

**Addressing the Disease, Not the Symptoms:
Lessons for Police Accountability from New Haven**

Wally Hilke

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INTRODUCTION

On March 15, 2015, New Haven Police Officer Josh Smereczynsky slammed a handcuffed, black, 15-year-old girl to the ground at the city's St. Patrick's Day parade.¹ According to the girl's grandmother, the arrested girl had been attacked in a nearby restaurant by an 18-year-old girl who had been threatening her for several months.² The images below show the officer's slam, and the text below each image tracks the time from the start of the video:³



1 second: NHPD Officer Josh Smereczynsky begins to slam the girl to the ground



2 seconds: mid-slam

¹ Ryan Flynn, *New Haven police officer cleared following probe into teen takedown arrest, rallies held at City Hall*, NEW HAVEN REGISTER (Mar. 27, 2015), <http://www.nhregister.com/article/NH/20150327/NEWS/150329555>; Paul Bass, *Video Captures Cop Slamming Girl to Ground*, NEW HAVEN INDEPENDENT (Mar. 18, 2015), http://www.newhavenindependent.org/index.php/archives/entry/st_patricks_arrest_body_slam/.

² Bass, *supra* note 1.

³ Young Roog, *Police slam 15 year old female!!! Saint Patrick's Day Parade New Haven CT.!*, YOUTUBE (Feb. 10, 2009), <https://www.youtube.com/watch?v=THmLeyzmPo8>.



**5 seconds: a second officer
arrives on the scene**



**8 seconds: three additional
officers surround the girl**

The girl was brought to jail, given a court date, and released.⁴ Several days after the incident, Police Chief Dean Esserman assigned the officer to desk duty following a meeting between community members and Mayor Toni Harp.⁵ The incident was referred to the New Haven Police Department's Internal Affairs department.⁶ On March 27, twelve days after the incident, the officer was cleared of all wrongdoing.⁷

The officer found a knife in the handcuffed girl's bag.⁸ The presence of the weapon was used to justify his actions. Chief Esserman told the press: "When the officer observed a weapon in the girl's bag, he took her down in a sweep move while she was handcuffed because he was concerned for his safety ... He was trained to do that."⁹

⁴ Bass, *supra* note 1.

⁵ Randall Beach, *New Haven police officer who arrested teen put on desk duty after City Hall protest*, NEW HAVEN REGISTER (Mar. 24, 2015), <http://www.nhregister.com/article/NH/20150324/NEWS/150329749>.

⁶ *Id.*

⁷ Flynn, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

On March 27, Chief Esserman and Mayor Harp held a joint press conference to announce the decision by the Internal Affairs department, which was interrupted by protesting police officers.¹⁰ The image below shows police officers and protesters massed in City Hall.¹¹



Although the involved officer had been cleared of all wrongdoing, to police union president Louis Cavaliere Jr. the act of removing the officer to desk duty was itself a betrayal. In one statement, Cavaliere called the decision “a cowardly move.”¹² Cavaliere claimed that Chief Esserman had promised the department that the officer would remain on duty and that the situation would not “become political”, only to reverse course as a result of community

¹⁰ Paul Bass, *Officer Cleared; Protesters Crash Cops’ Protest*, NEW HAVEN INDEPENDENT (Mar. 27, 2015), http://www.newhavenindependent.org/index.php/archives/entry/officer_exonerated_protestors_crash_cops_protest/.

¹¹ WTNH News 8, *New Haven cop exonerated; hundreds protest outside City Hall*, YOUTUBE (Mar. 27, 2015), <https://www.youtube.com/watch?v=7clYZ1cRLBA>.

¹² Beach, *supra* note 5.

pressure.¹³ At the protest, he said, “We really felt we were abandoned on this” and “we feel totally disrespected.”¹⁴

What sense can be made of the officer’s actions? It should come as no surprise that Officer Smereczynsky claimed he feared for his safety. It would have been foolish to admit any improper motive for his actions. But the facts of the incident call his explanation into question. The girl was already in handcuffs and there were several officers within shouting distance. Within five seconds of slamming the girl to the ground, nearby officers were able to rush to Josh Smereczynski’s aid. For the officer to believe that his safety was at risk, he must have thought that the girl could somehow grab the knife from her purse while handcuffed, and then stab the officer by twisting her torso and arms (she would have needed to wield the knife with her hands tied together behind her back.) The officer must also have believed that she could have done so quickly, or that she would pose a danger even if other officers assisted him, since he could have obtained assistance from other officers within seconds of the takedown.

What else might have motivated the officer’s actions? One possibility is that the officer believed that he had a right to forcefully complete the arrest of a struggling detainee, whether or not de-escalating alternatives were available. Certainly, some community members seem to believe that the girl brought the takedown upon herself. One pro-Smereczynsky protester at the March 27 protest held a sign reading: “Keep Calm – Don’t Resist – Teach Our Children.”¹⁵ This sign contains two messages: the girl’s resistance was responsible for the officer’s actions, and her guardians and (black) community are to blame for not teaching her better. One commenter on a New Haven Independent article wrote, “By the stance of her legs and her trying to drop her

¹³ *Id.*

¹⁴ WTNH News 8, *supra* note 11.

¹⁵ *Id.*

center of gravity the officer was justified by taking her to ground [sic] ... Don't resist arrest on concrete or asphalt it will never work out well for you.”¹⁶

Another possibility is that the officer believed that force was necessary to maintain respect and compliance. Some believe that the “thin blue line” between order and chaos relies on the public’s respect for police and that force and threats of force must be used to maintain that respect. On this account, the officer’s objective was not technical – effectively completing an arrest – but instead aimed at projecting an image of the police as strong and dangerous authority figures. More than two out of three police officers report that their fellow officers at least occasionally meet verbal abuse with physical force: A National Institute of Justice research brief showed that 68% of police officers believed that their fellow officers used physical force in response to verbal abuse with at least “seldom” frequency, and 15% believed that their fellow officers did so “sometimes, often, or always.”¹⁷ Other research has shown that black young people sometimes fear that their actions towards police may be perceived as disrespectful and met with arrest or violence.¹⁸ Comments on the Independent article also focus on the girl’s lack of respect. One reads, “Give me a break, you should be criticizing [the girl’s] parents for allowing her to have no respect and behaving the way she does. That’s pathetic.”¹⁹ Another comment: “If she wants to act tough and challenge and resist the officer and behave like a criminal there you go little girl so you’re grown enough for the consequences grow up.”²⁰

¹⁶ Bass, *supra* note 1.

¹⁷ DAVID WEISBURD ET. AL, POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY (2000), <https://www.ncjrs.gov/pdffiles1/nij/181312.pdf>.

¹⁸ See Craig B. Futterman et al., *Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities*, U. CHI LEGAL FORUM 125, 133 (2016): “The kids we work with range from fourteen- to eighteen-years-old. For some, being stopped [by police] is ‘an everyday thing.’ For others, it is a relatively infrequent occurrence. For all, it is an ever-present possibility. There is scarcely a moment they are out in the city when they are not alert to that possibility. It pervades their daily existence. For them, stops are at once utterly prosaic—a fact of life ‘like the weather’—and fraught with danger.”

¹⁹ Bass, *supra* note 1.

²⁰ *Id.*

A final possibility is that the officer did not want to be seen as unable to overcome a fifteen-year-old girl with his own strength. Although backup was nearby, he chose not to call for help. The officer might have imagined the aftermath at headquarters, his colleagues chuckling about his inability to control a little girl by himself. The prospect of calling for assistance may have threatened the officer's reputation, self-esteem, and sense of masculinity.

It is impossible to know what motivated Josh Smereczynsky's decision to throw a handcuffed fifteen-year-old girl to the ground. But arguments about the appropriateness of his actions reveal an underlying debate about the role that police should play. Professor Ian Loader has described policing as "an essentially contested set of practices whose role is itself in need of public deliberation."²¹ The above comments from news coverage of the incident demonstrate that some people believe that police have a responsibility to use violence to maintain respect for the law, or that failing to submit calmly to arrest is itself a justification for violence. On the opposite end of the spectrum, some claim that police impose second-class citizenship upon poor people and people of color, and that dramatic changes are needed to ensure equality.²² Much of the discussion comes down to setting the terms of debate: for example, some pro-Smereczynsky commenters accused the girl's supporters of seeking to cause racial tension despite a lack of evidence of racism.²³

Recent articles on police accountability have also focused on seemingly excessive disciplinary protections for police officers. Delay provisions allowing officers to wait up to a week before answering questions after shooting people – creating the risk that officers will

²¹ Ian Loader, *Democracy, Justice and the Limits Of Policing: Rethinking Police Accountability*, 3 SOCIAL AND LEGAL STUDIES 521, 521 (1994).

²² See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* (3rd ed. 2015).

²³ One commenter wrote, "Let's just deal with the facts here and not attribute racism to a cop where it isn't justified. That does nothing but create totally unnecessary racial division and disrespect for police officers." Bass, *supra* note 1.

coordinate a cover-up, as occurred in the recent police shooting of Laquan McDonald in Chicago – have been criticized by these articles.²⁴ Although there are reasons to be concerned about incremental changes insulating police officers from discipline, this paper suggests that the greater obstacles lie in cumbersome disciplinary proceedings that, at least in Connecticut, predate collective bargaining by police officers.

This Note deals with an urgent legal puzzle: why, and how, did the events described above happen? In this instance, the police accountability process never got off the ground; any possibility of official reprimand or punishment was effectively foreclosed when the police department's Internal Affairs department decided no wrongdoing had taken place. This decision, in turn, was influenced by the New Haven police union contract, which in turn was enabled by a Connecticut law requiring cities to negotiate with public sector unions.

My thesis is that three interrelated factors can account for the speedy vindication of Josh Smereczynsky. The first is collective bargaining for police officers. Because police unions bargain for working conditions and compensation, any changes to work assignments, accountability procedures, pension payments, or overtime allocation are all negotiated at the same table. Collective bargaining entrenches policies and practices that insulate police officers from accountability. Former New Haven Mayor John DeStefano has referred to this system as a “split the baby” environment.²⁵ Second, process-intensive police discipline procedures, which predate police unionization in New Haven, increase the costs and difficulty of punishing officer misconduct. Finally, the system of police compensation motivates police officers to resist work

²⁴ See, e.g., Aziz Hun & Richard McAdams, *Litigating the Blue Wall of Silence*, U. CHI. LEGAL FORUM (2016); Kevin Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bill of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005). On the collective cover-up of the Laquan McDonald shooting, see Ben Austen, *Chicago After Laquan McDonald*, N.Y. TIMES (Apr. 20, 2016), http://www.nytimes.com/2016/04/24/magazine/chicago-after-laquan-mcdonald.html?_r=0.

²⁵ Interview with John DeStefano, former mayor, City of New Haven, in New Haven, CT (Dec. 15, 2016) (on file with author).

rule changes. Overtime and extra duty assignments are the most reliable way for police officers to increase their compensation, incentivizing police officers to resist changes that might threaten their “share” of overtime. Additionally, the police pension constitutes a valuable benefit that officers can only realize if they are able to remain employed by the New Haven Police Department for a sufficient number of years. A cumbersome police discipline process with appeals procedures protects police officers from being fired and increases the likelihood that officers will be able to collect their valuable pensions, which make up a substantial part of their compensation.²⁶

Part I analyzes the effects of police unionization on police accountability, reviewing the Municipal Employee Relations Act, a 1965 statute requiring Connecticut cities to bargain with public sector unions. This Part also reviews the development of protections for police officers in subsequent police union contracts. Part II looks beyond unionization to analyze other laws and institutions that increase the difficulty of disciplining police officer misconduct. Part III reviews certain features of police compensation that incentivize police officers to resist oversight, discipline, and work rule changes. Part IV presents two brief case studies of city-police contract negotiations in New Haven, fleshing out the arguments of this essay. The Note concludes with reflections on the relationship between municipal employee bargaining, economic and accountability provisions in the New Haven police contract, and the solidarity shown by New Haven police officers protesting Josh Smereczynsky’s assignment to desk duty. Specifically, proponents of police reform should consider whether they can muster enough consistent and

²⁶ There are many other pertinent factors not discussed in this paper. Organizational culture is a prominent omission; within the scope of my research, I was not able to gain enough insight into the unique culture of the New Haven Police Department to sufficiently discuss the issue. *See, e.g.,* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 454 (2004): “The primary defect in [conventional explanations of police violence] is that they view police misconduct as resulting from factual and moral judgments made by officers functioning merely as individuals, rather than as part of a distinctive and influential organizational culture.”

focused support to dislodge deep-rooted obstacles to police accountability. If reformers cannot overcome anticipated levels of resistance, they should consider aiming for harm reduction and reinvestment instead of trying to change the character of policing practices.

I. POLICE UNIONIZATION INCREASED POLICE OFFICER INDEPENDENCE AND DECREASED ACCOUNTABILITY

This Part begins by reviewing the legislation that required Connecticut cities to bargain with public sector unions, including police unions. Several features of the legislation allowed police officers to take a leading role in setting working conditions and accountability procedures; in particular, the use of arbitration to decide on working conditions limited the ability of the city to deviate from common disciplinary protections. Next, this Part reviews the development of accountability protections in the past fifty years of police union contracts. Because bargaining is essentially a cumulative process, police officers have been able to increase their insulation from discipline over time. Finally, the Part reviews changes favorable to the City. Although the City has bargained for some favorable provisions over time, New Haven negotiators are forced to “buy” favorable improvements with concessions to the police union, due to the required bargaining process and the “stickiness” of existing contractual provisions.

A. Enabling Legislation: The 1965 Municipal Employee Relations Act

The Municipal Employee Relations Act, passed in 1965, required cities in Connecticut to negotiate with public sector unions.²⁷ Two years later, in 1967, the City of New Haven would sign its first contract with the New Haven Police Union. A brief review of the Act provides necessary context for understanding police union bargaining.

²⁷ Conn. Gen. Stat. Ann. § 7-467 - §7-477 (West).

First, the Act allows municipal employees, including police officers, to collectively bargain “on questions of wages, hours, and other conditions of employment...”²⁸ Municipalities have a corresponding duty to bargain in good faith with the union on wages, hours, and employment conditions.²⁹ The 2011 New Haven police contract³⁰ exemplifies the scope of conditions that can be included in bargaining. The contract defines wages,³¹ sick leave,³² clothing allowance,³³ and holidays;³⁴ designates units and working shifts, including eight shifts for patrol units and specialized units including traffic control, “neighborhood enhancement,” firearms, sexual assault and bias, and many other units;³⁵ allows officers to bid for the patrol shifts they want based on seniority;³⁶ allows the Department to change an employee’s days off once a year with 30 days’ notice, contingent on the employee’s approval;³⁷ sets the terms of the pension and health care plan;³⁸ and requires that all officers be given an identification card and a leather carrying case for their card and badge.³⁹

The inclusion of conditions of work in the union contract calcifies the management of police labor. If a police chief plans a new specialized unit or seeks to adjust the hours of shifts, he or she must win the union’s consent or fight for the change when the next contract is negotiated. Additionally, the use of seniority to determine shift placement limits the discretion of police managers to decide how to deploy officers. Finally, the union might use the “stickiness” of contract provisions to ask for concessions in exchange for agreeing to changes desired by

²⁸ Conn. Gen. Stat. Ann. § 7-468 (West).

²⁹ Conn. Gen. Stat. Ann. § 7-470(c) (West).

³⁰ Throughout this paper, I refer to the contract by the first year of its application, not the year it was signed. It is common for these contracts to apply retroactively.

³¹ 2011 New Haven Police Contract 46-48 (on file at New Haven City Hall, Department of Labor Relations).

³² *Id* at 7-11.

³³ *Id* at 12-15.

³⁴ *Id* at 15-17.

³⁵ *Id* at 24-32.

³⁶ *Id* at 26.

³⁷ *Id* at 31.

³⁸ *Id* at 38-48, 51-54.

³⁹ *Id* at 58.

police managers. Police managers may be forced to “purchase” desired management changes by agreeing to changes that they would not otherwise find desirable.

Under the Act, if a city and union cannot agree on a contract, they must go to arbitration.⁴⁰ Three arbitrators are selected: one chosen by the Mayor, one chosen by the executive head of the union, and one by a state board.⁴¹ The parties submit a list of all unresolved issues and a “last best offer” for each outstanding issue.⁴² The arbitrators must select one of the parties’ last best offers on each outstanding issue unless the parties specify a different procedure.⁴³ The arbitrators are instructed to give priority to the public interest and the city’s financial capability, and also to consider the manner in which negotiations have proceeded, the interests of the employee group, changes in cost of living, existing conditions of employment, and prevailing wages, salaries, fringe benefits, and other conditions of employment.⁴⁴ Additionally, the city’s legislative body may reject the arbitrator’s decision, leading to an additional review process.⁴⁵

The arbitration process provides advantages to both the police union and the city. In times of financial strain, the city may be able to hold wages flat or provide only minimal raises. As will be shown, real police wages in New Haven have remained essentially flat for more than twenty years. Arbitrators are explicitly instructed to give primary consideration to the city’s financial capability. On the other hand, municipalities may struggle to revise long-standing work rules. Arbitrators are instructed to consider both the existing conditions of employment and the

⁴⁰ Conn. Gen. Stat. Ann. § 7-473c(b)(1) (West).

⁴¹ *Id* at (b)(2).

⁴² *Id* at (d)(2), (d)(3).

⁴³ *Id* at (d)(6), (d)(7).

⁴⁴ *Id* at (d)(9).

⁴⁵ *Id* at (d)(12).

prevailing conditions in other cities. If provisions that impede police accountability are either longstanding or prevalent in other cities, an arbitrator might be reluctant to change them.

In summary, the Municipal Employee Relations Act turns many aspects of police work into bargaining chips for police union leaders. It provides the backdrop to contract negotiations and affects the strength of the bargaining parties.

B. Over Time, Police Accumulate Disciplinary Protections

The 1967 New Haven police contract provided for a grievance process that served as both “shield” and “sword” for officers. The contract allowed officers facing discipline to utilize a multi-step review process. Additionally, officers and the union⁴⁶ could proactively challenge departmental decisions on the basis of favoritism and discrimination, and could challenge a higher-up’s interpretation of Department policy using the same grievance process. The grievance process served two purposes: first, to enforce the working conditions specified in the union contract, and second, to allow police officers to challenge any decision or action perceived as disciplinary, including suspension and firing.

Under the 1967 contract, within 15 days of an “occurrence or event” giving rise to a grievance, an employee must submit a written grievance to the head of the Department (the police chief).⁴⁷ The chief “shall use his best efforts to settle the dispute” and submits a decision in writing within five calendar days of receiving the grievance.⁴⁸ Note the very short deadline for the response: five calendar days, regardless of weekends, holidays, vacation time, sick leave, etc.

If dissatisfied with the chief’s response, the complainant can appeal in writing to the Board of Police Commissioners, which must render a decision in writing within ten calendar

⁴⁶ 1967 New Haven Police Contract 8 (on file at New Haven City Hall, Department of Labor Relations).

⁴⁷ *Id* at 4.

⁴⁸ *Id* at 8.

days.⁴⁹ Then, the complainant may appeal to the Director of Administration, who must also provide a written decision within ten days.⁵⁰ Finally, the complainant may appeal to the Connecticut State Board of Mediation and Arbitration, and the arbitrator(s') decision is final and binding on both parties.⁵¹ The union and the police department split the fees for arbitration.⁵²

The 1967 contract is notable for the breadth of grievances that officers are allowed to raise. The contract describes a grievance as:

1. Discharge, suspension or other disciplinary action.
2. Charge of favoritism or discrimination.
3. Interpretation and application of rules and regulations and policies of the Police Department.
4. Matters relating to the interpretation and application of the Articles and Sections of this Agreement.⁵³

The 1967 police contract also provided for representation of officers in internal disciplinary hearings. The procedure applied to “all disciplinary inquiries and hearings” that might lead to suspension or dismissal.⁵⁴ Three major procedural protections were provided: witnesses must be sworn, police officers may have representation of their choice, and hearings are closed to the public, unless the officer requests an open hearing.⁵⁵

The contract also provided police officers with a right to be represented when a civilian complaint led to a “hearing or inquiry.”⁵⁶ The police department was required to pay for such representation.⁵⁷ Unlike other disciplinary proceedings, where an officer had a right to

⁴⁹ *Id.*

⁵⁰ *Id.* at 4-5.

⁵¹ *Id.* at 5-6.

⁵² *Id.* at 6.

⁵³ *Id.* at 3.

⁵⁴ *Id.* The contract mentions “suspensions” explicitly and also refers to hearings that might lead to “referral to the Board of Police Commissioners” and hearings conducted by the Board of Police Commissioners and other city disciplinary tribunals. As will be discussed below, a hearing by the Board of Police Commissioners is a necessary step to suspend officers for more than 15 days, or to dismiss them.

⁵⁵ *Id.* at 8-9.

⁵⁶ *Id.* at 9-10.

⁵⁷ *Id.*

representation only if suspension or dismissal were possible outcomes, an officer had an absolute right to representation in inquiries and hearings stemming from civilian complaints.

Enumerating the rights gained by police officers over time is challenging, in part because the union and police department signed many side letter agreements not reflected in the contract. Every police union contract has included the clause, “The City agrees to continue in force all benefits of whatever nature presently enjoyed by the members, not covered by the terms of this Agreement.”⁵⁸ Despite this challenge, the police contract tells the story of new rights won by police officers, even though the accounting is necessarily incomplete.

Over time, police officers gained a right to have disciplinary information removed from their personnel file and Internal Affairs file.⁵⁹ At first, the right of removal applied only to incidents in which the officer was not punished. The 1982 contract provided that only “disciplinary actions that do not result in discipline” should be removed, doing so automatically if the infraction was not repeated for two years and the employee had a good work record.⁶⁰ In 1984, the waiting period was lengthened to three years and sixty days, or 60 days after the end of a related civil action if a civil action was filed.⁶¹

The 1991 contract removed the provision for automatic removal of disciplinary records from officers’ files.⁶² Instead, the contract allowed officers to submit requests to the Board of

⁵⁸ See, e.g., 2011 New Haven Police Contract 57, <http://cityofnewhaven.com/HumanResources/pdfs/2011-2016%20Local%20530.pdf>.

⁵⁹ Former Police Chief Nick Pastore suggested in an interview that there remained some mechanism to retain records of serious discipline in an officer’s file, although the contract does not clearly provide for this. (“There was also a process in there to go to the Board of Police Commissioners if it was a serious situation, there was a way to keep [the incident] in there or be able to retrieve it, it wasn’t an erasure. But I had no problem with diminishing the penalty, it shouldn’t be there forever.”) Interview with Nick Pastore, Former Police Chief, New Haven Police Department, in New Haven, Ct. (Dec. 14, 2016) (on file with author).

⁶⁰ 1982 New Haven Police Contract 52 (on file at New Haven City Hall, Department of Labor Relations).

⁶¹ 1984 New Haven Police Contract 71-72 (on file at New Haven City Hall, Department of Labor Relations).

⁶² 1991 New Haven Police Contract (on file at New Haven City Hall, Department of Labor Relations).

Police Commissioners to remove specific disciplinary records.⁶³ But the 1994 contract restored the automatic removal process, providing for removal of verbal and written reprimands within one year and all other punishments within two, assuming in both cases no reoccurrences of the infraction and a good work record.⁶⁴ In 2004, the contract was revised to forbid officers from grieving written and verbal warnings unless used to justify additional discipline, and to increase the time limit for removing suspensions from an officer's file to three years.⁶⁵

Curiously, the automatic removal of disciplinary records was added to the 1994 contract, in the midst of a period when greater police accountability to communities was being promoted through a community policing initiative.⁶⁶ At the same time the city was pushing police officers to be more responsive to their communities, it was enacting barriers to identifying trends in police misconduct.

Police officers also bargained for additional protections regarding interrogations and questioning. The 2008 contract allowed officers to have a union official present whenever asked to give a statement that could result in discipline, review any previous statements they had made before submitting to additional questioning, review civilian complaints against them before being questioned, and pause questioning to privately consult with a union official at any point during departmental questioning.⁶⁷ These interrogation provisions emerge suddenly in the 2008 contract, with no predecessor clause in previous contracts. However, Robert Smuts, Chief Administrative Officer at the time of the 2008 contract negotiation, suggested that these

⁶³ *Id.* at 55-56.

⁶⁴ 1994 New Haven Police Contract 7 (on file at New Haven City Hall, Department of Labor Relations).

⁶⁵ 2004 New Haven Police Contract 6 (on file at New Haven City Hall, Department of Labor Relations).

⁶⁶ See generally, Caroline Van Zile, *Community Policing in New Haven: Social Norms, Police Culture, and the Alleged Crisis of Criminal Procedure*, YALE L. SCH. SCHOOL STUDENT LEGAL HIST. PAPERS (2011), http://digitalcommons.law.yale.edu/student_legal_history_papers/13.

⁶⁷ 2008 New Haven Police Contract 59 (on file at New Haven City Hall, Department of Labor Relations).

interrogation protections may have been won via side letter during the 1980's and only incorporated into the main contract in 2008.⁶⁸

The role of the union in the grievance process did not change much over the course of the contract, except for a clause in the 1982 contract. The relevant clause is below, with the section added in 1982 underlined:

Any employee may use this grievance procedure with or without Union assistance. In the event that an employee is aggrieved, he or she shall, prior to initiating a grievance at STEP ONE, discuss the subject of his or her aggrievement with the head of his or her division and a Union representative within fifteen (15) days after the event giving rise to the grievance, or within fifteen (15) days of when the employee would reasonably have had knowledge of the occurrence giving rise to the grievance. No such discussion shall be conducted in the absence of a Union representative.⁶⁹

Although any employee is ostensibly allowed to “use the grievance procedure with or without Union assistance,” the revised agreement requires that a union representative be present at the initial discussion between the department head and the aggrieved officer. In essence, an officer using the grievance process must discuss the grievance with his or her manager and a union representative, even if he or she later declines the union's assistance. This change may have increased the information collected by the union and made it easier for union leaders to track disputes.

C. The City Must Bargain for Discipline Changes

The Union's original ability to grieve anything from perceived favoritism to interpretations of police policy was short-lived. In the 1976 contract, the definition of “grievance” was revised to: “a dispute between an employee and/or the Union and the City, and/or any of its agents, servants, employees, officials, boards or commissions concerning the interpretation and application of any of the provisions of this Agreement, including the

⁶⁸ Telephone interview with Robert Smuts, former Chief Administrative Officer, City of New Haven (Dec. 19, 2016) (on file with author).

⁶⁹ *Id.* at 3.

discharge, suspension, demotion or other discipline of an employee.”⁷⁰ This revision narrowed the scope of grievances and disallowed employees from bringing charges of favoritism through the multi-step grievance process. Going forward, only allegations that the city had failed to follow its agreement with officers or improperly disciplined or discharged an officer would be processed as grievances.

The city won a few other changes over time. An early change was the requirement that the union pay to represent officers in disciplinary hearings and investigations, not the city. The 1976 contract lessened the city’s responsibility to pay for defense against civilian complaints, providing that the city would pay only for defenses against civilian complaints that were found to be without merit.⁷¹ The 1979 contract would release the city from even this responsibility, shifting costs to the Union.⁷² Clauses in the 2008 and 2011 contracts specified that the city could fire provisional employees for reasons other than “just cause” and that such employees could not bring grievances to arbitration.⁷³ In contrast, full employees may not be discharged or disciplined, “in any other manner except for just cause,” a provision of the police contract since 1976.⁷⁴

Other small changes have simplified the discipline process. For example, the Board of Police Commissioners was written out of the grievance process altogether in 2008, although the Board retained responsibility for imposing suspensions of greater than 15 days and dismissals.⁷⁵

Many of the above changes might best be thought of as a mutual adjustment of process requirements to the benefit of both parties. The quick pace of the 1967 contract must have been

⁷⁰ 1976 New Haven Police Contract 3 (on file at New Haven City Hall, Department of Labor Relations).

⁷¹ *Id.* at 9.

⁷² *Id.* at 13.

⁷³ 2008 Police Contract 3; 2011 Police Contract 3.

⁷⁴ 1976 Police Contract 3

⁷⁵ 2008 Police Contract 4.

onerous for police officers and police executives alike, with five day deadlines imposed on the chief's initial response to the grievance and the police officer's window to appeal. In contrast, under today's contract, the statute of limitations to appeal and the time to provide a decision are always at least ten days, with additional steps added to allow for informal resolution and discussion.⁷⁶

Unionization increased the difficulty of holding officers accountable for misconduct in other, subtle ways. Under the Municipal Employee Relations Act, work rules are placed on the bargaining table alongside wages, hours, and benefits. This dynamic forces the city to “purchase” changes that increase officer exposure to discipline by paying out additional money in overtime, wages, or benefits. This relationship is suggested by the evolution of officers' rights to remove disciplinary information from their files: the right expands over time, moving from removal of only unsubstantiated complaints to removal of all disciplinary information. Examples of this bargaining dynamic are presented in the case studies in Part IV.

II. POLICE POLITICAL MOBILIZATION PREDATES UNIONIZATION AND REDUCES POLICE ACCOUNTABILITY

This Part begins by reviewing the protections enjoyed by New Haven police officers beyond the union contract, focusing on state law and the city's charter. This survey reveals that key disciplinary protections for New Haven police officers predate the first union contract by decades. Next, this Part considers how other political organizing by New Haven police officers helped officers win desired changes and resist accountability reform. Ultimately, the political organization of police, which predates and extends beyond unionization and collective bargaining, also poses an obstacle to police accountability reform.

⁷⁶ 1982 Police Contract 3 (Police officer must meet with union rep and division head before submitting grievance and Director of Labor Relations must meet with union before decision); 1991 Police Contract 4 (Chief and/or designee must set up meeting between parties).

A. New Haven Police Won Accountability Changes Through City Charter

The New Haven Board of Police Commissioners is a critical actor in New Haven police discipline. Governance in New Haven is spread across a range of boards and other entities, leading to what Yale political scientist Douglas Rae described as, “a city government so rigid, so saddled with legislative process, so constrained by boards, bureaus, and commissions as to be a nightmare for any who would lead—or even follow—in a sustained strategy of change.”⁷⁷ The Board of Police Commissioners forms part of this local constellation of government bodies. A look at the history of the Board reveals that many rights associated with the police union – for example, the right to appeal a suspension or dismissal – in fact precede the first union contract by decades.

The Board of Police Commissioners is empowered by the New Haven City Charter to remove, reduce in rank, or suspend without pay any officer or employee in the department.⁷⁸ The Board is made up of six commissioners serving three year terms, with the Mayor appointing two members each year.⁷⁹ No more than three commissioners may belong to the same political party.⁸⁰ The Board is also authorized to, “together with [the police chief] ... make all rules and regulations relating to the administration of the [police] department,”⁸¹ among other responsibilities.

The police discipline process has evolved over time. The 1869 New Haven Charter provided that police officers were removable by the Board of Police Commissioners for due cause, and that the Board had the power and duty to resolve complaints against members of the

⁷⁷ DOUGLAS RAE, *CITY: URBANISM AND ITS END* 191 (2003).

⁷⁸ *Id.* art. 28 § 128.

⁷⁹ NEW HAVEN, CT., *CITY CHARTER* art. 26 § 111 (1952).

⁸⁰ *Id.*

⁸¹ *Id.*

Police Department.⁸² The 1897 charter granted the chief the power to suspend police officers for less than 10 days, and included a right of 48 hours' notice to police officers prior to a Board hearing.⁸³ In 1903, officers won the right to appeal their dismissal to a judge, a right that was included in the New Haven Charter of 1905.⁸⁴ This change weakened the Board of Police Commissioners' ability to impose discipline on police officers by allowing local judges to overturn the Board's verdicts.

Over time, the ability of officers to appeal Board-imposed discipline grew. The 1952 City Charter expanded the rights of police officers, allowing them to appeal any discipline imposed by the Board of Police Commissioners to a judge for review.⁸⁵ Officers were allowed to bring an appeal to any judge with jurisdiction in New Haven County.⁸⁶

The most recent New Haven City Charter, adopted in 2013, preserves the power of the Board of Police Commissioners to suspend and dismiss police officers, and continues to provide a right of appeal to any New Haven County judge with jurisdiction.⁸⁷ However, the chief gained the ability to suspend police officers for up to 15 days without pay, increased from 10 days under the 1952 charter.⁸⁸

The presence of the Board of Police Commissioners superimposes an additional level of process and protection onto the grievance process laid out in the union contract, forcing police administrators to rely on a Mayor-appointed board to administer serious discipline, and adding additional steps of process and hearings. As has been shown, many of these protections preceded the first New Haven police union contract by several decades.

⁸² NEW HAVEN, CT., CITY CHARTER § 38 (1869).

⁸³ NEW HAVEN, CT., CITY CHARTER § 67 (1897).

⁸⁴ NEW HAVEN, CT., CITY CHARTER § 65 (1905).

⁸⁵ NEW HAVEN, CT., CITY CHARTER art. 28 § 129 (1952).

⁸⁶ *Id.*

⁸⁷ NEW HAVEN, CT., CITY CHARTER art. 7 § 3 (2013).

⁸⁸ *Id.* art. 6 § 12(A)(4). The increase from ten to fifteen days first appears in the 1976 union contract.

The ability of police officers to appeal disciplinary decisions makes it more time-consuming and difficult for the city to impose discipline on officers. But it is not clear that unionization is the most important part of this story. Officers gained the right to appeal suspensions and firings many years before the union won the right to negotiate a contract. Consider also that some New Haven city and police administrators have denied that changes to the police contract affected the viability of police accountability processes.⁸⁹

B. Other Political Organizing Increased Police Influence and Decreased Accountability

In Connecticut, relatively few police protections have been won at a state level. Some laws appear designed to provide a police monopoly on criminal investigation: a 1949 law prevented cities from hiring private detectives to investigate or detect crimes unless State police have first been given an opportunity to take on the investigation.⁹⁰ Other laws allowed police to push for desired labor conditions and “run around” city lawmakers by appealing to voters: a 1951 act allowed municipal voters to force a referendum on whether to require a maximum 40-hour work week for police officers.⁹¹

In other states, police officers have won broader protections at a state level. Fourteen states have passed Law Enforcement Officers Bill of Rights legislation limiting the ability to question police officers.⁹² In Maryland, for example, police officers under internal investigation benefit from a ten-day “cool-off” period during which they cannot be required to make statements regarding alleged misconduct.⁹³

⁸⁹ DeStefano, *supra* note 25; Smuts, *supra* note 68.

⁹⁰ Conn. Gen. Stat. Ann. § 7-283 (West).

⁹¹ Conn. Gen. Stat. Ann. § 7-292 (West).

⁹² Eli Hager, *Blue Shield*, THE MARSHALL PROJECT (Apr. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield#.I6oFXdc7f>

⁹³ *Id.*

More informal exercises of police organization present obstacles to police accountability. The police protest described at the beginning of this Note is a good example. By interrupting the Mayor and Police Chief's press conference, the police union intended to embarrass the government executives and disrupt their narrative. The intended message was clear: the Mayor does not have control of the police or the support of the police.

Police officers have taken similar actions in other cities to protest proposed accountability measures or work rule changes. A 1992 New York Times article about a police protest began:

Thousands of off-duty police officers thronged around City Hall yesterday, swarming through police barricades to rally on the steps of the hall and blocking traffic on the Brooklyn Bridge for nearly an hour in the most unruly and angry police demonstration in recent memory. The 300 uniformed officers who were supposed to control the crowd did little or nothing to stop the protesters from jumping barricades, tramping on automobiles, mobbing the steps of City Hall or taking over the bridge. In some cases, the on-duty officers encouraged the protesters.⁹⁴

The police protest fed into Rudy Giuliani's "law and order" campaign. Giuliani spoke to officers at the rally and would go on to unseat New York Mayor David Dinkins in 1993.⁹⁵

Protests and publicity actions have been frequently used in New Haven. In 1978, 150 off-duty police officers protested at City Hall to support wage increases in an upcoming contract negotiation.⁹⁶ The picketing officers tied work conditions to crime rates in their chants, repeating, "Wages down, crime up."⁹⁷ New Haven officers also used "blue flu" work actions, where a majority of officers call in sick, in 1988⁹⁸ and 1991.⁹⁹

New Haven police officers have used other tools to wield political influence. A common tactic has been to call "no confidence" votes against the police chief. The union has voted to

⁹⁴ James C. McKinley Jr., *Officers Rally and Dinkins Is Their Target*, N.Y. TIMES (Sept. 17, 1992), <http://www.nytimes.com/1992/09/17/nyregion/officers-rally-and-dinkins-is-their-target.html>.

⁹⁵ *Id.*

⁹⁶ Lincoln Millstein, *Policemen Picket in New Haven*, THE HARTFORD COURANT, Apr. 6, 1978, at 20.

⁹⁷ *Id.*

⁹⁸ Matthew Kauffman, *Police Officers Call in Sick in New Haven*, THE HARTFORD COURANT, May 8, 1988, at B1.

⁹⁹ Kirk Johnson, *Three Killed in New Haven During a Sickout by Police*, N.Y. TIMES, Sept. 23, 1991, at B2.

express “no confidence” in recent police chiefs Nick Pastore (1990-1997),¹⁰⁰ Francisco Ortiz (2003-2008),¹⁰¹ Frank Limon (2010-2011),¹⁰² and Dean Esserman (2012-2016).¹⁰³

Although these political actions are facilitated by a formally recognized police union with bargaining power, police officers could collectively mobilize without this legal status. It is important, therefore, to consider the political influence of police officers above and beyond what is provided through unionization.

Police actions may inhibit police accountability not only by winning desired state laws, city ordinances, and contract provisions, but also by reminding elected officials of their need for police support. For example, hundreds of police officers in New York City turned their back on a video screen displaying Mayor Bill de Blasio at a police officer’s funeral.¹⁰⁴ Some of the officers objected to de Blasio sharing that he had taught his biracial son to be cautious in encounters with police officers.¹⁰⁵ A union official connected de Blasio’s criticism of police practices and drive for reform with violence against police officers, claiming that the Mayor had “blood on the hands.”¹⁰⁶

Police actions are not always popular – a Quinnipiac University poll showed that 69 percent of New York City voters disapproved of police turning their backs to the Mayor at the

¹⁰⁰ Ralph Blumenthal, *Policing New Haven: Patrol and Politics*, N.Y. TIMES (Nov. 1, 1991), <http://www.nytimes.com/1991/11/01/nyregion/policing-new-haven-patrols-politics-special-report-chief-with-high-profile-uses.html?pagewanted=all>.

¹⁰¹ Angela Trevino, *Union Votes No Confidence in Police Chief*, YALE DAILY NEW (Jan. 28, 2005), <http://yaledailynews.com/blog/2005/01/28/union-votes-no-confidence-in-police-chief/>

¹⁰² William Kaempffer, *New Haven Cops Vote 'No Confidence' in Chief Limon*, NEW HAVEN REGISTER (Feb. 3, 2011), <http://www.nhregister.com/article/NH/20110203/NEWS/302039904>.

¹⁰³ Juliemar Ortiz, *New Haven Police Union votes 'no confidence' in Chief Esserman*, NEW HAVEN REGISTER (July 7, 2016), <http://www.nhregister.com/generalnews/20160707/newhavenpoliceunionvotesnoconfidenceinchief-esserman>.

¹⁰⁴ J. David Goodman and Kirk Semple, *Another Silent Protest of Mayor de Blasio as Officer Liu Is Laid to Rest*, N.Y. TIMES (Jan. 4, 2015), https://www.nytimes.com/2015/01/05/nyregion/police-officers-gather-for-the-funeral-of-wenjian-liu-killed-in-an-ambush.html?_r=0.

¹⁰⁵ Erin Durkin, *Bill de Blasio details talk with biracial son about interacting with police*, N.Y. POST (Dec. 8, 2014), <http://www.nydailynews.com/news/politics/de-blasio-details-talk-son-dealing-cops-article-1.2036870>

¹⁰⁶ Goodman and Semple, *supra* note 104.

police funerals.¹⁰⁷ But while voters may disapprove of some police actions, support and approval of police remains high even at times of highly public police violence. In 2016, 76% of respondents in one poll said they had “a great deal” of respect for police in their area.¹⁰⁸ That same year, 56% of respondents in another poll reported that they had “a great deal” or “quite a lot” of confidence in police, and another 29% responded that they had “some” respect for police.¹⁰⁹ Even as specific police actions are seen as “going too far” by the public, they may be useful reminders to elected officials that the police remain popular and respected and that police resistance can be damaging to political careers.

III. POLICE COMPENSATION INCENTIVIZES RESISTANCE TO WORK RULE CHANGES AND ACCOUNTABILITY

Police compensation practices incentivize police officers to resist changes in staffing policy and police discipline. Collective bargaining over compensation gives police officers more leverage to resist policy changes, but is not the *cause* of such resistance – pension and overtime compensation predated the first New Haven police unions. This Part analyzes the structure of police compensation, and finds that overtime, extra duty, and pension payments are the most important methods for most police officers to increase their compensation. Police pensions allow officers to earn up to between 70 and 80 percent of their highest-earning years in annual pension payments post-retirement, and at a relatively young age. This Part theorizes that New Haven’s method of compensating police officers – where pension benefits and extra work are the best and

¹⁰⁷ *New Yorkers Turn Their Backs On Police Protests, Quinnipiac University Poll Finds; Lynch, Sharpton Both Get Negative Scores*, QUINNIPIAC UNIVERSITY/POLL (Jan. 15, 2015), <https://poll.qu.edu/new-york-city/release-detail?ReleaseID=2124>.

¹⁰⁸ Justin McCarthy, *Americans' Respect for Police Surges*, GALLUP (Oct. 24, 2016), <http://www.gallup.com/poll/196610/americans-respect-police-surges.aspx>.

¹⁰⁹ Frank Newport, *U.S. Confidence in Police Recovers From Last Year's Low*, GALLUP (June 14, 2016), <http://www.gallup.com/poll/192701/confidence-police-recovers-last-year-low.aspx>.

most reliable paths to earning more money – leads police officers to resist changes to work rules and management practices, including accountability efforts.

The real gap in pay between public- and private-sector employees consists in benefits (especially retirement and healthcare,) not salaries.¹¹⁰ In an interview, former mayor John DeStefano indicated that police pensions, not police healthcare, was the most impactful police benefit on the city’s financial bottom line.¹¹¹ Accordingly, the below analysis focuses on wages and pensions, not healthcare.

This Part begins by reviewing the history of police wage increases in New Haven, finding that wages have not grown for the past twenty years. Next, it reviews police compensation practices, finding that overtime and extra-duty work outweigh promotion and official advancement as a source of extra income for New Haven officers. Finally, police pensions are considered. Because police pensions constitute a valuable benefit that can only be redeemed if officers work for a certain number of years in New Haven, the pension compensation method entrenches police officers and provides an additional incentive to resist accountability and discipline reform.

A. New Haven Police Wages Have Remained Stagnant for Two Decades

Unionization appears to have led to a large initial jump in salaries for New Haven police officers. Although the first contract contained fairly modest raises - \$500 for all employees in 1967 and \$300 for all employees in 1968¹¹² – the next contract provided for a 35% raise for all

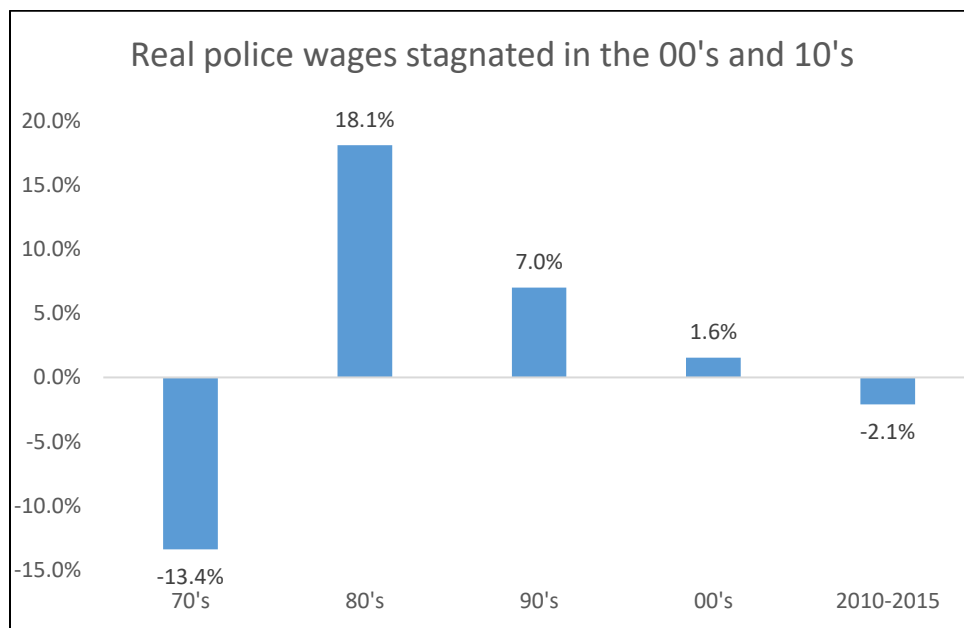
¹¹⁰ See, e.g., ANDREW BIGGS, OVERPAID OR UNDERPAID? A STATE-BY-STATE RANKING OF EMPLOYEE COMPENSATION (American Enterprise Institute for Public Policy Research, 2014), https://www.aei.org/wp-content/uploads/2014/04/-biggs-overpaid-or-underpaid-a-statebystate-ranking-of-public-employee-compensation_112536583046.pdf; THOM REILLY, WHY WE NEED TO RE-THINK PUBLIC EMPLOYEES’ COMPENSATION (Governing, 2014), <http://www.governing.com/gov-institute/voices/col-public-employee-lifetime-compensation-pensions.html>.

¹¹¹ DeStefano, *supra* note 25.

¹¹² 1967 Police Contract 32.

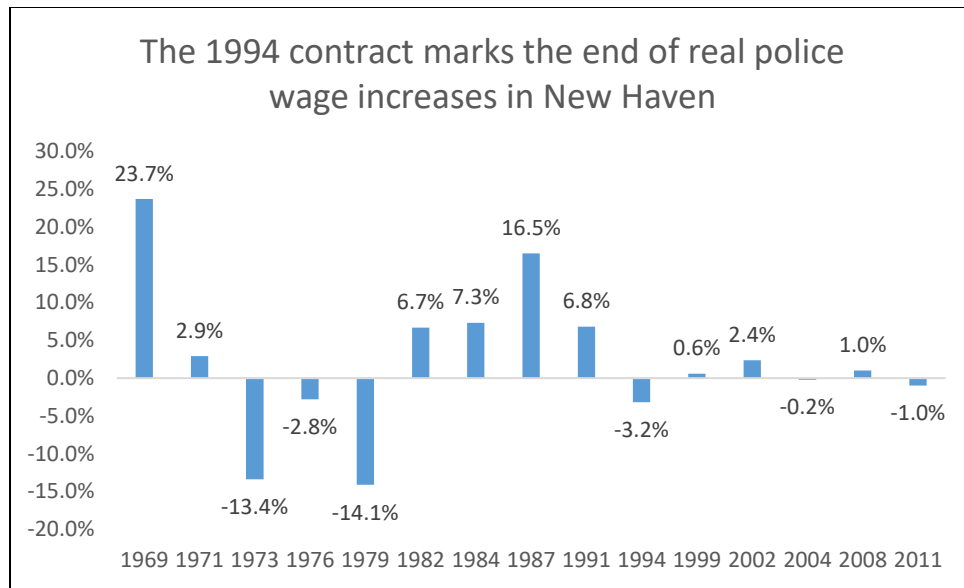
employees over two years.¹¹³ Since this early increase, however, police raises have barely kept pace with inflation. In fact, police officers have not had a real raise in more than two decades.

The following graphs show police raises against inflation (measured by the national Consumer Price Index) between 1967 and 2015.¹¹⁴ The first graph analyzes real raises by decade, and the second considers real raises by contract year. In the graphs, real changes in wages are summed for each year in the period reflected; for example, the sum of all real wage changes in the years 1980 to 1989 was 18.1%. In other words, each data point reflects the sum total of real wage changes during the decade or contract indicated, not the average change per year.



¹¹³ 1969 Police Contract 35.

¹¹⁴ Real changes in police wages were calculated by taking the wage increases set out in the New Haven police contracts and subtracting the corresponding Consumer Price Index rate. *Consumer Price Index (Estimate) 1800-*, MINNEAPOLIS FEDERAL RESERVE, <https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-1800>. (Last visited January 4, 2017).



Comparing wage increases against inflation provides a more accurate picture of how compensation has changed for police officers over time. In the short term, large increases in real wages followed unionization for New Haven police officers. The 1969-1971 contract raised real wages by 23.7% in just two years. However, the rate of growth in real wages was not sustained past those initial years. From 1971 to 2015, real wages increased by just 11%. From the 1994 contract to the 2011 contract (which extended through June 20, 2016,) real wages grew by only 1.1%.¹¹⁵

For a time, it appeared that police officers could rely on raises to improve their standard of living. But for the last twenty-one years, wage increases have only matched inflation. If police officers seek to increase their real earnings, they must look to sources other than union-negotiated raises.

¹¹⁵ Note that the salary analysis is somewhat complicated by the introduction of longevity payments. These payments first appear in the 1969 police contract, which provided an annual bonus payment of \$200 to officers who had served on the force for at least ten years and \$300 to officers who had served for at least twenty years. 1969 Police Contract 9-10. This longevity bonus rises gradually until the 1987 contract, when it becomes indexed to the pay rate for full grade police officers: a bonus of 1% base salary of a top grade Police Officer for 5 years longevity, 1.5% for 10 years, 1.75% for 15 years, and 2% for 20 years. 1987 Police Contract 8-9. These bonuses are cut in half in the 2008 contract (0.5%, 0.75%, 0.88% and 1% for each of the respective longevity periods) and are phased out entirely in the 2011 contract. 2008 Police Contract 7; 2011 Police Contract.

B. Overtime and Extra Duty, not Promotions, Make Up Most Increases in Police Earnings

In many organizations, employees can raise their earnings through merit, rising through the ranks through skill and dedication. But in the New Haven Police Department, few officers are able to significantly increase their pay through promotions. The below tables represent police officer salaries as of July 2015 and the distribution of New Haven police officers by job title.

Police officer salaries as of July 2015¹¹⁶

Title	Annual pay	Weekly pay
Commander	97,354	1,857.90
Captain	94,017	1,794.22
Chief Investigator	89,298	1,704.16
Superintendent	86,897	1,658.34
Lieutenant	85,643	1,634.41
Sergeant	76,840	1,466.41
Detective	72,780	1,388.93
Police Officer	68,297	1,303.38
Police Officer 2nd (3rd year)	52,729	1,006.28
Police Officer 2nd (2nd year)	44,404	847.4
Police Officer 2nd (1st year)	44,404	847.4

Number of police officers by rank, November 2013¹¹⁷

Title	# Positions	# Vacancies	Current employees at this rank	% officers at this rank	Wages relative to police officer pay, July 2015	Cost
Chief	1	0	1	0.3%	Unknown	153,750
Asst. Chief	4	0	4	1.0%	Unknown	439,000
Captain	5	5	0	0.0%	137.7%	443,100
Lieutenant	20	12	8	2.1%	125.4%	1,614,540
Sergeant	54	7	47	12.2%	112.5%	3,911,166
Detective	61	14	47	12.2%	106.6%	4,190,822
Police Officer	350	72	278	72.2%	100%	22,531,950
Totals	495	110	385	-		33,284,328

The above tables show that most police officers cannot significantly increase their wages through promotion. In November 2013, only 3.4% of the police force had reached the rank of

¹¹⁶ 2011 Police Contract 48.

¹¹⁷ Report on New Haven Police Department (2013)

<http://cityofnewhaven.com/Mayor/pdfs/Without%20Contacts/2.2%20Police.pdf>.

lieutenant or higher. The 12.2% of officers ranked sergeants received 12.5% higher pay than full-grade police officers, and the 12.2% of officers ranked detectives were paid 6.6% more.¹¹⁸

As discussed above, the Board of Police Commissioners is responsible for confirming promotions. Promotions are generally given to the top performers on a civil service exam, with some exceptions.¹¹⁹ For example, in 2012, one officer who scored high on the sergeant's exam but had been suspended for a year by the Board of Police Commissioners due to a DUI conviction and violations of department policy was passed over for promotion.¹²⁰ Officers may be disqualified for promotion due to misconduct, but do not seem to be able to improve their chances for promotion through high performance. The bottom line is test scores, not quality of work.

Between January 1, 2012 and November 2, 2012, New Haven police officers earned \$20.1 million in salary, \$4.5 million in overtime, and \$4.3 million in extra duty pay.¹²¹ During the period of the data collected by the Independent, 30.5% of all officer pay derived from overtime or extra duty work.¹²² This figure overshadows the 6.6% raise for becoming a detective or the 12.5% raise for becoming a sergeant, opportunities available only to a portion of officers who score well on civil service exams.

Overtime and extra duty pay can also increase the size of an officer's pension bonus after retirement, as will be discussed in greater detail below. This consideration makes overtime and

¹¹⁸ It could be argued that the 2013 snapshot underestimates the ability of police officers to raise their wages through promotion, due to vacancies in the detective, sergeant, and lieutenant positions. However, it is common for positions to remain vacant for budget reasons, as indicated by the large number of vacancies even at the police officer position in New Haven in November 2013. In absence of more recent data, the best measure of an officer's ability to advance is the actual number of officers at any position, not the number of theoretical vacancies.

¹¹⁹ Thomas MacMillan, *19 Promoted to Sergeant; 2 Skipped Over*, NEW HAVEN INDEPENDENT (Jan. 23, 2013), http://www.newhavenindependent.org/index.php/archives/entry/19_cops_promoted_to_sergeant/.

¹²⁰ *Id.*

¹²¹ Paul Bass, *Police, Fire Overtime Already \$1M over Budget*, NEW HAVEN INDEPENDENT (Nov. 15, 2012), http://www.newhavenindependent.org/index.php/archives/entry/police_fire_overtime/.

¹²² *Id.*

extra duty pay even more important for officers seeking to maximize their compensation. The data collected by the Independent is consistent with this explanation of police motivations: 38 officers earned amounts equal to 50% or more of their base salary in overtime and extra duty pay.¹²³

It has been shown that officers are little able to increase their earnings through bargained-for raises, and that few officers win promotions that significantly increase their salaries. Instead, overtime and extra duty pay are critical to maximizing earnings. But the amount of overtime that the city can pay is contingent on staffing levels, work rule assignments, and other management decisions. If the city seeks to change work rules, especially involving staffing and specialized units, it risks upsetting the earnings of its officers by reducing overtime. Officers are therefore incentivized to resist work rule changes.

C. The Design of the Police Pension Motivates Police Officer Entrenchment

Special Act 531, passed in 1957, provides for a pension for New Haven police and fire employees hired in 1958 and later.¹²⁴ Notice that the Act predates the first New Haven police union contract by a decade, demonstrating the ability of police officers to organize and exercise political influence in a non-unionized environment. The relevant portion of the Act reads as follows:

After retirement, in accordance with the provisions of this act, each member shall receive in lieu of any other compensation from the city an annual allowance, payable monthly during his lifetime and terminating at his death, in an amount equal to one and two-thirds per cent of his average annual rate of pay during the ten years of service immediately preceding his retirement for each full year of service ... No allowance under this plan, including workmen's compensation payments, if any, shall exceed two-thirds of such rate of pay. The word pay shall be deemed to mean wages or salary, including increases or decreases thereof, payments on account of overtime worked, and the value of maintenance, if any. Credit for service shall be determined by the time actually worked as a full-time employee except that credit for a full year of service shall be given where

¹²³ *Id.*

¹²⁴ 1957 Con. Acts 591-92 (Reg. Sess.).

absences within the year due to disability and leave of absence do not exceed ninety days.¹²⁵

The critical details of the original pension are as follows. First, the base of the pension payment is determined by taking the average of a certain number of years of service, in this case, the ten years of service preceding retirement. Consider this figure the “pension base” – the grand total that determines the pension payouts an officer receives after retirement. Officers earn a varying portion of their pension base annually after retirement, depending on how long they have served. Overtime work is factored into the pension base, so officers can increase their pension payments by working more overtime in the final years of their careers.

The second critical feature is that officers increase the payout percentage of their pension base by working additional years. An officer’s percentage take of the pension base is one and two-thirds percent for every year of service. The final sentence cited in the above excerpt indicates that an officer earns double credit for each year during which he or she is absent for ninety days or fewer due to disability and leave of absence. The pension base ceiling in this contract is two thirds of the pension base. An officer who earned double credit in each year of service would earn three and one third percentage points each year, reaching the pension ceiling of 66 2/3% in twenty years.

The Special Act also required that police officers either (1) serve for thirty continuous years and reach the age of fifty-five, or (2) reach the age of sixty-five, becoming subject to mandatory retirement, to retire and begin earning pension benefits.¹²⁶ Finally, officers were assessed five percent of their salaries to contribute to the pension fund.¹²⁷

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 590.

Notice that the inclusion of overtime in the pension base incentivizes certain decisions by officers. In particular, officers are motivated to work large amounts of overtime during the years that determine their pension base. By putting in extra hours for a few years, an officer can earn large increases in pension payments that he or she will collect annually for the rest of his or her life.¹²⁸

For many years, police officers were able to boost their pension payouts by working a lot of overtime for just a few years. One can predict that this feature increased police resistance to work rule and management changes: police officers must have understood that giving police managers more authority to set hours and work conditions would make it harder for officers to substantially increase their pension payments by selectively increasing their hours in the key “pension calculation” years. Although the City of New Haven has ended this calculation method for the most recently hired police officers, many officers on the force today still benefit from these generous pension calculation methods.¹²⁹

The 1979 contract increased the pension assessment to 6% of annual earnings, but made it much easier to “overtime-load” the pension base.¹³⁰ Under the 1979 contract, the pension base was set by the average total earnings of an officer’s 5 highest-earning years among his or her last 10 years of service.¹³¹

The 2008 contract ended the practice of overtime-loading for new officers: officers hired on November 1, 2009 or later would receive pensions calculated only on base salary, not

¹²⁸ Former New Haven Chief Administrative Officer Robert Smuts confirmed the practice of “overtime-loading” and indicated that the city administrators considered it a major issue to address in the 2008 contract negotiations. “The effort by a lot of officers to work huge amount of hours to push up their highest three years [sic] of salary, their pension contribution, actually ended up impacting the work they performed as well,” he said. Smuts, *supra* note 68.

¹²⁹ 2008 Police Contract 37

¹³⁰ 1979 Police Contract 49.

¹³¹ *Id.*

overtime payments.¹³² Instead, a 4.8% cut of overtime and extra duty payments would go to the city's Defined Contribution Plan, a 401(k) retirement plan essentially providing for individual retirement accounts, limiting the city's financial liability.¹³³ The 2011 contract continued the decline in pension benefits by limiting pension payments for new officers to 70% of the pension base, not 80% as in previous years.¹³⁴

Assuming that the New Haven police pension retains its basic form, the end of "overtime-loading" will decrease officer incentives to resist work rule changes. However, the pension will remain a valuable benefit that incentivizes officers to remain in place and resist disciplinary reform. Having deferred the major economic reward of their employment until retirement, officers have more at stake when facing discipline. Officers believe that a single well-publicized mistake could cost them their job,¹³⁵ and may be wary of even beginning to accumulate demerits on their records.

IV. TWO CASE STUDIES ON NEW HAVEN POLICE MANAGEMENT AND CONTRACT NEGOTIATIONS

The above Parts have reviewed three related factors that explain police resistance to accountability reform. The below case studies survey two recent examples of police-city conflict and police management in New Haven, and show the above themes in action.

A. The City Gains an Economic Edge in the 2008 Contract Negotiations

The 2004 police contract expired on June 30, 2008. 444 days later, on November 17, 2009, the city and the police union signed a new contract. The deal contained minimal raises and

¹³² 2008 Police Contract 37.

¹³³ *Id.*; Melissa Bailey, *City, Police Union Strike Tentative Pact*, NEW HAVEN INDEPENDENT (Sep. 25, 2009), http://www.newhavenindependent.org/archives/2009/09/city_police_uni.php.

¹³⁴ 2011 Police Contract 38.

¹³⁵ See, e.g., Briana Barocas & Danielle Emery, *Providing support to police officers: perspectives on peer assistance and work-related stress*, in *STRESS IN POLICING: SOURCES, CONSEQUENCES AND INTERVENTIONS* 329-30 (Ronald J. Burke ed., 2016).

large cuts to pension payouts for new officers. Ultimately, the contract negotiation process favored the city in its attempts to win economic concessions from the police union.

One much-discussed change in the 2008 contract ended the practice of allowing officers to retire early (in as little as fifteen years) and collect a pension by trading in accumulated sick leave.¹³⁶ Going forward, officers would need to work at least twenty years before being allowed to trade in sick time for accelerated pension benefits.¹³⁷ Another change was a new “bad boy” clause allowing the Board of Police Commissioners to revoke or reduce retirement benefits to officers criminally convicted of acts of dishonesty or fraud that led to their termination from the department.¹³⁸ Other major changes in the contract included a new pension plan for younger officers that ended the practice of including overtime pay in the pension base and instead funneled overtime and extra duty deductions into a 401(k) plan; raises of 0%, 3%, and 3% for the three years of the contract; cutting police longevity payments in half; specifying that provisional employees could be fired for any reason; removing the Board of Police Commissioners from the grievance appeal process, as discussed above; a reduction to medical benefits for officers injured on the job with fewer than twenty years of experience; and a new evening shift for the motorcycle unit.¹³⁹

Then-Mayor John DeStefano explained in an interview that pension costs dominated the city’s financial calculus, and that his main goal was to win concessions on pensions and reduce early retirements that increased costs to the city.¹⁴⁰ The threat of binding arbitration helped the city to win these concessions. “Under Connecticut labor law it’s a binding arbitration system...

¹³⁶ Bailey, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ 2008 Police Contract 44.

¹³⁹ Bailey, *supra* note 133. Robert Smuts, then-Chief Administrative Officer, also emphasized changes to police extra duty. In his accounting, previously, officers were allowed to solicit work assignments from outside businesses and “farm out” those assignments to other officers, including ranking supervisors. Smuts, *supra* note 68.

¹⁴⁰ DeStefano, *supra* note 25.

If it was tough economic times, labor knew it, we knew it, we would paint an honest picture that said we can't afford these contracts and we would press the opportunity that presented," Mayor DeStefano said.¹⁴¹ The prospect of arbitration and the city's financial status improved the city's bargaining position. At the same time, change had to be gradual. "The spectrum for really moving the contract is not wide, this is a split the baby environment," said DeStefano. "Eliminating all of these buybacks, there was an arc to this ... knowing there was going to be another contract in three or four years."¹⁴²

Then-Chief Administrative Officer Robert Smuts reiterated the impact of the economic recession on the city's finances and the financial status of the police pension.¹⁴³ He also emphasized the personal considerations of the negotiation, saying, "[union president] Lou Cavalier ... was getting to the point where he cared about his son's position in the department, both whether he could become a union leader as well as his actual position in the department ... there's a differential between how much the lead negotiator for the union side would care about the issue versus how impactful it is on the city's bottom line."¹⁴⁴ In other words, resolving the contract in a certain timeframe or with certain provisions might be of great value to the union negotiator while having only a minor effect on the city's interests. Making use of those personal considerations helped the city to win a better deal.

The union president, Louis Cavaliere, described the threat of binding arbitration at a time of economic recession as motivating the deal. "This may not be the greatest contract in the world, but it's enough to vote 'yes' and not go through the dangers of arbitration," he said.¹⁴⁵

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Smuts, *supra* note 68.

¹⁴⁴ *Id.*

¹⁴⁵ Melissa Bailey, *Police OK Labor Contract*, NEW HAVEN INDEPENDENT (Oct. 1, 2009).

Although some labor theorists might assume that unions have a greater advantage in contract negotiations, due to their ability to think in longer timeframes and provide continuity of leadership, Mayor DeStefano similarly took a long view of the city's ability to win desired contract changes over time. DeStefano's lengthy term as Mayor may have increased his ability to play the long game. DeStefano served as Mayor for twenty years; his four immediate predecessors served for four, ten, four, and six years.¹⁴⁶ It is not clear whether DeStefano's long-term bargaining orientation was characteristic of city governments or contingent on his long tenure.

Additionally, the changes won by DeStefano's administration centered on economic concessions, not accountability rights and procedures. The one change to accountability – allowing the revocation of pension benefits for officers convicted of certain criminal charges and terminated by the department – followed in the wake of high profile corruption cases against New Haven police officers. Former police officer Billy White, who pled guilty to taking bribes and stealing government funds,¹⁴⁷ had recently had his \$91,000 annual pension upheld in arbitration.¹⁴⁸ Although the union pushed back against the “bad boy” clause,¹⁴⁹ the city was able to win its inclusion, perhaps due to high public awareness of police corruption at the time of the negotiation.

B. Community Policing Strategy Meets Union Resistance

The 2008 contract negotiation showed how the structure of police contract bargaining can help cities win economic concessions from unions. However, achieving policy changes through

¹⁴⁶ List of mayors of New Haven, Connecticut, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_mayors_of_New_Haven,_Connecticut (last visited January 4, 2017).

¹⁴⁷ Melissa Bailey, *Billy White Pleads Guilty*, NEW HAVEN INDEPENDENT (Oct 26, 2007), http://www.newhavenindependent.org/index.php/archives/entry/billy_white_pleads_guilty/.

¹⁴⁸ Bharat Ayyar, *City's corrupt cops may lose pensions*, YALE DAILY NEWS (Mar 5, 2008), <http://yaledailynews.com/blog/2008/03/05/citys-corrupt-cops-may-lose-pensions>.

¹⁴⁹ *Id.*

bargaining has proven more difficult for the city. Contract negotiations in the 1990's era of community policing demonstrate challenges and costs to police administrators of making policy changes.

When Nick Pastore became the New Haven police chief in 1990, the city was in the midst of a large crime increase. Robbery and aggravated assaults increased by 50% between 1987 and 1989.¹⁵⁰ The previous police administration had responded with measures described by the New York Times as “harsh tactics.”¹⁵¹ One example of policing methods used by the previous administration: “A squad of officers hidden in a van known as the ‘stud bus’ often descended on youths gathered on street corners, seizing or roughing up many without cause, according to widespread complaints. The unit was referred to on the streets as ‘the beat-down posse.’”¹⁵²

In response, Pastore sought to implement a new kind of community-based policing founded on the support and respect of community members. One of his first acts was a “ventilation” of the police department: a removal of officers and commanders who would not cooperate with his agenda. A 1991 New York Times article reveals that five police commanders were given severance packages paying 75% of salary and health benefits for life, which the article described as “well above the norm.”¹⁵³ He also moved more than one hundred officers from desk duty to patrol assignments.¹⁵⁴ As a result of his changes, 74 of 418 officers left the police department.¹⁵⁵

¹⁵⁰ Ralph Blumenthal, *Policing New Haven: Patrol and Politics*, N.Y. TIMES (Nov. 1, 1991), <http://www.nytimes.com/1991/11/01/nyregion/policing-new-haven-patrols-politics-special-report-chief-with-high-profile-uses.html?pagewanted=all>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Van Zile, *supra* note 66, at 41.

¹⁵⁵ *Id.*

In an interview, Pastore described an active effort by union negotiators to preserve the status quo and prevent policy change. “There was pushback ... I posed a threat to a lot of people that ... formed their own cabals,” he said. “And they didn’t want any change ... they pushed the union to represent them not making change ... they wanted to undermine it. They were getting to the union to take me on. And they did.”¹⁵⁶ He described the union’s posture as “disingenuous,” explaining that officers acted to preserve their positions within the department, but often would not reveal their motives explicitly at the bargaining table.¹⁵⁷

Pastore described using financial issues as leverage to win desired policy changes. “I knew that I had some good bargaining points about money and benefits and we’re going to make a better department and get new equipment,” he said. Interviews with police officers active at the time of the negotiation have also emphasized Pastore’s use of overtime pay and other financial incentives to advance the community policing agenda.¹⁵⁸

To Pastore, the union pushback was part of a larger trend of organized police resistance against changes that threatened officers’ economic stability and status within the police department. Describing the tactical motivation to require arbitration for grievances, discussed above, Pastore said, “The officers wanted to stress the capabilities of the system, the administrative system ... you had people coming into the arbitration process that came from labor and knew the process better than the administration did. They were going to test it with an emphasis on beating it.”¹⁵⁹ In Pastore’s accounting, stretching the resources of police administrators was a union strategy for protecting police officer job security.

¹⁵⁶ Pastore, *supra* note 59.

¹⁵⁷ *Id.*

¹⁵⁸ Van Zile, *supra* note 66, at 79 n 419; Michael M. Berlin, Implementing Community Policing: Case Studies of New Haven, Connecticut, and Richmond, Virginia (Oct. 23, 2006) (unpublished Ph.D. dissertation, Graduate School of the University of Maryland) (on file with author).

¹⁵⁹ Pastore, *supra* note 59.

Describing the challenges of holding police accountable for misconduct, Pastore emphasized the role of disingenuous officer testimony coached by union officials. “If you use your gun you’re always in fear of your life. That’s what you have to say. You get it? And there’s other catch-things you do. ... They’re flirting with being disingenuous, untruthful.”¹⁶⁰ Pastore’s contention is that union representatives will tell police officers how to answer questions posed by the Internal Affairs department, and that officers will lie about their own feelings, thoughts, and motivations if necessary to avoid discipline. Pastore also agreed that some of the changes made to the accountability process, like the interrogation protections added to the contract in 2008, were just “window dressing” and were unlikely to have much of an effect on police accountability.¹⁶¹

This look into the Pastore era reveals that police administrators sometimes leverage financial resources to win policy changes. His account suggests that police managers must strategize about how to “buy” the changes they want, because work rule changes must be negotiated with union executives. Although mandatory bargaining over working conditions makes up part of this story, the financial incentives that encourage police officers to resist work rule changes may be equally important.

CONCLUSION

Return to Josh Smereczynsky and the 15-year old girl he slammed to the ground at New Haven’s 2015 St. Patrick’s Day parade. How has this Note shed light on the response of the police department and the police union?

Officers are incentivized to organize to resist discipline. This resistance is not simply legal or contractual, but also takes the form of social practices among officers. Police

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

departments are well known for “codes of silence” and peer and superior-led reprisals against officers who report on one another.¹⁶² The culture and practice of collective resistance is exemplified in the video still image at the beginning of this Note of police officers rallying to defend Josh Smereczynsky from being placed on desk duty.

Police resistance to accountability provisions is also reinforced by collective bargaining rights and political mobilization. The leverage wielded by the police union through the negotiation process limits the ability of police managers to use disciplinary proceedings. Nick Pastore has also suggested that the union is more likely to protect certain officers (including more senior members) than others.¹⁶³

Finally, a lack of opportunity to “rise in the ranks” through merit may contribute to police resistance to accountability reforms. Promotions are based largely on exams, not on exemplary performance, and the raises for promotions are relatively meager. The police department exhibits a flat salary structure where the major financial rewards are tied to overtime, extra duty, and retiring and collecting a pension. The current bargaining structure does the opposite and motivates longer-tenured police officers to “stick it out” until retirement. Even officers who have “burned out” or come to resent the residents of the neighborhoods they work in will be motivated to stay in their job. They are not able to leave without sacrificing a large part of their promised compensation as constituted by pension payments.

Ian Loader warns us not to forget that policing is “an essentially contested set of practices whose role is itself in need of public deliberation.”¹⁶⁴ To the 15-year-old black girl slammed to

¹⁶² Blumenthal, *supra* note 150, explains that some officers “never forgave” Nick Pastore for testifying against other officers at a Police Board inquiry. *See also* Jamie Kalven, *Code of Silence*, THE INTERCEPT (Oct. 6, 2016), <https://theintercept.com/2016/10/06/in-the-chicago-police-department-if-the-bosses-say-it-didnt-happen-it-didnt-happen/>.

¹⁶³ Pastore, *supra* note 59.

¹⁶⁴ Loader, *supra* note 21.

the ground by Josh Smereczynsky, both the treatment she received and the lack of discipline imposed on Officer Smereczynsky may have felt like an enforcement of second-class citizen status. Those who believe that police officers enforce racial and economic subordination should consider the many factors that increase police officer resistance to even minor attempts at discipline. To upend existing police practices, it may be necessary to weaken the foundations that support police officer resistance to accountability: both work rule bargaining rights and compensation by way of deferred economic rewards.

The task of overcoming organized police resistance at a time when “supporting police” seems increasingly politicized may appear daunting. But in local politics, much is possible. A better deal may be reached because the union president wants to set his son up in the police department. An increasingly diverse police force may desire a change from the old way of doing business, and new police recruits reduced to second-tier benefits may break from the old union guard and seek more dynamic models of compensation. There might be allies in unexpected places for activists who hope for newer, more community-oriented models of policing.

At the same time, police officers might be too entrenched and powerful to be meaningfully curtailed through reform. Instead of trying to make police officers more virtuous and judicious, we might decide to reduce the reach of the police. Michael Kinnucan writes:

“If we wish to reduce police and prison violence we must reduce the number of people entering prison and interacting with the police ... Legalize drugs, legalize sex work, legalize public drinking, legalize loitering, legaliz[e] being in the park after dark. Take a long hard look at all the occasions on which working-class people interact with the police in their everyday lives and simply get rid of as many as possible.”¹⁶⁵

Many police reform proposals would fail to address the underlying incentives that lead police officers to resist work rule changes and accountability reform. Even if reformers succeeded in achieving goals like elected civilian review boards, de-escalation training, and

¹⁶⁵ Michael Kinnucan, *Some Labor Disputes in the State Violence Industry*, HYPOCRITE READER (Feb. 2017), <http://www.hypocritereader.com/72/state-violence-industry>.

broader use of police body cameras, police officers would still have deeply entrenched incentives to resist greater control over their work and discipline. What's more, the popular support enjoyed by police – which has remained high even during times of high media coverage of police misconduct – suggests that police officers will usually win these fights. Instead of assuming that the reform mission can significantly improve the policing experience of society's most vulnerable residents, it is time to consider whether broader changes, from drug decriminalization to reinvestment of police budgets, might more directly achieve progressive goals.