the school-to-prison pipeline, the teacher might be viewed as a bully, an authoritarian, and even analogous to a police officer.

There's no denying that police (and, by extension, police unions) have an ugly history of suppressing labor and of complicity with the violence of capital and of white supremacy.<sup>256</sup> But, as Part IV discusses, how much of support for unionization and worker organizing does or should rest on a belief that the job in question is socially desirable? Should the Mine Workers' Union be less deserving of political or theoretical support because its members' work contributes to the fossil fuel industry and attendant environmental harm?

### C. *Nature of Bargaining Power*

Related to the previous argument, perhaps we might simply distinguish police unions because of their relative bargaining power or social status. As police labor leaders have noted, police unions occupy a peculiar place because police are much better off than most workers.<sup>257</sup> The police labor movement has been a success: “As a result of collective bargaining rights . . . and political activism among police unions, officers are for the most part well-compensated. Salaries in many urban areas exceed \$100,000, where the central department and suburbs must keep up with each other in order to recruit the most qualified candidates.”<sup>258</sup> This success, though, operates as a double-edged sword. “No one should begrudge law enforcement officers these benefits and job protections,” the union leaders argue.<sup>259</sup> But those benefits are not without costs:

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255. See *supra* section II.B.; see also Thaddeus Russell (@ThaddeusRussell), Twitter (Jan. 14, 2019), <https://twitter.com/ThaddeusRussell/status/1084900565484679171> [<https://perma.cc/ZUD5-YS2P>] (“My teachers in Oakland were petty authoritarians who knew nothing about me and tracked me into remedial English. I learned nothing from them. They were glorified prison guards. My son and I feel the same about his [striking] teachers in LA. Please don't stand with them.”).

256. See Donner, *supra* note 110, at 1 (“[Police units] have, beginning in the Gilded Age, predominantly engaged in political repression, which in the context of policing, may be defined as police behavior motivated or influenced in whole or in part by . . . activities perceived as a threat to the status quo.”); Vitale, *The End of Policing*, *supra* note 107, at 40 (“In some cases, early police forces were created specifically for the purpose of suppressing workers' movements.”).

257. See Ron DeLord et al., *supra* note 73, at x.

258. *Id.*

259. *Id.*

The problem is that police officers are well-entrenched in the middle class, outdistancing many other workers in the community who don't receive the array of benefits and protections that officers do. Police unions must depend on public support for their pursuit of better wages and benefits; and support becomes more difficult when other workers in the community make considerably less in wages; pay high monthly premiums for substandard health insurance; and are struggling for economic survival.<sup>260</sup>

Police officers are not only granted a range of legal protections and authorized to use force; often, they're also relatively well-situated in an increasingly stratified economy.

Nevertheless, for their economic status to make much difference, we would need to assume that (1) their incomes and relative social status make them different from most unionized or unionizing workers, and (2) a principled defense of unionism can only defend the rights of the most marginalized workers.<sup>261</sup> The first point appears debatable, at best. Since the high-water mark of U.S. unionization in the wake of the Second World War, the largest growth sector for organized labor has been among white-collar workers, particularly within the public sector.<sup>262</sup> Certainly, salaries, benefits, and social status of "white-collar" workers vary dramatically. But any suggestion that unions exist only in particularly low-wage service sectors would appear to be empirically unfounded.<sup>263</sup>

The next Part discusses the second point at greater length.<sup>264</sup> Nevertheless, for the time being, it is worth noting that a class-conscious politics or theoretical defense of unionism generally doesn't depend upon a workforce that is the absolute poorest or most socially marginal. Certainly, there are many compelling historical examples that sound more like this extreme—from the United Farm Workers,<sup>265</sup> to more recent work by the

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260. *Id.*

261. As discussed in the previous section, there might be another possibility: that police had effectively eliminated the distinction between boss and worker and therefore become capital. I certainly can imagine a sliding scale of enthusiasm for unions or unionization, where they appear more vital the greater the power imbalance between boss and worker, and less vital the smaller the imbalance. But, to the extent one accepts the justifications of unionization common in the literature, I'm not sure why unions are necessarily a problem at the "less inequality" end of the spectrum. Further, mapping work relationships on a spectrum is easier said than done, and it's not clear exactly where police would fall (or, whether all officers in all departments or jurisdictions would fall in the same place).

262. See Michael Denning, *Culture in the Age of Three Worlds* 231 (2004).

263. See Press Release, Bureau of Labor Statistics, *supra* note 1, at 7–10 tbls.3 & 4 (showing that unionization and wage rates do not correlate).

264. See *infra* section IV.A.2.

265. See *The Rise of the UFW, United Farm Workers*, <https://ufw.org/research/history/ufw-history> [<https://perma.cc/RD99-5J5M>] (last visited Feb. 27, 2020) ("[California's long exploited] farmworkers had tried but failed so many times to organize the giant agribusiness farms that most observers considered it a hopeless task. And yet by the . . . [the mid-1970s] more than 50,000 farmworkers were protected by union contracts.").



Service Employees International Union (SEIU) in its “Justice for Janitors” campaigns.<sup>266</sup> And unions hardly are (or have been) the voice of the rich.<sup>267</sup> But it would be ahistorical to claim that the U.S. labor movement had revolved exclusively around the lowest-paid or most socially marginalized workers.<sup>268</sup> Indeed, some of the great labor “success stories” involve unions that effectively created the post-World War II middle class.<sup>269</sup>

All of which is to say that a theory of unionization that rests on an image of the most marginal worker needs to grapple with the reality of the U.S. labor market. Are higher-skill, higher-wage sectors in which unions retain great power (professional sports, entertainment, certain sectors of construction) undesirable outliers?<sup>270</sup> Or, should these sectors serve as a model for more of the workforce and the U.S. economy? Do unions have a meaningful role to play when the organizing workers are already relatively well off, or, at least, are not struggling with immediate hunger or eviction?

In some sense, these questions cut to the heart of what “solidarity” means and how capacious it should be as a concept for those who study labor. Imagining an expansive version of solidarity might speak to ties among workers regardless of class—the bargaining or legal victory for professional football players might redound to the benefit of fast food

266. For more information about “Justice for Janitors,” see Stephen Lerner & Jono Shaffer, 25 Years Later: Lessons from the Organizers of Justice for Janitors, *Nation* (June 16, 2015), <https://www.thenation.com/article/archive/25-years-later-lessons-from-the-organizers-of-justice-for-janitors> [<https://perma.cc/M72E-XC8D>].

267. See Sachs, *Unbundled Union*, *supra* note 13, at 168 n.83 (“As of March 2011, approximately 85.8% of union members lived in households representing the lower nine income deciles for U.S. households.”).

268. See, e.g., *id.* at 168–69 (collecting data on historical unionization rates and discussing how unions have organized for both lower- and middle-class workers).

269. See, e.g., Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 *Minn. L. Rev.* 1637, 1640 (2014) (describing how union membership may correlate with the growth of the middle class).

270. See Liam Dillon, *Here’s How Construction Worker Pay Is Dominating California’s Housing Debate*, *L.A. Times* (May 12, 2017), <https://www.latimes.com/politics/la-pol-sac-construction-workers-housing-20170512-htmstory.html> [<https://perma.cc/GD56-UBZ5>]; David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, *L.A. Times* (May 9, 2017), <https://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html> [<https://perma.cc/6A7J-HMGZ>] (“As union membership continues to decline nationwide, Hollywood remains a bastion of organized labor, with unions controlling nearly every aspect of production, including the director who calls ‘action’ and the truck drivers who transport equipment to and from sets. Their power can bring the film . . . industry to a standstill . . .”); see also Sports Unions Work to Level the Playing Field, *Am. Postal Workers Union* (June 30, 2009), <https://apwu.org/news/sports-unions-work-level-playing-field> [<https://perma.cc/3Y46-95DN>] (“Although their average salary is considerably higher and their ‘work year’ is much shorter, members of the nation’s four major sports unions share much in common with their counterparts in other industries, especially the historical basis for their creation: Poor wages and unfair working conditions.”).

workers. In contrast, narrowing the meaning of solidarity would get us back to the distinctions described by Lukács—the rich organizing to increase their salaries does little to help the plight of many poor workers.<sup>271</sup> Indeed, perhaps if the public comes to associate “organized labor” only with celebrities, then they will be less sympathetic to organized labor generally and will come to view unions as inessential.

Whatever one’s views on the social benefits of or theoretical case for higher-wage unions, it’s important to recognize that arguments against middle-class (or upper-class) unions cut much more broadly than discussions of police. So, for those who are skeptics of police unions as a result of their relatively higher wages and social standing, the real question is whether they would adopt similar critiques of autoworkers and other middle-class unionized work forces.

#### D. *Demographics and Politics*

Finally, we might distinguish police unions along lines of member politics and demographics. That is, as noted at the outset of the Essay, police unions are more likely to swing right politically and may be more heavily comprised of white men than some other public-sector unions, such as teachers’ unions.<sup>272</sup> For this distinction to have any teeth, though, our belief in or defense of public-sector unions would need to rest on these factors. If, for example, unionization were not viewed as a good in itself, but were only desirable to the extent it benefitted workers of color or advanced liberal, progressive, or left politics, then we might be right to look askance at a union that did none of those things. In other words, this critique rests on a view that unionization is not a good in and of itself; rather, unionization’s virtues are tied up in a particular understanding of unions elevating the voices of left-leaning people and people of color.

While some union supporters might take that view, it is largely ahistorical (or, at least, selectively accurate historically). Unions’ relationships to racial justice have been fraught. The image of unions heavily comprised of people of color (particularly Latinx workers) is a relatively recent one. Organized labor in the United States often butted heads with racial justice advocates. While radical unions such as the Industrial Workers of the World (IWW) embraced an explicitly antiracist agenda,<sup>273</sup> more mainstream unions have, from time to time, embraced or mobilized racist

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271. See *supra* notes 231–237 and accompanying text.

272. See *supra* notes 172–177 and accompanying text.

273. See, e.g., Peter Cole, *Wobblies on the Waterfront: Interracial Unionism in Progressive-Era Philadelphia* 72 (2007); Howard Kimeldorf, *Battling for American Labor: Wobblies, Craft Workers, and the Making of the Union Movement* 72 (1999) (describing the Wobblies’ “color blind” approach to union organizing).

and xenophobic policies in order to protect their members' interests and retain market control.<sup>274</sup>

Even when unions weren't outright hostile to the fight for racial equality, they certainly weren't always on the frontlines. The widely cited Supreme Court case of *Emporium Capwell Co. v. Western Addition Community Organization* stands as but one marker of the fraught relationship between unions and racial justice.<sup>275</sup> In *Emporium Capwell*, several black workers at a unionized San Francisco department store complained to union officials that management was discriminating based on race.<sup>276</sup> When workers found the union's response unsatisfactory, they picketed in an effort to exert pressure on management.<sup>277</sup> Eventually, when the workers refused to stop picketing, they were fired, leading to litigation.<sup>278</sup> This reflected "the crisis that liberalism found itself mired in at the end of the 1960s as it sought to accommodate its constituents' disparate visions of economic equality and social fairness."<sup>279</sup> The union hadn't adopted a position explicitly opposed to racial justice or civil rights. Indeed, the union was pursuing the workers' grievances. But it had refused to embrace a more radical vision that would have allowed workers to confront management directly. The case, therefore, became:

[A] symbol of how labor unions have interacted with community groups, often to the detriment of the movement itself. When community groups have sought to involve themselves in unions, they have found an ideology that is partly driven by law but partly rooted in notions of hierarchy and the legal entitlement to exclusively speak for workers.<sup>280</sup>

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274. See, e.g., Philip S. Foner, *Organized Labor and the Black Worker, 1619–1981*, at 263 (1982) (describing at least one instance when Black steelworkers had been excluded from leadership positions in a union); Risa L. Goluboff, *The Lost Promise of Civil Rights* 98–99 (2007) (describing union leaders' failure to address discrimination against black workers during the 1940s); Nelson Lichtenstein, *State of the Union: A Century of American Labor* 73 (rev. and expanded ed., 2013) ("[W]hite working-class racism and craft-union exclusion had made African Americans skeptical bystanders when it came to the fate of the U.S. labor movement."); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 *Calif. L. Rev.* 1767, 1782 (2001) ("[O]rganized labor, and the working class more generally, came to be associated with a conservative defense of the status quo and white male privilege."). But cf. Nelson Lichtenstein, *A Contest of Ideas: Capital, Politics and Labor* 109–29 (2013) (tracking the fraught relationship between union officials and black workers' fight for civil rights).

275. 420 U.S. 50 (1975).

276. See *id.* at 52–54.

277. *Id.* at 55–56.

278. *Id.* at 56–57.

279. Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-War Liberalism*, 25 *Berkeley J. Emp. & Lab. L.* 129, 130 (2004).

280. Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 *Hastings L.J.* 79, 128–29 (2002). But see Charlotte Garden & Nancy Leong, "So Closely Intertwined": *Labor and Racial Solidarity*, 81 *Geo. Wash. L. Rev.* 1135, 1149–51 (2013) (critiquing a reading of *Emporium Capwell* as emblematic of deeper racism in organized labor).

To be clear, the relationship between movements for worker power and for racial justice resists easy classification. “The labor movement” is—and always has been—far from monolithic,<sup>281</sup> and the same is true of marginalized groups or movements for racial justice.<sup>282</sup> Further, the temptation to speak of “race,” “class,” and other identities as distinct misstates the interconnectedness and interdependency of various hierarchies.<sup>283</sup> Much ink has been spilled and competing narratives abound on organized labor and race in the United States. Some commentators focus on the ways that unions worked to exclude people of color from the labor market,<sup>284</sup> while others argue that unions have been an important vehicle for civil rights.<sup>285</sup> Rather than endorsing one narrative here, I simply mean to emphasize that the question of unions and race is a complicated one. Suggesting that the operative justification for worker organizing or labor law was to advance the interests of racial justice seems highly contestable. So a critique of police unions that relies on an image of otherwise racially unproblematic unionism is misguided or, at least, in need of much greater

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281. See Judith Stein, *Running Steel, Running America: Race, Economic Policy, and the Decline of Liberalism* 2 (1998) (“Monographs on trade and others on labor, business, civil rights, and politics also serve to keep history in discrete channels . . . History is impoverished.”); Marion Crain, *Confronting the Structural Character of Working Women’s Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 *Kan. J.L. & Pub. Pol’y* 26, 32–33 (1994) (“Notwithstanding the deplorable history of sexism in the labor movement, unions are not monolithic.”).

282. See, e.g., Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 14 (Taylor & Francis e-Library ed. 2002) (“[W]omen are the sex which is not ‘one,’ but multiple.”); Angela Y. Davis, *Women, Race and Class* 110–26 (1981) (noting, amongst other variances, how leaders in women’s suffrage diverged on how to confront racism within their movement); Robinson, *supra* note 230, at 42–43; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 588 (1990) (“Not surprisingly, the story [feminist theory] tell[s] about ‘women,’ despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socioeconomically privileged . . .”); bell hooks, *Talking Back: Thinking Feminist, Thinking Black* 121 (1989) (“[I]t is precisely the notion that there is a monolithic black community that must be challenged.”).

283. See C.L.R. James, *The Black Jacobins: Touissant L’Ouverture and the Santo Domingo Revolution* 283 (1963) (“The race question is subsidiary to the class question in politics, and to think of imperialism in terms of race is disastrous. But to neglect the racial factor as merely incidental [i]s an error only less grave than to make it fundamental.”).

284. See, e.g., Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* 1–8 (2008); Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* 100–01 (1977) (“The legislation intended to be the keystone of President Roosevelt’s program to protect and uplift the working class had already become a millstone around the black worker’s neck . . .”); Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 *Berkeley J. Emp. & Lab. L.* 211, 213 (2002).

285. See, e.g., Marion Crain, *Colorblind Unionism*, 49 *UCLA L. Rev.* 1313, 1341 (2002) (embracing a vision of “race-conscious labor organizing”); Garden & Leong, *supra* note 280, at 1139 (“Like much conventional wisdom, the pervasive narratives describing unions and people of color as rivals are flawed.”); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 *Tex. L. Rev.* 889, 903 (1991).

explanation. If organizations that in some way reinforced the interests of (some version of) white masculinity or heteropatriarchy were inherently problematic, then many other unions—both contemporary and historical—should be subject to similar criticism as police unions.

Similarly, unions have not been uniformly left, liberal, progressive, or Democratic. Even if we (accurately) view unionization as an inherently left project,<sup>286</sup> unions have not uniformly embraced left political views or supported left-leaning politicians. In his controversial, but well-received history of the Teamsters, Thaddeus Russell argues that famed Teamsters President Jimmy Hoffa's success and leadership strategy owed much more to his conservative views and support for right-inflected economic policies, than it did to leftist solidarity.<sup>287</sup> While Hoffa shared the same basic goal of contemporary socialist and social-democratic labor leaders (i.e., "creating a monopoly over the labor market"), Russell argues, Hoffa was motivated not by "an ideology of worker communitarianism," but rather "by nothing more than the self-interest of an economic rationalist."<sup>288</sup> This isn't to suggest that Hoffa is emblematic of the U.S. labor movement.<sup>289</sup> Instead, I note Russell's characterization of Hoffa as a means of illustrating the multiplicity of ideals and ideologies that have defined the U.S. labor movement.

Historically, defenses of unionization have rested on an analysis rooted in power: Without a union or a means of bargaining and acting collectively, workers would exist at the whim of their bosses. This defense could rely on a range of different ideological commitments: The Marxist might argue that absent unions, labor would be powerless in the face of capital,<sup>290</sup> the syndicalist might argue that the union represents a superior alternative to the state as a vehicle for representing the interests of the people;<sup>291</sup> for the New Deal liberal, the union is a necessary way of protecting some modicum of equality, essential to the functioning of

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286. That is, unions, by empowering workers and serving as a vehicle for collective voice and collective bargaining, level the playing field and alter the terms of an ongoing, systemic conflict between labor and capital.

287. See Russell, *Out of the Jungle*, supra note 13, at 212.

288. *Id.* at 109.

289. Cf. Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 *N.Y.L. Sch. L. Rev.* 385, 410 (2006) ("Unions cannot overcome collective action problems by appeals to economic rationality. They must persuade potential members and activists to redefine their interests." (footnote omitted)).

290. See, e.g., Eric Hobsbawm, *How to Change the World: Reflections on Marx and Marxism* 59 (2011); Karl Marx, *The Poverty of Philosophy* 187–88 (Harry Quelch trans., Charles H. Kerr & Co. 1910) (1847); William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 *Law & Soc. Inquiry* 969, 977 n.8 (1998) ("Until World War I, the Marxist Second International hewed to an evolutionary brand of Marxism that emphasized the progressive role of capitalism's countervailing institutions: trade unions and working-class political parties.").

291. See, e.g., Paul Avrich, *Anarchist Voices: An Oral History of Anarchism in America* 318, 323 (1995); Michael Bakunin, *Statism and Anarchy* 90 (Marshall S. Shatz ed. & trans., Cambridge Univ. Press 1990) (1873).

democracy and a just society;<sup>292</sup> and, even for the conservative or libertarian the union might operate as an effective means of aggregating worker interests and reaching optimal bargaining outcomes.<sup>293</sup>

To conclude that unions are defensible only in so far as they represent a certain demographic or set of policy preferences would be to depart from each of these traditional, broader justifications. Of course, there is nothing wrong with departing from tradition.<sup>294</sup> But it is worth noting that such a defense of unionization would be a departure and might well suggest a different model of the union—more as a political party than a bargaining unit. Framed in its most generous (or radical) way, we might see this vision as reflecting aspects of IWW-style ideological unionization—i.e., unionization that reflected a broader political project or set of commitments to class solidarity and political radicalism. Think here of the call for one big union<sup>295</sup> as a means for the forces of labor to engage in

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292. See, e.g., 29 U.S.C. § 151 (2018) (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions . . . .”); Cynthia Estlund, *How the Workplace Constitution Ties Liberals and Conservatives in Knots*, 93 *Tex. L. Rev.* 1137, 1139 (2015) (book review) (“In effect, the NLRA created a metaphorical workplace constitution to extend the reach and the values of the actual Constitution beyond the state action threshold.”).

293. See, e.g., Milton Friedman, *Capitalism and Freedom* 116 (Univ. Chi. Press 1982) (1962) (expressing opposition to right-to-work laws); Russell, *Out of the Jungle*, *supra* note 13, at 212 (“But to the Teamster rank and file, the government repression that ultimately crushed [Hoffa’s] power made him a martyr for the fulfillment of their desires.”); Jack Goldsmith, *Conservative Support for Alt-Labor*, *OnLabor* (Oct. 17, 2013), <https://onlabor.org/conservative-support-for-alt-labor> [<https://perma.cc/5ZZY-YG4X>] (arguing that conservatives and libertarians who value “freedom of contract” should be enthusiastic about certain noncoercive forms of unionization and collective bargaining).

294. Indeed, there might be good reasons to think that older models of worker organizing (and, certainly, older labor law frameworks) might have outlived their usefulness. See, e.g., Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *Calif. L. Rev.* 1879, 1891–98 (2007) (describing the role of worker centers in the contemporary workers’ and immigrants’ rights movements); Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 *U.C. Irvine L. Rev.* 561, 579–91 (2014); V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 *Wis. L. Rev.* 739, 801; Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 *N.Y.L. Sch. L. Rev.* 465, 470–95 (2006); Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 *N.Y.L. Sch. L. Rev.* 515, 517–30 (2006); Rebecca J. Livengood, *Note, Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 *Harv. C.R.-C.L. L. Rev.* 325, 327–30 (2013).

295. See Melvyn Dubofsky, *We Shall Be All: A History of the Industrial Workers of the World* 166 (2d ed. 1988); Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 *Or. L. Rev.* 649, 679 (2006) [hereinafter White, *The Crime of Economic Radicalism*] (identifying “the strategic goal of IWW militancy” as “the eventual formation of ‘one big union’ embracing all true workers and poised to use its gigantic size and tactical militancy to wrest ownership and power from capitalists and from the capitalist state”).

open economic warfare with the forces of capital.<sup>296</sup> To supporters of a more radical unionism, perhaps this model would represent a marked improvement over the stale and “ossified” models of worker empowerment that are on their last legs.

But, there is a key difference between the radical unionist model and the contemporary model: The former is rooted in a radical ideology that identified class solidarity and empowerment as the end goals; the contemporary model appears to rest more on a set of liberal/progressive commitments that align more with a political party than a class or social group. To the Wobblies,<sup>297</sup> workers rising up and fighting capital might well have been an end in itself, or, at least, a means to a world in which labor had overthrown or unseated capital. To the contemporary advocates for union as political actor, the end appears to be electoral victory for Democrats or progressive candidates and the attendant adoption of policies favored by those candidates. Those policies certainly might benefit working people and might be better than the alternative. But it would be a stretch to argue that the vision is similarly radical or transformative and/or that its proponents are imagining a world in which the union might become the relevant unit of social and political ordering. Or, maybe more accurately, to some proponents of this vision, it might be deeply radical or transformative. Yet, unlike an IWW-style radical union model, the radicalism and transformation are not explicitly grounded in class warfare and the conflict between labor and capital.

#### IV. A PROBLEM OF UNIONS, OR A PROBLEM OF POLICING?

To the extent any or all of the distinctions discussed in the previous Part resonate, perhaps we needn't delve deeper into the distinction between police unions and other public-sector unions. Perhaps there is a principled theoretical distinction that might allow scholars and activists to endorse stripping police of union rights while continuing to advocate for public-sector unions. Perhaps. But I'm not convinced.

Instead, in this Part, I argue that we might identify different strands in the critical literature on police unions. The first strand is, at its core, a critique of public-sector unions. For a variety of reasons, police unions might be a particularly objectionable form of public-sector union. But the true vice of police unions is their very union-ness—the very properties

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296. One way of understanding the rise (and failure) of U.S. labor law is as a conservative or liberal legalist effort to prevent this more radical vision and the sorts of “labor strife” or “labor unrest” that characterized Depression-era workplaces. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *Minn. L. Rev.* 265, 268 (1978) (discussing the “deradicalization and incorporation of the working class by developments within the relatively autonomous dimension of legal consciousness, legal institutions, and legal practice”); see also James B. Atleson, *Values and Assumptions in American Labor Law 1–43* (1983).

297. Members of the IWW.

discussed in Part II. The second strand actually has relatively little to say about the unions themselves. Rather, this strand—finding perhaps its strongest voice in the growing literature on police abolitionism—is at its core a critique of police. Certainly, to these critics, police unions are objectionable. But they are objectionable because they represent a consolidation of otherwise- or already-illegitimate power. The problem is police. Police unions are an important lever of power in policing reform. And, given the challenges inherent in addressing judicial protections for police, perhaps police unions are the right lever on which reformers should focus their attention. But unionization is, in some sense, a distraction from the fundamental problem—police. This Part addresses these two strands in turn.

A. *Anti-Unionism or Narrow Pro-Unionism*

First, we might understand the prevalent critiques of police unions as reflecting a deeper hostility to public-sector unions, or simply a relatively narrow vision of unions' social value.

1. *Anti-Unionism*. — Looking at the parallels outlined in Part II, the critiques of police unions start to appear quite sweeping. Rather than a narrow critique geared toward a particularly problematic profession, they operate as a theoretical framework for a broader assault on (public-sector) organized labor. Consider the two classes of critique identified in Part I: the obstructionist critique and the political critique. Not coincidentally, these critiques serve as the rejection of Freeman and Medoff's "monopoly face" and "collective voice/institutional response face."<sup>298</sup> Critics have identified "what unions do" and concluded that unions do more harm than good. The self-serving qualities of unionization elevate the voices of some over the voices of others, subordinating the "public interest" to the private interests of the workers.<sup>299</sup>

That is, perhaps the problem with police unions is not something exceptional or unique to this one class of unions. In trying to suss out the distinction between police unions and other types of unions, perhaps what actually comes through is that some critics actually might be hostile to the unionization process or the role of organizing workers. Through this lens, the "voice" function allows for an outsized political footprint. The case of police unions stands as a particularly glaring example because of their

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298. Freeman & Medoff, *supra* note 151, at 5–6, 13.

299. See, e.g., Leo Troy, *The New Unionism in the New Society: Public Sector Unions in the Redistributive State* 103–06 (1994) ("But not only are there [] differences, in fact, there are conflicts of interests between the external philosophies of the New and the Old Unionism, even though the clash is not publicly acknowledged."); Fox, *supra* note 183, at 259 ("A governmental body that bargains with a union gives up some of its power to decide public matters, and to this extent, illegally delegates its power."); Robert S. Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, 1 *Gov't Union Rev.* 5, 5–6 (1980) (arguing that public-sector unionism "inherently diminishes" and is the "very antithesis" of democracy).



electoral influence and success in extracting concessions from local governments.<sup>300</sup> And if unions' "monopoly" function hampers proper functioning of industry and stymies reform, the police unions—again—serve as Exhibit A for this dysfunction. Or, put differently, if one embraces these critiques, police unions aren't unique, some objectionable mutation of an otherwise desirable social institution. Rather, police unions demonstrate all that's wrong with the unionization project.

2. *Narrow Pro-Unionism.* — One needn't oppose worker organizing outright to harbor some ambivalence about unions. A general preference for unions certainly might give way when faced with competing values.<sup>301</sup> More instrumental visions of unionism might allow for opposition to unionization that fails to serve the desired ends. Ambivalence could take many forms that might bear on police unions. But, here, I focus on an ambivalence rooted in a concern about too much collective power. This concern is hardly new. Indeed, a historicized treatment of U.S. labor law must grapple with the deep uncertainty about worker power that has defined even the most pro-union moments in labor law's development. Despite a common view that scholars and commentators on the left view unionization as an unqualified good, there's good reason to believe that the reality is much more complicated.

The history of U.S. organized labor might be understood as reflecting a cycle, or perhaps a fluctuation, between two poles: (1) a societal concern that organizing workers had too *little* power and needed protections so they could defend themselves against capital, and (2) a societal concern that organizing workers had too *much* power and were endangering the proper operation of the economy and causing third-party harms. We can see labor law as it has evolved as reflecting those concerns, vacillating between expanding and restricting workers' rights.

In the late eighteenth and early nineteenth centuries, legal and political elites perceived organizing workers as a threat to industry and the nation's fledgling economy, so organizing workers were prosecuted under the "labor conspiracy" doctrine.<sup>302</sup> Labor law was criminal law, and unionization was a crime.<sup>303</sup> Fast forward a century, and public opinion

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300. See Harmon, Problem of Policing, *supra* note 12, at 813–14 ("State executives, legislators, and judges are all likely influenced by police unions and officer associations.").

301. As Marcia McCormick notes, "[S]ome supporters of public sector bargaining accept this view that [it] may subvert the public interest and be antidemocratic, but justify any danger of antidemocratic effect by the fact that without it, pressure from the public will always prevail to keep wages and benefits for public employees at exploitative levels." McCormick, *supra* note 12, at 55.

302. See, e.g., Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic 114–16* (1993); Marjorie S. Turner, *The Early American Labor Conspiracy Cases: Their Place in Labor Law: A Reinterpretation 4* (1967); Levin, *American Gangsters*, *supra* note 186, at 120.

303. See, e.g., *Old Dominion Steam-Ship Co. v. McKenna*, 30 F. 48, 50 (C.C.S.D.N.Y. 1887) (describing unionization as *pro tanto* illegal); *People v. Cooper* (N.Y. Ct. Gen. Sess. 1836), reprinted in 4 *A Documentary History of American Industrial Society* 277, 279 (John

had shifted. In the years before the rise of the New Deal and the passage of the NLRA, violence against organizing workers captivated the public imagination.<sup>304</sup> With a nation struggling to make ends meet, capital became a villain in much mass culture, and workers seeking to earn a decent wage garnered greater sympathy.<sup>305</sup> Certainly, there was still significant fear of labor radicalism and the “wrong type” of unions, but the increasingly accepted public narrative was one of powerful bosses exploiting powerless workers.<sup>306</sup> So, the NLRA and modern labor law were born.

Despite the effusive rhetoric that accompanied the passage of the NLRA, the pendulum once again swung: Within ten years of the Act’s passage, Congress passed the Taft–Hartley Act, which dramatically restricted the power of unions.<sup>307</sup> As the wartime economy blossomed and organized labor grew further entrenched in the manufacturing sector, industrial pushback became fierce. Unions were interfering with the smooth functioning of the economy, opponents claimed, and they were acting as

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R. Commons, Ulrich B. Phillips, Eugene A. Gilmore, Helen L. Sumner & John B. Andrews eds., 1910) (“[Defendants] had not a right to meet together and to fix those prices [for an increase in wages] by combination—they had no right to say that boss shoemakers should not employ men not belonging to their society.”); *Commonwealth v. Grinder* (Pa. Rec’s Ct. 1836), reprinted in *A Documentary History of American Industrial Society*, supra, at 335, 336 (“[W]hile the law permits [a worker] to value his own services at his arbitrary will . . . it does not sanction the combination of two or more individuals, who unite for the purpose of obtaining those wages, and of compelling others to join them . . .”); William E. Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1109, 1166 (1989) (“[I]n some early Gilded Age cases, courts refused to grant [labor] injunctions because the suits . . . properly belonged in criminal court.”); Wythe Holt, *Labor Conspiracy Cases in the United States, 1805–1842: Bias and Legitimation in Common Law Adjudication*, 22 *Osgoode Hall L.J.* 591, 592–97 (1984) (describing the early criminalization of organized labor action as “conspiracy”); Benjamin Levin, *Criminal Labor Law*, 37 *Berkeley J. Emp. & Lab. L.* 43, 50–55 (2016); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 *Mich. L. Rev.* 518, 521 (2004) (quoting a 1937 Supreme Court opinion that referred to a sit-down strike as “an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner” (quoting *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939))).

304. See Forbath, *Distributive Constitution*, supra note 133, at 1128.

305. See generally Michael Denning, *The Cultural Front: The Laboring of American Culture in the Twentieth Century* (1997) (tracing the symbiotic relationship between organized labor and mass culture in the lead up to the New Deal).

306. See, e.g., *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 346 (1944) (“Collective bargaining was not defined by the [Railway Labor Act of 1926] which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.”); Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court’s Subversion of New Deal Labor Law*, 25 *Berkeley J. Emp. & Lab. L.* 275, 276 (2004) (“The [NLRA] was by no means fundamentally radical; it did not in any way portend the destruction of private property, wage labor, or capitalism. At the same time, the [NLRA] was a remarkably progressive legal document, consistent with a genuinely reformist vision of labor relations.”).

307. See, e.g., Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *Harv. L. Rev.* 1, 4 (1947) (arguing that Taft–Hartley “represent[ed] an abandonment of the policy of affirmatively encouraging the spread of collective bargaining”).

extortionate forces, exacting unreasonable rents from employers. Add to that the Red Scare and elision of unions with Communism, and the union was no longer the powerless entity in need of the state's protections. Instead, the specter of *real* union power proved intimidating, leading to the passage of Taft–Hartley and the Labor Management Relations Act, which helped “deradicalize” U.S. labor law and defang unions.<sup>308</sup>

These shifts in public opinion and legal protections have continued in the ensuing decades, even as federal labor law has stagnated or “ossified.”<sup>309</sup> The Reagan-era decimation of the Professional Air Traffic Controllers Organization (PATCO) was rooted in framing the workers as exerting too much power—effectively exerting the power to grind travel to a halt.<sup>310</sup> Similarly, shifting perceptions of unions as corrupt or “captured” by organized crime led to prosecutions and governmental control of some locals.<sup>311</sup> And, as discussed above, teachers’ unions have been public villains, decried by many, when they were viewed as using their power to the detriment of vulnerable students.<sup>312</sup> When seen as the powerless victims of austerity and harsh politicians, though, sympathies (at least on the political left) swung back.

This is, of course, a grossly oversimplified account of centuries of U.S. labor history. But it is meant to illustrate a basic point: Worker power (not “workers’ rights” or “worker dignity”) has historically prompted fear, concern, and a dialing back of legal protections. Worker power is often referred to romantically or idealistically as an unqualified good,<sup>313</sup> but

308. See, e.g., Nelson Lichtenstein, Taft–Hartley: A Slave-Labor Law?, 47 *Cath. U. L. Rev.* 763, 765 (1998) (describing how the Taft–Hartley Act reflected a conflict over a much larger social and political clash of ideologies in the New Deal political economy); Katherine Van Wezel Stone, The Post-War Paradigm in American Labor Law, 90 *Yale L.J.* 1509, 1511–17 (1981); cf. Catherine L. Fisk & Deborah C. Malamud, The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform, 58 *Duke L.J.* 2013, 2034–35 (2014) (examining the scholarly debate about whether and to what extent the NLRA was ever radicalized and, hence, was ever deradicalized by the Taft–Hartley Act).

309. See generally Estlund, *The Ossification of American Labor Law*, supra note 71 (arguing that U.S. labor law has become outmoded and has ceased to adapt to changing politics and market conditions).

310. See Joseph A. McCartin, *Collision Course: Ronald Reagan, the Air Traffic Controllers, and the Strike that Changed America* 6–14 (2011) (tracking the politics and public perception of the 1981 strike by PATCO members); Fox, supra note 183, at 308 (describing how even those who later urged President Reagan to pardon PATCO workers adopted President Reagan’s narrative and acknowledged the strong public support for his actions).

311. See generally Kenneth C. Crowe, *Collision: How the Rank and File Took Back the Teamsters* (1993) (tracing the history of corruption in the Teamsters, and the role of federal law enforcement); James B. Jacobs & Kerry T. Cooperman, *Breaking the Devil’s Pact: The Battle to Free the Teamsters from the Mob* (2011) (describing governmental scrutiny of the Teamsters from the mid-1980s to the 2000s).

312. See supra section II.B.

313. See, e.g., Andrias, *An American Approach*, supra note 120, at 706 (describing “New Dealers” as seeking to “build[] worker power and a more egalitarian political economy”). Some have problematized the idea of “power” exerted by labor forces, highlighting its

when worker power has been wielded, it hasn't necessarily been met with resounding support, particularly from liberals or progressives.<sup>314</sup>

There has long been a deep undercurrent in labor law, its public understanding, and its scholarly treatments that views unionization as a good—to a *point*. Unions might be important for many reasons, but as an aggregation of collective power, they also can be dangerous. This undercurrent relies on a view that unions serve as a counterbalance to the forces of capital; but when unions obtain too much power they may be as dangerous as capital or aggregations of corporate power. From industrial sabotage to the secondary boycott, unions might not advance liberal ideals or promote social stability.<sup>315</sup> Courts have treated exercises of union power as possibly portending “general class war.”<sup>316</sup> And lawmakers and commentators often frame union power as rooted in the actual or threatened exercise of force.<sup>317</sup> Despite labor's long path to legitimacy from the days of the nineteenth-century conspiracy prosecutions, the specter of violence haunts the rhetorical and legal landscape of labor regulation.<sup>318</sup>

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subjective and relational nature. See Rogers, *Passion and Reason in Labor Law*, supra note 156, at 359 (“Organizing is not just a process of building support for the union . . . , but also a process of building worker power and organization through collective action. Power . . . is not a thing or . . . quantity, but ‘an ongoing interplay of strategic maneuvering between partners,’ and it is partially constitutive of individual subjectivity.” (quoting Steven L. Winter, *The “Power” Thing*, 82 Va. L. Rev. 721, 818–19 (1996))).

314. But see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1390 (1993) [hereinafter Barenberg, *Wagner Act*] (“My reconstruction of Wagner's progressivism disputes the conventional assumption that New Deal labor policy rested on an ‘adversarial’ view of labor-management relations.”).

315. See, e.g., Hiba Hafiz, *Picketing in the New Economy*, 39 Cardozo L. Rev. 1845, 1850 (2018) (describing the historical use of and opposition to secondary boycotts); David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 Va. L. Rev. 1055, 1062 (1994) (“IWW talk of class conflict, sabotage, and revolution, in deliberately outrageous language mocking government and religion, fed public concerns about labor unrest, anarchist violence, and the deterioration of traditional values.”); White, *The Crime of Economic Radicalism*, supra note 295, at 687 (“[T]he concept of sabotage . . . was central to IWW ideology and propaganda, and . . . reflected very clearly the union's resistance to accelerating attempts by employers to assert totalitarian control in the workplace.”).

316. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 472 (1921); cf. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 205 (1921) (“The name ‘picket’ indicated a militant purpose, inconsistent with peaceable persuasion.”).

317. See, e.g., Gary Minda, *Boycott in America: How Imagination and Ideology Shape the Legal Mind* 42–47 (1999); Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. Ill. L. Rev. 1791, 1817 (“Although some labor protests did involve actual violence, judicial decisions in those cases often invoked sweeping condemnations of labor picketing itself.”).

318. See, e.g., David Witwer, *Shadow of the Racketeer: Scandal in Organized Labor* 241 (2009) (describing “the shadow of the racketeer, a menacing depiction of organized labor's power that antiunion forces invoked throughout the postwar era”); Eisenhower *Insists on End of Blackmail Picket Lines*, Chi. Trib., Aug. 7, 1959, at 5 (quoting President Eisenhower as advocating for “a law to protect the American people from the gangsters, racketeers, and other corrupt elements who have invaded the labor-management field”).

Which is to say that a certain squeamishness about powerful unions hardly should be surprising. Despite the repeated insistence from police union members and police union opponents that police unions are *different*,<sup>319</sup> police unions may just be another example of unions in their unpopular form: cartels, bullies, or distasteful manifestations of collective power. Indeed, in his work on police unions, David Sklansky has suggested that the problem with policing reform isn't unions as such.<sup>320</sup> Rather, it is that police unionism reflects a particular oppositional vision of organized labor.<sup>321</sup> This argument is common in much literature on labor law reform<sup>322</sup>—that a less oppositional model would be better for labor and capital.<sup>323</sup> But it is worth noting that such an argument runs directly counter to a long history of radical unionism and accounts of worker power that rest on a vision of unions as a means of fighting an economic war against capital.<sup>324</sup>

To be clear, support for unionization that is less than categorical need not reflect a liberal vision of unions. Such qualifications instead might come from a radical posture and provide valuable nuance to left accounts of labor primacy. Some narrow pro-unionism might properly be understood as a resistance to conservative unionism. But that critique can and should cut more broadly than a skepticism about police unions. From a more radical perspective, post-NLRA unionism has always been limited as a vehicle for transformative class politics.<sup>325</sup> It may be that aspects of the

319. See DeLord & York, *supra* note 62, at 11–18 (discussing the differences between “police unions and all other public and private sector unions”); *supra* Part III.

320. See Sklansky, *Democracy and the Police*, *supra* note 28, at 180–88.

321. See *id.*

322. Sklansky does suggest that his argument should be cabined because “the best model for workplace democracy in policing may differ . . . from traditional trade unionism.” *Id.* at 180–81.

323. See, e.g., Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *Colum. L. Rev.* 753, 953 (1994) (describing successful case studies of participatory management); Van Wezel Stone, *supra* note 156, at 168–72.

324. This is not to say that radical unionists or left labor scholars have always rejected cooperative management structures out of hand. See Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 *Harv. C.R.-C.L. L. Rev.* 39, 50 (1988) (“[W]orkplace democracy and economic prosperity alike require new forms of work organization combining adversary and participatory assumptions, institutions and practices.”). But a cooperative, rather than oppositional, approach risks repurposing unions as an asset for capital, either crowding out more radical, worker-representative unions, or legitimating employers’ practices and decisionmaking. As Veena Dubal puts it, “Instead of curtailing the power of capital, they would extend it.” Veena Dubal, *Solidarity Unionism v. Company Unionism in the Gig Economy*, *Law & Pol. Econ.* (June 18, 2019), <https://lpeblog.org/2019/06/18/solidarity-unionism-v-company-unionism-in-the-gig-economy/#more-2535> [<https://perma.cc/G37M-2QCP>].

325. See Stanley Aronowitz, *Introduction to Working Class Hero*, at xv (1983) (“Even when the CIO mobilized millions of industrial workers in the 1930’s or during the explosion of public sector unionism in the 1960’s, labor . . . did not emerge with a new strategy capable of making the most of gains at both the organizational and political

police union critique resonate with those more moderate, neoliberal, or technocratic approaches. Yet, some of the arguments advanced—think of those sounding in class solidarity<sup>326</sup>—might reflect a broader critique of U.S. unionism as conservative, insufficiently radical, and actually divorced from the ideological and tactical radicalism that have defined the IWW and a range of left unions.

Taking this more radical, narrow unionism as a guide might lead to a range of spaces increasingly explored by labor law scholars: the move away from exclusive representation, non-union models of organization, and the rise of left alt-labor. Notably, such a turn to alt-labor actually resonates with some accounts of police unions. Fisk and Richardson, for example, end up endorsing a vision of members-only or minority unionism as a way of promoting intradepartmental change.<sup>327</sup> Minority unionism has long enjoyed support in certain corners of the labor law literature—rather than embracing an exclusive bargaining model, whereby a majority of workers elect a union and that union must represent all of the bargaining unit, a minority-union model might allow for a multiplicity of unions in a given shop.<sup>328</sup> Workers only would be represented by the union if they voted to be.<sup>329</sup> To Fisk and Richardson, this approach might allow for dissenting voices (particularly black officers) to advance policies that might be less regressive than those currently associated with police unions.<sup>330</sup>

Of course, such an approach rests on a view that current union positions don't represent rank-and-file preferences (or, at least, the preferences of significant portions of unionized officers).<sup>331</sup> Even for those more skeptical about the potential for changing police from within, this approach might speak to ways in which police unions are emblematic of

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levels."); cf. Barenberg, *Wagner Act*, supra note 314, at 1390 ("[Senator Robert] Wagner's quasi-utopian mission was to 'build[] . . . a co-operative order' designed to reintegrate a class-riven society and to replace or at least legitimate asymmetric power relations." (quoting Robert Wagner, Address on NBC Radio: Industry and Labor 6 (Oct. 18, 1933) (transcript available in *The Robert Wagner Papers*, Georgetown University, at 600 SF 103, Folder 28))).

326. See supra section III.B.

327. See Fisk & Richardson, supra note 12, at 720–21.

328. See generally Charles J. Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (2005); Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 *Denv. U. L. Rev.* 1, 30–32 (2010) (arguing that exclusive representation "precludes an employer from bargaining with a minority union"); Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 *U.C. Irvine L. Rev.* 857, 868 (2014) ("[W]hatever the arguments for members-only bargaining in non-right-to-work states, there are substantially stronger arguments for the Board to conclude that section 8(a)(5) [of the NLRA] requires members-only bargaining in right-to-work states.").

329. See Morris, supra note 328, at 184.

330. See Fisk & Richardson, supra note 12, at 721.

331. Cf. Sklansky, *Democracy and the Police*, supra note 28, at 180–82 (noting potential benefits of rank-and-file-led reforms, while also arguing that "multivalent organizing and management-led exercises in participatory decision making could help to change the shape of police unionism").

other faults in the labor movement and the dominant model of unionism. That is, top-down governance, conservative approaches, and resistance to change might be seen as costs of the accepted model of unionism, even for scholars who believe in the importance of unionism as a means of vindicating workers' interests.

### B. *Anti-Policism*

Alternatively, we might understand the critiques of police unions as actually having little to do with unions, organized labor, or the relationship between workers and bosses. Maybe the problem isn't police unions; *maybe the problem is police*. Such a critique resonates with a growing literature and activism that embraces police abolition or the general abolition of the carceral state.<sup>332</sup> The abolitionist account, like other totalizing critiques of the criminal system,<sup>333</sup> tends to take as its starting point that the institutions and structures of criminal law are rotten to their core.<sup>334</sup>

From an abolitionist perspective, *everything* about the carceral state—from lawmaking, to policing, to the institutions of punishment—is oppressive

332. See, e.g., Mariame Kaba, Summer Heat, *New Inquiry* (June 8, 2015), <https://thenewinquiry.com/summer-heat> [<https://perma.cc/7VMA-4BJY>] (outlining steps toward police abolition); José Martín, Policing is a Dirty Job, but Nobody's Gotta Do It: 6 Ideas for a Cop-Free World, *Rolling Stone* (Dec. 16, 2014), <https://www.rollingstone.com/politics/politics-news/policing-is-a-dirty-job-but-nobodys-gotta-do-it-6-ideas-for-a-cop-free-world-199465/#ixzz3MAjhe2IM> [<https://perma.cc/MGK8-8TW3>] (highlighting alternatives to policing); Purnell, *supra* note 107 (“Oppressed people must give up the systems that harm them. Police are not public, nor good . . . . Police officers are prison-industrial complex foot soldiers, and poor people are its targets.”); Alex S. Vitale, What Does It Mean to Be Anti-Police?, *Nation* (Dec. 23, 2014), <https://www.thenation.com/article/what-does-it-mean-be-anti-police> [<https://perma.cc/LZK7-8Z5E>] [hereinafter Vitale, What Does It Mean] (“Every time a community calls for more police to solve their crime and disorder problems, it is re-empowering . . . a[n] . . . ideology that is, at root, demeaning to poor people and dismissive of the ability of the state to use social programs and market interventions to empower and reinvigorate communities.”).

333. See, e.g., Butler, *The System Is Working*, *supra* note 111, at 1456–57 (arguing that the system, rather than being “broken” is “working the way it is supposed to”—to harm and control poor people of color); Benjamin Levin, The Consensus Myth in Criminal Justice Reform, 117 *Mich. L. Rev.* 259, 262–63 (2018) [hereinafter Levin, *The Consensus Myth*] (describing this “mass” or phenomenological critique of the criminal system); McLeod, *Prison Abolition*, *supra* note 250, at 1161–62 (arguing that prison abolition is warranted to overturn core systemic discriminations in the criminal justice system); Roberts, *supra* note 99, at 1604–05 (illustrating how criminal law “enforce[s] an undemocratic racial caste system originating in slavery”).

334. See, e.g., Maya Dukmasova, Abolish the Police? Organizers Say It's Less Crazy than It Sounds, *Chi. Reader* (Aug. 25, 2016), <https://www.chicagoreader.com/chicago/police-abolitionist-movement-alternatives-cops-chicago/Content?oid=23289710> [<https://perma.cc/XXF4-S7V7>] (collecting statements by abolitionist activists); Kaba, *supra* note 332 (“By rhetorically constructing the criminal punishment system as ‘broken,’ reform is reaffirmed and abolition is painted as unrealistic and unworkable. Those of us who maintain that reform is actually impossible within the current context are positioned as unreasonable and naïve.”).

and geared toward the maintenance of social and economic inequality.<sup>335</sup> Policing as an institution cannot be divorced from white supremacy, massive disparities in income, and a long history of state and private violence against marginalized communities. As sociologist Alex Vitale argues, “Modern policing is largely a war on the poor that does little to make people safer or communities stronger, and even when it does, this is accomplished through the most coercive forms of state power that destroy the lives of millions.”<sup>336</sup> And abolitionist activist Mariame Kaba argues that “[o]n the way to abolition, we can take a number of intermediate steps to shrink the police force and to restructure our relationships with each other.”<sup>337</sup> For Kaba, one of those “intermediate steps” is “abolishing police unions.”<sup>338</sup>

If one adopts an abolitionist frame, police unions certainly may be objectionable. Police unions serve the ends of their members (i.e., police), and they enhance the political power of police officers.<sup>339</sup> So police unions might well be an appropriate target as a lever of power: Policies might improve with a greater (or continued) focus on undermining the interests of police unions. From this radical perspective, though, the unions are objectionable only in that they advance or entrench the power and interests of police. Absent a liberal reformist vision of policing, unions are not serving to prevent the *proper* mode or style of policing.<sup>340</sup> If one takes a liberal legalist approach, police unions are particularly odious because

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335. See, e.g., Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 Harv. L. Rev. 1684, 1686 (2019) (“Abolition calls on us not only to destabilize, deconstruct, and demolish oppressive systems, institutions, and practices, but also to repair histories of harm across the board.”); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 Harv. L. Rev. 1613, 1617 (2019) [hereinafter McLeod, *Envisioning Abolition Democracy*] (“Contemporary movements for penal abolition—building on a longstanding body of abolitionist writing and theory—have embraced both a negative or deconstructive project of dismantling penal systems and a positive project of world-building.”); Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, 22 Soc. Text 101, 114 (2004) (describing abolition as “the abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society”); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 Harv. L. Rev. 1575, 1576 (2019) (“The long historical praxis of abolition is grounded in a Black radical genealogy of revolt and transformative insurgency against racial chattel enslavement and the transatlantic trafficking of captive Africans.”).

336. Vitale, *The End of Policing*, supra note 107, at 53–54.

337. Kaba, supra note 332.

338. *Id.*; see also Vitale, *What Does It Mean*, supra note 332.

339. See Zoorob, supra note 102, at 247–49 (using evidence from “campaign events, data on police political behavior, and vote shares to make the case that widespread organizational networks may have been critical” to Trump’s 2016 election).

340. Cf. Eric J. Miller, *Breaking Windows as Corrective Justice: Impure Resistance in Urban Ghettos*, 53 Tulsa L. Rev. 313, 315 (2018) (“If racial ghettos ought not exist, as a normative matter, then we ought not be satisfied with technocratic and consequentialist solutions to the ‘problem’ of the ghetto that stop short of ending it. Tolerating ghettos requires either ignoring the question of their continued existence or justifying it.”).



they interfere with procedural justice and the sorts of institutional checks that might allow for good police governance. But if one rejects the claims of the liberal legalist by claiming that “community policing” or “democratic policing” are misnomers, then the critique of police unions necessarily morphs.<sup>341</sup>

I don’t mean to suggest that police abolitionists or other radical commentators are wrong to critique police unions. Again, these unions are critical players in debates about policing policy. Any activism to combat abusive policing or assert community self-determination necessarily runs up against the power of police unions. A failure to grapple with police unions would lead back to problematically court-centric accounts of police regulation and social change. But it’s important to understand how a radical critique differs from a liberal one.<sup>342</sup> Certainly, police unions remain an object of hostility as a cipher for institutional power. Yet, from a radical perspective, the police union is objectionable because of the core function of its members, not because it is impeding the proper functioning of good governance. Nor is the problem that police officers are speaking or bargaining collectively.<sup>343</sup> Additionally, where some liberal and progressive commentators have suggested that police unions might be reformed or repurposed to spur reform,<sup>344</sup> the abolitionist critique rejects such a claim out of hand: The sort of internal discipline or reexamination that a progressive police union might offer certainly would be an improvement over the status quo, but the unionized officers (even if they are more racially diverse or sympathetic to policing critiques) probably still would be committed to preserving their jobs and the institution of the police.

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341. See Kaba, *supra* note 332 (rejecting the frame that suggests that the system is “broken” or must be fixed).

342. See Ruth Wilson Gilmore, Foreword to Dan Berger, *The Struggle Within: Prisons, Political Prisoners, and Mass Movements in the United States*, at vii, vii–viii (2014) (“The distinction sketched out above is the difference between reformist reform—tweak Armageddon—and non-reformist reform—deliberate change that does not create more obstacles in the larger struggle.”); Akbar, *supra* note 26, at 410–13 (distinguishing between liberal, legalist reforms and radical, movement-oriented ones); Levin, *The Consensus Myth*, *supra* note 333, at 265–74 (mapping the theoretical and practical distinctions between different degrees of criminal justice critique).

343. Cf. Fisk & Chemerinsky, *supra* note 160, at 1076 (“Leaving aside the obvious fact that the blame for punitive criminal sentencing laws and lousy public schools should be laid at the door of many people and organizations beyond unionized guards and teachers, the problem is not the employees through their union acting as a group . . .”).

344. See, e.g., Sklansky, *Democracy and the Police*, *supra* note 28, at 180–88 (proposing a “rank-and-file” participation model to increase workplace democracy for police officers); Fisk & Richardson, *supra* note 12, at 721–22 (advocating that the law governing police labor relations implement a proposed form of “minority-unionism”); McCormick, *supra* note 12, at 60–62 (“Unions bring more to the table, however. They can help craft and implement solutions that will be more effective to reform police culture and change officer behavior.”); Walker, *The Neglect of Police Unions*, *supra* note 17, at 95–96 (“The neglect of police unions has seriously impeded understanding of American policing, particularly with respect to basic police management, innovation and reform, police–community relations, and police accountability.”).

Arguing against police unions as an abolitionist, then, resembles the pacifist's decision to vote against military appropriations or veterans' benefits: The decision reflects little about the specific policy or the relevant employee-benefits-style analysis; rather, opposition reflects a deeper, principled rejection of the legitimacy of the institution. Maybe police deserve higher pay and better parental leave. Or maybe they don't. But if you don't believe that police should have a job in the first place, these questions are moot.

I find this to be a theoretically defensible argument. And, in a discussion of the proper allocation of resources for advocacy and activism, this argument is important and compelling: Why focus on the rights of police when so many other workers are relatively powerless? Indeed, taking the military analogy a step further, one might ask (as some queer, left critics have) why antimilitarists should be focused on the rights of queer people to fight for the state if fighting for the state is inherently objectionable.<sup>345</sup>

To be clear, therefore, I am not suggesting that abolitionists should embrace police unions. Nor, as a general matter, does this Essay endorse a particular strategy for advocates. But I think that abolitionists committed to worker power and a broader, worker-centered vision of radical left politics should approach police unions with at least some ambivalence. Or, at the very least, given the public-sector union parallels Part II highlights, prolabor abolitionists should be wary of embracing many anti-police-union arguments.

First, attacking police by arguing for stripping organizing rights legitimates anti-union arguments. Adopting these arguments when faced with an unattractive industry or objectionable union helps bolster a set of arguments against unions in all cases, or at the very least in cases when workers perform controversial labor.<sup>346</sup> That is, using the stripping of labor rights as a vehicle to combat an industry or to advance policy goals legitimates such a move in other industries or contexts—notably industries and contexts that tend to have a very different political valence.<sup>347</sup> Dismantling

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345. See, e.g., Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* 142 (2011) (“[S]upport for gay and lesbian military service, and the ending of ‘don’t ask, don’t tell,’ allowed for a portrayal of the US military as a site of freedom and equality, which is a useful distraction from the realities of its brutality.”).

346. See, e.g., Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* 236–63 (1997); Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in *Lenin and Philosophy and Other Essays* 85, 85–126 (Ben Brewster trans., 2001 ed. 1971); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *Yale L.J.* 2176, 2189 (2013); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harv. L. Rev.* 355, 429–32 (1995). See generally *Selections from the Prison Notebooks of Antonio Gramsci* 581 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

347. See generally Fischl, *Running the Government*, supra note 23, at 40 (“The attack on public-sector unions thus threatens to exacerbate what is already a breathtaking ‘democracy deficit’ in U.S. labor relations and—should the effort gain traction and succeed—to cut American workers altogether out of a role in workplace governance.”).

the abusive power structures of the state certainly stands as an abolitionist goal, but turning to the logic(s) of neoliberalism to dismantle them seems like a risky proposition, particularly if one endorses a vision of abolition as a positive project—as rooted in building a new set of noncarceral social and political institutions.<sup>348</sup>

Second, stripping organizing rights or eliminating unions wouldn't necessarily return power to "the people" or "the community." As noted above, most relevant policy determinations simply would revert to local governments.<sup>349</sup> So a critique of police unions that isn't coupled with a deeper critique of governance would do little to shift the balance of power: Local governments have signed off on the CBAs that prevent police accountability and endorse objectionable use-of-force rules, so why should we trust those same government actors to produce better police governance or to embrace abolitionist politics in the absence of heavy union involvement?

Indeed, radical or abolitionist critiques of police and the carceral system as a whole tend to rest on a critique of the current structures of representative democracy. Even deeply nonradical critiques of the criminal system tend to argue that the carceral state represents the apotheosis of a massive democratic failure.<sup>350</sup> But, to abolitionists, there is little solace in arguments that current criminal law and criminal policy are the result of legislative decisionmaking or somehow reflect the popular, democratic will. The problem with police unions from an abolitionist perspective really is a problem with the ability to dismantle the structures of modern policing. Currently, unions stand guard over those structures, but so too do the elected officials who capitulate to union demands and sacrifice community will on the altar of political expediency. Reducing these problems to a critique of union power would effectively let politicians off the hook and would suggest that management—the same management

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348. See, e.g., Angela Y. Davis, *Abolition Democracy* 96 (2005) ("In thinking specifically about the abolition of prisons using the approach of abolition democracy, we would propose the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete."); McLeod, *Envisioning Abolition Democracy*, *supra* note 335, at 1617 (describing a "positive project of world building").

349. See *supra* section II.B. Further, CBAs and police unions are hardly the only legal institutions that interfere with police accountability. See Harmon, *Problem of Policing*, *supra* note 12, at 799–800 ("Moreover, the legal context in which departments operate is not static. The Age Discrimination in Employment Act of 1967 ('ADEA') initially applied only to private employers but was amended to protect local government employees, including police officers, in 1974.").

350. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 510 (2001) (arguing that "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones").

that has presided over contemporary police practices—should be allowed to emerge relatively unscathed.

#### CONCLUSION

For scholars and activists concerned about mass incarceration, there's a lot not to like about police unions. There is a great deal of work to be done in better understanding police unions, their legal and political role, and their place in broader reformist or radical projects. Emphasizing the role of police unions reflects a welcome departure from court-centric and formalistic treatments of policing. Appreciating the role of unions in the criminal system reflects an important turn to grapple with the political economy of criminal law and to take seriously the incentives and institutions that have helped to undergird the carceral state.

Ultimately, I don't disagree with the critiques of police unions prevalent in the literature. As a descriptive matter, they certainly are right: Police unions have fought to shield their members from public scrutiny and legal accountability. And police unions repeatedly have rallied behind politicians hostile to criminal justice reform, racial justice, and labor rights. But embracing these critiques uncritically would be a mistake, yet another example of a broad tendency to treat criminal law as exceptional and divorced from important conversations about labor politics, worker power, and the social and political fabric of society.

By encouraging a nuanced and critical examination of police unions and their flaws, I hope to suggest that there are major lessons to take away for both labor and policing scholars. For scholars of labor law, recognizing the shortcomings of police unions should contribute to a broader reckoning with the vision of labor power and with the theoretical justifications of labor law. Is the imagined "good" union one that actually doesn't exert too much power? Are the politics at the heart of pro-union scholarship reliant on radical notions of class solidarity or on liberal/progressive pragmatism designed to increase the relative strength of the Democratic Party or its political analogs? As Fisk and Richardson have argued, perhaps we might see in police unions a strong case for a shift toward "minority" unions that could advance the interest of dissenting voices within a police force.<sup>351</sup> And, perhaps such a lesson can be extended—to the extent that police unions represent the epitome of the "bad kind" of unionism,<sup>352</sup> perhaps the critiques of police unions can contribute to a growing literature that seeks to envision new modes of worker organizing outside of the NLRA model of exclusive bargaining. That is, recognizing "what's wrong with police unions" should help us to figure out what sort of labor law would be desirable or, at least, what normative commitments should be furthered by labor regulation.

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351. See Fisk & Richardson, *supra* note 12, at 721.

352. See Gude, *Support Police Unions*, *supra* note 65.

For policing scholars, police unions similarly should force hard questions: To what extent is the call for reform a call for “community” or “democratic” policing, which in turn rests on some vision of liberal reform?<sup>353</sup> If so, what sorts of illiberal policies might be acceptable to ensure that regulators can bring police to heel? To the extent that critique comes from a place of radicalism, though, should that change the calculus as to which tactics are desirable? If the ultimate goal is abolishing police, does that call for or justify support for legal or procedural tactics that strengthen other problematic state institutions?<sup>354</sup> That is, recognizing “what’s wrong with police unions” should help us understand what sort of policing oversight might be sufficient and exactly how deep the structural critiques of policing in the United States go.

Answering these questions is and will be a tall order. Taking police unions seriously has already paid dividends for scholars and activists concerned about policing’s role as a driver of inequality. But taking police unions seriously should require a deeper understanding of their place not only in the criminal system, but also in broader discussions about worker power and law enforcement in the political economy of postindustrial capitalism.

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353. See Friedman & Ponomarenko, *supra* note 72, at 1832 (arguing that an administrative oversight model would serve as an effective means of ensuring police oversight).

354. Cf. Levine, *Discipline and Policing*, *supra* note 38, at 844–45 (arguing that support for stripping police of procedural protections could backfire or legitimate flawed aspects of the criminal system).

