Article

The Law Enforcement Lobby

Zoë Robinson and Stephen Rushin†

† Zoë Robinson is a Professor of Political Science at Australian National University. J.S.D and J.D., University of Chicago. Stephen Rushin is the Associate Dean of Academic Affairs and Judge Hubert Louis Will Professor of Law at Loyola University Chicago. Ph.D. and J.D., University of California, Berkeley.

INTRODUCTION

In *Brown v. Plata*,[1] the U.S. Supreme Court issued a landmark decision that many observers believed could forever transform the criminal justice system in California.[2] The Court affirmed a district court ruling that found that California prisons were unconstitutionally overcrowded in violation of the Eighth Amendment's ban on cruel and unusual punishment.[3] To remedy this, the state had two options. First, California could release between 38,000 and 46,000 low-level offenders, which would, in turn, reduce the number of remaining inmates in existing prison facilities to at or less than 137.5% of their overall design capacity—the figure established by the Court to comply with the Eighth Amendment.[4] This option would demand that California take steps to do something it hadn't done in decades: decarcerate and reduce the footprint of its criminal justice system.

Alternatively, California could instead further increase the number of prisons and move inmates from overcrowded prisons to these new facilities.[5] This option would require California to find more revenue at the time of significant state budget shortages, due in part to the rapid expansion of expenditures on the criminal justice system. Around three decades before *Plata*, California spent about five dollars on higher education for every one

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1. 563 U.S. 493 (2011).

2. *See* Bailey W. Heaps, *The Most Adequate Branch: Courts as Competent Prison Reformers*, 9 STAN. J. C.R. & C.L. 281, 281–82 (2013) (describing the reaction to *Plata*, including language from the *Los Angeles Times* referring to the *Plata* decision as putting California on the "verge of a justice revolution") (quoting *California's Justice Revolution*, L.A. TIMES (Apr. 25, 2012), https://www.latimes.com/opinion/editorials/la-xpm-2012-apr-25-la-ed-realignment-district-attorney-20120425-story.html [https://perma.cc/PDC7-9X93])); *see also* Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 165 (2013) (stating that "[t]he year 2011 marked an important milestone in American institutional reform litigation" because of the *Plata* decision).

3. *Plata*, 563 U.S. at 545 ("The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding.").

4. *Id.* at 509–10, 541 (establishing that inmate population of no more than 137.5% of their overall design capacity would comply with the Eighth Amendment, as identified by the lower court).

5. *See id.* at 510 (identifying the need for the reduction of prison populations "[b]ecause it appears . . . the State cannot complete sufficient construction to comply fully with the order").

dollar on prisons.[6] By the date of the *Plata* ruling, expenditures on higher education and prisons were roughly equal, due in large part to the growth of the prison system.[7] Under these conditions, many civil rights advocates hoped that *Plata* would give "politicians in California some political cover to begin charting a new course for penal reform in the Golden State"—namely, decarceration to both comply with *Plata* and address the state's broader fiscal crisis.[8]

But to the disappointment of many civil rights advocates, rather than modestly reduce the size of the prison population, former Governor Jerry Brown initially responded to *Plata* by proposing a plan to significantly expand the state's prison system at a cost of approximately $315 million.[9] Many observers believed that Governor Brown's response to *Plata* was driven by his ongoing relationship with the powerful union that represents correctional officers in the state—the California Correctional Peace Officers Association (CCPOA).[10]

The CCPOA has a long history of influencing California politics. For example, the CCPOA had donated $2 million to Governor Brown's gubernatorial campaign.[11] Shortly after Governor Brown's successful election, the CCPOA posted a video on their website claiming that the union's financial support "[p]layed a decisive role in electing the governor" and predicting that the

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6. Marie Gottschalk, *Prison Overcrowding and* Brown v. Plata, NEW REPUBLIC (June 7, 2011), https://newrepublic.com/article/89575/prison-overcrowding-brown-plata-supreme-court-california [https://perma.cc/KJH9-THTW].

7. *Id.* ("Indeed, over the past three decades, the Golden State has gone from spending five dollars on higher education for every dollar spent on corrections to almost a dead-heat on spending.").

8. *Id.*

9. Saki Knafo, *California Governor Proposes Massive Prison Expansion to Avoid Freeing Inmates*, HUFFINGTON POST (Aug. 27, 2013), https://www.huffpost.com/entry/california-prison-expansion_n_3825796 [https://perma.cc/JG8F-3HD9].

10. Saki Knafo, *California Prison Guards Union Pushes for Prison Expansion*, HUFFINGTON POST (Sept. 9, 2013), https://www.huffpost.com/entry/california-prison-guards_n_3894490 [https://perma.cc/Y6LN-BREA] ("[W]ith Gov. Jerry Brown now pushing a plan to expand the prison system even further, many observers believe that the [CCPOA] bears some responsibility.").

11. Steve Lopez, *Video by Prison Guards Union Links Campaign Donations to New Contract*, L.A. TIMES (May 22, 2011), https://www.latimes.com/local/la-xpm-2011-may-22-la-me-0522-lopez-calprisoncosts-20110522-story.html [https://perma.cc/B7HM-YGHQ] (noting that this donation was part of the $7 million that the CCPOA spent on elections in 2010).

Governor would support the CCPOA when needed.[12] The CCPOA's lobbying efforts extended well beyond the Governor. In the years leading up to *Plata*, the CCPOA had donated tens of millions of dollars to local elected officials in hopes of influencing the state's criminal justice policy.[13] And the CCPOA played an integral role in shaping broader criminal justice policy, lobbying for harsh penalties for criminal offenders, including opposing efforts to reform the state's Three Strikes recidivist offender statute[14] and supporting limitations on the ability of supervisors to investigate and respond to allegations of correctional officer misconduct.[15]

So perhaps it should come as no surprise that after the Court issued its ruling in *Plata*, the CCPOA used its full weight to sway the Governor's response. After all, as Joan Petersilia has bluntly observed, correctional officer unions regularly attempt to encourage policies that may increase incarceration rates because, "more prisoners lead to more prisons; more prisons require more guards; more guards mean more dues-paying members and fund-raising capability; and fund-raising, of course, translates into political influence."[16] Thus, we may expect the CCPOA, like any union, to use its right to speech and political donations to advance the interests of its constituents. But, of course, the impact of Governor Brown's response to *Plata* would not just be felt by correctional officers. The lives and well-being of thousands of incarcerated individuals also hung in the balance, many of whom had little or no political power—and certainly no union or lobbying group organizing to represent their interests. California, like many states, has historically stripped the right to vote from

12. *Id.* (describing how the CCPOA bragged that of the 107 candidates that the CCPOA supported, 104 won their elections).

13. Ed Krayewski, *Are For-Profit Prisons, or Public Unions, the Biggest Lobby No One's Talking About?*, REASON (June 2, 2015), https://reason.com/2015/06/02/are-for-profit-prisons-or-public-unions [https://perma.cc/JX28-B4C8] ("The California prison guards union, for example, poured millions of dollars to influence policy in California alone—it spent $22 million on campaign donations since 1989, more than [both major private prison groups] *combined*.").

14. *See infra* notes 231–35 and accompanying text (examining the circumstances surrounding this advocacy).

15. *See infra* notes 215–22 and accompanying text (showing that California, among other states, has granted correctional officers protections from internal investigation and discipline).

16. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224 (2008).

many individuals serving prison sentences, as well as those recently released on parole.[17]

Under such conditions, the results are almost a foregone conclusion. Law enforcement interests win out at the expense of justice-involved populations.[18] The story from California is hardly unique. Across the country, the law enforcement lobby—police unions, correctional officer unions, and prosecutor associations—has played an integral role in shaping criminal justice policy.[19] These groups give money to political campaigns,[20] lobby legislative bodies,[21] and obtain favorable concessions during the collective bargaining agreement process.[22] Indeed, it is impossible to understand the criminal justice system today without both

17. But note that California recently restored the right of previously convicted felons on parole to vote through a major ballot initiative. Alix Martichoux & Adrienne Alpert, *Felons on Parole Get Right to Vote Restored in Decisive California Ballot Measure*, ABC7 NEWS (Nov. 4, 2020), https://abc7ny.com/proposition-17-prop-explained-california-parolee-right-to-vote/7638070 [https://perma.cc/48HA-XTKL] ("Previous California law prevents people from voting if they're imprisoned or on parole for a felony crime. [The newly passed ballot measure] only amends the latter half of that law . . . .").

18. This Article uses the term "justice-involved" as anyone who interacts with the justice system either through arrest, conviction, incarceration, probation, or drug courts. *See e.g.*, Ellen McCann, Criminal Justice Coordinating Council, *Ten-Year Estimate of Justice-Involved Individuals in the District of Columbia*, JUST. RSCH. & STAT. ASS'N 2 (Sept. 2018), https://www.jrsa.org/pubs/sac-digest/vol-29/dc-est-just-involved.pdf [https://perma.cc/K5R9-8ZG6] (defining "justice involved" as including anyone who has been arrested, convicted, or incarcerated); *State Opioid Oversight Project (SOOP)*, MINN. DEP'T OF HEALTH, https://www.health.state.mn.us/communities/opioids/mnresponse/soop.html [https://perma.cc/SV38-RHQA] (defining "justice-involved populations" as "individuals who have contact or interaction with courts, jails, or prisons including drug-courts, child protection cases, probation, jail, prison, and workhouse"); Tyler N.A. Winkelman, Edith C. Kieffer, Susan D. Goold, Jeffrey D. Morenoff, Kristen Cross & John Z. Ayanian, *Health Insurance Trends and Access to Behavioral Healthcare Among Justice-Involved Individuals—United States, 2008–2014*, 31 J. GEN. INTERNAL MED. 1523, 1524 (2016) ("Justice-involved individuals were defined as those who reported being arrested and booked (excluding minor traffic violations), paroled, or on probation in the 12 months preceding the survey interview date.").

19. *See infra* Part II (defining the law enforcement lobby and providing various examples).

20. *See infra* notes 166–69 and accompanying text (describing the political donations of police unions).

21. *See infra* notes 148–64, 224–36 and accompanying text (detailing police union lobbying efforts and the CCPOA's legislative lobbying activities).

22. *See infra* notes 117–25 and accompanying text (providing examples of collective bargaining provisions obtained by police unions).

an understanding and appreciation of the law enforcement lobby.

The law enforcement lobby has taken on a particular importance of late. In the wake of the murder of George Floyd in Minneapolis, a growing group of civil rights and racial justice advocates have pushed for the defunding[23] or even abolition[24] of parts of the criminal justice system.[25] They have argued that the most effective way to combat the harms caused by our justice system, which disproportionately affect communities of color, is to substantially reduce the system's footprint.[26] This demand has led to politically contentious battles over criminal justice

23. Even before the murder of George Floyd, there were calls to defund law enforcement. *See generally* Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 282–83 (2020) (describing support for defunding that grew across the country prior to the murder of George Floyd, premised on the belief that "[t]here are simply too many police officers . . . given discretionary authority to enforce criminal laws in an uneven way that disproportionately criminalizes poorer communities of color," which led many to support "disinvest[ment] from policing altogether and, instead, reallocate[ion of] many of these resources towards supporting the community"); Brentin Mock, *The Price of Defunding the Police*, BLOOMBERG: CITYLAB (July 14, 2017), https://www.citylab.com/equity/2017/07/the-price-of-defunding-the-police/533232 [https://perma.cc/4D8N-HTFH] (discussing the movement to defund the police); *Invest-Divest*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/invest-divest [https://perma.cc/GRX5-7BSE] (laying out a detailed policy platform that favors defunding police).

24. *See generally* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (providing a comprehensive scholarly discussion of prison abolition situated within legal scholarship); Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212 (2000) (featuring a conversation on the growth and evolution of the prison abolition movement); Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351 (2021) (evaluating the plausibility of prison abolition and offering some alternatives to the use of prisons).

25. Aaron Ross Coleman, *Police Reform, Defunding, and Abolition, Explained*, VOX (July 16, 2020), https://www.vox.com/21312191/police-reform-defunding-abolition-black-lives-matter-protests [https://perma.cc/4EWR-VWPQ] (describing the call for defunding and abolition of police departments following the murder of George Floyd).

26. *See, e.g.*, MOVEMENT FOR BLACK LIVES, *supra* note 23 (describing investments in policing as "investments in the criminalizing, caging, and harming of Black people" and urging disinvestment).

funding in city councils[27] and state legislatures[28] across the country. The law enforcement lobby has predictably proven to be an impediment to such efforts.[29] Nevertheless, only a very small body of legal scholarship has considered the place and role of interest groups in the criminal justice system.[30]

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27. For an example of these kinds of ongoing local debates, see Astead W. Herndon, *How a Pledge to Dismantle the Minneapolis Police Collapsed*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2020/09/26/us/politics/minneapolis-defund-police.html [https://perma.cc/DGE9-DZ4B] (detailing the "intensity of the debate" about how Minneapolis, which once had a majority of its city council pledge to defund and abolish the local police department, ultimately changed course).

28. *See, e.g.*, Megan Munce, *Gov. Greg Abbott Signs Slate of Legislation to Increase Criminal Penalties for Protestors, Punish Cities that Reduce Police Budgets*, TEX. TRIB. (June 1, 2021), https://www.texastribune.org/2021/06/01/texas-abbott-defund-police-protest [https://perma.cc/VD5R-K9AK] (detailing how Texas lawmakers crafted a controversial measure mandating that "if a municipality with a population over 250,000 reduces its law enforcement budget, the state would deduct money from its sales tax and ban the city from increasing property taxes or utility fees").

29. *See, e.g.*, Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (Apr. 2, 2021), https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html [https://perma.cc/DH9S-WRWX] (describing generally police union power); Robert Iafolla, *Defunding Is One Place Police Unions See Vaunted Powers Limited*, BLOOMBERG (June 12, 2020), https://news.bloomberglaw.com/daily-labor-report/defunding-is-one-place-police-unions-see-vaunted-powers-limited [https://perma.cc/4QYR-PW9B] ("Unions certainly could make defunding maneuvers drawn out and politically complicated.").

30. *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 730 (2005) [hereinafter Barkow, *Administering Crime*] ("As a result of . . . interest group dynamics . . . , elected officials have strong incentives to keep abreast of sentencing commission decisions and to keep tight reigns on these agencies."); Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1720–21 (2006) [hereinafter Barkow, *The Political Market for Criminal Justice*] (noting that the federal government must contend with interest group pressure to appear "tough on crime" in the same way that states do); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1282–83 (2005) [hereinafter Barkow, *Federalism and the Politics of Sentencing*] (describing the incentives behind the law enforcement lobby in favor of longer sentences); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090–91 (1993) ("Legislatures may authorize police and prosecutors to investigate and punish in ways that might in theory offend powerful interest groups, but police and prosecutors in practice are likely to exercise their discretion to as to avoid such unpleasant collisions. Thus, even when legislatures authorize broad law enforcement powers, police and prosecutors face a substantial incentive to limit

This Article argues that the law enforcement lobby operates as a pervasive influence in the criminal justice system that results in captured policymaking power and institutionalized injustice. Critically, this Article argues that the law enforcement lobby is also different than other similarly situated unions or lobbying groups. In some respects, law enforcement lobbying efforts look like the lobbying efforts of any group. They use the collective bargaining process, political donations, and speech to influence policies of concern to their members within the confines of our democratic political system.[31] Any time an interest group engages in political lobbying, this creates risks of regulatory capture, corruption, and conflicts of interests.[32] Nevertheless, we argue that the harms of the law enforcement lobby are unique in several ways.

For one thing, the life and liberty harms created by law enforcement misconduct are distinctive. When a police officer engages in misconduct, it can result in a victim killed, injured, or wrongfully convicted of a crime they did not commit.[33] A disturbingly large number of incarcerated individuals experience sexual violence and physical injuries each year, in part because of the

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the application of those powers to the least politically influential segments of society."); Lisa L. Miller, *Rethinking Bureaucrats in the Policy Process: Criminal Justice Agents and the National Crime Agenda*, 32 POL'Y STUD. J. 569, 569–70 (2004) ("[T]his study analyzes the role of federal, state, and local criminal justice bureaucrats, in contrast to traditional interest groups, community organizations, and crime victims, and hypothesizes that criminal justice agents dominate the criminal justice policy process at the national level."); Bruce L. Benson & Iljoong Kim, Causes and Consequences of Over-Criminalization 17–18 (unpublished manuscript) (on file with authors) ("Legislators do not initiate or shape criminal law policy—they simply react to demands of the major criminal justice lobbies."); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191 (2019) (noting that commentators frequently focus on the power of prosecutors, and in doing so, leave out police and legislators, which are "two of the most powerful criminal justice actors").

31. *See infra* Part II.A (making this concession and discussing work by other scholars making this same observation).

32. *See infra* notes 238–44 and accompanying text (describing these traditional lobbying concerns).

33. *See* Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1058–59 (2021) (noting the "unique nature of professional conduct in policing relative to other fields" because police "generally carry weapons and are trained to utilize force" and "fill out police reports and regularly testify before court in criminal proceedings").

misconduct of correctional officers.[34] And the generally unreviewable discretion granted to prosecutors can contribute to abuses that can culminate in wrongful convictions.[35] The responsibilities of law enforcement are "fundamentally different than those given to teachers, firefighters, government social workers, or other civil servants," and by extension, the public interest in the regulation and oversight of law enforcement behavior is particularly acute.[36]

Additionally, the law enforcement lobby faces few coordinated, comparably well-organized counterweights. Justice-involved populations most adversely affected by changes in criminal justice policies are generally economically and politically marginalized.[37] In many states, currently or formerly incarcerated individuals lose their right to vote, either temporarily or permanently.[38] Encounters with the criminal justice system can also significantly depress lifetime wages and limit labor market re-entry, particularly for Black and Hispanic individuals.[39] More generally, Black and Hispanic individuals have historically been

34. *See, e.g.*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 251146, SUMMARY: SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15 (2018), https://bjs.ojp.gov/content/pub/pdf/svraca1215_sum.pdf [https://perma.cc/E5X3-N3TF] (reporting 8,151 allegations of staff-on-inmate sexual misconduct in American prisons in 2015 and 5,809 such allegations in American jails during the same year).

35. Several scholars have discussed the link between prosecutors and wrongful convictions. *See generally, e.g.*, Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004) (discussing the frequency of prosecutorial misconduct that contributes to wrongful convictions and considering possible disciplinary measures in response); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006) (describing prosecutorial tunnel vision that can contribute to wrongful convictions).

36. Rushin, *supra* note 33, at 1059.

37. Kerry L. Haynie, *Containing the Rainbow Coalition: Political Consequences of Mass Racialized Incarceration*, 16 DU BOIS REV. 243, 249 (2019) (arguing that scholarly attention should focus more on how mass incarceration and felon disenfranchisement serve roles similar to those of poll taxes and English competency tests in reducing the political power of communities of color).

38. *See infra* note 335 and accompanying text on felon disenfranchisement.

39. Bruce Western & Catherine Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration*, 97 SOC. FORCES 1517, 1537 (2019) (finding that race plays a role in market re-entry for formerly incarcerated individuals).

victimized by political marginalization[40] and institutional racism throughout American history, which has substantially reduced their income mobility[41] and socioeconomic status,[42] likely contributing to lower political participation.[43] Under these conditions, we argue that the existence of a powerful law enforcement lobby creates problems of subordination within our democratic polity that are constitutionally—as well as socially and morally—problematic. Put differently, we argue that the efforts of the law enforcement lobby have perpetuated racial subordination. In this way, the law enforcement lobby exercises a unique and pervasive power over the operation of democratic institutions.

This Article concludes by considering various steps that states could take to counteract the power of the law enforcement lobby. In doing so, we connect our discussion of the law enforcement lobby with growing calls for democratization and power-shifting in the criminal justice system. First, we argue for reforms that "level up" the power of competing interests that can counter the power of the law enforcement lobby in criminal justice policymaking. In doing so, we focus specifically on reforms that imbed contestation in policymaking by communities most impacted by the criminal justice system, consistent with emerging scholarship on democratization and power-shifting. We also propose channeling collective resources into a broad entity that could generate legislative subsidies sufficient to disrupt the law enforcement lobby's capture of criminal justice policymaking. Next, we suggest policymakers adopt "capacity-adjacent" re-

40. *See, e.g.*, Paru Shah & Robert S. Smith, *Legacies of Segregation and Disenfranchisement: The Road from* Plessy *to* Frank *and Voter ID Laws in the United States*, 7 RUSSELL SAGE FOUND. J. SOC. SCIS. 134, 135 (2021) (describing the ways that voter identification laws have further dismantled voting rights, especially for African Americans).

41. Randall Akee, Maggie R. Jones & Sonya R. Porter, *Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races*, 56 DEMOGRAPHY 999, 1018 (2019) (showing significant stratification by race for income and income mobility over time).

42. *See, e.g.*, Shervin Assari, *Diminished Economic Return of Socioeconomic Status for Black Families*, 7 SOC. SCIS. 1, 1 (2018) (finding that "the economic return of family [socio-economic status] is smaller for Black compared to White families, regardless of the [socio-economic] indicator").

43. *See* Jan E. Leighley & Arnold Vedlitz, *Race, Ethnicity, and Political Participation: Competing Models and Contrasting Explanations*, 61 J. POL. 1092, 1110–11 (1999) (finding that the socioeconomic status theory for explaining voter participation received strong support after empirical examination).

forms, like expanding voting rights for individuals formerly convicted of felonies. Finally, we propose mechanisms to "level down" the power of the law enforcement lobby, including restrictions on the lobbying capacity of law enforcement interest groups that draws on First Amendment Speech Clause doctrine that permits restriction of public employee speech. We believe these proposals would withstand judicial scrutiny and, taken together, could facilitate broader transformation of the American criminal justice system.

This Article proceeds in four parts. Part I describes the concept of power within the criminal justice system. Part II then illustrates how the law enforcement lobby has captured power within the justice system. Part III diagnoses the problems with the law enforcement lobby. Part IV offers some normative recommendations for remedying the distinctive harms created by the lobby.

I. POWER IN THE CRIMINAL JUSTICE SYSTEM

The concept of power dominates the criminal justice literature. A wide range of scholarship analyzes the locus and use of power by key criminal justice actors. A large body of literature examines the power of prosecutors, actors that "enjoy vast unfettered power,"[44] focusing on, for example, the power to determine whether or not to charge and prosecute defendants,[45] or the power to decide the terms of punishment, or, importantly, "who

44. Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 738 (1991); *see also* Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998) (noting that prosecutors have "virtually unchecked powers"); Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 54 (2012) ("Prosecutors have enormous power . . . ."); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1341 (2013) ("It would be difficult to overstate the power conferred on prosecutors . . . .").

45. Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 43 (1988) ("Prosecutors have unlimited discretion not to charge, and when they do proceed, they have largely unlimited power to determine which charges to file."); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 778 (2016) ("[I]t is hard to dispute that prosecutors generally have broad power to decline to bring charges and that they use that power sometimes.").

gets sent to prison and for how long."[46] Similarly, the power of police is significant in the criminal justice system, with officers holding the status as first movers, deciding "whom to investigate, how to investigate, how many resources to commit, and whether to bring the fruits of any investigation to a court (via a prosecutor)."[47]

Across the body of work on criminal justice, these assessments of the power of the police, prosecutors, and prisons, as well as the associated normative reform measures, tend to fall into two approaches.[48] The first approach focuses on the attendant rules that grant the criminal justice actor power. This approach examines the use of power and ways by which to constrain or eliminate that power.[49] This is, then, an outcomes-oriented approach to analyzing the application of power in the criminal justice system which has as its goal impacting substantive outcomes through policy modification.[50] For example, challenging judicial interpretation of rules that empowers prosecutorial discretion over plea bargaining,[51] or proposing rules that reduces violence in policing.[52] The second approach seeks to ensure the legitimacy of criminal justice policies, a citizenship-enhancing conception that "brings principles of procedural justice into the conversation"[53] to ensure a community perception that the crim-

46. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 206 (2017) ("Prosecutors have been and remain the engines driving mass incarceration.").

47. Bellin, *supra* note 30, at 192; *see also* Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 306 (2018) ("Policing is central to the operation of the modern criminal law.").

48. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 783 (2021) (noting that there are "two leading ways of thinking about the objective of reforming the governance of law enforcement").

49. *Id.* at 795 (noting that this approach involves "analyz[ing] the effectiveness of various police policies").

50. *Id.* at 783 ("[R]eformers focus on policies that they hope will lead to particular outcomes traditionally associated with policing success . . . .").

51. Bellin, *supra* note 30, at 182 (discussing the "great prosecutorial power" in plea bargaining).

52. Simonson, *supra* note 48, at 795–97.

53. *Id.* at 797; *see also* 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, 1866 (2013) (discussing a view of police success which "depends primarily on the procedural justice or fairness of police conduct"); Tom Tyler, *What Are Legitimacy and Procedural Justice in Policing? And Why Are They Becoming Key Elements of Police Leadership?*, *in* POLICE EXEC. RSCH. F., LEGITIMACY AND PROCEDURAL JUSTICE: A NEW ELEMENT OF

inal justice system is fair, in order to ensure those impacted by the system trust in that system.[54]

But the project of identifying power and attending to its deployment and legitimacy is concerned only with a specific type of power—what Daryl Levinson terms the power of capacity.[55] Power in these terms concerns the power of the state and its actors to control the governed, "the capacity of the state to actually penetrate civil society, and to implement . . . decisions throughout the realm."[56] The power of capacity can also be characterized in terms familiar to lawyers: as discretion. Jeffrey Bellin argues that when criminal justice scholars talk about the extent of power of criminal justice actors, what they mean is there is significant "ability to freely choose between different options."[57] Claims of power, then, are really claims about the discretion granted to the state actors to make consequential decisions vis-à-vis an accused, defendant, or convicted person.

This is not to say that discretion—of power of capacity—is not worthy of examination, criticism, and reform. Instead, our claim is that if the goal is reforming the criminal justice system, it is critical to shift our focus and efforts from power as capacity to the power to generate that capacity: the power of control.[58] That is, the "power to determine what state capacity will and will not be used to accomplish."[59] Levinson defines this power to control as "the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred

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POLICE LEADERSHIP 6, 7–8 (2014) ("To build a stronger partnership between the police and the community, we need a focus on what shapes public views about trust and confidence and ultimately influences the perceived legitimacy of the police in the community."); Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 776 (2014) (finding that police legitimacy "is quite sensitive to the manner in which . . . [police] contacts unfold and the overall exposure of citizens to involuntary police stops and street detentions").

54. Simonson, *supra* note 48, at 799 (stating that "the goal is for people to trust the police").

55. Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 45–46 (2016).

56. *Id.* at 46 (quoting Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 EUR. J. SOCIO. 185, 189 (1984)).

57. Bellin, *supra* note 30, at 178 (discussing this in the context of prosecutors).

58. Levinson, *supra* note 55, at 46–47 (describing "power of control" as "the kind of power . . . that is most frequently front and center in constitutional law").

59. *Id.* at 46.

policies."[60] Similarly, Rahman and Simonson define power as "direct political power: the ability of a person, or a group of people . . . to influence policy outcomes and control the distribution of state resources."[61]

A small but growing body of contemporary criminal justice scholarship recognizes the importance of examining the criminal justice system and its actors through a power lens.[62] Simonson states that while this "trend in scholarship does not always explicitly name power as a goal," its focus shifts away from questions of legitimacy, crime control, and harm reduction and toward "'alternative, disruptive frameworks': abolition, transformation, resistance."[63] This power lens recognizes that the perpetuation of the status quo in the criminal justice system is inextricably connected to "the social control of—and denial of political power to—poor and Black Americans."[64] Power in these terms is concerned with governance and policymaking arrangements, and not the substantive outcomes or policies themselves. That is, power is defined as who has the ability to control or impact policy outcomes in terms of the power of capacity (or scope

60. *Id.* at 39. The classic and most frequently used definition of power is Max Weber's definition. Weber states that "[p]ower . . . is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance . . . ." MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 53 (Guenther Roth & Claus Wittich eds., 1968); *see also* Louise Marie Roth, *The Right to Privacy is Political: Power, the Boundary Between Public and Private, and Sexual Harassment,* 24 LAW & SOC. INQUIRY 45, 47 (1999) (noting that Weber's definition of power is the "classic sociological definition"); Bellin, *supra* note 30, at 175 (using "Weber's widely-embraced definition of power as a baseline"). Robert Dahl defines power as influence: "A has power over B to the extent that he can get B to do something that B would not otherwise do." Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957).

61. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 692 (2020).

62. For some examples of this type of scholarship, *see, e.g.*, Simonson, *supra* note 48; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295; Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555 (2015); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018).

63. Simonson, *supra* note 48, at 800.

64. *Id.*

of discretion) granted to police, prosecutors, and prisons.[65] In focusing on the power to control, we are concerned with the foundational democratic question of who controls the allocation and constraint of power in the criminal justice system.[66] And given the significant power of capacity imbued in criminal justice actors, the question of who controls that power is critically important.[67]

The project of determining who controls and constrains state power is one that is, at base, a constitutional question. Fundamentally, the issue of power of control is one of constitutionalism and institutional design. Under the classic account, the power to control is de jure located in the legislature, which has the formal control to craft law and allocate power.[68] But in the context of criminal justice policymaking—as it is more generally—the de facto power of control lies not with the legislators but with the major interest groups that set and shape the legislative agenda behind closed doors.[69] Under this account of policymaking, interest groups force legislative attention to an issue through conscious mobilization.[70] Interest groups—or lobbyists—present issues in a way that maximizes their positional advantage by shaping the range of policy options to maximize their own interests and increasingly supply a "legislative subsidy" in the form of policy information, political intelligence, and legislative labor to legislators.[71] "This epistemic role situates interest groups to shape both how issues are defined and problems remedied,"[72] with those holding the most de facto power manipulating the

65. *Id.* at 789–90 (explaining differing outcomes of different communities' control of police).

66. Levinson, *supra* note 55, at 33.

67. *Id.* at 47.

68. *But see id.* at 75 (quoting Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2613–14 (2006)).

69. Benson & Kim, *supra* note 30, at 18 ("Thus, the important part of the legislative process takes place behind closed doors and involves only groups representing narrow ranges of interest. This domination by lobbyists in the setting of legislative agendas is not unique to criminal law issues or to California, of course.").

70. Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1409 (2016).

71. *Id.* at 1410.

72. *Id.*

agenda so as to determine the outputs of a collective choice mechanism. The outcome is a result of elite manipulation,[73] whereby interest groups jockey for positional authority and work toward an outcome that ultimately reflects the plurality of community interests.

Yet, criminal justice policymaking differs from traditional subjects of regulation,[74] with de facto policymaking power being almost exclusively one-sided. As Rachel Barkow notes, "one of the most—if not *the* most—powerful lobbying groups in criminal law consists of those charged with exercising the penal power: law enforcement . . . and prosecutors."[75] These law enforcement lobbyists—police unions, prosecutorial groups, and prison guard lobbyists—are lobby groups with the intense and concentrated interest in the criminal justice system that is necessary to become successful beneficiaries of policymaking.[76] Of course, powerful interest groups exist in other regulatory contexts as well. But what sets criminal justice policymaking apart is the almost complete absence of an opposing entity.[77] That is, policymaking in criminal justice is dominated by a law enforcement lobby that acts largely without opposition. The law enforcement lobby exercises disproportionate power in a one-sided political competition.

That the law enforcement lobby is so powerful is "owing to structural advantages that competing groups lack. . . . wield[ing] disproportionate influence in legislative and administrative decisionmaking processes and shift[ing] policy in their preferred directions, at the expense of competing interests and the broader public welfare."[78] Representation of countervailing interests—interests of the accused, defendants, and the convicted—is limited. The regulatory subjects are politically weak and ill-equipped to argue policy on their own behalf. As Barkow has argued, "it is hard to imagine a more anemic political group."[79] Prisoners are disenfranchised to some degree in almost every

73. WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 136–37 (1982); Levinson, *supra* note 55, at 90 ("But government institutions do not really have wills or interests of their own; their behavior is determined by the interests—officials and democratic-level constituencies—that control them.").

74. Barkow, *Administering Crime*, *supra* note 30, at 723–30.

75. *Id*. at 728.

76. Dripps, *supra* note 30.

77. Barkow, *Administering Crime, supra* note 30, at 727 n.22.

78. Levinson, *supra* note 55, at 113–14.

79. Barkow, *Federalism and the Politics of Sentencing*, *supra* note 30, at 1282.

state, and the wider affected communities have traditionally lacked a voice in the political process.[80] Without the ability to offer significant legislative subsidies in terms of either votes or money, legislatures can be indifferent, or even hostile, to preferences of the subjects of the criminal justice system.[81]

This legislative favoring of the law enforcement lobby results in the largely unrestricted power of control (discretion) that we see in the criminal justice system today. Barkow makes this point in the context of sentencing law, arguing that harsher sentencing laws are a product of pro-regulatory lobbyists that comprise of prosecutors who have incentives to "resist changes that would reduce sentences and to support having longer sentences on the books to give them greater bargaining power in their negotiations with defendants."[82] The prosecutors are supported by other law enforcement officials, including "[p]rivate prison companies, corrections officer unions, and rural communities . . . [who] have an economic stake in the expansion of prisons."[83] Criminal justice reform, then, is not perceived as a public good to be supplied by the legislature. Instead, criminal justice policy is like any other private good and will be motivated by what consumers of the good are willing to pay "in such political currency as votes, volunteer time, and campaign contributions, either provided to the legislator or withheld from an opponent."[84] In the current political marketplace for criminal justice policy, there is very little political return for the legislator in implementing criminal justice reform that favors the accused, defendant, or convicted. Rather, there is significant political risk in ensuring "the enmity of the law enforcement bureaucracy."[85] Indeed, the power of the law enforcement lobby over legislators was evidenced in a study that found legislative creation of criminal offenses increase in election years.[86]

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80. *Id.* at 1282–83.

81. Dripps, *supra* note 30, at 1079; *see also supra* notes 1–18 (describing the role of the law enforcement lobby in the aftermath of *Plata* in California).

82. Barkow, *Federalism and the Politics of Sentencing*, *supra* note 30.

83. *Id.* at 1283.

84. Dripps, *supra* note 30, at 1089.

85. *Id.* at 1094.

86. John Baker, *Revisiting the Explosive Growth of Federal Crimes,* HERITAGE FOUND. (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/M52C-BVHP].

Despite this political landscape where one side of the debate is systematically favored,[87] criminal justice scholars and activists have insufficiently considered the law enforcement lobby as a site of study and reform. As a historic matter, this is understandable. However, we argue that the recent and ongoing movement of Black and brown Americans against subordinating criminal justice policies means that it is fitting to switch our focus from power as capacity to power as control in the criminal justice system. While historically the political movement against the criminal justice lobby has been "anemic,"[88] the Black Lives Matter movement and other movements provide the possibility of countervailing forces to the current political dominance by the law enforcement lobby. By attending to the question of how the power of control is actioned and entrenched in the criminal justice system, we can organize and mobilize communal interventions on behalf of defendants at the point of greatest impact—the policymaking stage. The contemporary movements provide a unique moment for challenging the law enforcement lobby and raise the possibility of challenging the status quo whereby the law enforcement lobby exercises nearly exclusive control of criminal justice policy. In this way, we are concerned with relatively direct political power and the capacity of individuals or groups to influence policy outcomes and control distribution of state resources.[89] In order to facilitate the voice of the growing movements, we argue that a focus on the locus of power is the best lever for ultimately transforming the criminal justice system. That is, by focusing on the locus of power in the criminal justice system, we ask where the power to control is located and ask about the plausibility and actioning of promoting the power of countervailing interests to provide a more balanced policymaking process.

In the following Part we examine the law enforcement lobby in detail, outlining the rise of police unions, prosecutorial groups, and the prison lobby as powerful political lobbyists in the criminal justice system.

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87. Barkow, *Federalism and the Politics of Sentencing*, *supra* note 30, at 1277.

88. *Id.* at 1282.

89. Simonson, *supra* note 48, at 803–05.

II. CAPTURE IN THE CRIMINAL JUSTICE SYSTEM: THE LAW ENFORCEMENT LOBBY

The law enforcement lobby has grown alongside the criminal justice system. Over time, the law enforcement lobby has emerged as a powerful actor exerting significant control over criminal justice policies. Despite their attempts to recast their role as neutral stakeholders, the law enforcement unions and associations engage in lobbying reminiscent of other political interest groups. And unlike the typical labor account, where the union merely seeks to protect the rights of its members, the law enforcement lobby has a substantial role in influencing broader policy to the detriment of the key players in the criminal justice system—criminal defendants. In this way the unions go beyond the classic union account of presenting a collective voice on hours and wages, and instead skews the underlying rules of the system against a largely voiceless population.[90]

A. LAW ENFORCEMENT INSTITUTIONS AS LOBBYISTS

Law enforcement unions are powerful actors shaping criminal justice policy across the country—and go beyond traditional conceptions of labor unions and levers of power to merely protect the rights of their members. Indeed, law enforcement unions are more than merely unions. They are also political lobbyists wielding substantial power in criminal justice circles. But historically, many law enforcement unions prefer that their influence go largely unnoticed to the general public. Actors in the criminal justice system have long tried to rhetorically position themselves in public policy debates not as "lobbyists" but as neutral "stakeholders" or non-political advocates for community safety.[91] In

90. Note, however, that other types of unions also engage in political lobbying, which may result in significant impacts on vulnerable populations, though to a lesser extent than the law enforcement lobby. *See, e.g.*, Nicole Hong & Matthew Haag, *A Hotel Was Set to Become Affordable Housing. Then the Union Stepped In.*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/nyregion/new-york-hotel-workers-union.html [https://perma.cc/AYA7-YHKJ] (describing how the Hotel Trade Council worked in the aftermath of the COVID-related tourism slump to halt conversions of empty hotels in New York City to housing for unhoused people).

91. Laura Huey & Danielle Hryniewicz, *"We Never Refer to Ourselves as a Lobby Group Because 'Lobby Group' Has a Different Connotation": Voluntary Police Associations and the Framing of Their Interest Group Work*, 54 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 287, 288 (2012) ("Lobbying thus becomes 'consultation' or is recast in even more idealized terms as 'seeking to find the truth,'

documenting this tension, Laura Huey and Danielle Hryniewicz found that police unions in particular "serve to maintain the historical fiction of police neutrality on political issues" in part because the appearance of neutrality is politically expedient.[92] If the public viewed law enforcement unions are purely political actors, they may give their opinions less weight. Despite these rhetorical attempts to reframe the actions of police unions, there is little doubt that law enforcement unions engage in lobbying like any other political interest group. Police unions, prosecutor associations, and correctional officer unions pressure legislators, make political donations, attempt to influence public opinion through advertisement and press releases,[93] and engage in a wide array of informal contact with policymakers.[94]

In fact, as Huey and Hryniewicz explain, law enforcement unions not only engage in lobbying like any other interest group, they lobby from a privileged position.[95] They found that police unions have greater access to legislators[96] and their positions receive greater deference because they leverage the public's perception of them as merely "representatives of law and order."[97] As explained in more detail in the next subparts, these lobbying efforts have helped shape criminal justice policy. And the law enforcement lobby has understandably pushed for more discretion and job protections for its members, both through legislation and the collective bargaining process, often to the detriment of criminal defendants.[98]

But some may argue that the law enforcement lobby is working as intended. Police unions, correctional officer unions, and prosecutor associations are performing their intended functions. Whether we call it lobbying or not, these unions represent law enforcement personnel in the collective bargaining process and the legislative decision-making process in hopes of shaping the law in a manner consistent with their interests and beliefs. And

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whereas police interest groups become 'stakeholders' advocating not on behalf of themselves but for 'safer communities.'").

92. *Id.*

93. *See infra* Part II.B (providing numerous examples throughout each subsection).

94. Huey & Hryniewicz, *supra* note 91, at 290 (explaining how police unions "contact[] government officials directly to express opinions, and engag[e] in informal contacts with decision makers" including lunches and coffees).

95. *Id.* at 298.

96. *Id.* at 299–300.

97. *Id.* at 300.

98. *See infra* Part II.B.

supporters of the law enforcement lobby may argue that civil rights activists can similarly use these same levers of power, including collective bargaining negotiations and legislation, to counteract the influence of the law enforcement lobby. As Benjamin Levin recently explained, critics of the law enforcement lobby must be careful not to conflate critiques of the law enforcement lobby with critiques of the labor movement more generally.[99] Doing so might justify the weakening of collective bargaining rights in other employment contexts.

As we argue, the law enforcement lobby does more than merely collectively represent the interests of frontline officers on matters like hours and wages. Instead, the law enforcement lobby has used its insider position to skew the justice system in a more expansive and punitive direction at the expense of justice-involved populations that often lack an adequate voice in policy development.[100]

B. THE RISE OF THE LAW ENFORCEMENT LOBBY

Law enforcement unions have grown in prominence across the United States even while other public sector unions have shrunk. Starting in the mid twentieth century, frontline police officers and prison guards gained the power to bargain collectively with their employers in many states across the country.[101] By the late twentieth century, the majority of police officers and prison guards were part of politically powerful unions that played a pivotal role in shaping criminal justice policy in the United States.[102] Around the same time, legislators across the

99. Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1338–39 (2020) (warning police union critics of embracing far-reaching critiques of police unions that may be used to justify broader dismantling of collective bargaining rights; further calling these overly broad critiques "risky proposition[s]").

100. *See infra* Part III (building our account, including the lack of adequate voice for justice-involved populations).

101. *See* Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1203–07 (2017) (detailing the emergence of police unions and collective bargaining rights historically in this field); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736 (2017) ("Unions finally succeeded in gaining a lasting foothold in American police departments in the late 1960s, as rank-and-file officers felt attacked by the civil rights movement's focus on police brutality and racism and by federal court decisions limiting police officers' investigatory and arrest powers.").

102. BRIAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 13 (2011), http://bjs.gov/content/

country responded to rising crime by increasing criminal sentence length[103] and making it easier to charge juvenile offenders in adult court.[104] These shifts, in turn, increased the demand for police and correctional officers and further strengthened the power of these unions.[105]

Even as crime rates have declined precipitously in recent decades,[106] police and correctional unions, along with associations of state and local prosecutors, have pushed back against efforts to reduce the scope of the criminal justice system. We describe these three interrelated actors as the law enforcement lobby. This Part considers the rise and continued power of the law enforcement lobby in the United States. In doing so, it separately analyzes the rise of the police union lobby, the correctional officer lobby, and the prosecutor lobby. It shows how these three entities often work together to advance coercive and regressive criminal justice policies.

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pub/pdf/lpd07.pdf [https://perma.cc/F8MJ-UNW4] (showing that around two-thirds of American police officers are employed at departments that collectively bargain with police officers over wages, benefits, and other terms or conditions of employment); *see also* Fisk & Richardson, *supra* note 101, at 744–47 (documenting the influence of police unions through the political process).

103. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 9–12 (1999) (discussing the rise in crime, the popularity of "tough on crime" legislative responses, the corresponding growth of the criminal justice system, and the mixed evidence on its effectiveness).

104. SHAY BILCHIK, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, NCJ 178995, JUVENILE JUSTICE: A CENTURY OF CHANGE 5 (1999) https://www.ojp.gov/pdffiles1/ojjdp/178995.pdf [https://perma.cc/Z4DX-5Z9D] (finding that all but three states by the early-to-mid 1990s responded to a perceived threat of rising juvenile violence by making the juvenile justice system more punitive).

105. Joshua Page, *Prison Officer Unions and the Perpetuation of the Penal Status Quo*, 10 CRIMINOLOGY & PUB. POL'Y 735, 741 (2011) (showing the growth of the size of the correctional officer union in response to the growth of incarceration rates).

106. *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007) (chronicling this historic decline in crime across the country).

1. Police Unions

While rates of unionization have declined in most industries over the last several decades, police officers have emerged as one of the most unionized professions in the United States.[107] Police unions initially struggled to gain a foothold in the United States, in part because of public backlash to the Boston Police Strike of 1919.[108] But the officers began to gain the statutory right to collectively bargain under many states' laws in the 1960s.[109] Officers organized and demanded the right to bargain collectively, in part, because "rank-and-file officers felt attacked by the civil rights movement's focus on police brutality and racism and by federal court decisions limiting police officers' investigatory and arrest powers," and the development of civilian oversight apparatuses in some major cities.[110]

In the wake of national riots and rising crime, police unions increased their political power in the decades that followed by presenting themselves as "representatives of white ethnic conservative interests."[111] And in many cities, police unions have coalesced bipartisan political support by presenting themselves as representatives of both the labor movement (garnering support from the left) and law and order (solidifying support on the

107. Scheiber et al., *supra* note 29 ("While rates of union membership have dropped by half nationally since the early 1980s, to 10 percent, higher membership rates among police unions give them resources they can spend on campaigns and litigation to block reform.").

108. *See generally* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 13–16 (2004) (providing a detailed accounting of the Boston Police Strike of 1919).

109. Fisk & Richardson, *supra* note 101 ("Unions finally succeeded in gaining a lasting foothold in American police departments in the late 1960s, as rank-and-file officers felt attacked by the civil rights movement's focus on police brutality and racism and by federal court decisions limiting police officers' investigatory and arrest powers.").

110. *Id.*; *see also* Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 196 (2005) (describing this motivation for the mobilization of officers to create unions).

111. Dylan Matthews, *How Police Unions Became So Powerful—and How They Can Be Tamed*, VOX (June 24, 2020), https://www.vox.com/policy-and-politics/21290981/police-union-contracts-minneapolis-reform [https://perma.cc/5BDK-JMPU].

political right).[112] Today, the overwhelming majority of states permit officers to bargain collectively. Most states permit front-line police to bargain collectively about matters like wages, hours, and so-called "conditions of employment," which frequently includes officer accountability, civilian oversight, and disciplinary appeals.[113] According to one estimate, around two-thirds of American police officers work at a department that has authorized collective bargaining.[114] The largest police union in the United States, the Fraternal Order of Police (FOP), represents over 330,000 officers across the country.[115]

And even in those states that do not, officers play a critical role in the development of criminal justice policies through political organizing and lobbying.[116] The growth of police unions has had several important implications for American criminal justice policy. First, police unions have leveraged the collective bargaining process to thwart officer accountability and limit

112. Rushin, *supra* note 101, at 1204 ("Police unions generally benefit from broad, bipartisan support—even from conservative politicians who have fought against unionization for other government employees."); *see also* Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2206 (2014) (concluding that police unions "enjoy broad legal and social support").

113. Rushin, *supra* note 101, at 1205–06 (describing the scope of collective bargaining rights and citing cases delineating the limits of these rights in different jurisdictions).

114. REAVES, *supra* note 102 (concluding that sixty-six percent of officers are employed at departments permitting collective bargaining).

115. Alex Gangitano, *Police Unions Face Lobbying Fights at All Levels of Government*, HILL (June 13, 2020), https://thehill.com/business-a-lobbying/502557-police-unions-face-lobbying-fights-at-all-levels-of-government [https://perma.cc/T836-ED4T].

116. *See infra* notes 132–78 and accompanying text (describing the lobbying efforts and political sway of police unions that shape criminal justice policy).

democratic oversight of policing. A number of civil rights activists,[117] media outlets,[118] and academics[119] have found that police collective bargaining agreements frequently include provisions that may impede officer accountability efforts. These include provisions that delay interviews of officers after allegations of

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117. *See, e.g.*, DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie & Brittany Packnett, *Police Union Contracts and Police Bill of Rights Analysis*, CAMPAIGN ZERO (June 29, 2016), https://campaignzero.org/wp-content/uploads/2022/11/CampaignZeroPoliceUnionContractReport-1.pdf [https://perma.cc/E8MT-QN3L] (analyzing the contractual terms of eighty-one police labor agreements); NIXTHE6, https://nixthe6.org [https://perma.cc/LYK9-Y4YZ] (expanding on Campaign Zero's earlier analysis by conducting an examination of over 600 police labor agreements); *Community Oversight of Police Union Contracts,* NAACP LEGAL DEF. FUND 11–20 (Aug. 2020), https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Community-Oversight-of-Police-Union-Contracts-FINAL3.pdf [https://perma.cc/7R77-HFSW] (linking to eighty-two of the largest police union contracts and providing an analysis of topics covered in each contract).

118. *See, e.g.*, Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017), http://www.reuters.com/investigates/special-report/usa-police-unions [https://perma.cc/QU2T-PGVS] (coding eighty-two police labor agreements); Martha Bellisle, *Police Contracts Can Stand in the Way of Accountability*, AP NEWS (July 19, 2020), https://apnews.com/article/64a6a990a1fcc5db38768c82a2a34d2c [https://perma.cc/QM3K-3W3Z] (offering numerous examples of how police contracts can impede accountability); *Pattern of Protection: Union Contracts Scrutinized for Unique Police Provisions*, WSAW-TV (Nov. 13, 2020), https://www.wsaw.com/2020/11/14/pattern-of-protection-union-contracts-scrutinized-for-unique-police-provisions [https://perma.cc/862Q-WGWF] (analyzing eighty-five contracts, twenty-four policy manuals, and nineteen state police officers' bills of rights, and finding numerous potentially objectionable provisions); Reade Levinson & Lisa Girion, *U.S. Police Union Contracts: Main Takeaways from Reuters Analysis*, REUTERS (Nov. 17, 2020), https://www.reuters.com/article/us-usa-police-rochester-takeaways/u-s-police-union-contracts-main-takeaways-from-reuters-analysis-idUSKBN27X1EW [https://perma.cc/J2QK-8M9X] (conducting a reexamination of the same labor contracts over three years later).

119. *See generally, e.g.*, Rushin, *supra* note 101 (conducting an academic examination of police collective bargaining agreements); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545 (2019) [hereinafter Rushin, *Police Disciplinary Appeals*] (analyzing how 656 police union contracts handle police disciplinary appeals procedures); Samuel Walker, *The Baltimore Police Union Contract and the Law Enforcement Officers's* [sic] *Bill of Rights: Impediments to Accountability*, SAMUELWALKER.NET (2015), http://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf [https://perma.cc/FNM4-4P6C] (describing how the state law in Maryland along with the Baltimore police labor contract combine to impede accountability).

misconduct,[120] limit or ban civilian oversight,[121] purge disciplinary records from personnel files,[122] and establish complex appellate procedures[123] that can lead to terminated officers being rehired by arbitrators against the wishes of police chiefs and city leaders.[124] These provisions can make it difficult for police chiefs

120. *See, e.g.*, *Agreement Between the City of Bowling Green, Ohio and the Bowling Green Police Patrolman's Association OPBA: June 18, 2021–June 13, 2023*, CITY OF BOWLING GREEN, OHIO 6 (Nov. 3, 2021), https://www.bgohio.org/DocumentCenter/View/314/Bowling-Green-Police-Patrolmans-Association-OPBA-PDF [https://perma.cc/MKU9-KK4U] (providing a five-day delay for interrogations of officers); *Agreement by and Between the City of Seattle and Seattle Police Officers' Guild: Effective Through December 31, 2020*, CITY OF SEATTLE 9–10 (Nov. 14, 2018), https://www.seattle.gov/documents/Departments/HumanResources/Labor%20Relations/SPOG_CBA_2015-2020.pdf [https://perma.cc/ERG8-37BT] (establishing that officers should receive a classification report up to thirty days before some interrogations).

121. *See, e.g.*, *Agreement by and Between the City of San Antonio, Texas and the San Antonio Police Officers' Association: October 1, 2009 Through September 30, 2014*, CITY OF SAN ANTONIO 85 (Oct. 1, 2009), https://www.sanantonio.gov/Portals/0/Files/Atty/CollectiveBargaining/Police%20CBA%202009-2014.pdf [https://perma.cc/4UGJ-FEHK] (making any determination by the Citizen Advisory Action Board merely advisory and not binding on the police chief); *Agreement Between City of Miami, Miami, Florida and Fraternal Order of Police, Walter E. Headley, Jr., Miami Lodge No. 20: October 1, 2013 Through September 30, 2015*, CITY OF MIA. 28 (Nov. 12, 2013), http://egov.ci.miami.fl.us/Legistarweb/Attachments/73969.pdf [https://perma.cc/42PR-WPXS] (establishing the members of the panel to decide disciplinary matters, made up entirely of fellow officers).

122. *See, e.g.*, *Labor Agreement by and Between Queen City Lodge No. 69 Fraternal Order of Police and the City of Cincinnati: Non-Supervisors for the Years May 2, 2021–April 27, 2014*, CITY OF CINCINNATI 39–40 (May 2, 2021), https://www.cincinnati-oh.gov/hr/labor-relations/police-contract-non-supervisors-2021-2024 [https://perma.cc/4KND-MTQ4] (establishing a retention schedule that could result in punishment being removed from disciplinary files after set periods of time); *Agreement Between State of Hawaii, City & County of Honolulu, County of Hawaii, County of Maui, and County of Kauai and State of Hawaii Organization of Police Officers Bargaining Unit 12: July 1, 2017–June 30, 2021*, STATE OF HAW. 42 (Nov. 7, 2017), https://s3.documentcloud.org/documents/21123940/shopo-cba-2017-2021.pdf [https://perma.cc/8FVG-RYJF] (removing prior misconduct from disciplinary files after a set length of time).

123. *See generally* Rushin, *Police Disciplinary Appeals*, *supra* note 119 (summarizing thoroughly the commonality of these appellate procedures on appeal across a large sample of agencies).

124. Kimbriell Kelly, Wesley Lowery & Steven Rich, *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired [https://perma.cc/KH37-WP5R] (providing

to punish officers that may have engaged in unconstitutional behavior.[125] They also make it challenging for police organizations to terminate the employment of problematic officers—even in cases where the evidence of the officer misconduct is largely or entirely unrefuted.[126] This can mean that, even when a police chief wants to respond forcefully to officer misconduct or reform a struggling policing organization, provisions in the collective bargaining agreement may make organizational reform difficult.

Commentators have hypothesized on the structural incentives that may contribute to the frequency of these provisions in police collective bargaining agreements. Some have argued that the lack of transparency in collective bargaining negotiations combined with the political power of police unions may be contributing to a form of regulatory capture.[127] Others have speculated that scarce municipal resources force political leaders to make unfortunate trade-offs.[128] For example, when political leaders cannot meet unions demands on salary or benefits, they often offer concessions on internal investigations, civilian oversight, and disciplinary procedure instead.[129] Whatever the reason for these significant concessions in police collective bargaining agreements, a growing number of studies suggest that the

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data from a number of agencies on the frequency of officers being rehired on appeal after allegations of serious misconduct).

125. *See* Rushin, *supra* note 101, at 1241 ("Even when faced with the sting of evidentiary exclusion or the heavy financial burden of civil suits, police union contracts can make it challenging for police chiefs to hold officers accountable for wrongdoing.").

126. *See generally* Rushin, *supra* note 33, at 1059–61 (finding that around half of all officers terminated for professional misconduct are rehired on appeal in a dataset of 624 disciplinary cases from twenty-eight states and further providing numerous examples of officers engaging in serious misconduct but being ordered rehired on appeal).

127. *See, e.g.*, Rushin, *supra* note 101, at 1244–47 (arguing that increasing transparency in union negotiations would "likely . . . reduce regulatory capture and corruption").

128. *See id.* at 1246 ("Even for municipalities that are ideologically opposed to such disciplinary concessions, the temptation can be irresistible if such a concession results in a smaller hit to the municipal budget.").

129. *See, e.g.*, John Chase & David Heinzmann, *Cops Traded Away Pay for Protections in Police Contracts*, CHI. TRIB. (May 20, 2016), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop-20160520-story.html [https://perma.cc/92JE-6E6R] (providing a real-world example of this sort of trade-off occurring in a major American city).

presence of these provisions[130] or the mere presence of collective bargaining rights[131] may contribute to higher rates of police misconduct or officer-involved killings of civilians.

Second, police unions have emerged as powerful political actors. In other countries like Canada, Australia, and the United Kingdom, the law limits or bans police unions from making political contributions.[132] But in the United States, police unions regularly lobby local, state, and federal legislators.[133] They endorse political candidates, including other actors within the criminal justice system like prosecutors.[134] And they financially support or oppose legislative reforms, including some that only minimally affect frontline officers, but have a significant impact on the broader criminal justice system.[135]

Media outlets across the country have documented numerous examples of police unions exerting their political power at the local level. In Houston, the police union "bought ads warning about rising crime and pressing for more officers to be hired."[136] In Costa Mesa, California, the police association hired private

130. *See, e.g.*, Abdul Rad, Police Institutions and Police Abuse: Evidence from the U.S. (Apr. 23, 2018) (M.A. thesis, University of Oxford) (on file with authors) (finding an apparent relationship between the number of protective clauses in police labor agreements and rates of officer killings of civilians).

131. *See* Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 38 J.L. ECON. & ORG. 1, 5 (2022) (finding a relationship between the introduction of collective bargaining rights for some law enforcement officers in Florida and subsequent changes in police behavior); *see also* Cardiff Garcia & Stacey Vanek Smith, *The Link Between Disproportionate Police Brutality and Police Unions*, KDLG (June 12, 2020), https://www.kdlg.org/post/link-between-disproportionate-police-brutality-and-police-unions [https://perma.cc/Z4RG-3FQ3] (discussing forthcoming research by Rob Gillezeau, Jamein Cunningham, and Donna Feir on this subject).

132. *See* Daniel DiSalvo, *The Trouble with Police Unions*, 45 NAT'L AFFS., Fall 2020, at 24, 33 ("[P]olitical activity differentiates [U.S. police unions] from police unions or federations in other countries—such as Canada, Australia, and England—where police unions are limited or barred from involvement in election campaigns.").

133. *See id.* at 33 ("[Police unions] spend tens of millions of dollars annually on lobbying and electioneering.").

134. *See id.* at 34 ("Bestowing or withholding endorsement of political candidates is another way police unions wield political influence.").

135. *See, e.g.*, *id.* at 35 ("Police unions have also challenged the legitimacy of transparency measures such as civilian review boards and police auditors, all while advising officers not to cooperate with them and seeking legislative repeals.").

136. *Id.* at 34.

investigators and a law firm to conduct opposition research in order to pressure city councilors in the leadup to the 2012 elections.[137] For years, police unions in cities like Phoenix, Arizona[138] and Newark, New Jersey[139] fought to prevent the establishment of a police oversight board. In San Francisco, California, the police union paid for television advertisements opposing the establishment of new use of force standards[140] and in Boston the police union challenged the implementation of a body-worn camera program.[141] Police unions have vocally opposed progressive prosecutors like Larry Krasner in Philadelphia, Pennsylvania,[142] Kim Foxx in Cook County, Illinois,[143] and

137. *Id.*

138. *See* Uriel J. Garcia, *Viral Police Video May Be Tipping Point for Phoenix to Create Citizen Review Board for Use-of-Force Cases*, ARIZ. CENT. (July 3, 2019), https://www.azcentral.com/story/news/local/phoenix/2019/07/03/phoenix-police-unions-oppose-creating-a-citizen-oversight-board-use-of-force-viral-video/1628581001 [https://perma.cc/5627-JNZ2] ("While community members have called for a civilian review board for years, the Phoenix police union has successfully fought it.").

139. James Surowiecki, *Why Are Police Unions Blocking Reform?*, NEW YORKER (Sept. 12, 2016), http://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform [https://perma.cc/5Y6K-SSKS] ("Earlier this year, Newark created a civilian-review board that was acclaimed as a model of oversight. The city's police union immediately announced it would sue to shut it down.").

140. *See* Vivian Ho, *SF Police Union's Ad Slamming Proposed Gun Policy Draws Criticism*, SFGATE (Dec. 1, 2016), http://www.sfgate.com/bayarea/article/SF-police-union-s-ad-slamming-proposed-gun-10659351.php [https://perma.cc/QB8W-K3PU] (describing an advertisement that cautions "[m]any will die" due to the new use-of-force policy).

141. *See* Michael Levenson & Evan Allen, *Boston Police Union Challenges Body Camera Program*, BOS. GLOBE (Aug. 26, 2016), https://www.bostonglobe.com/2016/08/26/cameras/9TTDBCwV0reVpw3l5UCh1H/story.html [https://perma.cc/85FZ-MUWY] ("Boston's largest police union renewed its fight against body cameras Friday, seeking an injunction to bar the city from forcing 100 officers to begin wearing the devices next week.").

142. *See* Julia Terruso & Stephanie Farr, *Krasner, Police Union Spar on Day After Primary Election*, PHILA. INQUIRER (May 17, 2017), https://www.inquirer.com/philly/news/politics/city/Krasner-police-union-spar-day-after-election.html [https://perma.cc/JX9Q-7AEJ] (chronicling the union leader in Philadelphia calling Krasner "anti-law enforcement," labeling some of his supporters "the parasites of the city," and saying that "[h]is election would be catastrophic to the department and the community as a whole").

143. *See* Andy Grimm, *Chicago Police Union: Cops Have 'Deep Mistrust' for State's Attorney Kim Foxx,* CHI. SUN-TIMES (July 2, 2019), https://chicago.suntimes.com/2019/7/2/20680132/chicago-police-union-cops-deep-mistrust

Kim Gardner in St. Louis, Missouri.[144] Police unions have also led slowdowns and de-policing efforts as coordinated protests to disagreements with political leaders in cities like New York[145] and Baltimore,[146] among other locales.[147]

Police unions have also exerted their power to influence legislation at the state and federal level. In approximately twenty states, police unions have successfully lobbied state legislatures to pass law enforcement officer bills of rights (LEOBRs), many of which insulate officers from certain investigation techniques and limit civilian oversight.[148] Much like the collective bargaining agreements discussed above, many of these state laws prevent limiting the use of various interrogation techniques against

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-states-attorney-kim-foxx [https://perma.cc/UEZ8-4XDM] ("The union representing Chicago police officers wants a special prosecutor to replace Cook County State's Attorney Kim Foxx in any case where a cop is the victim of a crime or has been accused of misconduct.").

144. *See* Scheiber et al., *supra* note 29 (detailing the fierce opposition of the local police union to a proposal to independently investigate officer misconduct).

145. *See, e.g.*, Erik Ortiz, *Police Union Suggests Work Slowdown After NYPD Officer Is Fired in Eric Garner's Death*, NBC NEWS (Aug. 20, 2019), https://www.nbcnews.com/news/us-news/police-union-suggests-work-slowdown-after-nypd-officer-fired-eric-n1044486 [https://perma.cc/4WPE-AQBT] (detailing threats from police of a "work slowdown").

146. *See* Alex MacGillis, *The Tragedy of Baltimore*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/magazine/baltimore-tragedy-crime.html [https://perma.cc/4WPE-AQBT] (describing the effects of "a monthslong retreat from policing . . . encouraged, some top officials in the department at the time believe, by the local police union").

147. *See* Matthews, *supra* note 111 ("In extreme cases, this resistance to discipline has translated into 'depolicing,' in which police forces cease making arrests as a protest against civilian leaders and activists whom they perceive as demonizing police.").

148. *See* Eli Hager, *Blue Shield*, MARSHALL PROJECT (Apr. 27, 2015), https://www.themarshallproject.org/2015/04/27/blue-shield [https://perma.cc/MA4J-J898] (providing an overview of many of these LEOBRs); Keenan & Walker, *supra* note 110, at 185–90 (coding these LEOBRs); Stephen Rushin & Atticus DeProspo, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 658 n.68 (2019) (noting the existence of the twenty LEOBRs); Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 222–23 (identifying the twenty LEOBRs).

police officers suspected of misconduct,[149] limit civilian involvement in internal officer investigations,[150] and more. Even in states that have no formal LEOBR, police unions have lobbied for the passage of laws that offer specific protections for police officers that are not ordinarily offered to other public employees.[151] When civil rights advocates have attempted to repeal or reduce the scope of these LEOBRs, police unions have collectively organized to stop or reduce the scope of such changes.[152] For example, after the death of Freddie Gray in Baltimore police custody in 2015, civil rights activists in Maryland attempted to reform the state's "extraordinarily cop-friendly" LEOBR.[153] The law at the time delayed interviews about alleged misconduct,[154] limited the investigation of anonymous complaints,[155] and established a statute of limitations on internal investigations,[156] among other limitations. When the civil rights leaders sought to amend this law, they soon confronted an organized coalition of police unions that gave substantial sums of money to state politicians considering the bill.[157] Police union members also packed

149. *See, e.g.*, KY. REV. STAT. ANN. § 15.520(5)(c) (West 2023) (granting officers a forty-eight-hour waiting period before interrogations); NEV. REV. STAT. ANN. § 289.060(1) (West 2023) (providing forty-eight-hour waiting period in many cases).

150. *See* Keenan & Walker, *supra* note 110, at 239 (identifying Kentucky, Maryland, and Rhode Island as locations that restrict civilian involvement in the investigation of police misconduct).

151. *See* Rushin, *supra* note 101, at 1212–13 (discussing such measures in Pennsylvania, among other locations).

152. *See, e.g.*, *infra* note 153 (detailing events in Baltimore).

153. Lee Fang, *Baltimore Activists Recount How Police Unions Crushed Accountability Reforms*, INTERCEPT (May 1, 2015), https://theintercept.com/2015/05/01/police-union-influence-maryland-runs-deep [https://perma.cc/6AWV-9B49].

154. MD. CODE ANN., PUB. SAFETY § 3-104(j)(2)(i) (West 2003) ("The interrogation shall be suspended for a period not exceeding 10 days until representation is obtained.").

155. *Id.* § 3-104(C)(1)(i) ("A complaint against a law enforcement officer that alleges brutality in the execution of the law enforcement officer's duties may not be investigated unless the complaint is sworn to, before an official authorized to administer oaths, by: . . . the aggrieved individual . . . .").

156. *Id.* § 3-104(c)(2) ("Unless a complaint is filed within 90 days after the alleged brutality, an investigation that may lead to disciplinary action under this subtitle for brutality may not be initiated and an action may not be taken.").

157. *See* Fang, *supra* note 153 (noting that the Baltimore FOP donated at least $1,834,680 to state politicians in the decade before this legislative debate).

the hearing rooms as legislators considered the proposed package of reforms.[158] As one of the civil rights leaders pushing the reform package remarked, police unions were "simply more organized and had better relationships with the lawmakers."[159] Ultimately, lawmakers satisfied police union demands by narrowing substantially the scope of the 2016 reform package[160]; however, Maryland lawmakers did eventually reform the law in the wake of George Floyd's murder.[161] Nevertheless, police unions in Maryland have similarly helped block laws mandating police body cameras, increasing the liability caps for lawsuits against police officers and hindering efforts to collect more data on police conduct.[162] The success in Maryland is just one example of police unions harnessing their collective financial resources to influence criminal justice policy.

In North Carolina, the state's Sheriff's Association supported a law to limit public access to body camera footage, arguably blunting the accountability and deterrence effects of body camera programs across the state.[163] In Philadelphia, Pennsylvania, after the former Police Commissioner attempted to establish an internal policy that would release the names of officers involved in the shooting of a civilian, the police union lobbied the

158. *See id.* (linking to a Facebook page organizing officer lobbying efforts and showing officers filling a legislative room during debates).

159. *Id.*

160. Stephen Rushin, *Unions and Police Reform*, *in* CAMBRIDGE HANDBOOK ON POLICING IN THE UNITED STATES 533, 535 (Tamara Rice Lave & Eric J. Miller eds., 2019) (noting that "[u]nder pressure from police unions, legislators removed proposals that would have added a civilian review process in cases of officer misconduct and empowered state prosecutors to investigate all killings by police"); *see also* MD. CODE ANN., PUB. SAFETY § 3-104(j)(2)(i) (West 2016) (largely mirroring prior version).

161. *See* MD. CODE ANN., PUB. SAFETY § 3-104 (West 2022) (establishing countywide and statewide administrative charging committees, consisting largely of civilians, to review allegations of police misconduct).

162. *See* Lee Fang, *Maryland Cop Lobbyists Helped Block Reforms Just Last Month*, INTERCEPT (Apr. 28, 2015), https://theintercept.com/2015/04/28/balltimore-freddie-gray-prosecute [https://perma.cc/V9NM-C559] (reporting that "[a] package of police reform bills . . . was weakened under political pressure from Maryland police unions, a major force in state politics").

163. Bryan Anderson, *NC Senate Votes to Regulate Release of Body-Cam Footage*, NEWS & OBSERVER (June 29, 2016), https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome article86759837.html [https://perma.cc/H22N-YPY9] ("Eddie Caldwell, executive vice president at the N.C. Sheriff's Association, praised the bill as easy to understand and said it protects the privacy of individuals who are recorded.").

state legislature for a state law preventing such releases of officer identities.[164] Similar stories exist elsewhere in the country, where police unions have helped establish a patchwork of state laws limiting the public disclosure of officer information and disciplinary records.[165]

One way that police unions have consistently influenced criminal justice policies across the country is through targeted political donations. An analysis by Tom Perkins at the *Guardian* identified over $87 million in donations by police unions at the state and local level in the last two decades.[166] This includes over $64.8 million in donations to politicians in Los Angeles, $19.4 million in New York City, and $3.5 million in Chicago.[167] At the federal level, Perkins identified around $47.3 million in campaign contributions to U.S. Senators or House Representatives over the same time period.[168] Los Angeles unions representing sheriff's deputies contributed around $10.4 million to political candidates.[169] And importantly, these donations do not fall neatly along party lines. One analysis by Open Secrets found that both parties received substantial contributions—with Democrats actually receiving more money on average from police unions at the federal level than Republicans in most years.[170]

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164. *See* John Sullivan, Derek Hawkins, Kate McCormick, Ashley Balcerzak & Wesley Lowery, *In Fatal Shootings by Police, 1 in 5 Officers' Names Go Undisclosed*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7_story.html [https://perma.cc/98W6-P5AE] ("[J]ust hours after [then-Philadelphia Police Commissioner] Ramsey announced that he would follow the task force's recommendation to quickly release officers' names in his own city, the local police labor union . . . filed an unfair-labor-practice charge . . . . The union went further, pushing a bill on the issue in the state legislature.").

165. *See, e.g.*, Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), http://www.wnyc.org/story/police-misconduct-records [https://perma.cc/3NDU-N87D] ("[A] police officer's disciplinary history is effectively confidential in almost half of US states.").

166. Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, GUARDIAN (June 23, 2020), https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la [https://perma.cc/UU7Z-8AMM].

167. *Id.*

168. *Id.*

169. *Id.*

170. *PAC Profile: National Fraternal Order of Police*, OPEN SECRETS, https://www.opensecrets.org/pacs/lookup2.php?strID=C00382556&cycle=2012 [https://perma.cc/TR9M-ZZQK].

Even federally, police unions have successfully coordinated to prevent police regulation and oversight. Under former President Donald Trump, police unions played an important role in re-establishing the federal program sharing repurposed military hardware with local police departments.[171] Police unions have vocally opposed federal police reform efforts, including the use of consent decrees to overhaul police departments engaged in patterns or practices of unlawful misconduct.[172] Often, police union lobbying involves efforts to influence criminal justice policies that less directly affect officers' daily lives.[173] The National Narcotics Officers' Associations' Coalition has attempted to block reforms aimed at reducing the sentence lengths for some drug offenders.[174] Similarly, many law enforcement lobby groups lobbied against the Fair Sentencing Act of 2010, which was designed to reduce disparities in sentencing between crack and powder cocaine.[175] Civil rights activists frequently cite the his-

171. *See* Tom Jackman, *Trump to Restore Program Sending Surplus Military Weapons, Equipment to Police*, WASH. POST (Aug. 27, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/27/trump-restores-program-sending-surplus-military-weapons-equipment-to-police [https://perma.cc/G789-575V] ("The police union had lobbied for the restoration of the program, and Trump said he would do so during his campaign.").

172. *See, e.g.*, Jessica Anderson, *National Police Advocacy Group Calls on Trump Administration to Modify Baltimore's Consent Decree*, BALT. SUN (Feb. 26, 2019), https://www.baltimoresun.com/news/crime/bs-md-ci-consent-decree-20190226-story.html [https://perma.cc/5ZKG-MSUR] (explaining how the National Police Association asked the Trump administration to modify the Baltimore consent decree, agreed to by the Obama administration, because the Association believed it to be too burdensome, confusing, and at times contradictory).

173. *See infra* notes 174–78 and accompanying text (describing police lobbying efforts).

174. *See* Ryan J. Reilly & Saki Knafo, *Law Enforcement Lobby Quietly Tries to Kill Sentencing Reform*, HUFFINGTON POST (Apr. 2, 2014), https://www.huffpost.com/entry/sentencing-reform-opposition_n_5065403 [https://perma.cc/2L8H-BZL5] (listing the National Narcotic Officers' Associations' Coalition as one of the organizations attempting to "kill a bipartisan bill that would roll back tough mandatory sentences for people convicted of federal drug offenses under legislation passed during the height of America's drug war three decades ago").

175. *Id.* ("Several law enforcement organizations opposed the Fair Sentencing Act of 2010, which reduced the disparity between mandatory minimum sentences for crack and powder cocaine.").

torical differences in sentence length for powdered and crack cocaine as a source of racial disparities in the justice system.[176] And of course, many of the largest police unions and associations endorsed President Donald Trump during 2016[177] and again in 2020,[178] arguing that his administration would better emphasize "law and order" and protect police officer interests.[179]

2. Prosecutorial Lobbyists

Police are not the only members of the law enforcement lobby that exert a substantial influence on criminal justice policy. Prosecutors—both in their individual capacity and as part of

176. *See id.* ("Under the previous law, the disproportionately large numbers of black men arrested for crack offenses faced far harsher sentences than their white counterparts, who were more likely to be arrested for offenses involving powder cocaine.").

177. *See, e.g.*, 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 [https://perma.cc/J3TC-NB3F] ("The Fraternal Order of Police, which bills itself as the largest police union in the world, endorsed Donald J. Trump (R) for president Friday . . . ."); Michael Tanenbaum, *Philadelphia Police Union Endorses Donald Trump for President*, PHILLY VOICE (Sept. 18, 2016), https://www.phillyvoice.com/philadelphia-police-union-endorses-donald-trump-president [https://perma.cc/44K8-V3CV] ("The Philadelphia Fraternal Order of Police announced Sunday night that it is officially endorsing Republican presidential candidate Donald Trump in the 2016 election.").

178. *See, e.g.*, Brooke Singman, *Fraternal Order of Police Endorses Trump in 2020 Race*, FOX NEWS (Sept. 4, 2020), https://www.foxnews.com/politics/fraternal-order-of-police-endorses-trump [https://perma.cc/DG35-S3WD] ("The Fraternal Order of Police endorsed President Trump's reelection on Friday, saying he has the 'full and enthusiastic support' of its more than 355,000 members."); Jeff Neiburg, *Delaware Fraternal Order of Police Endorses Trump; President Responds*, DEL. NEWS J. (Sept. 5, 2020), https://www.delawareonline.com/story/news/2020/09/05/delaware-fraternal-order-of-police-endorses-trump-president-responds/5728007002 [https://perma.cc/C97X-X8UC] ("For the second consecutive presidential election cycle, the Fraternal Order of Police has endorsed Donald Trump for president."); *Chicago Police Union Endorses President Trump's Reelection Bid*, NBC CHI. (Sept. 12, 2020), https://www.nbcchicago.com/news/local/chicago-police-union-endorses-president-trumps-reelection-bid/2338110 [https://perma.cc/S8DM-BAE3] ("Chicago's Fraternal Order of Police has endorsed President Donald Trump in his campaign for reelection . . . .").

179. *See, e.g.*, Elise Schmelzer, *Colorado's Largest Police Union Endorses Trump,* DENVER POST (Sept. 4, 2020), https://www.denverpost.com/2020/09/04/colorado-police-union-trump-endorsement [https://perma.cc/DN6S-NHLE] ("The union's national president, Patrick Yoes, cited Trump's support for law enforcement in his comments on the endorsement.").

organized associations or unions—similarly make financial contributions, accept contributions and lobby for policies that may institutionalize injustice.[180] First, prosecutors regularly accept political donations from other members of the law enforcement lobby like police unions. Many of these lobbying efforts by police unions have been designed to prevent the election of so-called progressive prosecutors. Take the example of the Los Angeles police union's support of former Los Angeles County District Attorney Jackie Lacey.[181] Over the years, the local police union contributed over $2.2 million dollars to support Lacey's election.[182] And when Lacey faced a challenge from the reform-minded George Gascón—who promised to prioritize police accountability, reduce incarceration rates, seek shorter criminal sentences for certain classes of offenders and eliminate the death penalty—the union for frontline police officers at the Los Angeles Police Department contributed another $1 million to a PAC dedicated to Gascón's defeat.[183] The union for the Los Angeles County Sheriff's Department added another $800,000 to the effort, and

180. *See* Radley Balko, *Behind the Scenes, Prosecutor Lobbies Wield Immense Power*, WASH. POST (Apr. 23, 2018), https://www.washingtonpost.com/news/the-watch/wp/2018/04/23/behind-the-scenes-prosecutor-lobbies-wield-immense-power [https://perma.cc/8HDQ-CVVE] (summarizing evidence of the power of prosecutor lobbies); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 232 (2007) ("[P]rosecutors are especially effective lobbyists for criminal expansion . . . .").

181. *See* Miriam Aroni Krinsky & Buta Biberaj, *Want Prosecutorial Reform? Start with Curtailing the Influence of Police Unions*, APPEAL (Aug. 24, 2020), https://theappeal.org/want-prosecutorial-reform-start-with-curtailing-the-influence-of-police-unions [https://perma.cc/8XTB-5QR6] ("Most recently, Los Angeles County District Attorney Jackie Lacey benefited from over $2.2 million in expenditures by police unions, and the LAPD union donated another $1 million to a PAC dedicated to defeating her challenger, George Gascón, who has promised to toughen standards around police use of force.").

182. *See id.*; *see also* Brittany Martin, *Jackie Lacey Rejects Calls to Keep Police Union Money Out of DA Campaigns*, L.A. MAG. (June 5, 2020), https://www.lamag.com/citythinkblog/jackie-lacey-police-union-money [https://perma.cc/R3QU-JSQP] ("Lacey had benefitted from nearly $2.2 million in contributions by law enforcement unions to committees and organizations that supported her reelection campaign.").

183. *See* Eliyahu Kamisher, *LA Police Union Contributes $1 Million to Anti-George Gascón PAC*, APPEAL (Jan. 20, 2020), https://theappeal.org/george-gascon-los-angeles-police-union [https://perma.cc/4UFK-V585] ("The union representing the Los Angeles Police Department has contributed $1million to defeat district attorney candidate George Gascón in a high-stakes election to determine who will oversee the country's largest prosecutor's office.").

unions representing Los Angeles County prosecutors contributed another $50,000.[184] Similarly, in San Francisco, police lobbying groups spent an estimated $650,000 in hopes of preventing the election of former District Attorney Chesa Boudin.[185] One advertisement paid for by a local law enforcement group read: "Chesa Boudin: The #1 Choice of Criminals and Gang Members!"[186] Law enforcement also donated to Boudin's challenger, Suzy Loftus.[187]

These donations are significant for several reasons. For one thing, prosecutors must often make charging decisions involving officers.[188] Prosecutors are also one of the best positioned actors to identify and respond to officer misconduct, including dishonesty on the witness stand and violations of constitutional rights.[189] And prosecutors help manage *Brady* lists of impeachment material on testifying police officers that ought to be turned over the defense attorneys.[190] This is why scholars like

184. James Queally & Maloy Moore, *Police Unions, Justice Reformers Battle for Dollars in Bitter L.A. County D.A. Race*, L.A. TIMES (Feb. 24, 2020), https://www.latimes.com/california/story/2020-02-24/political-donations-jackie-lacey-george-gascon-los-angeles-district-attorney [https://perma.cc/ZJM4-G2BC] ("[T]he union representing L.A. County sheriff's deputies contributed $800,000 to a pro-Lacey committee that consists mostly of law enforcement groups. The Peace Officers Research Assn. of California has also contributed $107,500 to pro-Lacey efforts, while the union representing L.A. County prosecutors funneled $50,000 into the race.").

185. Kamisher, *supra* note 183 ("Law enforcement groups in San Francisco spent more than $650,000 campaigning against progressive favorite Chesa Boudin in the city's November DA race.").

186. Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 9, 2019), https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement [https://perma.cc/X8FM-2WP2] ("The [San Francisco Police Officers A]ssociation also donated $3,500 to a pro-Loftus political action committee.").

187. *See id.*

188. *See generally* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1447 (2016) ("The job of investigating and prosecuting police officers who commit crimes falls on local prosecutors, as it has in the wake of a number of highly public killings of unarmed African-Americans since Michael Brown died in August 2014.").

189. *See generally* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 313–26 (2001) (arguing for various reforms to prosecutor offices to ensure identify and respond to dishonesty and abuse).

190. *See id.* at 311 (explaining the *Brady* and *Giglio* decisions and describing how prosecutors in Los Angeles "failed to adopt an explicit policy defining [their] obligations outlined by the United States Supreme Court").

Erwin Chemerinsky have argued that by employing proper controls, prosecutor offices can help identify patterns of police misconduct before they spiral out of control.[191]

Additionally, prosecutors can set policies that have wide-ranging implications for the broader criminal justice system. Prosecutors wield nearly unreviewable discretion in making charging decisions for all types of criminal offenses.[192] Thus, policies set by a district attorney about certain categories of crimes can have ripple effects throughout the justice system. Take as an example the promises made by Boudin at various points in his campaign or since he won election as the San Francisco District Attorney.[193] His decisions to seek alternatives to incarceration could have contributed to lower rates of imprisonment.[194] His pledge to eliminate cash bail had the potential to effectively remove bail bondsmen (a $2-billion-dollar-a-year industry nationally[195]) from the local justice system.[196] His promise to not seek criminal charges for contraband uncovered during pretextual traffic stops may have influenced the scope of police authority

191. *See id*. at 314–20 (recommending prosecutors develop procedures to ensure compliance with *Brady*, track officer witness testimony, and more).

192. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 4 (2009) ("[C]riminal prosecution is an unreviewable executive function.").

193. *See infra* notes 194–96 and accompanying text (recounting Boudin's promises). Note that voters recalled Boudin in June of 2022. Jeremy B. White, *San Francisco District Attorney Ousted in Recall Election*, POLITICO (June 8, 2022), https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002 [https://perma.cc/CR78-6U8P].

194. *See* Elizabeth Weill-Greenberg, *How Chesa Boudin is Pursuing His Promise to Reduce Incarceration*, APPEAL (Mar. 18, 2021), https://theappeal.org/chesa-boudin-san-francisco-district-attorney-reduce-mass-incarceration-criticism [https://perma.cc/HFA9-RVHU] ("During Boudin's campaign he promised to reduce the city's reliance on incarceration and end cash bail.").

195. Andrew Davis, *How Bail Keeps People Locked up for Being Poor and Led to a $2 Billion Private Industry*, CNBC (Nov. 14, 2019), https://www.cnbc.com/2019/11/14/who-makes-money-from-bail.html [https://perma.cc/A6HK-V2WD] ("The bail bond industry rakes in an estimated $2 billion per year, according to industry observers.").

196. Evan Sernoffsky, *San Francisco DA Chesa Boudin Ends Cash Bail for All Criminal Cases*, S.F. CHRON. (Jan. 29, 2020), https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-ends-cash-bail-for-14996400.php [https://perma.cc/NKT8-PSA5] ("Two weeks after Chesa Boudin took the oath of office as San Francisco's newest district attorney, the city's top prosecutor announced Wednesday that his office will no longer ask for cash bail as a condition for defendants' pretrial release.").

and investigatory techniques.[197] When prosecutors accept donations from actors that are directly influenced by these policy decisions, like police officers, correctional officer unions, and bail bondsmen, it raises questions about the impartiality of their decisions.

Second, prosecutors themselves engage in their own lobbying efforts aimed at influencing criminal justice policy. For example, when former U.S. Attorney General Eric Holder attempted to eliminate mandatory minimum prison sentences for nonviolent drug offenses, he faced strong opposition from associations of prosecutors across the country.[198] The National Association of Assistant U.S. Attorneys lobbied both Republicans and Democrats in Congress in hopes of avoiding these reforms.[199] The National District Attorneys Association testified to the U.S. Sentencing Commission in opposition to the reform.[200] This is just one of numerous documented cases of prosecutors and prosecutor associations not only "enforcing the law" but also "making it" through their lobbying efforts.[201] As Josie Duffy Rice has doc-

197. *See* MJ Johnson, *DA Boudin to Stop Charging for Contraband at Traffic Stops, Gang Enhancements*, S.F. EXAM'R (Feb. 28, 2020), https://www.sfexaminer.com/news/da-boudin-to-stop-charging-for-contraband-at-traffic-stops-gang-enhancements [https://perma.cc/3FS7-HWYL] ("The district attorney's office will no longer seek charges for contraband found during 'pretextual' traffic stops and will not charge status enhancements that increase jail sentences, such as those imposed for gang membership or for having three strikes . . . .").

198. *See* Sari Horwitz, *Some Prosecutors Fighting Effort to Eliminate Mandatory Minimum Prison Sentences*, WASH. POST (Mar. 13, 2014), https://www.washingtonpost.com/world/national-security/some-prosecutors-fighting-effort-to-eliminate-mandatory-minimum-prison-sentences/2014/03/13/f5426fc2-a60f-11e3-a5fa-55f0c77bf39c_story.html [https://perma.cc/78M4-FGD9] ("Attorney General Eric H. Holder Jr.'s broad effort to eliminate mandatory minimum prison sentences for nonviolent drug offenders and reduce sentences for defendants in most drug cases is facing resistance from some federal prosecutors and district attorneys nationwide.").

199. *Id.* (noting lobbying of Democratic Senator Patrick Leahy and Republican Senator Chuck Grassley).

200. *Id.* (recalling the testimony of the director at large of the National District Attorneys Association before the U.S. Sentencing Commission).

201. Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law—They're Making It*, APPEAL (Apr. 20, 2018), https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a [https://perma.cc/Q8QG-TUZG]; *see also* Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), https://www.thenation

umented in detail, in January of 2018, New York Governor Andrew Cuomo proposed a far-reaching criminal justice reform package, including limits on civil asset forfeiture, reform to the discovery process, reductions in trial delays, and a reduction in the use of cash bail.[202] There appeared to be public support and political will to pass this type of a reform bill.[203] But a few months later, New York legislators quietly killed the measure—seemingly in response to lobbying efforts by the "bail bond lobby" and the District Attorney's Association of the State of New York.[204] As Duffy Rice concludes, "[t]his phenomenon is not New York-specific" since "[e]very state has an equivalent organization of prosecutors with strong policy perspectives, which often have enough sway to simply shut down criminal justice reform at the legislative level."[205] Prosecutor associations have similarly exerted their influence to help block death penalty reforms in Florida,[206] limit asset forfeiture reform in Alabama[207] and Ari-

.com/article/archive/prosecutors-are-banding-together-to-prevent-criminal-justice-reform [https://perma.cc/PZ3M-FB59] ("For the most part, these prosecutors' associations adopt a 'tough on crime' stance, advocating for legislation that would give them greater discretion to lock people up.").

202. Duffy Rice, *supra* note 201.

203. *Id.* (describing the public polling showing support for the measure and the governor's advocacy).

204. *Id.* ("Whose fault is it that criminal justice reform failed in New York? . . . [T]here's one behind-the-scenes player whose influence gets little attention: the District Attorney's Association of the State of New York (DAASNY).").

205. *Id.*

206. *See* Pishko, *supra* note 201 (describing the efforts by the Florida Prosecuting Attorneys Association (FPAA) to prevent Aramis Ayala from no longer seeking the death penalty in cases in the Ninth Judicial Circuit in Florida, and providing extensive details of the FPAA's lobbying efforts).

207. *See* Brian McVeigh & Dave Sutton, *Civil Asset Forfeiture: An Alabama Sheriff and County District Attorney's View*, YELLOWHAMMER (Feb. 13, 2018), http://yellowhammernews.com/civil-asset-forfeiture-alabama-sheriff-county-district-attorneys-view [https://perma.cc/2778-C8E2] (describing opposition from the president of the Alabama District Attorneys Association and the Alabama Sheriffs Association to proposed reform); Jeremy Beaman, *Alabama's Civil Asset Forfeiture Reform Effort Takes a Turn Towards Creating a Public Database on Property Seizures*, YELLOWHAMMER (Mar. 18, 2018), http://yellowhammernews.com/alabamas-civil-asset-forfeiture-reform-effort-takes-a-turn-towards-creating-a-public-database-on-property-seizures [https://perma.cc/RVZ7-UNBC] (stating that the sponsor of the civil asset forfeiture reform bill was uncomfortable moving forward without support from law enforcement, and citing the position taken by the presidents of the state prosecutor and sheriff associations).

zona,[208] and impede marijuana legalization in Indiana,[209] just to name a few additional examples. But perhaps no story better illustrates the power of the prosecutor lobby than Louisiana. As Jessica Pishko explained, Louisiana incarcerates more individuals per capita than any state in the United States.[210] In order to reduce the state's prison population, a bipartisan task force recommended a series of reforms that would gradually contribute to decarceration and save the state approximately $300 million over ten years.[211] While the measure passed the Louisiana legislature, it faced immediate opposition from the Louisiana District Attorney's Association (LDAA)—eventually leading to Louisiana Governor John Bel Edwards to agree to a compromise with the LDAA that significantly reduced the scope of the legislation.[212]

In sum, prosecutors, much like police and correctional officers, exert significant control over the development of criminal justice policy.

3. Correctional Officer Unions

The rise of correctional guard unions is likely linked to the growth of the incarcerated population in the United States. As Heather Ann Thompson observed, "as states increasingly embraced laws and policies that, in turn, dramatically increased prison populations . . . guard labor activism only grew," driven in part by low wages, high rates of on-the-job injuries, and prison

208. Duffy Rice, *supra* note 201 ("Meanwhile, the Arizona Prosecuting Attorneys' Advisory Council has pushed for harsher drug penalties while opposing forfeiture and bail reforms."); *see also* Hank Stephenson, *Prosecutors Look to Cut Phone Line for Public Meetings to Expose 'Weasels' Who Attend*, ARIZ. CAPITOL TIMES (Mar. 24, 2017), https://azcapitoltimes.com/news/2017/03/24/prosecutors-look-to-cut-phone-line-for-public-meetings-to-expose-weasels-who-attend [https://perma.cc/MQ8C-AQGF] (describing similar efforts by prosecutors in Arizona to block asset forfeiture reform in the state).

209. *See* Drew Daudelin, *Prosecuting Attorneys Unite Against Legalized Marijuana—'The War on Drugs Is Not Over,'* WYFI (Dec. 6, 2017), https://www.wfyi.org/news/articles/prosecuting-attorneys-hold-conference-against-marijuana-legalization [https://perma.cc/B6ZZ-J44N] ("The Indiana Prosecuting Attorneys Counsel Wednesday delivered a firm warning to state lawmakers about marijuana legalization.").

210. Pishko, *supra* note 201 ("Louisiana incarcerates more people per capita than any state in the United States . . . .").

211. *Id.* (detailing the proposed reforms).

212. *Id.* (noting the compromise).

overcrowding.[213] These unionization efforts led to improved officer safety, but they also contributed to greater control over the internal disciplinary process.[214] Much like police unions, correctional officer unions have been successful in obtaining contractual limitations on the internal disciplinary process through the collective bargaining process.[215] A study by Gaylene S. Armstrong, Dennis Longmire, Doug J. Dretke, and Kevin Steinmetz found that numerous clauses in correctional officer labor contracts could impede officer accountability—specifically as it relates to the investigation of staff-inmate sexual misconduct.[216] Through analyzing labor contracts in twenty-four states and the Federal Bureau of Prisons, they found that many contracts purged disciplinary files after set lengths of time,[217] established potentially challenging disciplinary appeals procedures,[218] contained notice requirements that may impede "stealth investigation[s]" of correctional officer misconduct or allow for the undue influence of potential witnesses,[219] and more. In addition to these provisions, some correctional officer labor contracts delay office interrogations of officers suspected of misconduct,[220] provide officers with access to incriminating evidence against them

213. Heather Ann Thompson, *Downsizing the Carceral State: The Policy Implications of Prison Guard Unions*, 10 CRIMINOLOGY & PUB. POL'Y 771, 772–73 (2011).

214. *Id.* at 773 ("[C]ollective bargaining was an important tool for helping prison guards unions 'to enhance its members' on-the-job autonomy and authority in matters ranging from shift and post assignments to personnel investigations and discipline.").

215. *See infra* notes 216–22.

216. *See generally* Gaylene S. Armstrong, Dennis Longmire, Doug J. Dretke & Kevin Steinmetz, *Impediments of Labor Contracts on Prison Administrators' Response to Staff-Inmate Sexual Misconduct*, 25 CRIM. JUST. POL'Y REV. 325, 325–46 (2014) (documenting relevant provisions).

217. *Id.* at 334 (identifying purge periods of between twelve months and five years).

218. *Id.* at 339–40 (describing arbitration clauses for appeal procedures found in all but one contract).

219. *Id.* at 339.

220. *See, e.g.*, Collective Bargaining Agreement Between the State of Alaska and the Alaska Correctional Officers Association 18 (July 1, 2018) [hereinafter Alaska Correctional Officers CBA] (on file with authors) (establishing a presumptive five working day delay before interrogations, except for exigent circumstances); Agreement Between the State of California and California Correctional Peace Officers Association (CCPOA) 44 (July 3, 2018) [hereinafter California Correctional Officers Agreement] (on file with authors) (stating that officers get twenty-four hours of notice if they are the target of an investigation and reasonable delays otherwise).

before such interrogations,[221] set time limits on internal investigations of correctional officer misconduct,[222] and indemnify officers if misconduct results in a lawsuit.[223]

Outside of their role in the development of internal disciplinary procedures, substantial evidence suggests that correctional officer unions and associations act as a powerful political lobby to influence potential criminal justice legislation—particularly legislation that may contribute to decarceration. Joshua Page has extensively chronicled the growth of correctional officer unions in states like California and New York and their resistance to "efforts to downsize prisons."[224] As Page has documented, correctional officer unions in both California and New York have employed "similar methods to reach their goals" of preventing decarceration:

> [T]hey engage in campaigns that drum up fear of changing the penal status quo. They insist that reducing correctional populations, closing prisons, and shedding staff will compromise public safety, destroy local economies (particularly in prison towns), and enhance general insecurity. Moreover, they strike fear in politicians who might support downsizing prisons but do not want to be opposed by law enforcement, crime victim, [sic] and related organizations in future elections.[225]

In California, as the prison population grew, so too did the membership of the CCPOA.[226] With this growth, the CCPOA also increased its political footprint, becoming one of the state's largest contributors to political candidates in the 1990s.[227] By the end of that decade, the CCPOA was donating $2.3 million a year to both Republican and Democratic politicians in the state.[228] This growing political clout and organization paid off for CCPOA members. By 2008, CCPOA members made substantially more than the national average, they had generous pension plans that allowed them to retire at the age of fifty with ninety percent of

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221. *See, e.g.*, Alaska Correctional Officers CBA, *supra* note 220 (providing correctional officers with access to date, time, location, video, and audio-recording); California Correctional Officers Agreement, *supra* note 220, at 45 (giving officer access to video, subject matter, and purpose information).

222. *See, e.g.*, California Correctional Officers Agreement, *supra* note 220, at 46 (establishing twelve-month time limit).

223. *See, e.g.*, Alaska Correctional Officers CBA, *supra* note 220, at 61 (stating that the state will not indemnify officers for judgments against them for cases arising within the scope of their employment).

224. Page, *supra* note 105, at 736.

225. *Id.* at 737.

226. *Id.* at 741 (showing this parallel increase in fig. 2).

227. *Id.*

228. *Id.*

their salaries, and they had labor contracts that limited "managers' capacity to investigate and discipline officers . . . ."[229] The CCPOA has also worked closely with the California District Attorneys Association, the California Police Chiefs Association, the California State Sheriffs Association, and the California Coalition of Law Enforcement Associations to promote criminal justice policy favorable to their members.[230]

As just one example of the political power of the CCPOA, consider their opposition to reforming the state's Three Strikes law that greatly enhanced criminal punishment for certain recidivist offenders.[231] The Three Strikes law increased the average sentence length for these recidivist offenders by around nine years, costing the state billions of dollars.[232] Reformers attempted to narrow the scope of the Three Strikes law so that it only applied to violent or serious criminal offenses.[233] But in response, the CCPOA organized an alliance of law enforcement and victims' advocates to oppose the proposed change to the Three Strikes law.[234] The group spent hundreds of thousands of dollars, issued press releases, and ran commercials that warned that the law would result in the release of large numbers of dangerous felon offenders (even though the law generally applied to non-violent offenders).[235] As Page recounts, "[t]he strategy worked," as voters eventually turned down the ballot initiative by a 53% to 47% margin.[236]

The story of the CCPOA is admittedly just one example of the political power exerted by correctional officer unions. Nevertheless, numerous reporters and academics have documented similar stories of the political power of correctional officer unions in influencing public policy across the country.[237]

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229. *Id.* at 742.

230. *Id.* at 743.

231. *Id.* at 744.

232. *Id.*

233. *Id.*

234. *Id.* at 745.

235. *Id.* at 747.

236. *Id.* at 748.

237. *See, e.g.*, 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/VDH4-NDNB] (documenting similar efforts by other correctional guard unions, including the New York State Correctional Officers and Police Benevolent Association and the correctional guard union in Illinois).

III. THE COSTS OF CAPTURE

The law enforcement lobby presents a unique challenge to the future of criminal justice reform and the growing defunding and abolition movements. The capture of criminal justice policymaking power by the law enforcement lobby imposes significant costs that are not necessarily present in other regulatory contexts. Further, the entrenched nature of these costs exacerbates and reinforces the power disparities present in criminal justice policymaking.

In some ways, the law enforcement lobby raises many of the traditional lobbying costs identified in other contexts, including the risk of conflicts of interest,[238] regulatory capture,[239] and corruption.[240] For example, a prosecutor must sometimes decide whether to file charges against a police officer accused of excessive or unnecessary use of force.[241] If that same prosecutor has received political donations from the police union representing that officer, some may wonder whether that creates a conflict of interest.[242] Mayors and city councilors, who often receive substantial contributions from police unions, play an important role in developing internal disciplinary procedures for police officers

238. *See, e.g.*, Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 101, 103 (2020) ("Prosecutors unionizing with police, of course, present a host of ethical conflicts of interest, not just for both groups, but for the union as its own entity, especially when conflicts between police and prosecutors arise.").

239. Rushin, *supra* note 101, at 1215–16 (describing the possibility of regulatory capture in the context of police unions). *See generally* Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006) (providing a broader review of regulatory capture).

240. *See generally* Nauro F. Campos & Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUB. CHOICE 1, 1–2 (2007) (summarizing the link between lobbying and corruption).

241. *See, e.g.*, Levine, *supra* note 188, at 1450, 1470 (describing police officers as prosecutors' "closest professional allies" and discussing scholarly concern over the role of prosecutors in making charging decisions about officers); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 791, 803–04 (2000) (observing potential conflicts of interest between prosecutors and police and discussing the potential reluctance of officers to investigate their own).

242. *See, e.g.*, Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 22 (2001) (stating that prosecutors sometimes have "too close of a relationship with local police," calling into question their impartiality and leading to a reluctance to file criminal charges).

through collective bargaining negotiations.[243] This raises concerns about whether these negotiations amount to a "division of the spoils" rather than a good-faith negotiation over the merits of different disciplinary approaches.[244] Similarly, state legislators that accept political donations from police and correctional officer unions similarly play important roles in the passage of officer bills of rights and legislation regulating officer discipline.[245] These too raise questions about whether these legislators are unduly influenced by these political donations.

While potentially worrisome, these concerns are relatively non-unique to the law enforcement context. Political scientists, economists, and other social scientists have extensively analyzed the effect of interest groups over governmental behavior, sometimes described as interest group theory. Any time an interest group organizes, lobbies, and makes political donations, there is an inherent concern that this may result in that group receiving unfairly preferential treatment from legislators.[246] In other contexts, this may include "legal monopolies, broadcast spectrum rights or other valuable public property, lucrative government contracts, lax regulatory oversight," or other so-called economic rents.[247] In the context of the law enforcement lobby, these economic rents may include few criminal prosecutions of police officers, weak internal disciplinary standards, and regressive criminal justice policies that contribute to the growth and strength of the lobby.

But we argue that the law enforcement lobby also raises some relatively unique concerns that extend beyond traditional lobbying concerns. In this Part we outline three distinct costs imposed by the law enforcement lobby's capture of criminal justice policymaking: the power to influence life and liberty, the

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243. *See generally Politicians Who've Accepted Money from Law Enforcement (2015–2020)*, NIXTHE6, https://nixthe6.org/contributions [https://perma.cc/5R3Y-CCXE] (showing the amount of money donated by law enforcement to political leaders across the country).

244. *See* Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html [https://perma.cc/7LUT-JYF7].

245. *See generally* NIXTHE6, *supra* note 243 (providing data from correctional officer union donations, including lobbying groups representing private prisons).

246. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35 (1991).

247. Jordan M. Barry, *Political Free Riding* 8 (San Diego Legal Studies Paper No. 12-087, 2012), http://dx.doi.org/10.2139/ssrn.2012881.

power to perpetuate racial subordination, and power over democracy. These are by no means the only costs resulting from a captured criminal justice policymaking market. They are, however, the most salient.

A. POWER TO INFLUENCE LIFE AND LIBERTY

First, law enforcement officials wield a unique power to influence life and liberty interests. Personnel within the justice system often exercise unique levels of discretion and power relative to other public servants. And when members of the law enforcement lobby abuse this discretion, the harms to the public are acute, and by extension the public interest in these matters is especially high. This makes the law enforcement lobby distinguishable from other similar contexts, like firefighters, sanitation workers, teachers, or public works employees.

A recent study of police disciplinary appeals outcomes reveals the wide range of misconduct committed by police officers.[248] Some police disciplinary cases involve "technical offenses" ranging from "relatively serious violations of department policy . . . to relatively minor offenses, like violations of uniform dress code, scheduling disagreements, tardiness, and even one case involving an officer bringing his new puppy to visit coworkers at the precinct without authorization."[249] These are similar to the kind of misconduct you may find in any workplace. But a substantial percentage of police disciplinary cases involve much more serious misconduct such as physical violence, killings of unarmed civilians, racism, homophobia, and dishonesty that could result in wrongful convictions.[250] This underscores the distinctive character of police work. As that study concluded:

> Unlike most other public servants, sworn law enforcement officers generally carry weapons and are trained to utilize force. As part of their job, we also expect police officers to make split-second judgments on the application of the law. And we expect them to honestly fill out police reports and regularly testify before court in criminal proceedings about their observations and actions. These job responsibilities are fundamentally different than those given to teachers, firefighters, government social workers, or other civil servants.[251]

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248. *See* Rushin, *supra* note 33, at 1053–59.

249. *Id.* at 1054, 1056–57 (finding that 54.5% of cases involved these kinds of technical offenses).

250. *Id.* at 1054–56 (finding that 25.6% involved use of unauthorized force, 23.1 percent involved dishonesty in a professional capacity, 5.1% were deemed sexual offenses, and 2.6% of cases involved an act of racism or homophobia).

251. *Id.* at 1058–59.

Similarly, a coalition of news organizations in California have teamed up to create a public database of police officer misconduct after the passage of a new state law granting the public access to this information.[252] They sent 1,305 public record requests to 723 state and local law enforcement agencies.[253] Thus far, they have identified over 317 cases of officer dishonesty, 226 incidents of sexual assaults, and over 500 cases of officer use of force documented in these records.[254]

Indeed, even outside of professional misconduct, the harms created by the criminal justice system are unique and exceptional compared to other public servants. Police generally kill over 1,000 civilians a year.[255] Police conduct tens of millions of traffic stops every year,[256] and complete over 10 million arrests per year.[257] Correctional administrators reported nearly 25,000 allegations of sexual assault or rape involving incarcerated adults in 2015.[258] And an estimated 7.1% of children in juvenile detention centers reported being sexually victimized in 2018.[259]

As discussed in the previous Part, the law enforcement lobby has participated substantially in protecting its members from facing accountability for life and liberty harms, and in expanding

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252. *Shining a Light*, CAL. REPORTING PROJECT, https://web.archive.org/web/20210710023911/https://projects.scpr.org/california-reporting-project [https://perma.cc/S6C5-CCRP].

253. *Id.*

254. *Id.*

255. DUREN BANKS, PAUL RUDDLE, ERIN KENNEDY & MICHAEL G. PLANTY, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 250112, ARREST-RELATED DEATHS PROGRAM REDESIGN STUDY, 2015–16: PRELIMINARY FINDINGS 1–2 (2016), https://bjs.ojp.gov/content/pub/pdf/ardprs1516pf.pdf [https://perma.cc/M67G-F2C9] (summarizing the available data on police killing estimates).

256. Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 637 (2019).

257. *2018 Crime in the United States*, FBI, UNIF. CRIME REPS. tbl.29 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-29 [https://perma.cc/JM9W-PLR8] (showing, for example in 2018, that police in the United States reported 10,310,960 arrests).

258. RAMONA R. RANTALA, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 251146 SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15, at 1 (2018), https://bjs.ojp.gov/content/pub/pdf/svraca1215.pdf [https://perma.cc/NRK4-73BL].

259. ERICA L. SMITH & JESSICA STROOP, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 253042 SUMMARY: SEXUAL VICTIMIZATION REPORTED BY YOUTH IN JUVENILE FACILITATES, 2018, at 1 (2019), https://www.bjs.gov/content/pub/pdf/svryjf18_sum.pdf [https://perma.cc/LS84-8EHD].

the discretionary authority of its members to use coercive enforcement tactics. The law enforcement lobby has played a major role in the development of collective bargaining provisions that make it difficult to discipline or terminate law enforcement officers who engage in serious misconduct.[260] The law enforcement lobby has used its political power to pass state legislation further insulating its members from accountability.[261] And it has used its resources and political power to block the passage of criminal justice reforms that could limit the harms imposed by its members on the public.[262] Indeed, these life and liberty harms are not incidental to the law enforcement lobby; rather the strength of the law enforcement lobby has arguably contributed to the unwillingness or inability of our political system to curtail the unique harms created by the justice system.

B. POWER AND RACIAL SUBORDINATION

Next, the power of the law enforcement lobby perpetuates racial subordination. Subordination asks whether a law, legal doctrine, practice, or custom subordinates the interests of racial minorities and/or marginalized groups for the benefit of another social group.[263] Subordination is "institutional, historical, and ideological, and results in systematic dominant group privilege,"[264] and is an "umbrella term encompassing intentional and unintentional mechanisms of group injustice at all levels of scale."[265] Subordination is not only expressive and a "function of the social messages sent by particular acts or policies,"[266] instead subordination encompasses the "policies, practices, and physical structures that tacitly accommodate a more privileged group's needs at the expense of the subordinate group."[267] Moreover,

260. *See supra* Part II.B.

261. *See supra* Part II.B.

262. *See supra* Part II.B.

263. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 88 (1994). *See generally* ROBIN DIANGELO, WHAT DOES IT MEAN TO BE WHITE? DEVELOPING WHITE RACIAL LITERACY 59–61 (Shirley R. Steinberg ed., 2012).

264. Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 762 n.4 (2020) (citing DIANGELO, *supra* note 263, at 67–70).

265. *Id.* at 763 n.4 (citing DIANGELO, *supra* note 263, at 52).

266. Sophia Moreau, *Discrimination and Subordination*, *in* 5 OXFORD STUDIES IN POLITICAL PHILOSOPHY 117, 119 (David Sobel, Peter Vallentyne & Steven Wall eds., 2019).

267. *Id.*

subordination is preserved by the effects of discriminatory law and policies and/or their application that perpetuates the differences in power and authority between social groups and thus "render[s] certain social groups or their needs invisible."[268] Subordinating laws and policies, then, "rationalize the greater power and de facto authority that are held by [powerful] groups and the greater deference we pay to them."[269] The consequence is that subordinated groups have less political and social power than other societal groups, as well as less de facto authority—the power to be listened to and taken seriously.[270]

That the criminal justice system structurally entrenches the subordination of Black and brown Americans is well established. Both criminal justice laws and policies and the application of power under those laws by the police, prosecutors, and prison authorities result in a distribution of harm that is skewed against marginalized groups. The subordinating effects of the criminal justice system begins with the very definition of law breaking, which Dorothy Roberts notes is biased against Black Americans.[271] Roberts gives the example of loitering laws which empower police officers to over-police Black communities, assume that "a distinction between law-abiding and lawless people that can be detected,"[272] and give the police significant discretion to control Black people on public streets. For Roberts, the loitering laws and similar laws such as stop-and-frisk result in Black and brown Americans being disproportionately targeted and arrested for minor offenses.[273] This results in extended incarceration for many individuals due to an inability to pay bail or fines and or plea bargains for offenses that they did not commit due to the inability to pay.[274]

The data bears out the disproportionate impact of the criminal justice system on Black and brown Americans, who are disproportionately arrested, charged, convicted, and incarcerated

268. *Id.*

269. *Id.* at 120.

270. *Id.* at 128.

271. *See* Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017).

272. *Id.* at 1600.

273. *See id.* at 1603–04.

274. *Id.*

relative to their population.[275] And this is not necessarily because Black and brown Americans always commit crimes in disproportionate numbers. Instead, the racialized application of criminal laws can be self-reinforcing, and Black and brown Americans are constructed—and stigmatized—as disproportionally criminal and violent. David Cole notes that "[t]here is a mutually reinforcing relationship between criminal stigmatization of blacks and racial subordination: the criminal stigmatization of blacks perpetuates and justifies their subordination as a group, and the status of blacks as a segregated, subordinated group makes it easier to insist on ever-more-stringent stigmatizing measures in criminal law."[276]

Yet, examination of the subordinating criminal justice system rarely attends to *how* criminal justice personnel attain power over the populous.[277] What is frequently missing is an account of the role of the law enforcement lobby as a key ex ante institutional actor that acts to perpetuate and structurally entrench the levers of racial subordination at the policymaking stage that are then operated by the police, prosecutors, and prisons during the exercise of their power. In fact, the law enforcement lobby not only perpetuates racial subordination, it is the central institutional locus for the dissemination of criminal justice laws and policies that subordinate Black and brown Americans. While in the context of interest group politics there is a general understanding that there are harms associated with a lobbying loss and that these harms are generalized in the context of criminal justice policymaking, these assumptions are not valid. Instead, the asymmetrical nature of lobbying related to criminal justice policymaking imbues "real-world harms that are particularized and skewed toward marginalized groups."[278]

Recognizing that some Americans are criminalized and racialized by powerful lobby groups provides a more complete ac-

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275. Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 829 (2003) (discussing "the overwhelming empirical evidence demonstrating unjust and unequal treatment in the criminal justice system of African Americans and, to a lesser extent, Latinos").

276. *Id*. at 864.

277. *See* Monica C. Bell, *Anti-Segregation Policing* 95 N.Y.U. L. REV. 650, 659–729 (2020) (providing a detailed account of the mechanisms that contribute to segregated, subordinating policing in the United States).

278. Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 96 (2021).

count of how Black and brown Americans are constructed as outsiders and excluded from America's political economy.[279] It requires a pivot from a view of racialized criminalization as a consequence of a *perception* of Black criminality. Instead, it requires overt recognition that Black and brown subordination in the criminal justice system is the result of express advocacy that aims to structure law enforcement policy to channel power toward law enforcement institutions and consequently away from marginalized groups. The result is preservation of institutionalized power of the dominant group and, conversely, the subordination of the marginalized groups. And, as discussed in Part I, given the dearth of countervailing capacity in criminal justice policymaking, this power—and therefore racial subordination—is necessarily entrenched.[280] There is, in other words, nothing to counter the dominant ideologies that sustain racial subordination in the criminal justice context.[281]

In recognizing the role of the law enforcement lobby in perpetuating the subordination of Black and brown Americans, we do not intend to suggest that the lobby intentionally lobbies for power and resources with the goal of perpetuating racial inequality. The law enforcement lobby has incentives to increase the institutional and individual power of police, prosecutors, and prison officials for job performance reasons. For example, given that the performance of a prosecutor is assessed based on conviction rates, there are clear incentives for the prosecutor to lobby for more discretion to achieve those convictions through plea bargaining, and the ability to threaten additional charges or longer sentences.[282] Bill Stuntz has noted this, stating that

279. *See* Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1075 (2005) (making a similar point about how "[a]nti-subordinationist principles require taking more complete account of how enemy groups [in the national security context] are racialized, and how they become constructed as outsiders and the kind of harms that may befall them as such").

280. *See supra* Part I.

281. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398–99 (1991).

282. LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 88 (2008); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001) ("By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well.").

"[p]rosecutors are better off when criminal law is broad than when it is narrow."[283] Yet, significant evidence demonstrates that racism—and a contemporaneous desire to subordinate Black and brown Americans—permeates the criminal justice system. Therefore, while we cannot impute racial animus to the law enforcement lobby, there exist reasons to be wary of the role that race plays in driving their lobbying decisions.

Whether the lobbying is directed by conscious racial animus or not, the policymaking process continues to perpetuate the subordination of the primary subjects of criminal justice policy. The law enforcement lobby's access and control over political power then enables them to reinforce their own status and resources, channeling power and political wealth along racial lines. Only by recognizing the critical contribution of the law enforcement lobby to the subordination of Black and brown Americans through the criminal justice system can reformers begin to develop institutional design principles and norms that can mitigate the biased influence of the law enforcement lobby in the political process.

C. POWER AND DEMOCRACY

"Democracy is a slippery word."[284] At base, democracy implies majoritarian rule. But embedded within this conception are a range of values—including participation, representation, accessibility, transparency, equality, and accountability, amongst others—and practices to action those values through political institutions—including deliberation, voting, public hearings, and so on. Robert Dahl outlines that a model democracy is "a political system in which the members regard one another as political equals, are collectively sovereign, and possess all the capacities, resources, and institutions they need in order to govern themselves."[285] A positive account of American democracy recognizes interest groups as an entrenched institutional feature of democracy. Legislators rely heavily on the resources provided by interest groups, including money, voting blocs, and policy proposals. Power, then, is located de jure in the legislator—who controls the

283. MILLER, *supra* note 282.

284. John Morison, *Models of Democracy: From Representation to Participation?*, *in* THE CHANGING CONSTITUTION 134, 134 (Jeffrey Jowell & Dawn Oliver eds., 6th ed. 2007).

285. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 311 (1989).

legislature and the power to pass policy[286]—and de facto (at least in large part) in interest groups, who are the actual deciders.[287]

Under the standard account of interest group politicking, there is nothing uniquely problematic about interest group power. Diverse groups form and pressure the state to implement their policy position into law, engaging on important questions of public policy and, via the state, coming to a compromise position that is generally satisfactory.[288] This conception of interest group politics does little to damage the democratic process. On the contrary, it can be seen as democracy-enforcing, where diverse interests debate important issues in politics and come to a mutual agreement as to the remedy.[289] From a Madisonian perspective, while power accumulates at the sub-structural level in interest groups, the diversity of those groups means that the power is (at least somewhat) diffused and balanced.[290] And while political participation in governmental decision-making is mediated through interest groups, interest group pluralism ensures relatively equal capacity to engage in public institutions.[291]

Yet, in the context of the criminal justice system, this account of power and influence on policymaking is disrupted. Recall from Part I that criminal justice policymaking differs from

286. *See* Levinson, *supra* note 55, at 84.

287. *Id.*

288. Zoë Robinson, *Lobbying in the Shadows: Religious Interest Groups in the Legislative Process,* 64 EMORY L.J. 1041, 1090 (2015); *see also* Daniel Carpenter & David A. Moss, *Introduction to* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 11–12 (Daniel Carpenter & David A. Moss eds. 2014) (considering "weak" versus "strong" capture); Richard L. Hall & Richard Anderson, *Issue Advertising and Legislative Advocacy in Health Politics, in* INTEREST GROUP POLITICS 221, 237 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed. 2012) (describing how "[f]ree speech and broad participation [in our democratic representation] by diverse voices promote democratic deliberation and lend legitimacy to the policy process").

289. Robinson, *supra* note 288 ("[T]he different interests pressure the state to find a compromise that is acceptable to all groups—an acceptable policy outcome.").

290. *See* THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009); Levinson, *supra* note 55, at 33–34 ("From the Founding to the present, the central organizing principle of the structural constitution has been that power must be divided, diffused, or balanced."); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 106 (1995) ("[T]he Framers' [had a] virtual obsession with the concentration of power.").

291. AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP 60–61 (2014).

traditional regulatory policymaking because de facto policymaking power is almost entirely one-sided. Power, then, is reposed in the law enforcement lobby, the result of which is preference domination at the policymaking stage by one specific set of community interests. Policymaking domination is largely a consequence of the lack of countervailing interests lobbying for the implementation of the policy preferences of the subjects of the criminal justice system—the accused, the defendants, the prisoners, and the parolees. This one-sided political competition results in unique democratic harms that are not present—or at least are less salient—in other regulatory contexts.

In the first instance, captured criminal policymaking results in participatory and representational harms that disempowers the most vulnerable members of the political community, and members that disproportionally comprise Black and brown Americans. The growing literature on the democratization of the criminal justice system recognizes the value of participation in the criminal justice system. For example, Joshua Kleinfeld outlines that the "end is to ensure that the individuals who comprise society can participate in 'democratic-opinion-and-will-formation,' and that government has to listen once the democratic opinion and will are formed."[292] The goal of democratizing participation for Kleinfeld and others is that "law and other exercises of governmental power should reflect and respond to the ethical life of the people living under that law and government."[293] John Rappaport notes the consequentialist reasons to value and promote equality of participation, including civic education and engagement, strengthening of the community and dampening public conflict.[294]

Arguably the values associated with democratic participation generally, and policymaking specifically, are intensified in

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292. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1385 (2017).

293. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1466 (2017).

294. John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 725 (2020); *see also* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 235–36 (1984) (stating that democratic participation interests people in citizenship and in the welfare of their country); JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 148–49 (1927) (emphasizing the importance of civic and political engagement to democracy and community); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 45 (1970) ("[Democratic] participation . . . leaves the individual better psychologically equipped to undertake further participation in the future.").

the context of criminal justice given the consequence of criminalization. Law enforcement personnel wield unique levels of discretion and power over the citizenry, with consequences including loss of liberty and loss of life.[295] Further, as both a historic and contemporary reality, the power is deployed in a racially imbalanced manner. Black Americans are disproportionately stopped and searched; in New York City between 2002 and 2012, 4.4 million pedestrian stops were conducted, with Black individuals being stopped on over half of the occasions.[296] Black Americans are also more likely to be imprisoned; one third of American inmates are Black.[297] Black Americans are more likely to be killed by police than white Americans.[298] As Rappaport notes, these data "are far out of line with national population demographics and do not simply reflect differential rates of offending across racial groups."[299]

In the face of this entrenched and systemic disempowerment is the active lobbying to increase the scope and discretion of law enforcement actors by the law enforcement lobby. In the parlance of corporate law, this represents self-dealing, whereby those with the power of decision-making deploy resources to benefit themselves at the expense of the broader community with interests in how the resources are utilized.[300] Of course, as Rappaport has argued, democratization in terms of participation does not direct reformist outcomes. But recognizing that institutionally entrenched self-dealing exists in criminal justice policymaking suggests that the participation of the subjects of criminal justice law and policy is critical. Whatever theory of the value of democratic participation is taken—legitimacy, pluralism, equality, contestation, and so on—the frequent absence of meaningful participation by the subjects of criminal justice policy, and the one-sided self-dealing by the law enforcement lobby, imbues significant democratic harms.

Democratic participation has a purpose. Legislators and other decision-makers operate in environments of constant uncertainty, where their ultimate choice will often depend on the

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295. *See supra* Part III.A.

296. Rappaport, *supra* note 294, at 713 (citing Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013)).

297. *Id.*

298. *See id.*

299. *Id.*

300. *See* Brandon N. Cline & Claudia Williamson, *Trust and the Regulation of Corporate Self-Dealing*, 41 J. CORP. FIN. 572, 572 (2016).

information about the consequences—both policy and electoral—of proceeding with a specific policy choice.[301] As Cary Coglianese, Richard Zeckhauser, and Edward Parson have written, "[i]nformation is the lifeblood of regulatory policy,"[302] and "the value of any type of regulatory analysis ultimately depends on the quality and reliability of the information on which it is based."[303] The American polity enshrines a policymaking context where legislators rely on interest groups for salient information. Matthew Stephenson notes that government decision-makers will invest in policy development only as much as their marginal benefit aligns with their marginal costs.[304] In such an environment, decision-makers frequently rely on information presented to them, without further research or investment. In an environment where information is generated from only one perspective, information asymmetry becomes engrained in the process. Valuing *participation*, then, is to engender and value a diversity of *information* at the critical policymaking stage.

Informational asymmetry in criminal justice policymaking additionally suffers from informational endogeneity, whereby the one-sided information is provided by interest groups acting for government actors. There are two specific problems with information endogeneity in this context. First, information is provided to legislators by interest groups that are visibly linked to the government. When the law enforcement lobby engages in efforts to influence public policy, it comes with the imprimatur of state authority. Governmental institutions and their actors find themselves uniquely situated to dominate state policy on behalf of the state itself, ensuring a circular "web[] of influence."[305] Second and relatedly, the information received from the law enforce-

301. Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1423 (2011); *see* Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 836 (2021) (discussing the uncertainty under which government agencies work); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 325–26 (2010) (considering the impact of public petitions on environmental law).

302. Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277 (2004).

303. *Id.* at 278.

304. Stephenson, *supra* note 301, at 1430–31.

305. *See* Miller, *supra* note 30, at 569.

ment lobby as state actors, carries with it the perception of expertise. As Anna Lvovsky notes, "invocations of expertise have emerged as a common and highly effective method for demanding deference, a type of *open sesame* parting the gates."[306] The totem of expertise presents the law enforcement lobby as comprised of professional and impartial bureaucrats. The asymmetrical provision of information, then, is legitimized, with law enforcement officials perceived as expert proxies that can accurately represent the interests of all persons involved in the criminal justice system, rather than repeat players that have an intense self-interest in expanding the scope of criminal justice policy.

* * *

Collectively, the costs imposed by the law enforcement lobby capture of criminal justice policymaking power ensure the perpetuation of the status quo. We believe that these costs create unique and distinctive problems that demand different kinds of solutions.

IV. BALANCING POWER, OBVIATING CAPTURE

The preceding Parts outline both a positive account of criminal justice policymaking and a normative account of the unique costs of a captured criminal justice policy market. The concentrated benefits gained by the law enforcement lobby have imposed significant costs on the public, most specifically on the subjects of the criminal justice system. Recognizing the embedded structural nature of the issue, in this Part we propose a framework for disrupting the captured nature of criminal justice policymaking power by shifting power from the law enforcement lobby—the police, the prosecutors, and the prisons—to the populations most impacted by criminal justice policy. In so doing we do not simply propose a mechanism whereby the voices of the impacted are heard. Instead, by deploying a power-shifting lens,[307] we seek "observable results,"[308] whereby persons are im-

306. Anna Lvovsky, *Rethinking Police Expertise,* 131 YALE L.J. 475, 486 (2021).

307. *See generally* Simonson, *supra* note 48 (explaining and advancing a compelling argument as to the necessity of using a power-shifting lens approach to police reform).

308. *Id.* at 804.

bued with the ability to impact policy and control the distribution of power and resources.

In this Part we propose mechanisms that seek to change the balance of the power to control criminal justice policy: first, by building the power and influence of directly impacted persons over criminal justice policy (ratcheting up power), and second, by reducing the power of the law enforcement lobby (ratcheting down power). By focusing on the point at which power over policies, priorities, and practices are controlled and allocated, we narrow in on the most salient and impactful site for reform in the criminal justice system. By proposing power-shifting and the building of political power we are not focused on outcomes in terms of policies that might, for example, reduce policing, or limit prosecutorial discretion and so on. Rather, by proposing ratcheting up and ratcheting down of policymaking power and influence, we aim to "better enable countervailing interests and community groups to assert their views, to hold governments and other actors to account, and to claim a share of [the] governing power."[309]

Importantly, our focus on power-shifting—and our specific proposals for challenging the current power structures and institutionalizing power-shifting in policymaking—is made possible by contemporary social movements for criminal justice reform.[310] These social movements are consistently and persistently calling for institutional reform to enable bottom-up power and the subsequent transformation of the criminal justice system. These movements are providing a "sustained challenge to [the] power holders"[311] alongside the "promise to get there."[312] That is, in terms of challenging and shifting the power to control, contemporary social movements challenging the criminal justice system have the potential to generate legislative subsidies sufficient to not only challenge, but transform, the status quo. Consequently, in Section A, we propose mechanisms for building countervailing capacity and shifting power in criminal justice policymaking. Section B looks at the other side of the equation and suggests

309. Rahman & Simonson, *supra* note 61, at 690.

310. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 824–25 (2021) ("Social movements are the partners of movement law scholars rather than their subject.").

311. Charles Tilly, *Conclusion from Interactions to Outcomes in Social Movements*, *in* HOW SOCIAL MOVEMENTS MATTER 253, 257 (Marco Giugni, Doug McAdam & Charles Tilly eds., 1999).

312. Akbar et al., *supra* note 310, at 829 n.20.

that contemporaneous with building countervailing capacity, we should seek to reduce—or at least constrain—the power of the law enforcement lobby.

A. BUILDING COUNTERVAILING CAPACITY

1. Institutionalizing Contestation

The first order priority of shifting the power to control criminal justice policymaking to the community most impacted by the criminal justice system is to build the institutional capacity of the relevant community interests. This focus on imbuing institutional power in groups builds a necessary counterweight to the power of the law enforcement lobby, building in institutional resistance that the current structures lack. By building countervailing capacity, we aim to facilitate and institutionalize contestation in criminal justice policymaking, thereby "leveling up" the influence of countervailing voices in order to "block the conversion of resources into power."[313]

We start from the premise that, from the implementation of the U.S. Constitution, the central principle of American government has been the division of power so as to prevent the "accumulation of all powers . . . in the same hands," which "may justly be pronounced as the very definition of tyranny."[314] Necessarily, the reality of modern democracy means that some persons have greater capacity to influence and accumulate power. The project

313. Levinson, *supra* note 55, at 135; *see also* K. Sabeel Rahman, *Policymaking as Power-Building,* 27 S. CAL. INTERDISC. L.J. 315, 318 (2018) (arguing that "public policy should be aimed at institutionalizing the countervailing power of constituencies that are often the beneficiaries of egalitarian economic policies, yet lack the durable, long-term political influence"); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 555 (2021) (discussing political inequality and exploring how the law can be used to "explicitly and directly . . . enable low- and middle-income Americans to build their own social-movement organizations for political power"). Our approach differs from that of Andrias and Sachs not only in that we focus on the criminal justice system and its subjects rather than mobilizing the power of the poor and working class, but also because we are not proposing to use the law as a means of facilitating organizing political power. Instead, given that we focus on legislative subsidies beyond money, i.e., votes and policies, we propose to build on the current social movement to transform the criminal justice system. In this way, our prescriptions do not rely on the approval of those with influence in the system in the way that Andrias and Sachs might do.

314. Levinson, *supra* note 55, at 33–34 (quoting THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003)).

of democratizing criminal justice and power-shifting recognizes this lived reality and seeks to deploy the growing power of social movements relating to criminal justice reform to facilitate contestation of the entrenched power structures.[315] The end goal, then, is shifting and building collective contestory power, enabling the subjects of criminal justice policy to have a "real say over all aspects of their lives, where they are not subject to unchecked private or state power"[316] in order to "build pathways for transformation."[317] Building countervailing capacity creates "structural safeguard[s] against the tyranny of an inevitable majority party or coalition" by implementing arrangements to provide formal power-sharing.[318]

What might a power-shifting arrangement at the criminal justice policymaking stage look like? At base, we propose the channeling of social movements into institutionalized political action in the form of interest groups focused on criminal justice policymaking.[319] Collective action in the form of grassroots campaigns across a vast array of criminal justice issues currently

315. ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971) (exploring the question of "what conditions favor or impede a transformation into a regime" that allows "opponents of the government [to] openly and legally organization in free and fair elections," understanding that that is not how our system currently operates). *See generally* Rahman & Simonson, *supra* note 61 (illustrating how two current movement approaches "shift power and attempt to redress inequality" within local government structures); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (discussing the importance and impact of "bottom-up forms of participation" within criminal justice activism).

316. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 113 (2020).

317. *Id.* at 106.

318. Levinson, *supra* note 55, at 100.

319. Heather Gerken proposes a leveling up strategy in the context of equalizing access to lobbying more generally. Similar to the public funding of elections and criminal defense attorneys, Gerken proposes supplementing private lobbyists with publicly funded lobbyists for less politically powerful individuals and interests. While publicly funded lobbying is an option that should be considered, we argue that powershifting, and the direct empowerment of the subjects of the criminal justice system, is a preferable option. *See* Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. STATE U. L. REV. 1155. 1165–68 (2011); *see also* Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 45–59 (2019) (proposing "regulatory intermediaries" to stand in for the public in the context of police rulemaking); Bruce E. Cain, *More or Less: Searching for Regulatory Balance, in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN

exist, channeling resources to cop-watching, court-watching, and community bail funds, amongst others.[320] While these collective action movements destabilize the carceral state by challenging, at various junctures, the exercise of the power of capacity of institutional actors, such as the police, without contesting the power to control, they ultimately fail to challenge the status quo.

A key characteristic of "democracy is the continuing responsiveness of the government to the preferences of its citizens."[321] However, as outlined in Part I, responsiveness in the American political system is conditioned upon the capacity to deliver legislative subsidies—the promise of votes, money, or policies to the legislator. To contest the controlling power of the law enforcement lobby, the success of any institutional contestation is dependent on the delivery of countervailing legislative subsidies. With the movement against criminal justice inequities growing, the promise of legislative subsidies that contest those offered by the law enforcement lobby is, for the first time, a real possibility. Indeed, if organized and channeled into appropriate institutional forms, the promise of votes, funding, and policies from those impacted by the system potentially outstrips what the law enforcement lobby can promise legislators. In turn, the veto power of the law enforcement lobby is undermined, pulling the political lever necessary for legislative action. This would result in a true transformation of the power to control criminal justice policy; criminal justice policy is the result of political pressure. As it stands, "[v]oters and powerful interest groups demand these laws . . . and almost no influential interests stand in the way."[322] By institutionalizing and building the capacity of countervailing institutions, we can facilitate the shifting of power to the subject of criminal justice policy.

There are moves occurring within the criminal justice reform movement to organize around policymaking. The recently formed People's Coalition for Safety and Freedom (People's Coalition) proposes a "People's Process" whereby the interests of the

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DEMOCRACY 263, 278 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) ("Building again on the principle of countervailing interests, an alternative approach would be to increase the types of lobbyist and other forms of expertise in the political system . . . . [For example,] a more explicit acknowledgment of the role of intermediary groups.").

320. Akbar et al., *supra* note 310, at 857 n.143 (providing various citations for these kinds of efforts).

321. DAHL, *supra* note 315.

322. Barkow, *The Political Market for Criminal Justice*, *supra* note 30, at 1718.

communities impacted by criminal justice policies are prioritized in the federal law-making process.[323] The People's Coalition comprises a number of community organizations with the goal of shifting decisional power to those most impacted by criminal justice policy.[324] It recognizes the importance of contestation at the point power to control is exercised, stating that: "For far too long . . . federal legislation has been driven by powerful interests and drafted in opaque ways. By bringing a transformative approach to building consensus . . . and content for a transformative legislative outcome, we seek to change the way—and for whom—policy and budgeting operates."[325] For the People's Coalition, federal criminal justice policies should be developed by, or in conjunction with, "the people most harmed by policing, criminalization, and incarceration."[326]

Yet, while this recognition and preliminary organizing is necessary, it is not sufficient to contest and destabilize the entrenchment of the law enforcement lobby. Groups like the People's Coalition focus on town hall meetings, assemblies, listening sessions, and workshops which provide a voice to the impact communities.[327] But they have yet to provide the political organization necessary to disrupt the institutionalization of the law enforcement lobby.[328] Legislators will not act on the policy proposals put forward by the social movements alone; these are a part of the contestation package, but without more, these efforts will not yield the sought-after transformation of criminal justice policies. It is only when the social movements integrate into the political system and make it acceptable, if not beneficial, for law-

323. Simonson, *supra* note 48, at 824.

324. *Id.* at 825.

325. *Id.* (quoting *Reckoning with Mass Criminalization and Mass Incarceration: A Proposal to Advance a New Vision of Public Safety and Dismantle the 1994 Crime Bill Through a Participatory People's Process*, CTR. FOR POPULAR DEMOCRACY 5 (Sept. 2019), https://safetyandfreedom.org/wp-content/uploads/2020/10/Peoples-Coalition-Safety-and-Freedom-Campaign-Concept.pdf [https://perma.cc/W2SC-W3BW]).

326. *Id.* at 827.

327. *Id.* at 782.

328. *Cf.* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 151 (2013) ("[L]egal interventions designed to facilitate political *organizing* by the poor and middle class are thus a viable alternative to campaign finance reforms and a promising means of redressing representational inequality.").

makers to progress their interests that policy change will occur.[329] Integration into the political system, then, is essential to contest and transform current criminal justice policies and structures.

It is beyond the scope of this Article to outline a manifesto for the deployment of a formalized criminal justice interest group, designed to contest the systemic capture of criminal justice policymaking by the law enforcement lobby. However, it is important to note that disaggregated efforts, both in terms of money and personnel, are unlikely to yield contestation sufficient to alter legislator preferences. This means a shift in the way that criminal justice reform groups both see themselves and function within the existing array of reform groups is necessary.

The most powerful strategy for successfully challenging capture of the power to control criminal justice policy may be to organize as many existing criminal justice reform movements and groups into a single—or at least small number of—organized interest group as possible. By consolidating institutional authority and visibility,[330] the reformers decrease the opacity and fragmentation of countervailing interests that is "problematic from the standpoint of balancing power and enabling countervailing power."[331] Of course, there are tradeoffs for reform groups in terms of loss of identity, agenda control, and policy preferences, but we claim that in order to shift power and truly transform criminal justice policy, a consolidated, large, visible, and sophisticated organization maximizes leverage ex ante. By combining funds and potential voting blocs reformers can realistically challenge the subsidies offered to the legislator by the law enforcement lobby.[332]

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329. THOMAS T. HOLYOKE, INTEREST GROUPS AND LOBBYING: PURSUING POLITICAL INTERESTS IN AMERICA 70 (2014).

330. Rahman, *supra* note 313, at 360–61 (using the Consumer Financial Protection Bureau, the Financial Stability Oversight Council, the New York Rent Guidelines Board, and the Oakland Commission as examples of how organizers have consolidated countervailing power in areas that were previously fragmented).

331. *Id.* at 362.

332. We recognize that this is no easy task. Philanthropic donors and activists alike have specific projects and issues of focus. It is likely that a single organization or small group of powerful organizations will be required to initiate this proposal with funding and other resource commitments. We believe, however, that our approach is the best mechanism by which to challenge the entrenched power of the law enforcement lobby and transform the criminal justice system. There is also the possibility of deploying the state as an institutional

Consequently, there exists the potential for actual influence over the power to control state power. While there are difficulties in mobilizing and organizing existing groups into a single institutional entity, the capacity for real influence should create a strong incentive for participation and itself facilitate "the capacity of constituencies to mobilize, organize, and exercise power."[333] That the federal government could act as the locus for reform is a possibility. In his 2022 fiscal year budget, President Biden announced $1.3 billion for state and local criminal justice reform in order to spur positive change, an increase of seventy eight percent over the previous year's spending.[334] While government interests are transient, the opportunity exists to build countervailing capacity through this centralized filter, at least at the outset, portending a greater possibility of success.

Yet, there remain capacity-adjacent concerns that potentially undermine the potency of this proposal. That means in addition to capacity building and power-shifting proposals, it is important to consider capacity-adjacent movements to bolster the possibility of success. The next subsection considers the most salient of these concerns.

2. Capacity-Adjacent Reforms

There exist three salient obstacles that, while not fatal to our ultimate reform agenda, raise capacity-adjacent concerns that should be considered alongside the building of countervailing capacity.

Foremost among these obstacles is the continued disenfranchisement of felons in some form in a majority of states.[335] Given our reform approach rests on the capacity to offer legislative subsidies in terms of votes, the inability of 5.2 million members—or

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locus for organizing. *See generally* Gerken, *supra* note 319 (suggesting a "public finance analog" whereby legislators have access to "policy research consultants" and do not have to rely on lobbyists in the way that they do currently).

333. Rahman, *supra* note 313, at 363.

334. Michael Crowley, *Biden's Budget Steps up Spending for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (June 25, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-budget-steps-spending-criminal-justice-reform [https://perma.cc/NL5P-CDM4].

335. Christopher Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT 5 tbl. 1 (2020), https://www.sentencingproject.org/app/uploads/2022/08/Locked-Out-2020.pdf [https://perma.cc/SCU9-9NLF] (showing a complete breakdown of state restrictions on voting rights for individuals formerly convicted of felonies).

one out of forty-four adults—of the affected community to vote is significant.[336] In only two states, Maine and Vermont, do felons remain enfranchised.[337] In another seventeen, felons are disenfranchised during the term of their prison sentence, and in the remaining thirty-one states felons are disenfranchised for some combination of the prison, parole, probation, and post-sentence period.[338] The consequence of these individuals being restricted from participation in the democratic process is that they are unable to deploy what for many is the best resource for systemic reform, their voting power. This collective sanction imposes greater burdens on the families and communities of felons to mobilize to provide the resources necessary to generate countervailing capacity at a time when the costs of a felony conviction weigh heavily on families and communities.[339]

Given the importance of votes to the building of countervailing capacity, we note the related obstacle of the high levels of nonvoting individuals in the relevant community. Demographic imbalances in voter turnout are salient, with Black and Hispanic Americans, and poor and working-class Americans—the populations most impacted by criminal justice policies—generally voting in proportionally lower numbers than white middle- and upper-class Americans.[340] Voter suppression is a significant driver of lower voter turnout, especially among Black Americans.[341] For example, in the 2020 election, Georgia Secretary of State Brian

336. *Id.* at 15.

337. *Id.* at 5.

338. *Id.*

339. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1161 (2004) ("Criminal disenfranchisement laws . . . operate as a kind of collective sanction: They penalize not only actual wrongdoers, but also the communities from which incarcerated prisoners come and the communities to which ex-offenders return . . . .").

340. Bertrall L. Ross II, *Addressing Inequality in the Age of* Citizens United, 93 N.Y.U. L. REV. 1120, 1151 (2018); Kevin Morris & Coryn Grange, *Large Racial Turnout Gap Persisted in 2020 Election*, BRENNAN CTR. FOR JUST. (Aug. 6, 2021), https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election [https://perma.cc/BKZ2-6VCC] ("70.9 percent of white voters cast ballots while only 58.4 percent of nonwhite voters did . . . . 62.2 percent of Black American voters, 53.7 percent of Latino American votes, and 59.7 percent of Asian American voters cast ballots in 2020.").

341. Rashawn Ray & Mark Whitlock, *Setting the Record Straight on Black Voter Turnout*, BROOKINGS (Sept. 12, 2019), https://www.brookings.edu/blog/how-we-rise/2019/09/12/setting-the-record-straight-on-black-voter-turnout [https://perma.cc/5QFY-6N76].

Kemp refused to register over 50,000 voter registrations, the majority of whom were Black Georgians.[342] In a number of states, including Texas, Arizona, North Carolina, Mississippi, Alabama, South Carolina, and Louisiana, upwards of 850 polling places were collectively closed.[343]

The situation is unlikely to improve given the Supreme Court's 2021 decision in *Brnovich v. Democratic National Committee*,[344] where the Court effectively gutted the Voting Rights Act.[345] There, the Court held that, despite the discriminatory burden on African Americans, Hispanic Americans, and Native Americans of Arizona's out-of-precinct policy and its ballot collection law, the law did not violate Section 2 of the Voting Rights Act, and was not enacted with a racially discriminatory purpose.[346] Following the Court's 2013 decision in *Shelby County v. Holder*[347], which gutted Section 4 of the Voting Rights Act[348], there remain limited possibilities to challenge restrictions on voting rights under current legislation.[349] For our purposes, the consequence is not only suppression of the democratic right to vote, but the possible curtailment of the effectiveness of reform efforts directed at building countervailing capacity. The fewer

342. P.R. Lockhart, *Georgia Put 53,000 Voter Registrations on Hold, Fueling New Charges of Voter Suppression*, VOX (Oct. 12, 2018), https://www.vox.com/policy-and-politics/2018/10/11/17964104/georgia-voter-registration-suppression-purges-stacey-abrams-brian-kemp [https://perma.cc/SHQ6-JXH4].

343. Ray & Whitlock, *supra* note 341 ("Regarding voter disenfranchisement, several states with large and growing Black and Hispanic populations closed polling places: Texas closed over 400 polling places, Arizona closed over 200, and the states of Louisiana, Alabama, Mississippi, North Carolina, and South Carolina collectively have closed over 250 polling places.").

344. 141 S. Ct. 2321 (2021).

345. For more analysis on this case, see Spencer Bokat-Lindell, *Did the Supreme Court Just Kill the Voting Rights Act?*, N.Y. TIMES (July 6, 2021), https://www.nytimes.com/2021/07/06/opinion/supreme-court-voter-suppression.html [https://perma.cc/98GZ-WM7E], which explains the harms of the case for voting rights in the United States.

346. Ciara Torres-Spelliscy, *One of the Oldest Problems in America Persists: How to Protect the Voting Rights of Non-White Citizens*, SCOTUSBLOG (July 6, 2021), https://www.scotusblog.com/2021/07/one-of-the-oldest-problems-in-america-persists-how-to-protect-the-voting-rights-of-non-white-citizens [https://perma.cc/4VQ4-F4T8].

347. 570 U.S. 529 (2013).

348. *Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 4, 2018), https://www.brennancenter.org/our-work/court-cases/shelby-county-v-holder [https://perma.cc/K9MZ-FD4R].

349. Torres-Spelliscy, *supra* note 346.

votes that can be generated and promised as a legislative subsidy, the less effective any countervailing institution will be. Consequently, it is imperative to persist in efforts to remove barriers designed to keep Black and brown Americans from voting as a capacity-adjacent movement.[350]

Finally, it is important to note the import of the embedded resource inequality in our capacity-building reform agenda. The costs of mobilizing and organizing interests are high, and the individuals most impacted by the criminal justice system tend to have limited funds to invest. This means that realistically, building financial capacity for any countervailing interest group and legislative subsidies will, at least in the short term, rely on the willingness of philanthropic individuals and groups to combine their funds and work towards a single goal. There are, however, other possibilities. Maggie McKinley suggests that unequal access to the political process raises distinct constitutional issues under the Petition Clause.[351] Jordan Barry suggests giving citizens "political dollars" that they can donate to organizations engaged in criminal justice advocacy.[352] Bertrall Ross proposes earmarked donations that would enable campaign contributors to direct their contributions to mobilizing marginalized populations.[353] Ross also suggests campaign finance vouchers that can be donated to interest groups, with the goal of equalizing the political playing field by enabling the mobilization of movements.[354] Matthew Wansley suggests the empowerment of existing lobbyists to agitate what he terms "virtuous capture."[355]

While financial impediments to building effective institutionalized countervailing capacity are real, this obstacle should not be overstated. Mobilization in and of itself is a valuable, and significant, resource.[356] Indeed, as we noted at the outset, it is

350. Ross, *supra* note 340, at 1163 (discussing how legislation such as the Voting Rights Act and National Voter Registration Act have attempted to remove barriers for Black voters, as well as other minority groups).

351. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1183–95 (2016).

352. Barry, *supra* note 247, at 48–52.

353. Ross, *supra* note 340, at 1184–86.

354. *Id.* at 1183–84.

355. Matthew Wansley, *Virtuous Capture*, 67 ADMIN. L. REV. 419, 423–25 (2015).

356. Levinson, *supra* note 55, at 136–37 ("[M]obilized groups that have been excluded from formal political channels can exercise power in the streets . . . .

the contemporary collective movements pushing for accountability and reform in the criminal justice system that makes the possibility of countervailing capacity plausible in the first place. These social movements mark a "profound shift" in the political landscape[357] and portend the "denaturaliz[ation] of the status quo and allows more radical possibilities to emerge."[358]

B. REDUCING CAPACITY OF THE LAW ENFORCEMENT LOBBY

Shifting power to the subjects of criminal justice law and policy not only involves ratcheting up countervailing capacity, but it also may involve ratcheting down the power of the dominant political forces. While the theory of political equality is contested, most democratic theorists agree that politics as unequal institutional domination threatens American democracy.[359] To the extent we are concerned about shifting power away from the dominant law enforcement lobby and to the community most impacted by the criminal justice system, we suggest operationalizing power shifting by limiting the capacity of the law enforcement lobby. This is no simple task. Even the most radical of reformers working at the forefront of the law of democracy suggest that "leveling down" the power of entrenched interests is an "ambitious goal."[360]

The most powerful means to ratchet down the power of the law enforcement lobby is to impose restrictions on their activity, limiting access to legislators and/or requiring greater transparency around interactions between legislator and lobbyist. To be sure, regulating lobbying activity through existing regulatory schemes is not a panacea. While restrictions on lobbying vary as between the federal government and the states, and between the

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Groups of citizens can withdraw social and economic cooperation . . . . [M]obilization can also create influence through the standard processes of democratic politics.").

357. Akbar et al., *supra* note 310, at 827 ("Social movements have marshaled some of the most profound changes in how we related to one another and what we can expect of the state.").

358. *Id.* at 822.

359. Levinson, *supra* note 55, at 120 & n.489.

360. Nicholas Stephanopolous, *The False Promise of Black Political Representation*, ATLANTIC (June 11, 2015), https://www.theatlantic.com/politics/archive/2015/06/black-political-representation-power/395594 [https://perma.cc/RB4N-CM9H] (describing research findings that show policymakers are more responsive and sensitive to preferences of groups in society with political capital and, correspondingly, ignore those groups that have and continue to be marginalized); *see also* Levinson, *supra* note 55, at 127–28.

states themselves, they have universally been described as lax.[361] Scholars have consistently argued that the lobbying regulation requirements fail to capture important information of significant relevance to public knowledge of the power of private interests in the political process.[362]

At the federal level, the 1995 Lobbying Disclosure Act (LDA) centers on disclosure of lobbying activities, requiring registration of lobbyists, limits on persons who can act as lobbyists, and disclosure of information relating to the lobbying activities undertaken.[363] Similarly, states variously limit financial contributions by lobbyists, fundraising by lobbyists, and requirements relating to disclosure of lobbying activities.[364] These provisions recognize that access to a legislator and the lawmaking process skews the political process in favor of systemically entrenched actors.[365] Maggie McKinley notes that "the amount of time spent with a lawmaker corelates closely with the political power of the individual securing the meeting, so the less politically powerful can expect far less time and, by inference, less process devoted to their issues as a result."[366] Plausibly, then, power-shifting suggests the need for limiting this access.

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361. *E.g.*, Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 194 (2012) ("Despite the recent popular attack on lobbying and lobbyists, lobbying regulation traditionally has been lax . . . ."); *id.* at 202 ("Though the [Lobbying Disclosure Act of 1995] certainly required more disclosure that the 1946 Act, it was still a weak enforcement regime."); Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 518–22 (2007) (describing why the Lobbying Disclosure Act of 1995 is little more than a symbolic piece of legislation).

362. *See e.g.*, Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know*, 13 ELECTION L.J. 138, 144–51 (2014) (explaining why, in the context of today's legislative and judicial approach to lobbying, the public's "right to know" is so central to democracy).

363. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601–14). For a history of federal lobbying regulation see William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, *in* THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE 5 (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds., 4th ed. 2009), which traces the development of lobbying related legislation and regulation from 1860 to 1954.

364. Hasen, *supra* note 361, at 207.

365. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 59–60 (2012); McKinley, *supra* note 351, at 1195–97.

366. McKinley, *supra* note 351, at 1197.

Regulating the access of the law enforcement lobby specifically through legislative amendment raises constitutional issues. While the Supreme Court has generally upheld lobbying restrictions relating to disclosure,[367] restrictions limiting access raises issues of limiting speech under the First Amendment Speech Clause. In *Citizens United*, the Court held that the government's interest in anticorruption was insufficient to justify restrictions on political speech.[368] Rick Hasen argues that justifications based on political equality are "likely to fare even worse in the post-*Citizens United* world,"[369] and argues, in fact, that "equality talk justifying lobbying regulations *decreases* the chances that such laws would be upheld."[370] Yet, limitation of the access of the law enforcement lobby need not rely on the traditional interests of anti-corruption or equality. Instead, the unique identity of the law enforcement lobby as government employees—or organizations comprised of government employees—provides a distinguishing feature that potentially avoids the complexities of the limits of *Citizens United* and its progeny.

In *Citizens United*, the Court emphasized the fact that private speech could not be limited simply to level the playing field; that is, that the government cannot restrict speech related to elections simply to protect the voices of one group over another.[371] However, in the context of public employees, the Court has allowed restrictions on employee speech to promote government interest in "promoting the efficiency of . . . public services,"[372] that outweighs an employee's interest in "commenting upon matters of public concern."[373] Further, in the 2006 decision of *Garcetti v. Ceballos*,[374] the Court held that public employee

367. Hasen, *supra* note 361, at 209–11; Kang, *supra* note 365, at 35 (characterizing disclosure requirements as one of the major pillars on the acceptable forms of campaign regulation today).

368. Citizens United v. FEC, 558 U.S. 310, 369 (2010) ("[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself."); Hasen, *supra* note 361, at 197.

369. Hasen, *supra* note 361, at 216.

370. *Id.*

371. *Citizens United,* 558 U.S. at 336–41 ("We find no basis for the proposition that in the context of political speech, the Government may impose restrictions on certain disfavored speakers.").

372. For discussion of the balancing test utilized by the Court, see Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

373. *Id.*

374. 547 U.S. 410, 424 (2006) ("Proper application of our precedents thus

speech pursuant to official duties is "categorically beyond the scope of First Amendment concern" and not entitled to constitutional protection.[375] There remains, of course, difficult interpretive questions regarding the scope of the public employee speech doctrine in the context of lobby restrictions, including whether the lobbying action falls within the scope of employment. But there is something remarkable about the possibility of a doctrine that limits the ability to challenge entrenched power being used to challenge the entrenched power of the law enforcement lobby.

There also remains the possibility of an alternate rationale to support the regulation of the law enforcement lobby, should it be necessary. Rather than resting on an equality or anti-corruption rationale, legislative limits on the access of the law enforcement lobby can rest on an anti-subordination justification. Theoretically, an anti-subordination rationale postulates that societally disadvantaged groups should not have subordinated status because they lack political power, along with a commensurate obligation to actively work to remedy, or at least prevent the perpetuation of, any subordination.[376] In their seminal work on anti-subordination theory, Jack Balkin and Reva Siegel argue that "guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and . . . that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups."[377] Monica Bell shows that Black Americans in particular have been consistently and persistently subordinated by the structure and substance of the criminal justice system.[378] As discussed in Part III, disproportionate application of criminal justice regulation at all points reinforce racial hierarchy and subordinate Black and brown Americans. This interest is directly tailored to the systemic harms that the law enforcement lobby imposes on Black and brown Americans with the imprimatur of the state. This is not

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leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

375. Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2136 (2018).

376. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

377. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* 58 U. MIA. L. REV. 9, 9 (2003).

378. Bell, *supra* note 277, at 687–728 (describing the mechanisms of pro-segregation policing in modern America).

an interest that seeks to address political inequality. It is an interest that directly confronts the racialized nature of the law enforcement system that is perpetuated by the law enforcement lobby.

Ultimately, legislative amendment to limit the activity of the law enforcement lobby is possible. The First Amendment barriers to reform that impeached restrictions such as those in *Citizens United* are potentially inapplicable in the unique context of the law enforcement lobby, whereby entrenched government actors seek to use their power and position to seek rents against the public interest.

CONCLUSION

Across the country community demands are growing for a more publicly accountable and reimagined system of criminal justice.[379] But as community activists and organizers bring these demands before city councils and state legislators, many reform efforts have been thwarted because of the power of the law enforcement lobby.[380] Indeed, as we argue, the law enforcement lobby represents an important and undertheorized barrier to transformative change in the criminal justice system. It does more than merely represent the interest of its constituents. The law enforcement lobby exerts an outsized role in expanding the footprint of the carceral state, increasing the discretion of law enforcement personnel, and minimizing the accountability and oversight of its members. It has accomplished this, in part, because of the lack of a sufficiently well-organized and adequately funded political counterweight. This has resulted in life and liberty harms to the community, racial subordination, and the capture of democratic institutions.

No one proposal in this Article will fully remedy the challenges posed by the law enforcement lobby. But by building countervailing capacities for power, better institutionalizing contestation, and enacting constitutionally permissible restrictions on lobby capacities, communities can ensure more robust democratic engagement in the development of criminal justice policies.

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379. *See, e.g.*, Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), https://time.com/5847967/george-floyd-protests-trump [https://perma.cc/27PZ-HMNC] (detailing the growing protests and demand for reform and reimagination of the criminal justice system, which reignites with the murder of George Floyd in the summer of 2020).

380. *See* discussion and sources cited *supra* Part II.B.