



5-1-2022

Black & Blue: Black Letter Law & Police Union Collective Bargaining Impede Reform

Patrick Brooks

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Recommended Citation

Brooks, Patrick (2022) "Black & Blue: Black Letter Law & Police Union Collective Bargaining Impede Reform," *University of Baltimore Law Review*. Vol. 51: Iss. 3, Article 6.

Available at: <https://scholarworks.law.ubalt.edu/ublr/vol51/iss3/6>

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BLACK & BLUE: BLACK LETTER LAW & POLICE UNION
COLLECTIVE BARGAINING IMPEDE REFORM

*Patrick Brooks**

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I. INTRODUCTION

Nationwide demands for policing reform collide with an underappreciated counterforce.¹ Police unions wield and defend their power to resist reform with a force only surmountable to the extent state legislatures are willing to act and implement change.² Law and order, effective policing, and safe communities are simply essential.³ Determining how much procedural protection to give the brave individuals who provide these services when they themselves face allegations of misconduct, however, is a difficult issue.⁴ This Comment aims at objectively analyzing one example of the complex intersection between police unions and policing reform to shed light on the current requirements for progress.⁵

Baltimore provides a unique, yet relatable, snapshot of the current struggle against systemic racism and unconstitutional policing.⁶ From the tragic death of Freddie Gray, to structural reform litigation with the Department of Justice (DOJ), and the resulting Consent Decree, Baltimore has first-hand experience of police union power to resist reform.⁷ Baltimore Fraternal Order of Police (FOP) preferences have been protected by state labor laws, allowing collective bargaining with municipalities over contract terms that cover broad topics,⁸ and

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1. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 719 (2017); see also Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1198 (2017).
2. See *infra* Parts VI–VII.
3. See generally Exec. Order No. 13,929, 85 Fed. Reg. 37325 (June 16, 2020).
4. See Seth W. Stoughton et al., *How to Actually Fix America's Police*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/> [https://perma.cc/U4QX-96RY].
5. See Baynard Woods & Brandon Soderberg, *Baltimore Tried Reforming the Police. They Fought Every Change*, WASH. POST (June 18, 2020, 9:26 AM), https://www.washingtonpost.com/outlook/baltimore-police-reforms-crime/2020/06/18/7d60e91e-b041-11ea-8758-bfd1d045525a_story.html [https://perma.cc/SKS5-23VA].
6. See *id.*
7. See *id.*
8. MD. CODE ANN., STATE PERS. & PENS. § 3-101(d) (West 2021).

further entrenched by extra statutory protections.⁹ Prior reform efforts in Baltimore have failed.¹⁰ The police union still shields problematic officers from allegations of misconduct, let alone discipline.¹¹ Any investigations that are actually undertaken, a feat in itself, have been impeded by union contracts and state statutes that the powerful union vigorously lobbies for and defends.¹²

Maryland legislators must overcome this politically strong opponent to policing reform, not only to ensure the constitutional rights of their constituents, but also to set an example of the possibilities for progress.¹³ Baltimore has been thrust into the national spotlight because of tragic events allowed by the State's Law Enforcement Officer's Bill of Rights (LEOBR) and the city's Collective Bargaining Agreement (CBA) with the police union.¹⁴ Both the LEOBR and the CBA contain provisions that impede transparency, accountability, and reform.¹⁵ Together they hinder investigations of officers facing charges, including murder, as Baltimore saw when indictments for the death of Freddy Gray resulted in zero convictions.¹⁶

9. MD. CODE ANN., PUB. SAFETY §§ 3-101 to 3-113 (West 2021).

10. See Woods & Soderberg, *supra* note 5.

Members of the department undermined every new policy in an open revolt. Some cops decided that if the city didn't have their back, they'd stop working hard and allow chaos to reign, showing how important they were. Others, particularly plainclothes officers, took the opposite approach: They doubled down on harassing citizens, violating their constitutional rights and even fabricating probable cause to maintain 'law and order.'

Id.

11. See Rushin, *supra* note 1, at 1252–53.

12. See *id.*

13. See Jessica Anderson, *Maryland Laws That Have Long Protected Police Face Scrutiny as Public Demands More Accountability*, BALTIMORE SUN (June 12, 2020, 1:32 PM), <https://web.archive.org/web/20200612181817/https://www.baltimoresun.com/news/crime/bs-md-ci-cr-police-reforms-20200612-cy63mihhjndvjparmkmoazil3m-story.html> [https://perma.cc/3WP9-FZ7J].

14. See Douglas Ankney, *Police Unions: Obstacles to Criminal Justice Reform and Police Accountability*, CRIM. LEGAL NEWS (Nov. 2020), <https://www.criminallegalnews.org/news/2020/oct/15/police-unions-obstacles-criminal-justice-reform-and-police-accountability/> [https://perma.cc/T9AF-CBZM].

15. See Rushin, *supra* note 1, at 1203.

16. See Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALTIMORE SUN (July 27, 2016, 8:57 PM),

Current legislative reform efforts aim to cross the “thin blue line” with a sharp black pen;¹⁷ however, Maryland legislators may not spill enough ink to truly reform the story of “Charm City.”¹⁸ In discussing the recent effort to repeal the LEOBR, the legislature points out the depressing fact that “[w]e’ve made zero progress since Freddie Gray[.]”¹⁹ Had George Floyd’s death occurred in Maryland, the LEOBR would have prevented firing the officers involved, like the Minneapolis Police Chief did.²⁰ Even full repeal of the LEOBR, however, is not a complete solution.²¹

This Comment is not intended to hold Baltimore up as a martyr in the clash between police unions and policing reform efforts but will detail the issue with a contextualized example of the difficult decisions required for progress.²² Policing reform efforts, in Maryland and nationwide, must account for police union powers embedded in both collective bargaining and extraconstitutional legislative enactments.²³ More precisely, Maryland should use its existing framework for regulating public sector bargaining in another sphere as a model for regulating police union bargaining.²⁴ This argument moves beyond the “black lives vs. blue lives” debate, which is so detrimental to meaningful discussions of the issue.²⁵ Instead, the goal is consistent accountability across public sector

<https://www.baltimoresun.com/news/crime/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<https://perma.cc/BHR8-D5SF>].

17. See Jim Newell, *The Thin Blue Line is in Retreat*, SLATE (June 8, 2020, 6:18 PM), <https://slate.com/news-and-politics/2020/06/police-reform-is-popular-now.html> [<https://perma.cc/A982-MKUZ>].
18. See Hannah Gaskill, *Here’s a Status Report on Police Reform Measures Passed by House Workgroup*, MD. MATTERS (Oct. 9, 2020), <https://www.marylandmatters.org/2020/10/09/heres-a-status-report-on-police-reform-measures-passed-by-house-workgroup/> [<https://perma.cc/G5WG-32NH>].
19. Jeff Barker, *Leaders See ‘Unique Moment’ for Police Reform*, BALT. SUN (Aug. 18, 2020, 7:48 PM), <https://www.baltimoresun.com/politics/bs-md-police-reform-baltimore-20200817-i6e5d5kb5jehnhks7mfsmcfnp-story.html> [<https://perma.cc/49S4-DV2W>].
20. *Id.*
21. See Fisk & Richardson, *supra* note 1, at 750.
22. See Woods & Soderberg, *supra* note 5.
23. See *infra* Parts VI–VII.
24. See *infra* Part VI.
25. Eyder Peralta, *Black Lives, Blue Lives: Political Conventions Reveal a Country Deeply Divided*, NPR (Aug. 1, 2016, 12:15 PM), <https://www.npr.org/2016/08/01/487931022/black-lives-blue-lives-political-conventions-reveal-a-country-deeply-divided> [<https://perma.cc/2ZE6-SD68>].

employment, hopefully accomplished through uniformly regulating the collective bargaining of employees serving communities.²⁶

The analysis proceeds through six subsequent parts by building a context for reform, explaining a prior attempt, and making recommendations concerning current efforts.²⁷ Part II provides an overview of the law governing public sector unions and lays out the rise of police unions.²⁸ Part III describes the legal framework in Maryland that controls police union collective bargaining, explains the State's recently repealed LEOBR, and details the current Baltimore police CBA.²⁹ Part IV introduces the Baltimore FOP and adds some depth and weight with the story of a local tragedy that sparked federal intervention.³⁰ Part V explains current legislative reform efforts with a focus on successes, and Part VI states recommendations for improvements.³¹ Part VII concludes with a call to action: a call for amending state public sector labor laws—in addition to LEOBRs—as necessary to accomplish the unattained, yet vital, reformatory goals of the DOJ Consent Decree.³²

II. BACKGROUND: THE SCOPE OF COLLECTIVE BARGAINING

The National Labor Relations Act (NLRA) governs private sector unions and their interactions with employers.³³ This statute gives employees nationwide the right to bargain collectively with their employers via elected union representation.³⁴ Through such bargaining, unions and employers contractually agree on terms and conditions of employment, thus formulating CBAs.³⁵ Expressly excluded from the definition of “employers” covered by the NLRA is “any wholly owned Government corporation,” state or federal, with

26. See *infra* Part VI. Police exceptionalism is a theme running throughout this piece, showing that problematic officers who face allegations or investigations are treated differently from any other public sector employee, or any member of the community they serve. See *infra* notes 64, 65, 75, 146, 149, 238 and accompanying text.

27. See *infra* Parts II–VI.

28. See *infra* Part II.

29. See *infra* Part III.

30. See *infra* Part IV.

31. See *infra* Parts V–VI.

32. See *infra* Part VII.

33. See National Labor Relations Act, 29 U.S.C. §§ 151–69.

34. See 29 U.S.C. § 152(3) (defining “employee”); *id.* § 157 (explaining employee rights).

35. See 29 U.S.C. § 151 (policy statement).

its labor rights and collective bargaining controlled by public sector labor laws.³⁶

The Federal Service Labor-Management Relations Statute (FSLMRS) governs public sector unions, but only those comprised of federal government personnel.³⁷ This statute, enacted in 1978, was modeled on the NLRA with important distinctions that preclude negotiating managerial decisions or policy determinations.³⁸ Public sector unions comprised of state employees are permitted to bargain and regulated by state-level public sector labor laws.³⁹

Maryland already has statutes that regulate negotiations with public sector unions representing teachers and other education personnel.⁴⁰ Interpreting these statutes, the courts of Maryland have long “exempt[ed] educational policy determinations from the collective bargaining process[.]”⁴¹ This is because the State Board of Education is charged by statute with “[d]etermin[ing] the elementary and secondary educational policies of this State[.]”⁴² This will form a helpful comparison in the current analysis, as police unions are not exempted from negotiating policy determinations and both Federal and Maryland public sector labor laws already provide statutory frameworks for addressing that shortcoming.⁴³

The 1970s and 1980s brought a rise in public sector bargaining.⁴⁴ Police unions gained the financial clout used to back favorable legislation and political candidates.⁴⁵ Unions have an obligation to bargain for the best interest of their many dues-paying members.⁴⁶ Police unions likely have good intentions of ensuring the best interests of the officers performing such a dangerous and difficult job.⁴⁷ However, problems arise as these unions gain the financial,

36. *Id.* § 152(2) (excluding regulation of public sector labor-management relations).

37. *See* Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101–35.

38. *See* 5 U.S.C. § 7101 (findings and purpose). Statutory “management rights” clauses stop federal employee unions from negotiating essential management decisions, such as policy determinations, with federal agency employers. *See id.* § 7106(a)(1).

39. *See, e.g.*, MD. CODE ANN., STATE PERS. & PENS. § 3-102 (West 2021).

40. *See* MD. CODE ANN., EDUC. § 6-408 (West 2021).

41. *Montgomery Cnty. Educ. Ass’n, Inc. v. Bd. of Educ.*, 534 A.2d 980, 985 (1987).

42. MD. CODE ANN., EDUC. § 2-205(b)(1) (West 2021).

43. *See infra* Part VI.

44. *See* Katherine J. Bies, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 123 (2017).

45. *See id.*

46. *See* 29 U.S.C. § 158(d); MD. CODE ANN., STATE PERS. & PENS. § 3-306(b) (West 2021).

47. *See Home*, BALT. CITY LODGE #3 FRATERNAL ORD. OF POLICE, <https://fop3.org> [<https://perma.cc/655S-KF72>] (last visited Jan. 9, 2021).

political, and statutory strength to protect their interests by resisting officer discipline and systemic reform.⁴⁸

As of 2019, union membership in the public sector was over five times higher than in the private sector, at 33.6% compared to 6.2%.⁴⁹ Even within the public sector, “protective service occupations” are unionized at higher rates than other employees.⁵⁰ The police officers involved in the deaths of Breonna Taylor and George Floyd were union members with prior instances of misconduct who continued to serve until these tragic events.⁵¹ Derek Chauvin, the officer who was fired, arrested, and charged with the murder of George Floyd, had at least seventeen prior misconduct complaints while Myles Cosgrove, one of the officers terminated over the killing of Breonna Taylor, also had a history of previous allegations.⁵² These officers’ CBAs concealed misconduct, hindered discipline, and continue to obstruct reform efforts.⁵³

III. BLACK: MARYLAND’S PERMISSIVE STATUTES

As recently as 2017, forty-one states have statutes that allow police union collective bargaining.⁵⁴ Common terms in the resulting CBAs block transparency, accountability, and reform.⁵⁵ Municipalities bargain away public policy decisions that affect the constitutional rights of their constituents.⁵⁶ For example, disciplinary procedures

48. Bies, *supra* note 44, at 143.

49. See Bureau of Lab. Stat., *Union Members – 2020*, News Release, U.S. DEP’T OF LAB. (Jan. 22, 2021), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/4ABF-EWLL>].

50. *Id.*

51. See Sam Blum, *Police Unions Wield Massive Power in American Politics — for Now*, ROLLING STONE (July 7, 2020, 2:45 PM), <https://www.rollingstone.com/politics/politics-features/police-unions-politics-george-floyd-breonna-taylor-1024473/> [<https://perma.cc/59WV-HJ8L>].

52. See *id.* Derek Chauvin, who knelt on George Floyd’s neck until he died, had previously critically wounded another civilian and was even “named in a brutality lawsuit[.]” but he never received any “discipline other than two letters of reprimand.” Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> [<https://perma.cc/VW69-YXM2>].

53. See Dewan & Kovalski, *supra* note 52.

54. Rushin, *supra* note 1, at 1204 n.58.

55. See *id.* at 1213–14.

56. See Ayesha Bell Hardaway, *Time Is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 STAN. J. C.R. & C.L. 137, 194–95 (2019).

are established through bargaining and many problematic officers keep their badges and guns despite prior misconduct.⁵⁷

At least twenty states also have statutory LEOBRs which provide officers with additional procedural protections from both investigations of, and discipline for, misconduct.⁵⁸ Police unions use their political and financial pull to get these statutes enacted and the LEOBRs, in turn, give the unions favorable policies which are never even bargained for with municipalities.⁵⁹ Combined, police CBAs and LEOBRs provide rank-and-file officers protections that so far surpass due process that they are unreasonable in any context.⁶⁰

Maryland has both forms of mutually enhancing protections for officers, for now,⁶¹ and together they have impeded reform efforts and will continue to do so unless addressed by the State legislature.⁶²

A. *Maryland's LEOBR*

LEOBRs are statutory and so cannot be changed except by amendment approved by both the legislature and Governor, while CBA protections can be changed by negotiations between police unions and employers.⁶³ During disciplinary investigations, LEOBRs provide police officers with due process protections unavailable to other public sector employees.⁶⁴ In 1974, after the FOP had been bargaining with Baltimore for years, Maryland was the first state to enact its LEOBR.⁶⁵ The statute provides protection for problematic officers and limits what the city can bargain for in its CBA.⁶⁶

57. Rushin, *supra* note 1, at 1222.

58. Ian Kullgren & Robert Iafolla, *Cities, States Prevail in Early Legal Clashes with Police Unions*, BLOOMBERG L. (Nov. 18, 2020, 5:31 AM), <https://news.bloomberglaw.com/daily-labor-report/cities-states-prevail-in-early-legal-clashes-with-police-unions> [<https://perma.cc/Z66U-ERL8>].

59. Fisk & Richardson, *supra* note 1, at 744–45.

60. Rushin, *supra* note 1, at 1213 (discussing how police union contracts, CBAs and LEOBRs limit disciplinary investigations).

61. H.B. 670 will effectively repeal Maryland's LEOBR on July 1, 2022. *See* H.B. 670, 2021 Leg. 442nd Sess. (Md. 2021). Police CBAs remain unregulated and will continue to impede transparency, accountability, and reform. *See infra* Parts III, VII.

62. *See* Rushin, *supra* note 1, at 1266.

63. *See infra* note 67 and Section III.B.

64. Rushin, *supra* note 1, at 1208–09 (exemplifying police exceptionalism).

65. Bies, *supra* note 44, at 125 (showing union influence on enactment of procedural protections).

66. *See id.* (alteration in original) (“The recent investigation of the police officers charged in the killing of Freddie Gray in Baltimore highlights the ability of [LEOBRs] to impede accountability and transparency. Indeed, Baltimore mayor noted the significant role that the [LEOBR] played in the delay of the investigation . . .”).

The Maryland LEOBR has problematic provisions that are being repealed.⁶⁷ The State also could have revised it through a public sector labor statute as the LEOBR is not included in the Maryland Constitution.⁶⁸ The LEOBR prevented meaningful community oversight;⁶⁹ prevented punishing officers for brutality if the complaint was filed more than ninety days from the incident;⁷⁰ limited interrogations;⁷¹ and allowed removal of complaints from personnel files.⁷² All these clauses covered topics that would have to be bargained for in states without LEOBRs and decided by municipalities in states with better regulated police collective bargaining.⁷³ Each topic should be a municipal policy decision or management rights decision.⁷⁴

With LEOBRs, like with CBAs, police take advantage of their knowledge of how the criminal justice system works to shield themselves from its operation.⁷⁵ Federalism and the Tenth Amendment of the U.S. Constitution insulate LEOBRs from federal interference, including via DOJ consent decrees.⁷⁶ Some other states have LEOBRs even more protective than Maryland's.⁷⁷ Police unions come to power and then lobby for the legislative enactment of LEOBRs to entrench that power, insulating it from both bargaining

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67. See MD. CODE ANN., PUB. SAFETY §§ 3-101 to -113 (West 2021); see also H.B. 670, 2021 Leg. 442nd Sess. (Md. 2021) (repealing LEOBR).
 68. MD. CODE ANN., PUB. SAFETY §§ 3-101 to -113 (West 2021); see generally MD. CONST. (West, Westlaw through Nov. 2018 amendments).
 69. MD. CODE ANN., PUB. SAFETY § 3-104(b) (West 2021).
 70. *Id.* § 3-104(c)(2).
 71. See *id.* § 3-104(d)–(k).
 72. See *id.* § 3-110.
 73. See Hardaway, *supra* note 56, at 198–99.
 74. See *id.*
 75. Rushin, *supra* note 1, at 1211 (alluding to the taproot of extreme police exceptionalism).
 76. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of ‘Pattern or Practice’ Police Misconduct Reform* 374 (2012) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf> [<https://perma.cc/2SNM-UYGM>] (explaining federalism argument).
 77. Rushin, *supra* note 1, at 1209–10. The Delaware LEOBR bars municipalities from requiring officers to disclose their personal assets, providing protection from anticorruption measures, while California’s bars the use of polygraphs when interrogating officers. *Id.* at 1210. The Illinois LEOBR eliminates anonymous civilian complaints. *Id.*

and direct federal intervention.⁷⁸ While some Maryland legislators were working toward full repeal of the LEOBR, they acknowledged that this would leave intact protections established through collective bargaining.⁷⁹ The Maryland legislature must also address the more foundational arm of police union power—their unregulated collective bargaining capabilities—that lead to protections similar to those in the LEOBR.⁸⁰

B. Baltimore FOP's Current CBA

Public employees in Maryland, including police officers, are statutorily permitted to collectively bargain, defined as “good faith negotiations by authorized representatives of employees and their employer[.]”⁸¹ Baltimore police officers have designated the FOP as their bargaining representative, determining their employment contracts since 1966.⁸² The FOP negotiates with the city with the goals of first, “reaching an agreement about wages, hours, and other terms and conditions of employment” and second, creating a CBA by “incorporating the terms of the agreement in a written memorandum of understanding[.]”⁸³ Vague “other terms and conditions of employment” bleed into matters affecting officer discipline and policing reform over which cities bargain, permitting powerful unions to set the terms.⁸⁴

The current Baltimore CBA contains provisions that limit transparency, accountability, and reform.⁸⁵ The Baltimore FOP bargained for a CBA that requires the Internal Affairs Division (IAD) to provide accused officers with their “casebook materials” thirty

78. See Walter Olson, *Maryland Lawmakers' Task Force Urges Repeal of Police "Bill of Rights"*, CATO: CATO AT LIBERTY (Oct. 16, 2020, 1:14 PM), <https://www.cato.org/blog/maryland-legislative-task-force-recommends-repeal-police-bill-rights> [<https://perma.cc/ZD2P-PPUJ>].

79. *Id.*

80. See *infra* Section V.B.

81. MD. CODE ANN., STATE PERS. & PENS. § 3-101(d)(1) (West 2022).

82. *About Us*, BALT. CITY LODGE #3 FRATERNAL ORDER OF POLICE [hereinafter FOP *About Us*], <https://fop3.org/about-us/> [<https://perma.cc/EVY6-UCHZ>] (last visited Jan. 9, 2021).

83. MD. CODE ANN., STATE PERS. & PENS. § 3-101(d)(1)(i) (West 2022).

84. See *id.*; Fisk & Richardson, *supra* note 1, at 748–49.

85. See generally CITY OF BALT., MEMORANDUM OF UNDERSTANDING BETWEEN THE BALTIMORE CITY POLICE DEPARTMENT AND BALTIMORE CITY LODGE No. 3, FRATERNAL ORDER OF POLICE, INC. UNIT 1 (2018) [hereinafter CBA], [https://labor-commissioner.baltimorecity.gov/sites/default/files/labor_commissioner/attachments/FOP%20MOU%20Unit%20I%20\(FY%202019-2021\)%20notated%2012.19.18.pdf](https://labor-commissioner.baltimorecity.gov/sites/default/files/labor_commissioner/attachments/FOP%20MOU%20Unit%20I%20(FY%202019-2021)%20notated%2012.19.18.pdf) [<https://perma.cc/TX7G-J9LE>].

days prior to officer hearings for minor violations and forty-five days prior to hearings for major violations.⁸⁶ The CBA keeps disciplinary actions from the public eye, “except in unusual circumstances wherein the Department finds that announcement of the discipline is in the public interest.”⁸⁷ Individual officers can even remove information from the public record because “[i]f an employee requests expungement of a formal complaint *or other material from any file* of the employee pursuant to the [LEOBR], the complaint and/or material shall be expunged within sixty (60) days of the request.”⁸⁸ Employment grievances (transfers, suspensions, and terminations) are ultimately resolved through arbitration and the CBA provides methods for skipping other procedural steps.⁸⁹

There are reasons why police unions can be more successful than other government employee unions in negotiating limits on discipline.⁹⁰ During negotiations, cities make concessions to police unions in these areas because they cannot always afford to increase the wages and benefits of the officers being represented.⁹¹ The union trades wages for officer impunity, while the city trades away the constitutional rights of its constituents to maintain its budget.⁹² To limit the scope of collective bargaining statutes, courts and state labor relations boards have generally held that managerial prerogatives should not be subject to negotiation as so-called “conditions of employment.”⁹³ In practice, however, courts are deferential to public employee unions.⁹⁴ Only a handful of courts have examined whether disciplinary procedures in police departments are conditions of employment, subject to collective bargaining.⁹⁵

States must “amend labor laws to increase transparency and community participation in the development of police disciplinary procedures.”⁹⁶ Maryland should look to its existing public sector labor law, regulating the realm of education, in formulating a new statute to exclude from bargaining any policy matters relating to investigation and discipline of improper use of force or other

86. *Id.* at 23–24.

87. *Id.* at 26.

88. *Id.* (emphasis added).

89. *See id.* at 4, 79.

90. Rushin, *supra* note 1, at 1252–53.

91. *Id.* at 1216.

92. *See id.*

93. *Id.* at 1206.

94. *Id.*

95. *Id.*

96. *Id.* at 1199.

incidents where officers improperly harm members of the public.⁹⁷ Municipalities should not be allowed to bargain away public policy decisions that affect the constitutional rights of their constituents, block corrective discipline, and impede effective reform efforts.⁹⁸

IV. BLUE: BALTIMORE POLICE

Baltimore exemplifies high levels of both crime and police misconduct within the context of racial, economic, and cultural disparities.⁹⁹ The FOP represents brave officers in this difficult setting by negotiating CBAs and supporting favorable legislation, like the LEOBR.¹⁰⁰ Each shield problematic officers and block transparency and accountability to the communities they serve, the supervisors they report to, and the city that employs them.¹⁰¹ Provisions of both the CBA and the LEOBR impede city, state, and federal reform efforts.¹⁰²

A. *The FOP in Baltimore City*

Since 1966, Fraternal Order of Police Lodge #3 (the Union) has been the sole bargaining agent for police officers, police agents, flight officers, sergeants, and lieutenants in Baltimore.¹⁰³ As the Union says on its website:

[a]lthough the safety of our line officers is our number one concern, FOP Lodge #3 is also committed to expanding and protecting the rights and benefits of all our members as well as speaking out on issues that affect law enforcement in the City of Baltimore and State of Maryland.¹⁰⁴

97. See *infra* Part VI.

98. Hardaway, *supra* note 56, at 198–99.

99. Diane Bernard, *Report: Maryland Has Largest Black Prison Population in U.S.*, PUB. NEWS SERV. (Jan. 23, 2020), <https://www.publicnewsservice.org/2020-01-23/criminal-justice/report-maryland-has-largest-black-prison-population-in-u-s/a68966-1> [<https://perma.cc/QK9Y-FCHM>].

100. FOP *About Us*, *supra* note 82.

101. Fisk & Richardson, *supra* note 1, at 750 (“In the approximately twenty states with statutory LEOBORs, many of these protections exist as a matter of state law and thus even elimination of the police union or its contract would not immediately change the law unless the statute were repealed as well.”).

102. See *id.* at 737.

103. FOP *About Us*, *supra* note 82.

104. *Id.* (alteration in original).

The FOP represents around 5,000 dues-paying-officers of the Baltimore Police Department (BPD) who all swore an oath to protect and serve the citizens of Baltimore.¹⁰⁵

The President of the Union has expressed concerns regarding the 2017 DOJ Consent Decree.¹⁰⁶ While the union is not a party to the agreement, its members are obligated to execute the legal commitments therein.¹⁰⁷ However, the Union claims that its members are unaware of what they are accountable for under the Consent Decree and of what implementation should look like.¹⁰⁸ The Union alleged that “BPD commanders are themselves confused and conflicted about the need for the Consent Decree”¹⁰⁹ and that they “impart conflicting direction to their subordinates, which creates confusion for the officers who, in turn, have nowhere to go for clarification or explanation.”¹¹⁰

The Baltimore FOP claims it wants nothing more than transparency and accountability for the BPD, but it also claims that neither exist at the top of the department and the rank and file are the ones who suffer.¹¹¹ While many police unions intervene in structural reform litigation between the DOJ and the cities employing their officer-members, the Baltimore FOP took no such action.¹¹² Instead, the Union could rely on the principles of federalism, their CBA, and the State’s LEOBR statute, which would both be unconstitutional for the Federal government to alter or supersede.¹¹³ The federally enforced Consent Decree, between the BPD, the city, and the DOJ, skirted the issue of any of its requirements conflicting with the CBA and avoided the issue of altering the LEOBR altogether.¹¹⁴ For true

105. Michael T. Mancuso, Union President, *The Mismanagement of the Baltimore Police Department and Its Impact on Public Safety* 9 (2019), <https://fop3.org/wp-content/uploads/2019/10/Mismanagement-Report-October-2019-Web.pdf> [<https://perma.cc/JU7Z-9BUK>].

106. *See id.* at 6.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 11.

112. Hardaway, *supra* note 56, at 182; *see* United States v. Balt. Police Dep’t, 249 F. Supp. 3d 816 (D. Md. 2017); United States v. Balt. Police Dep’t, 282 F. Supp. 3d 897 (D. Md. 2017) (PACER search of court records showing no FOP motion to intervene).

113. Chanin, *supra* note 76, at 374 (“The federalism argument against pattern or practice reform is quite simple: Control over public safety is reserved by the Tenth Amendment to state and local governments.”).

114. *See* Consent Decree, United States v. Police Dep’t of Balt. City et. al., No. 17-cv-00099, at 87 (D. Md. 2017).

transparency and actual accountability state legislators must consider statutes concerning police union collective bargaining and LEOBRs.¹¹⁵

B. Freddie Gray

The 2015 death of Freddie Gray put the national spotlight on Baltimore and the BPD.¹¹⁶ Freddie Gray was arrested on the morning of April 12, 2015, for reasons that remain unclear, and died on April 19.¹¹⁷ During the trip to the police station, Freddie Gray suffered a fatal injury to his spinal cord.¹¹⁸ The van made unexplained stops before reaching the station, and it is still unknown what else happened during the trip.¹¹⁹ Public outcry and riots followed, bringing attention to Baltimore and federal intervention into its policing.¹²⁰

The state LEOBR allowed removal of any prior complaints against arresting officers, limiting any disciplinary or corrective action that could have prevented this tragic event.¹²¹ The LEOBR also imposed strict limits on any interrogations subsequent to or preceding the incident.¹²² “In Baltimore, and in other cities and counties across the country, police union contracts [also] contain provisions that impede the effective investigation of reported misconduct and shield officers who are in fact guilty of misconduct from meaningful discipline.”¹²³

While announcing the charges against the officers involved at a press conference, the State’s Attorney Marilyn Mosby explained that the “investigation found Gray suffered a fatal spinal injury because

115. See Fisk & Richardson, *supra* note 1, at 754–55.

116. David A. Graham, *The Mysterious Death of Freddie Gray*, ATLANTIC (Apr. 22, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/> [<https://perma.cc/N3TF-2G9U>] (“When the Baltimore man was arrested, he was alive and well. By the time he reached a police station, he couldn’t breathe or talk. What happened?”).

117. *See id.*

118. *Id.* (explaining that Mr. Gray was treated for fractured vertebrae and a crushed voice box, injuries doctors identified as indicative of severe car accidents).

119. *See id.*

120. *See id.*

121. See MD. CODE ANN., PUB. SAFETY § 3-110 (West 2021).

122. *See id.* § 3-104(d)–(k).

123. SAMUEL WALKER, THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICER’S BILL OF RIGHTS: IMPEDIMENTS TO ACCOUNTABILITY 1 (2015), <https://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf> [<https://perma.cc/5TCD-3RQP>].

he was not properly restrained in a police van.”¹²⁴ The officer driving the van was charged with second degree murder while the other officers were charged with involuntary manslaughter and assault.¹²⁵ Mosby also explained that “the initial arrest was illegal because it lacked probable cause.”¹²⁶ The Union claimed that none of the officers involved were responsible for Mr. Gray’s death.¹²⁷ The officers even filed a malicious prosecution case against Mosby, which the Fourth Circuit Court of Appeals found should have been dismissed by the federal district court.¹²⁸

After a mistrial was declared for the officers facing the most severe charges, the prosecutors dropped all remaining charges with zero convictions in the arrest and death of Freddie Gray.¹²⁹ Mosby stood by her decision to bring the charges, as the medical examiner’s office ruled the death a homicide, and accused the police investigators of sabotage.¹³⁰ In addition to the terrible loss experienced by the Gray family and the community, the city also suffered great losses.¹³¹ The state’s attorney’s office and the BPD, which bought riot gear and paid officers overtime in anticipation of protests, spent an estimated \$7.4 million on the trials.¹³² In a subsequent civil action the city of Baltimore settled with the Gray family for \$6.4 million.¹³³

C. Federal Intervention

Following the tragic death of Freddie Gray, the Mayor of Baltimore asked the Civil Rights Division of the U.S. DOJ to conduct

124. Ben Kamisar, *Police Union Pushes Back on Freddie Gray Findings*, THE HILL (May 1, 2015), <https://thehill.com/blogs/blog-briefing-room/news/240793-police-union-pushes-back-on-freddie-gray-findings> [https://perma.cc/447T-GBA8].

125. *Id.*

126. *Id.*

127. *Id.*

128. *See Nero v. Mosby*, 890 F.3d 106, 131 (4th Cir. 2018).

129. Rector, *supra* note 16.

130. Omar Jimenez, *Mosby Says She Pursued ‘Justice Over Convictions’ in Gray Case, Accuses Investigators of Malfeasance*, WBAL (July 27, 2016), <https://www.wbal.com/article/179236/2/mosby-says-she-pursued-justice-over-convictions-in-gray-case-accuses-investigators-of-malfeasance> [https://perma.cc/J24R-SQ87] (accusing “individual Baltimore police officers of undermining her case, by pursuing a parallel investigation, omitting important questions and creating notes with the goal of sabotaging the prosecution”).

131. *See* Rector, *supra* note 16.

132. *Id.*

133. *Id.* The CBA requires the City to provide counsel in a civil trial, to seek settlement, and to indemnify FOP unit member-defendants. CBA, *supra* note 85, at 22.

a pattern-or-practice investigation of BPD's police practices.¹³⁴ The DOJ recognized the challenges faced by police officers in Baltimore and other communities around the country.¹³⁵ Every day police officers risk their lives to uphold the law and keep communities safe.¹³⁶ The DOJ investigation concluded, however, that "there is reasonable cause to believe that BPD engages in a pattern or practice of conduct that violates the Constitution or federal law."¹³⁷ The DOJ identified systemic deficiencies, including a failure to hold officers accountable for misconduct.¹³⁸ The BPD "fails to provide information about officer misconduct in a transparent manner or receive input on the accountability process from the community it serves."¹³⁹ The DOJ also found "a cultural resistance to accountability[,]" discouraging officers from reporting the misconduct of their fellows and hampering supervisors in sustaining allegations.¹⁴⁰

The investigation report discussed the effects of the LEOBR on the issues with the BPD practices.¹⁴¹ The BPD risks compromising investigations by providing accused officers with a detailed notice describing the alleged misconduct before any investigation occurs.¹⁴² The LEOBR requires officers to receive notice of allegations and five days to obtain counsel prior to questioning.¹⁴³ In practice, the BPD frequently notifies officers almost immediately after receiving a complaint.¹⁴⁴ LEOBR-prescribed waiting periods between incidents and the questioning of officers involved may impede effective investigations.¹⁴⁵ Similar waiting periods are not afforded to members of the public who are involved in or witness to an

134. Complaint ¶ 20, *United States v. Balt. Police Dep't*, No. 17CV00099, 2017 WL 6604576 (D. Md. Jan. 12, 2017).

135. CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/XBS7-AS9X>].

136. *Id.*

137. *Id.*

138. *Id.* Systemic failures include: "discouraging individuals from filing complaints; poor investigative techniques; unnecessary delays; minimal review and supervision; and a persistent failure to discipline officers for misconduct, even in cases of repeated or egregious violations." *Id.* at 139.

139. *Id.*

140. *Id.*

141. *See id.* at 144–47.

142. *Id.* at 144.

143. *Id.*

144. *Id.*

145. *Id.* at 144 n.129.

incident.¹⁴⁶ BPD often required witnesses to be interviewed immediately, even while the witness's friend or family member was being taken to the hospital as a result of an incident.¹⁴⁷

To discipline an officer for misconduct, the LEOBR requires the department to complete the internal investigation and bring charges within one year.¹⁴⁸ Officers facing allegations of misconduct are granted powers by the LEOBR and the CBA to shape the membership of the trial board that will hear their case in ways that undermine accountability.¹⁴⁹ Each board must include one officer of the same rank as the accused officer, and the accused has the right to reject assigned Board members three times through the use of "peremptory strikes."¹⁵⁰ The LEOBR was amended in early 2016 to authorize jurisdictions to allow up to two civilians to serve on trial boards if permitted by local law or if negotiated through collective bargaining with the police union.¹⁵¹ The BPD still refuses to allow any civilians to serve on trial boards.¹⁵²

Arduous litigation between the city and the DOJ followed the latter's investigation.¹⁵³ The result was a Consent Decree between the city, the BPD, and the DOJ with the goal of reforming policing in Baltimore.¹⁵⁴ The purpose of the decree was to "ensure that the City and BPD protect individuals' statutory and constitutional rights, treat individuals with dignity and respect, and promote public safety in a manner that is fiscally responsible and responsive to community priorities."¹⁵⁵ The agreement was intended to improve community relations, to increase "transparency and public input, improve oversight and accountability systems to ensure that the Department will collect and analyze data on officer activities, impose discipline

146. *Id.* (exemplifying police exceptionalism).

147. *Id.*

148. *Id.* at 145.

149. *Id.* at 146 (another example of police exceptionalism).

150. *Id.*

151. *Id.* at 147.

152. *Id.*

153. *See* *United States v. Balt. Police Dep't*, 249 F. Supp. 3d 816, 817 (D. Md. 2017) (entering into a consent decree to resolve the litigation between parties); *see also* *United States v. Balt. Police Dep't*, 282 F. Supp. 3d 897, 898–99 (D. Md. 2017) (appointing an independent monitor pursuant to the consent decree in order to evaluate and report on defendant's compliance).

154. *See* Consent Decree, *Balt. Police Dep't*, 249 F. Supp. 3d 816 (No. 17-99), ECF No. 2-2 (the police union was not a party to the agreement).

155. *Id.* at 1.

for misconduct fairly and efficiently, and enhance support for officers[.]”¹⁵⁶

The theoretical and practical shortcomings of the decree are due to a lack of consideration for the police collective bargaining process and an inability to supersede the LEOBR.¹⁵⁷ The agreement did not affect collective bargaining rights or state law.¹⁵⁸ It states, “[i]f the City and BPD are unable to eliminate conflicts between the provisions of this Agreement and law(s), ordinance(s), or collecting bargaining provision(s), the City and BPD will comply with the Agreement to the extent permissible.”¹⁵⁹ To put it simply, the Consent Decree has only been followed to the extent permitted by the CBA and the LEOBR.¹⁶⁰

V. LEGISLATIVE REFORM EFFORTS

The 2020 killings of George Floyd and Breonna Taylor sparked nationwide protests that in turn renewed legislatures’ attention to policing.¹⁶¹ Responsive cities are beginning to address CBA clauses that block accountability, and federal courts are upholding the changes against union challenges.¹⁶² Black Lives Matter supporters are beginning to receive some answers to cries that such clauses “too often shield officers accused of lethal misconduct from accountability.”¹⁶³ CBA changes are necessary for progress, but insufficient in the twenty states with added protection of LEOBRs.¹⁶⁴ While protesting has helped spark some change, it is up to the state legislators to further improve the systems that continue to allow long-standing, seriously disturbing police practices in the United States.¹⁶⁵

156. *Id.*

157. *See id.* at 187. The Tenth Amendment precludes direct federal override of these state laws. *See* U.S. CONST. amend. X. While the federal government could provide grants, other monetary incentives, or access incentives to induce states to adjust their own statutes and regulate collective bargaining, this would still require legislative action at the state level. *See* *New York v. United States*, 505 U.S. 144 (1992).

158. *See* Consent Decree at 187, *Balt. Police Dep’t*, 249 F. Supp. 3d 816 (No. 17-99), ECF No. 2-2.

159. *Id.*

160. *See id.*

161. Kullgren & Iafolla, *supra* note 58.

162. *Id.* (“[C]ollective bargaining has never been recognized as a fundamental constitutional right protected by substantive due process.”).

163. *Id.*

164. *Id.*

165. *See infra* Parts VI–VII.

A. Other Jurisdictions

Washington, D.C. is one notable example of recent litigation involving police union reform.¹⁶⁶ The U.S. District Court in D.C. dismissed an FOP challenge to a law that barred the union from bargaining over police discipline.¹⁶⁷ The Union's equal protection claim failed under the lowest level of constitutional scrutiny as the law is "rationally related to its interest in promoting police accountability."¹⁶⁸ One side of the debate views this as a "blueprint" for police departments nationwide, while the other fears the negative consequences of giving city administrators unilateral control over police discipline "without any input from employees."¹⁶⁹

Oregon and Connecticut have each passed measures eliminating CBA provisions related to discipline.¹⁷⁰ While Oregon's remains unchallenged, a federal judge in Connecticut upheld that state's law which nullifies CBA restrictions on the release of officer disciplinary records.¹⁷¹ Portland has passed a measure giving "an independent commission authority to discipline and even fire officers."¹⁷² A federal judge in New York upheld a New York City plan to make a public database of "police, firefighter, and correctional officer discipline."¹⁷³ The city plan was possible because New York State repealed a ban on the release of personnel records.¹⁷⁴

Nationwide, calls for reform are being answered with rules subjecting police officers to similar repercussions as other public employees accused of misconduct.¹⁷⁵ Courts are signaling that police will have a better chance of resisting these changes through the political process than through litigation.¹⁷⁶ Well-funded police unions, however, are more comfortable with political resistance than risky appellate litigation.¹⁷⁷ Union appeals could lead to a federal

166. See Kullgren & Iafolla, *supra* note 58.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (exemplifying the goal of uniform accountability throughout the public sector).

176. *Id.*

177. See Fisk & Richardson, *supra* note 1, at 756 (explaining that unions in large departments "control a multimillion-dollar budget amassed from union dues [which] gives them enormous power to influence public policy because they can donate a portion of these funds to politicians viewed as friendly to their interests").

Circuit Court ruling that the Constitution does not protect CBA provisions, establishing the precedent that “any other law nullifying a contractual protection would survive constitutional scrutiny[.]”¹⁷⁸

B. Maryland

The Maryland House and Senate have been working on legislation to remove public complaints from inaccessible “personnel records” and to make records of past complaints publicly available.¹⁷⁹ Such increased transparency will greatly change the course of events surrounding tragic interactions with police, as problematic officers may not be in those situations to begin with or may be more susceptible to justice afterwards.¹⁸⁰ Democratic State Senator Jill P. Carter of Baltimore pushed to repeal the LEOBR, strengthen discipline, and increase transparency.¹⁸¹

A Baltimore FOP attorney claimed that changing the LEOBR would harm officers and their right to due process and would not address the real issue of “mismanagement and incompetency” in the BPD.¹⁸² The FOP offered a similar explanation for the widespread corruption of the Gun Trace Task Force, postdating the Consent Decree and resulting in twelve officers being convicted in federal court.¹⁸³ The FOP conceded, however, that even if the LEOBR is repealed, “officers would still have access to due process protections under the 14th Amendment[.]”¹⁸⁴

The Maryland Police Accountability Act of 2021, a title under which two important bills were passed, is the state’s legislative attempt to seize the reformative moment.¹⁸⁵ The committee charged with working on the legislation listed “eight areas of focus: disclosure of records, use of force, police discipline, independent

178. Kullgren & Iafolla, *supra* note 58.

179. S. 1029, 2020 Leg. (Md. 2020); H.D. 1221, 2020 Leg. (Md. 2020).

180. *See supra* notes 51–53, 117–24 and accompanying text (George Floyd, Breonna Taylor, and Freddie Gray, respectively).

181. Barker, *supra* note 19.

182. *Id.*

183. *Id.*

184. Hannah Gaskill, *Attorney for Police Unions Slams Baltimore Commissioner Over Law Enforcement Officers’ Bill of Rights*, MD. MATTERS (Aug. 25, 2020), <https://www.marylandmatters.org/2020/08/25/attorney-for-police-unions-slams-baltimore-commissioner-over-law-enforcement-officers-bill-of-rights/> [<https://perma.cc/Q3GG-DUUN>].

185. *Id.*; *see also* S.B. 178, 2021 Leg. (Md. 2021) (“Anton’s Law”); H.B. 670, 2021 Leg. (Md. 2021) (effectively repealing the LEOBR as of July 1, 2022).

investigations, demilitarization, liability caps, training, and duty to intervene.”¹⁸⁶

It still might be challenging to pass police reform efforts, as “[s]even of the 14 lawmakers picked by House Speaker Jones to improve police accountability in Maryland have accepted money from police unions[.]”¹⁸⁷ Public records, available at the State Board of Elections, show more than \$20,000 contributed by police unions to the Workgroup to Address Police Reform and Accountability in Maryland.¹⁸⁸ This exemplifies the unions’ normal approach of politically resisting reforms that affect their members.¹⁸⁹ The Workgroup to Address Police Reform nevertheless voted to recommend a full repeal of the LEOBR.¹⁹⁰ Its report states:

There have been demands made of the legislature on the issue of police accountability for many years that have been met with tremendous resistance from elected leaders. In the midst of the social unrest of the past few months, several demands have emerged as a consensus among those of us that have been pushing for true police accountability. Chief among these demands are changes to the Maryland Public Information Act that would disclose police investigatory records, and repeal of the Law Enforcement Officer Bill of Rights, which essentially allows police to police themselves.¹⁹¹

186. Barker, *supra* note 19 (“duty to intervene” refers to an officer’s responsibility to step in and stop excessive force by a colleague).

187. Ian Round, *FOP Contributions to Legislative Group Raise Doubts About Its Effectiveness*, BALT. BREW (June 29, 2020), <https://baltimorebrew.com/2020/06/29/fop-contributions-to-legislative-group-raise-doubts-about-its-effectiveness/> [<https://perma.cc/D4CB-KCMS>].

188. *Id.*

189. *See id.*

190. David Collins, *Maryland Police Reform Workgroup Recommending Full Repeal of LEOBR*, WBAL (Oct. 15, 2020), <https://www.wbal.com/article/maryland-police-reform-workgroup-recommends-full-repeal-of-law-enforcement-officers-bill-of-rights-leobr/34383913#> [<https://perma.cc/5YYT-MCFM>].

191. Meredith Curtis Goode, Md. Coalition for Justice and Police Accountability, *Repeal of LEOBR, Reform of MPIA, Limit to Use of Force Necessary to Ensure Police Accountability*, ACLU OF MD. (Oct. 15, 2020) (quoting the Md. Coalition for Justice and Police Accountability), <https://www.aclu-md.org/en/press-releases/repeal-leobr-reform-mpia-limit-use-force-necessary-ensure-police-accountability> [<https://perma.cc/M48R-QZD5>].

While these demands and legislation that stemmed from them are essential steps along the path to progressive policing reform, they fail to account for the full gravity of the issue.¹⁹²

“Anton’s Law,” which for the most part makes Internal Affairs (IA) records publicly available as of October 2021, is a necessary step toward increased transparency and accountability.¹⁹³ This bill also requires the disclosure of certain IA records to prosecutors.¹⁹⁴ Further, it limits the execution of “no-knock” warrants to between the hours of 8:00 AM and 7:00 PM, within ten days from judicial approval.¹⁹⁵

More relevant to the current discussion, House Bill 670 is the legislative measure that effectively repeals the LEOBR as of July 1, 2022.¹⁹⁶ This bill also removes the requirement that IA complaints be notarized.¹⁹⁷ Furthermore, it establishes Police Accountability Boards in every county, makes the trial boards public in these matters and requires members that include a civilian, an Administrative Law Judge, and an officer of equal rank to the officer on trial.¹⁹⁸ Perhaps most importantly, the bill will allow for suspension and even termination of problematic officers.¹⁹⁹ This act has no effect, however, on current CBAs and even goes as far as “prohibiting a law enforcement agency from negating or altering certain requirements established in accordance with certain provisions of law through collective bargaining[.]”²⁰⁰

VI. RECOMMENDATIONS

If the other prong of police union power remains unaltered, namely their ability to collectively bargain protective CBA clauses,²⁰¹ then even full repeal of the LEOBR will not provide transparency, “true police accountability,” or lasting reform.²⁰² States must amend public sector labor laws to ensure that all avenues of police union

192. See Ankney, *supra* note 14.

193. See S.B. 178, 2021 Leg. (Md. 2021).

194. *Id.*

195. *Id.*

196. See H.B. 670, 2021 Leg. (Md. 2021).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. See Rushin, *supra* note 1, at 1213.

202. Compare Rushin, *supra* note 1, at 1213 (calling for state labor law amendments as necessary to increase accountability), with Goode, *supra* note 191 (urging changes to several other pieces of legislation unrelated to labor law).

impediments are blocked.²⁰³ Amendments or enactments would ensure progress by prohibiting police unions from bargaining over matters that affect either the constitutional rights of individual citizens or the public policy obligations of municipalities.²⁰⁴

Maryland should pass a statute to “exempt [police] policy determinations from the collective bargaining process[.]”²⁰⁵ An existing State Board is already “charged by statute to determine and implement” educational policy, thereby keeping those matters off the bargaining table.²⁰⁶ A new Labor Board, designated for police negotiability issues, should be charged with determining which policy decisions cannot be bargained away with police unions.²⁰⁷ Police “use of force” issues, which should include ways to cover up incidents and impede investigations, were an area of focus for the Maryland legislative committee and would be a prime candidate for policy matters to be excluded from bargaining.²⁰⁸

In the realm of education, the State Board is already required by statute to “develop a balancing test to determine whether the impact of the matter on the school system as a whole outweighs the direct impact on the teachers or employees.”²⁰⁹ A similar balancing test should be applied to determine whether matters should be excluded from police union negotiations.²¹⁰ Reforms to policing systems, and the gravely impacted communities they serve, should not be held up by assertions of officer protections so clearly outweighed in the current context.²¹¹

States that allow police union collective bargaining could legislate policy exclusions or a balancing test either specifically for those unions, or generally for the entire public sector.²¹² Police unions

203. See Rushin, *supra* note 1, at 1244.

204. See Hardaway, *supra* note 56, at 194–95.

205. See *Montgomery Cnty. Educ. Ass’n, Inc. v. Bd. of Educ. of Montgomery Cnty.*, 534 A.2d 980, 985 (Md. 1987) (discussing longstanding exemption of “educational policy determinations”).

206. *Id.*

207. See, e.g., MD. CODE ANN., STATE PERS. & PENS. §§ 3-201 to -209 (West 2021) (establishing and describing the State Labor Relations Board).

208. See Goode, *supra* note 191.

209. MD. CODE ANN., EDUC. § 6-408(c)(5)(vi)(2) (West 2021).

210. Compare *id.* (explaining the use of a balancing test to resolve labor disputes in other contexts), with Hardaway, *supra* note 56, at 194–95 (arguing that police labor rights should not outweigh essential public policy decisions and necessary police reform efforts).

211. See Hardaway, *supra* note 56, at 197–98.

212. See Kullgren & Iafolla, *supra* note 58.

could be treated differently than other public sector unions but, even if they were not, other public sector unions would not be in violation of generally applicable laws.²¹³ The D.C. law granting city administrators the authority to unilaterally rewrite disciplinary procedures for police officers may seem like a dangerous precedent for the public sector in general.²¹⁴ But unique standards for police are not a new concept and their CBAs include protections rarely found in other public sector CBAs.²¹⁵ Moreover, other public sector employees are not protected by statutory LEOBRs.²¹⁶ Unique standards for police are reasonable means to achieve necessary ends, but general laws regulating bargaining over disciplinary procedures related to policy determinations and individual constitutional rights would be unlikely to affect other public sector CBAs.²¹⁷

Municipalities should not be able to bargain away “managerial” public policy decisions, nor should they be statutorily stripped of the obligations to make them.²¹⁸ Managerial functions should be excluded from both CBAs and LEOBRs.²¹⁹ Maryland was the first state in the nation to enact a LEOBR in 1974, and is now the first state to repeal it;²²⁰ however, even without this law on the books, new statutes must remove policy decisions from the CBA prong of police union power.²²¹ These changes would light the progressive path for other states trudging through police union impediments to reform.²²²

Addressing both conflated shields to progress, police union CBAs and LEOBRs, is necessary for any attempt at policing reform.²²³ Repealing LEOBRs is not sufficient.²²⁴ States must also ensure that the exact same provisions are not collectively bargained for by police unions.²²⁵

213. *See id.*

214. *Id.*

215. *Id.*

216. *See, e.g.,* MD. CODE ANN., PUB. SAFETY § 3-101 (West 2021).

217. *See* Kullgren & Iafolla, *supra* note 58.

218. *See* Hardaway, *supra* note 56, at 198–99.

219. *See id.*

220. Bryn Stole & Pamela Wood, *Maryland Legislators Pass Landmark Police Reform Package into Law, Overriding Gov. Hogan's Vetoes*, BALT. SUN (Apr. 10, 2021), <https://www.baltimoresun.com/politics/bs-md-pol-saturday-session-20210410-eyfrbxrlevhrvohrm43lbntvyq-story.html> [<https://perma.cc/28TP-PCKD>].

221. *See* Fisk & Richardson, *supra* note 1, at 750.

222. *See supra* text accompanying notes 54–60.

223. *See* Fisk & Richardson, *supra* note 1, at 750.

224. *Id.*

225. *See id.*

VII. CONCLUSION

This Comment is not meant to show the statutory landscape in Maryland or the social context in Baltimore to be comparatively worse than others but is intended to explain the legislative action required for progressive policing reform in a difficult context.²²⁶ The city of Baltimore has a troubled story filled with racial tensions and police misconduct,²²⁷ but growing awareness and nationwide protests provide an opportunity for a new chapter in the narrative.²²⁸

Maryland legislators are taking strenuous steps and making the difficult decisions required to reform policing and quell systemic racism.²²⁹ Progressive goals of the DOJ Consent Decree will be better served by repealing the State LEOBR while also keeping issues related to public policy decisions and individual constitutional rights out of police CBAs.²³⁰ The Maryland legislature, and other legislatures nationwide, must address both prongs in any attempt at policing reform.²³¹ Now is the time to overcome statutory and contractual impediments to true accountability, to real transparency, and to lasting reform.²³²

Any state with a LEOBR must address it in any attempt at progressive policing reform; however, these legislatures cannot leave untouched the state public sector labor laws that allow police unions to collectively bargain clauses similar to LEOBRs into their CBAs.²³³ These laws should ensure uniform accountability across the public sector, as opposed to extreme police “exceptionalism,” and should keep policy decisions in the hands of representative leaders.²³⁴ Police unions will undoubtedly push back against reforms affecting their contractual or statutory protections.²³⁵ The voices of America are begging for change to the systems of unconstitutional policing that allow an exorbitant amount of officer involved fatalities.²³⁶ To

226. See *supra* Parts V.B.–VI.

227. See Woods & Soderberg, *supra* note 5.

228. See Kullgren & Iafolla, *supra* note 58.

229. See Goode, *supra* note 191.

230. See *supra* text accompanying notes 157–60.

231. See *supra* text accompanying notes 54–62.

232. See *supra* text accompanying notes 157–65.

233. See Fisk & Richardson, *supra* note 1, at 750.

234. See *supra* notes 26, 64, 65, 75, 146, 149 and accompanying text.

235. See Bies, *supra* note 44, at 123–24.

236. Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> [<https://perma.cc/V36H-HH3W>].

answer these cries, and ensure uniform accountability in the public sector, state legislatures must address both contractual and statutory enactments of police union power.²³⁷

237. *See supra* Part VI.