

MANAGING THE POLICE EMERGENCY*

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There is a policing emergency in the United States. Police across the country cause massive, widespread, and unpredictable physical harm—killings, beatings; psychological harm—negative stress-related birth and educational outcomes, general worsened mental health; and sociological harm—advancing the racial, gender, and economic hierarchies that undermine our work towards an equal society. Even after the largest protest movement in U.S. history in summer 2020, the traditional political process has failed to make significant inroads against this emergency.

This Article begins to explore in depth the legal ramifications of recognizing the policing emergency. It suggests that among the most important ramifications is unlocking a previously unappreciated tool for reform: emergency managers.

As defined here, emergency managers are individuals or small groups empowered by state or local governments to exercise the powers of the government in response to an emergency when traditional political systems cannot or will not respond adequately or quickly enough. The current state of policing constitutes just such an emergency demanding immediate action.

Emergency managers—thus far limited to the fiscal and educational realms—can be a powerful tool for addressing this policing emergency. To achieve their goals, emergency managers have been imbued with a range of powers—from providing oversight to usurping all of the powers of local elected officials. The broad emergency powers and unitary nature of this position subvert the piecemeal nature of both local politics generally and of the police reform project

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specifically and can allow the emergency manager to break through procedural and political barriers that have previously served to uphold the status quo.

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INTRODUCTION

Complicated questions arise when sketching the exact contours of the policing emergency. But for many people, that such an emergency exists cannot be seriously contested. We have created a system wherein it is a regular

occurrence for police to injure, shoot, and kill people—disproportionately Black and Brown people—in gruesome and disturbing ways. Is it possible that there is no emergency when police shoot to death a twelve-year-old child playing in a park?¹ Or when they shoot a woman dead who was sleeping in her own home?² Or suffocate a man to death while he exclaims that he can't breathe, and civilians plead with them to stop?³ Or do the same to another man, but this time with a knee on his neck for over eight minutes?⁴ Or continue to put their knees on civilians' necks again,⁵ and again,⁶ and again,⁷ even after massive protests about the use of this very tactic? How about when they turn a traffic stop into a shooting, killing one father⁸ and paralyzing another,⁹ each time while the men's children look on, and each time with seven shots? Or kill a teenager cornered in an alley when he seemingly tried to pull up his pants?¹⁰ Or kill two men in the

1. Tamir Rice. See Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> [<https://perma.cc/BJ7Y-86AC> (dark archive)].

2. Breonna Taylor. See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What To Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021, 12:26 PM), **Error! Hyperlink reference not valid.**<https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/U366-JJ65> (dark archive)].

3. Eric Garner. See Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html> [<https://perma.cc/3YWS-LG7X> (dark archive)].

4. George Floyd. See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/XW5V-FFAL> (dark archive)] (Nov. 5, 2020).

5. Sircarlyle Arnold. See @msolurin, TWITTER (Jan. 5, 2021, 7:40 PM), <https://twitter.com/msolurin/status/1346617602907512834> [<https://perma.cc/8R8J-EQ7B>].

6. Donni Wright. See Ashley Southall, *Officer Who Pressed a Knee into Bystander's Neck Leaves N.Y.P.D.*, N.Y. TIMES, <https://www.nytimes.com/2020/10/28/nyregion/nypd-officer-francisco-garcia.html> [<https://perma.cc/G6M9-PYXR> (dark archive)] (Nov. 5, 2020).

7. An unidentified man in Allentown, Pennsylvania. See Braktkton Booker, *Police Investigate Incident Where Officer Appeared To Use Knee To Restrain Suspect*, NPR (July 14, 2020, 7:02 PM), <https://www.npr.org/2020/07/14/890503313/police-investigate-incident-where-officer-appeared-to-use-knee-to-restrain-suspe> [<https://perma.cc/9YQU-KLRS>].

8. Philando Castile. See Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [<https://perma.cc/U62Z-KYV2> (dark archive)].

9. Jacob Blake. See Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html> [<https://perma.cc/365E-CZGC> (dark archive)].

10. Timothy Thomas. See John Larson, *Behind the Death of Timothy Thomas*, NBC NEWS (Apr. 9, 2004, 7:29 PM), <https://www.nbcnews.com/id/wbna4703574> [<https://perma.cc/UAM5-Q9ZB>]; *Twenty Years Later: The Death of Timothy Thomas and the Uprising That Followed*, CIN. & HAMILTON CNTY. PUB. LIBR. BLOG (Apr. 16, 2021), <https://cincinnati.library.org/blogs/post/20-years-later-timothy-thomas/> [<https://perma.cc/W984-AVL4>].

same city within a month—one allegedly holding a sandwich,¹¹ the other holding a cellphone,¹² and neither suspected of any crime? Or shoot another teenager to death accused of, at worst, taking some cigarillos from a convenience store?¹³ Or beat a man so severely that they fracture his skull and give him permanent brain damage, while a dozen other officers look on, commenting like they’re watching a prizefight?¹⁴

Is it possible that these events do not constitute an emergency? As a rhetorical matter, no. These events have sparked massive protests, riots, and uprisings, and have shifted political and social winds around the country and world. Laypeople of all stripes would likely say this meets their definition of an emergency. But perhaps surprisingly, as a *legal* matter, the answer is maybe. That is because there is no singular definition of emergency in the legal world. Deciding what does or does not constitute an emergency is a question most often left to political actors. And there are numerous examples of those political actors declaring emergencies that seem trifling, while ignoring events that seem like they require desperate action.

But this lack of an objective definition does not mean that the “emergency” label lacks power. Quite the opposite. Instead, the declaration of an emergency by the state empowers government to take action beyond its usual ken, to take that action outside of the usual political processes, and often leads the courts to give deference to these actions.¹⁵

While defining “emergency” may seem to be a political battle, this Article will argue that, to the extent the law defines emergency at all, emergencies tend to have three characteristics.¹⁶ First, an emergency involves significant harm.¹⁷ Second, something about that harm is unpredictable or uncontrollable.¹⁸ And

11. Casey Goodson Jr. *See Will Wright, Columbus Police Kill Black Man Weeks After Protests Against Brutality*, N.Y. TIMES, <https://www.nytimes.com/2020/12/22/us/columbus-ohio-shooting.html> [<https://perma.cc/A7R6-EUVY> (dark archive)] (May 14, 2021).

12. Andre Maurice Hill. *See id.*

13. Michael Brown. *See What Happened in Ferguson?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [<https://perma.cc/3RYG-LCNN> (dark archive)] (Aug. 10, 2015).

14. Rodney King. *See Anjali Sastry Krbecek & Karen Grigsby Bates, When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 16, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [<https://perma.cc/4YHN-865N>].

15. *See, e.g.,* Alexander Mehra, *Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and the Financial Crisis*, 13 U. PA. J. BUS. L. 221, 223–24 (2010); David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1405–08 (2014); Michelle A. Dauber, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1306–08 (2007); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1016–20 (2003).

16. *See infra* Section I.A.

17. *See infra* Section I.A.

18. *See infra* Section I.A.

third, that harm cannot be prevented through the regular political process.¹⁹ These characteristics are not all mandatory, and a particularly strong showing in one may make up for deficiencies in others. For example, a sufficiently harmful event may be an emergency even if it was predictable, and a sufficiently unpredictable event may require the use of emergency powers even if it is comparatively less harmful. While declaring any particular event an emergency is largely left to political decision-makers, these three factors tend to appear either explicitly or implicitly in emergency powers statutes; in emergency doctrine, specifically in the Court's treatment of the Contract Clause; and in dictionary definitions of "emergency."

The state of policing in the United States fits this definition to a tee. While police killings are hypersalient examples of the harm caused by this emergency, they are only the tip of the iceberg. Instead, the policing emergency's harms—harms which are disproportionately borne by racial and ethnic minorities and others already subjugated in our society—are threefold. These harms are physical—stops, searches, pat downs, beatings, killings; psychological—the well-documented effects that this violence has on communities that spread far beyond the individuals subjected directly to the violence; and sociological—that police have been used to maintain unjust hierarchies in our society.²⁰ And these harms are great in magnitude. Even though a police killing or other police interaction may, at first glance, appear to affect only the person who is physically harmed, research has shown that these killings have negative effects on the health and well-being of a much wider group. But even ignoring these broader harms, millions of people have *direct* police contact every year, and for large groups of the population that contact can be stressful at its best and demeaning, assaultive, or deadly at its worst.²¹

And the policing emergency's harms are unpredictable to the point they appear random. Look again at the litany of seemingly mundane situations

19. See *infra* Section I.A.

20. See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 46 (2009) [hereinafter Capers, *Policing, Race, and Place*] ("[L]aw enforcement . . . tak[es] into consideration racial incongruity in assessing whether reasonable suspicion exists to justify a *Terry* stop. As a result of this practice, law-abiding minorities entering predominantly white neighborhoods are frequently stopped and questioned as to the reason for their presence in the neighborhood."); Aya Gruber, *Policing and "Bluelining"*, 58 HOUS. L. REV. 867, 873 (2021) (describing "bluelining" as "maintaining raced and classed spatial and social segregation through the threat and application of violence"); Paul Butler, *Walking While Black*, NAT'L L.J. (Nov. 10, 1997, 12:00 AM), <https://www.law.com/nationallawjournal/almID/1202421509992/walking-while-black/> [<https://perma.cc/7K6V-DBG2> (dark archive)]; see also Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 956–57 (2002) [hereinafter Carbado, *(E)Racing*]; Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 199–200 (2019); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 52–53 (2017).

21. See *infra* Section I.C.3.

described at the beginning of this piece that led to deadly encounters. A child playing with a toy gun in a park. A man on his cell phone in his car. Traffic stops and petty crimes. The variety of situations in which police have killed makes it virtually impossible for any individual to make choices that would allow them to eliminate the possibility of being killed by the police. This is especially so because the police's power to initiate an encounter is nearly limitless. Traffic laws have been written so that virtually any driver can be legally stopped, and police have further been given the leeway to stop someone when they read those laws incorrectly.²² Pedestrians, meanwhile, are protected only by a "reasonable suspicion" requirement for involuntary stops, reasonable suspicion which can serve entirely as pretext, and by no affirmative requirement to ensure that a "voluntary" stop is, in fact, voluntary.²³ Ultimately, this means that for large swaths of the population, the only options for dealing with the policing emergency are harm minimization—most infamously "the talk" given to young people of color by their family members about surviving police encounters—and prayer.

Finally, the policing emergency has persisted through every tool of the traditional political process. Despite massive political will built up against the current state of policing, most clearly seen through the protests against police brutality in summer 2020, there has been minimal change.²⁴ But this moment in time is just another example of the police's long-observed ability to resist reform. Whether through police unions, police culture, or other more idiosyncratic tactics, the police's ability to withstand traditional political processes is well established.²⁵

When described in these broad strokes, it may seem some version of the policing emergency is present in nearly every police department in the country. That is because this core of the policing emergency stems from aspects and effects of policing that transcend jurisdiction.

Stated simply, this transcendent core is violence. The violence of police is inherent to how we have chosen to implement public safety across the country. This can be seen not only through the national responses to police violence, but also through doctrine. Indeed, the core legal regulations shaping police behavior stem from the Federal Constitution.

22. See *Heien v. North Carolina*, 574 U.S. 54, 57 (2014).

23. See *Utah v. Strieff*, 136 S. Ct. 2056, 2069–70 (2016) (Sotomayor, J., dissenting); *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

24. See, e.g., Astead W. Herndon, *How a Pledge To Dismantle the Minneapolis Police Collapsed*, N.Y. TIMES, <https://www.nytimes.com/2020/09/26/us/politics/minneapolisdefund-police.html> [https://perma.cc/2VF4-GCLN (dark archive)] (Nov. 3, 2021); see also Sarah Holder, Fola Akinnibi & Christopher Cannon, *'We Have Not Defunded Anything': Big Cities Boost Police Budgets*, BLOOMBERG (Sept. 22, 2020), <https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/> [https://perma.cc/7LSY-F9JT (dark archive)].

25. See *infra* Section I.C.

But having the same core does not mean that the policing emergency is the same, whether in form or intensity, in every jurisdiction in the country. Policing is ultimately a local enterprise, and there is considerable variation in both policy and personnel across the more than ten thousand law enforcement departments in the country. Recognizing this variation, this Article argues that people seeking to identify how the policing emergency has manifested in their jurisdiction should look to five categories: excessive force, corruption, lack of accountability,²⁶ cover-ups, and supremacist ties or behaviors.²⁷ Though they are neither exhaustive nor dispositive, these categories seek to capture the problems with policing that are routinely decried by both activists and academics of all stripes and to make identifying the policing emergency a more tangible exercise.

With the policing emergency identified, the question naturally arises: what do we do about it? This Article suggests one possible answer, emergency managers. As I define the term, an emergency manager is an individual or small group granted the powers of a state or local government in a time of emergency to address that emergency outside of the normal democratic process. Emergency managers have been used for nearly a century in the context of fiscal emergencies and for decades to rescue academically failing schools.²⁸ Throughout this history, they have come in many stripes and have been imbued with a range of powers. At their least intrusive, emergency managers serve to oversee local governments and to provide them with expert advice.²⁹ But at their most powerful, an emergency manager can be imbued by a state government with the power to fully usurp the powers of local government.³⁰ These most powerful emergency managers, most (in)famously Kevyn Orr in Detroit and others empowered by the same Michigan statute, have been decried as antidemocratic dictators by commentators and activists alike.³¹

That criticism is not wholly warranted. Unlike previous scholarship, this Article is the first to view emergency managers prospectively, importing them to a new context—policing. Doing so shows that most of these criticisms do not intrinsically apply to emergency managers, and are instead tied to the political economies in which emergency management has been used. Previously, emergency managers were used in the fiscal and educational contexts by conservative mayors and governors to seize power from disproportionately

26. See, e.g., Alice Speri, Ryan Devereaux & Sam Biddle, *New York Police Are Attacking Protestors — They Know They Won't Face Consequences*, INTERCEPT (June 2, 2020, 6:45 PM), <https://theintercept.com/2020/06/02/new-york-police-protesters-george-floyd/> [<https://perma.cc/XC56-5WUY>].

27. See *infra* Section I.C.

28. See *infra* Part II.

29. See *infra* Section II.A.1.

30. See *infra* Section II.A.2.

31. See *infra* Section II.A.2.

more liberal, minority localities.³² The emergency managers appointed by those conservative leaders have then implemented conservative policies in these liberal places, policies that the locality was unlikely to choose for itself.³³

Stepping back from that particular political economy, the application of emergency managers to fiscal crises, academically troubled schools, and to police begins to show that emergency management is, at its core, a tool. Like all tools, emergency management has strengths and weaknesses, and is appropriate for some situations but not others. While the dictatorial nature of emergency managers has been decried as antidemocratic in the fiscal and educational contexts, it is exactly this dictatorial nature that makes it a powerful tool for police reform.

Too often, police reform has failed not because the people do not want it, but because structural impediments stand in its way. Police exercise outsized political power,³⁴ are protected from investigation and termination by union contracts and a culture—the fabled Blue Wall of Silence—that protects bad actors and expels whistleblowers,³⁵ and may also be protected from political forces by the structures of local government itself.³⁶

An emergency manager can cut through these impediments. The ability to subvert the procedural, structural, and political roadblocks that have stifled previous attempts at change is the tool's greatest strength. Even in their weakest form, empowering emergency managers to provide oversight could break down the Blue Wall of Silence and increase accountability. And in their strongest form, emergency managers are empowered by the state to seize control over the entire functioning of local government. Here, an emergency manager could abrogate union contracts, fire problem officers, change policies, reorient budgets, and radically alter the operation of the police to create structural changes that greatly reduce the police's power to inflict violence.

This Article proceeds in four parts. Part I explores how to define “emergency” generally before pinpointing the policing emergency's violent core. It then suggests how that emergency might be identified in each of the thousands of local police agencies across the country. Part II shifts to emergency managers. It explores the history and powers of emergency managers, through a discussion of the laws and literature around emergency management in the fiscal and educational contexts. Part III discusses how emergency managers

32. See *infra* note 249 and accompanying text (discussing the demographics of cities and school districts placed under emergency control).

33. See *infra* Section II.C.

34. 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/374Y-M9EP].

35. See Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How To Challenge the Police Privilege To Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 214–19.

36. See Herndon, *supra* note 24.

might be used to solve the policing emergency. It first explains why emergency managers could work and should be used in this context and then focuses on the questions lawmakers should consider as they build policing emergency managers. Part IV considers the major objection to emergency managers, that they should not be used because they are an antidemocratic force.

I. THE POLICING EMERGENCY

A. *Defining Emergency*

Before describing the policing emergency, this part will first tackle a baseline issue, identifying what an “emergency” is. There is no universal definition of emergency within the law.³⁷ And especially when the term is used by political actors, definitions can seem even less cohesive.³⁸ Nevertheless, that does not mean the term is completely without meaning.

To think through the question, it is helpful to begin with a dictionary definition. Merriam-Webster defines emergency as “an unforeseen combination of circumstances or the resulting state that calls for immediate action” or “an urgent need for assistance or relief.”³⁹ Similarly, the Oxford English Dictionary defines emergency as “a state of things unexpectedly arising, and urgently demanding immediate action.”⁴⁰

These definitions capture three facets of an “emergency” that repeat throughout the law.⁴¹ First, they note that “emergency” denotes an urgent need for relief. This sense of urgency is often due to the magnitude of the potential (or actualized) harm. Second, these definitions identify an emergency as requiring “immediate” action. Legally, this often translates to the suspension of usual deliberative processes in favor of unilateral executive action. These unilateral decisions are justified in part because of the third part of an emergency. As both Merriam-Webster and Oxford note, emergencies are often

37. See Karin Loevy, *What Is an Emergency? The Legal Politics of Defining the “Un-Definable,”* 22 ILSA J. INT’L & COMP. L. 155, 158 (2015) (noting that in traditional emergency powers theory “[i]t is common knowledge that emergencies, are unexpected events, and therefore essentially un-definable”).

38. See, e.g., Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1810 (2015) (describing the use of “non-emergency emergency rulemaking,” or rulemaking using emergency procedures “for utterly routine matters”).

39. *Emergency*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/emergency> [<https://perma.cc/RT56-ZS7J>] [hereinafter *Emergency*, MERRIAM-WEBSTER].

40. *Emergency*, OXFORD ENG. DICTIONARY, www.oed.com/view/Entry/61130 [<https://perma.cc/ERY8-7Y8M> (staff-uploaded, dark archive)] [hereinafter *Emergency*, OXFORD ENG. DICTIONARY].

41. See, e.g., *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 439–40 (1934) (affirming the ability of state governments to abrogate contracts when there is “urgent public need demanding such relief” from causes physical, economic, or otherwise akin to “fire, flood, or earthquake”).

“unforeseen”⁴² or “arise unexpectedly.”⁴³ It is in part this surprise nature that justifies the suspension of usual order.⁴⁴

But even within dictionary definitions, not all emergencies are surprises. In 2019, Oxford recognized “climate emergency” as its word of the year.⁴⁵ “Climate emergency” is defined as “a situation in which urgent action is required to reduce or halt climate change and avoid potentially irreversible environmental damage resulting from it.”⁴⁶ This definition suggests that an emergency may exist even if it is foreseeable, or even foreseen,⁴⁷ so long as the magnitude of harm is great enough to warrant immediate action. Thus, while most people think of unexpected emergencies as the “classic” emergency,⁴⁸ the rise of the “climate emergency” shows that a broader definition is also recognized as valid.

Importantly, the law is not bound to the mass of dictionary definitions, and emergencies in other situations show just how wide of a berth political actors have when defining and declaring (or declining to declare) an emergency. In addition to the expected emergencies—such as weather events or the COVID-19 pandemic—politicians have declared emergencies in many other contexts. Perhaps most related to the policing emergency, over twenty state and local governments have already declared racism a public health crisis.⁴⁹ Utah, followed by fifteen other states, has declared pornography a public health emergency.⁵⁰ Multiple state and local governments have also declared

42. *Emergency*, MERRIAM-WEBSTER, *supra* note 39.

43. *Emergency*, OXFORD ENG. DICTIONARY, *supra* note 40.

44. See L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-805, NATIONAL EMERGENCY POWERS 2-3 (2021) *Error! Hyperlink reference not valid.* (noting that “emergency conditions” are those which “have not attained enough of stability or recurrency to admit of their being dealt with according to rule.” (quoting EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 3 (4th rev. ed. 1957))).

45. *Word of the Year 2019*, OXFORDLANGUAGES, <https://languages.oup.com/word-of-the-year/2019/> [<https://perma.cc/6CYL-GDA3>].

46. *Id.*

47. Warnings about climate change date back to at least the 1970s. See, e.g., James P. Sterba, *Problems from Climate Changes Foreseen in a 1974 C.I.A. Report*, N.Y. TIMES, Feb. 2, 1977, at A10.

48. See, e.g., Alan S. Trust, *What Constitutes an E-Mergency: Not Your Parents’ Emergencies: Part I*, 29 AM. BANKR. INST. J. 42, 42 (2010) (identifying “the classic view of an emergency” as one involving unforeseen exigent circumstances).

49. See Christine Vestal, *Racism Is a Public Health Crisis, Say Cities and Counties*, STATELINE (June 15, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/15/racism-is-a-public-health-crisis-say-cities-and-counties> [<https://perma.cc/65ND-GA4B>] (identifying twenty-four states or localities, including Michigan, Ohio, Wisconsin, and Denver, Colorado, as having made these declarations); see also Gov. Sisolak Proclaims Racism a Public Health Crisis, OFF. NEV. GOVERNOR (Aug. 5, 2020), https://gov.nv.gov/News/Press/2020/Gov__Sisolak_proclaims_racism_a_public_health_crisis/ [<https://perma.cc/AU4N-DDJQ>].

50. See Alex Stuckey, *Utah Ceremonially Declares Porn a ‘Public Health Crisis,’* SALT LAKE TRIB. (Apr. 20, 2016, 7:32 AM), <https://archive.sltrib.com/article.php?id=3795327&citytype=CMSID> [<https://perma.cc/6VMH-KA7M>]; Mattie Quinn, *Is Porn a Public Health Crisis? 16 States Say Yes.*,

homelessness emergencies.⁵¹ The Governor of New Mexico recently declared a state of emergency “due to the ongoing and pervasive threat of riots and insurrection” surrounding President Joseph Biden’s inauguration.⁵² And Presidents, acting under the National Emergencies Act,⁵³ have declared sixty-two emergencies with thirty-seven still in effect.⁵⁴ These emergencies have ranged in substance, from blocking government property from numerous countries, including Iran,⁵⁵ to prohibiting transactions with drug traffickers,⁵⁶ to stopping cyber criminals,⁵⁷ to taking immigration-related action on the southern border.⁵⁸

Perhaps unsurprisingly given the breadth of these declared emergencies, statutes empowering political actors to declare emergencies tend to be written broadly.⁵⁹ The Federal Disaster Relief Act, for instance, defines emergency as any “instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”⁶⁰ Other emergency statutes do not define emergency at all, simply leaving declarations to the discretion of an official. Delaware simply states that the Governor can proclaim a state of emergency “upon a finding that an emergency or disaster has occurred or that such occurrence or threat of that occurrence is imminent.”⁶¹ Florida says only that “[a] state of emergency shall be declared by executive

GOVERNING (July 17, 2019), <https://www.governing.com/archive/gov-pornography-public-health-crisis-states.html> [https://perma.cc/X2K9-H69P].

51. J.B. Wogan, *Why Governments Declare a Homeless State of Emergency*, GOVERNING (Nov. 6, 2015), <http://www.governing.com/archive/gov-when-cities-declare-homeless-state-of-emergency.html> [https://perma.cc/GK85-3JUD].

52. KRQE Staff, *Gov. Lujan Grisham Declares State of Emergency Leading up to Inauguration*, KRQE NEWS, <https://www.krqe.com/news/new-mexico/gov-lujan-grisham-declares-state-of-emergency-leading-up-to-inauguration/> [https://perma.cc/5W5P-9GSN] (Mar. 12, 2021).

53. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651).

54. HALCHIN, *supra* note 44, at 15.

55. *Id.*; see also Exec. Order No. 12170, 44 Fed. Reg. 65729, 65729 (Nov. 14, 1979).

56. Exec. Order No. 12978, 60 Fed. Reg. 54579, 54579 (Oct. 21, 1995).

57. Exec. Order No. 13694, 3 C.F.R. § 297 (2015).

58. Proclamation No. 9844, 3 C.F.R. § 12 (2019) (revoked by Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021)).

59. See, e.g., *Legislative Oversight of Emergency Executive Powers*, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx#2021> [https://perma.cc/C4MF-PF5H] (Jan. 4, 2022) (noting that every state empowers its governor to declare an emergency but finding that as of May 2020, twelve states had no legislative limits on those declarations).

60. The Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, § 103(b)(1), 102 Stat. 4689, 4689 (codified as amended at 42 U.S.C. § 5122(1)).

61. DEL. CODE ANN. tit. 20, § 3115(c) (LEXIS through 83 Del. Laws, c. 266).

order or proclamation of the Governor if she or he finds an emergency has occurred or that the occurrence or the threat thereof is imminent.”⁶²

While there are some more specific definitions of emergency, these are often contained within statutes addressing more specific problems. For example, Iowa has a statute addressing a “public order emergency,” which defines its scope as addressing “such substantial interference with the public peace as to constitute a significant threat to the health and safety of the people or a significant threat to public or private property.”⁶³ Illinois likewise has a targeted emergency declaration statute, but to a focus on atomic explosions, natural disasters, and telecommunications failures.⁶⁴

Beyond these explicitly political statutes, the exigency exception to the Fourth Amendment’s warrant requirement likewise shows just how broadly (and loosely) we have defined emergency.⁶⁵ The Supreme Court has defined exigency within this context as a “compelling need for official action and no time to secure a warrant.”⁶⁶ That exception appears limited to a short list of possibilities: “hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a subject’s escape, and risk of danger to the police or others.”⁶⁷ But the possibilities within those circumstances are capacious. Far from being limited to just entering burning buildings,⁶⁸ courts have allowed police to justify warrantless searches as exigent even when, for example, they did not have probable cause to believe their target committed the crime that justified the exigency,⁶⁹ when they seemingly had ample time and opportunity

62. FLA. STAT. ANN. § 252.36(2) (Westlaw through laws and j. res. in effect from the 2021 1st Reg. Sess. and Spec. “A” and “B” Sess. of the 27th Leg.); *see also* MICH. COMP. LAWS § 10.31(1) (2021) (repealed) (empowering the governor “[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled”).

63. IOWA CODE ANN. §§ 29C.2(8)–3 (Westlaw through legislation from the 2021 2d Extraordinary Sess.).

64. 20 ILL. COMP. STAT. ANN. 3305/2(a) (Westlaw through P.A. 102-695 of the 2021 Reg. Sess.).

65. *See Johnson v. United States*, 333 U.S. 10, 14–15 (1948).

66. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

67. *United States v. Evans*, 549 F. App’x 397, 402 (6th Cir. 2013) (quoting *United States v. Williams*, 354 F.3d 497, 503 (6th Cir. 2003)); *see also* *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

68. *See Tyler*, 436 U.S. at 509–10.

69. *See, e.g., United States v. Caraballo*, 831 F.3d 95, 104 (2d Cir. 2016) (“[T]he officers thought they lacked probable cause to arrest Caraballo on Barratt’s murder, [although] they properly considered him their ‘primary suspect.’”).

to obtain a warrant,⁷⁰ or when the police's explanation of potential harm is dubious, at best.⁷¹

The leeway in this area is perhaps clearest, however, when examining events that meet the definition of an emergency but go unaddressed. The politicization of COVID-19 may be the most recent example of this. While some politicians took extreme, if necessary, measures to prevent COVID-19's spread—issuing stay-at-home orders, shutting down businesses and houses of worship, mandating masks—others took none of these steps.⁷² Indeed, some state-level officials took steps in the opposite direction, mandating that localities and government offices *not* take steps that they believed would lessen COVID-19's effects, such as mandating vaccination or limiting business occupancy.⁷³

But perhaps the most graphic example of this political leeway in the emergency space is lynching. A detailed history of lynching in the post-Reconstruction United States is far beyond the scope of this Article.⁷⁴ But a bare-bones account of lynchings in the early twentieth century will show that problem meets even a strict dictionary definition of an emergency. The harm was obviously great. From 1877 to 1950, more than 4,000 “racial terror lynchings” occurred throughout the American South.⁷⁵ These lynchings were often brutal acts of torture witnessed, at times, by thousands of people.⁷⁶ And their effects extended far beyond those killed. Lynchings helped to perpetuate racial and economic hierarchy,⁷⁷ and caused “devastating” harm to the “physical, mental, and emotional well-being of African Americans” unfortunate enough to

70. See, e.g., *United States v. Iwai*, 930 F.3d 1141, 1148–61 (9th Cir. 2019) (Bybee, J., dissenting) (noting the possibility of an anticipatory warrant, that officers had obtained multiple warrants over the previous days of their investigation, and that they had multiple hours to obtain a warrant before entering Iwai's home).

71. See, e.g., *Evans*, 549 F. App'x at 407 (Griffin, J., concurring) (noting that the police justified their search by referencing a mother's fear of harm to her child from the father, when the mother actually said that she feared what would happen to the child if the police rushed into the house).

72. See, e.g., Greg Allen, *Fla. Republican Gov. DeSantis Cancels COVID-19 Restrictions Statewide*, NPR (May 4, 2021, 5:06 AM), <https://www.npr.org/2021/05/04/993384848/fla-republican-gov-desantis-cancels-covid-19-restrictions-statewide> [<https://perma.cc/9UP8-UEF7>] (noting that Florida did not have a statewide mask mandate).

73. See, e.g., *id.*; Jake Zuckerman, *DeWine Signs Bill To Temporarily Ban School COVID-19 Vaccine Mandates*, OHIO CAP. J. (July 15, 2021, 12:50 AM), <https://ohiocapitaljournal.com/2021/07/15/dewine-signs-bill-to-temporarily-ban-school-covid-19-vaccine-mandates/> [<https://perma.cc/DK4H-8PN7>].

74. For a more detailed account, see EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017) [hereinafter *LYNCHING IN AMERICA*], <https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf> [<https://perma.cc/2S2P-HR7U>].

75. Teri Dobbins Baxter, *Dying for Equal Protection*, 71 HASTINGS L.J. 535, 563 (2020) (quoting *LYNCHING IN AMERICA*, *supra* note 74, at 4). While rarer, lynchings occurred in the North as well. *Id.* at 565.

76. *Id.* (“A 1917 lynching in Memphis, Tennessee attracted thousands of spectators.”).

77. *Id.* at 565–68.

witness them.⁷⁸ Indeed, lynching was one cause of the Great Migration, in which millions of Black people moved to northern states in part “to escape the racial terror exemplified by lynchings.”⁷⁹

Lynchings were also largely unpredictable. While nominally linked to allegations of Black criminality, those allegations could be falsified, and other lynchings occurred merely because of social norm violations or bad luck.⁸⁰ In other words, like a tornado, one might be able to predict that a lynching would occur, but figuring out exact parameters could happen only shortly before it was too late. Finally, lynchings totally subverted normal criminal justice processes. Not only were lynchings mob violence that subverted traditional criminal punishment, but despite their public nature, lynchings went on to escape punishment themselves en masse. “[A]fter 1900, only 1 percent [of lynchings] resulted in a lyncher being convicted of any criminal offense.”⁸¹ Lynchings therefore seem to fit well within the bounds necessary for emergency action. But when faced with this emergency, politicians at the local, state, and national levels demurred in the face of white, Southern resistance.⁸² Stated plainly, these leaders saw an emergency occurring on a grand scale, and they made the political choice not to act. That is the breadth of discretion in which defining and declaring emergencies sits.

These examples—whether historical, legal, or definitional—ultimately suggest that despite my cataloging of three factors, emergencies are ultimately judged by a discretionary, totality-of-the-circumstances test. Sometimes grave harm is enough, other times it is ignored. The usual processes may be suspended because of an emergency’s sudden nature, but other times they may be suspended for expediency’s sake or maintained despite some sudden harm. And some emergencies are sudden, but others simmer for years, decades, or perhaps even centuries.

B. *The Policing Emergency*

With the idea of an emergency defined generally, the natural next question is: What is the policing emergency? I do not attempt to explore the full contours of the policing emergency. That project—which would necessitate both significant historical analysis and in-depth evaluation of each of the many

78. *Id.* at 567.

79. *Id.* at 568.

80. *See id.* at 563–64; *see also* OKLA. COMM’N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT 11 (2011), <https://www.okhistory.org/research/forms/freport.pdf> [https://perma.cc/6JGM-VDKP] (noting that the charges against the man that set off the Tulsa Massacre were “later dismissed and highly suspect from the start”); *Emmett Till’s Accuser Admits She Lied*, EQUAL JUST. INITIATIVE (Jan. 31, 2017), <https://eji.org/news/emmett-till-accuser-admits-she-lied/> [https://perma.cc/N2MG-AV8L].

81. LYNCHING IN AMERICA, *supra* note 74, at 48.

82. *See id.* at 48–50; Baxter, *supra* note 75, at 566–67.

thousands of local police agencies across the country—is far beyond this Article’s scope. Instead, I identify only the policing emergency’s core. That core is violence.

Specifically, that core is the harm that extends from the police’s violence. Those harms occur on three levels. The first, most obvious level is physical harm. This is police shootings; beatings; frisks; tight handcuffs; pepper spray; tasers; and the manifold other ways that police physically accost individuals. Second is the psychological harm. This harm extends far beyond those directly physically harmed by police to those who witness, are exposed to, and are threatened by police’s physical violence. Third, there is sociological harm. This is the harm of hierarchy. It is the police’s tendency, both historical and modern, to take actions that maintain the racial, economic, and other hierarchies that we, as a country, claim to want to dismantle.⁸³

These harms track neatly onto the three qualities of an emergency described above. They are large in magnitude, often unpredictable,⁸⁴ and traditional processes have proven largely unable to address them. To further explain these harms and to show how they map onto the definition of an emergency, the remainder of this part will use the summer 2020 protests, uprisings, and riots as a case study.

Summer 2020 saw what may have been the largest protest movement in U.S. history.⁸⁵ Polls suggest that between fifteen and twenty-six million people protested during May and June 2020.⁸⁶ By comparison, the Women’s March of 2017 turned out about three million people, and the civil rights marches in the

83. Past authors in this area have adopted the World Health Organization’s definition of police violence: “The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.” See, e.g., Denise Herd, *Cycles of Threat: Graham v. Connor, Police Violence, and African American Health Inequities*, 100 B.U. L. REV. 1047, 1049–50 (2020). I deviate from this definition to include sociological violence because the WHO’s definition does not capture the police’s role in maintaining the various negative hierarchies, as has been highlighted by both abolitionists and academics in recent years. See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 659 (2020) [hereinafter Bell, *Anti-Segregation Policing*]; #8TOABOLITION, <https://www.8toabolition.com/> [<https://perma.cc/N44H-N3Z8>].

84. To be more precise, the unpredictability I refer to here is the emergency’s stochasticity. While trends in the harms police cause may certainly be analyzed, predicting on whom those harms will befall at any given point is virtually impossible, and so it is likewise impossible for any given individual to take sufficient preventive measures to guarantee they will avoid those harms.

85. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/J95M-EAAS> (dark archive)].

86. *Id.* (citing polls taken between June 4 and June 22).

1960s involved only hundreds of thousands.⁸⁷ These millions of protestors across the country were joined by protestors internationally.⁸⁸

1. Physical Harms

These protests began in response to the sort of shocking physical violence that often causes people to take to the streets, a horrific video of Derek Chauvin killing George Floyd by keeping a knee on his neck for 9 minutes and 29 seconds while onlookers recorded, begging him to stop or for other police to intervene. But the protests quickly became about more than that one horrific event, as people from across the country reckoned with the harm that their own police departments had caused.⁸⁹ Names of victims of police brutality rang out. At the same time, protestors and the activists leading and organizing them focused not only on these most egregious acts of police, but the routine violence that the entire policing system has inflicted on the Black, Brown, poor, disabled, LGBTQIA, sex worker, and other communities that were historically subjugated, politically disfavored, or for other reasons have remained the disproportionate targets of police violence.⁹⁰

Unlike previous protests, which focused on repercussions for the specific officers involved or policy reforms designed to curb specific abuses, these protests made more expansive calls for change.⁹¹ Protestors now called for remaking the entire policing system under the theory that the sorts of previously identified “abuses” were not abuses at all, but were instead the regular functioning of the policing system.⁹²

While this mass movement illuminated the depth of the citizenry’s dissatisfaction with the police, it was the acts of the members of that system—the police and their allies in government—that showed the emergency itself. Across the country, police responded to calls for reform or abolition with violence against protestors. Tear gas, batons, and impact munitions were

87. *Id.*

88. See Jen Kirby, “Black Lives Matter” Has Become a Global Rallying Cry Against Racism and Police Brutality, VOX (June 12, 2020, 7:30 AM), <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium> [<https://perma.cc/Q3M2-TJH5>].

89. See Keeanga-Yamahatta Taylor, *Did Last Summer’s Black Lives Matter Protests Change Anything?*, NEW YORKER (Aug. 6, 2021), <https://www.newyorker.com/news/our-columnists/did-last-summers-protests-change-anything> [<https://perma.cc/Z9B6-628P> (dark archive)] (noting the widespread symbolic responses of officials across the country in response to protests in their jurisdictions).

90. See, e.g., #8TOABOLITION, *supra* note 83; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/M8EH-FVVV> (dark archive)].

91. See, e.g., #8TOABOLITION, *supra* note 83; Christopher Wilson, *Group Behind Moderate Police Reform Proposal Issues Apology for Distracting from Defunding and Abolition Movement*, YAHOO! NEWS (June 10, 2020), <https://www.yahoo.com/video/police-reform-8cantwait-project-zero-cofounder-apology-143505275.html> [<https://perma.cc/24TH-U7WX>].

92. See, e.g., #8TOABOLITION, *supra* note 83; Wilson, *supra* note 91.

commonplace. Some police drove their cars into crowds of protestors,⁹³ and some politicians defended them.⁹⁴ A wall of mothers was filmed peacefully protesting; they were later attacked by police.⁹⁵ One NYPD officer said over the dispatch radio in response to protestor movement, “Shoot those motherfuckers.”⁹⁶ A teenage organizer in Chicago had her front teeth knocked out.⁹⁷ Much of this violence was captured on video for the world to see.⁹⁸

This police violence was not a surprise to many police critics or veterans of protests past. The police violence in Ferguson, Missouri, during protests after Officer Darren Wilson killed Michael Brown was rampant, ensnaring protestors and journalists alike.⁹⁹ But the widespread and indiscriminate nature of the violence bolstered activists’ claims that these were not the acts of a few bad apples; this was the nature of the police.

The physical harm suffered by these protestors was emblematic of the physical harm regularly meted out by the police. While it is difficult to quantify exactly how many people are directly physically harmed and how (whether or not with legal justification) by the police each year, that number is likely in the millions. The Bureau of Justice Statistics’ Police-Public Contact Survey likewise suggests that over twenty-eight million people over the age of sixteen are subjected to police-initiated contact, with well over one million people

93. See Alec Snyder, *Video Appears To Show Detroit Police Car Driving into Protesters*, CNN (June 30, 2020), <https://www.cnn.com/2020/06/29/us/detroit-police-car-plows-protesters-trnd/index.html> [https://perma.cc/2HBJ-BRHS]; Li Cohen, *Video Shows NYPD Vehicles Driving into Protesters in Brooklyn*, CBS NEWS (May 31, 2020), <https://www.cbsnews.com/news/video-shows-nypd-vehicles-driving-into-protesters-in-brooklyn-2020-05-31/> [https://perma.cc/2F5A-9PWH].

94. Henry Austen, Suzanne Ciechalski & Tom Winter, *New York Mayor Bill de Blasio Defends Police After Video Shows NYPD SUV Driving into Protesters*, NBC NEWS (May 31, 2020), <http://www.nbcnews.com/news/us-news/new-york-mayor-bill-de-blasio-defends-police-after-video-n1220246> [http://perma.cc/GD42-2HE4].

95. Tim Dickinson, *From the Administration That Brought You Kids-in-Cages, It’s Tear-Gassed-Moms*, ROLLING STONE (July 22, 2020, 7:48 PM), <https://www.rollingstone.com/politics/politics-news/from-the-administration-that-brought-you-kids-in-cages-its-tear-gassed-moms-1032760/> [https://perma.cc/J4GY-K2A2].

96. Speri et al., *supra* note 26.

97. See Maxwell Evans, *60 Protestors Sue City, Alleging Chicago Police Abused Them ‘Without Justification’ at Summer Protests*, BLOCK CLUB CHI. (Nov. 19, 2020), <https://blockclubchicago.org/2020/11/19/60-protester-sue-city-alleging-chicago-police-abused-them-without-justification-at-summer-protests/> [https://perma.cc/9K4C-K3HB].

98. See, e.g., Martha Bayne & Jason Schumer, *What Happened May 30?*, S. SIDE WKLY., <https://protesttimeline.southsideweekly.com/> [https://perma.cc/988F-LFZ3] [hereinafter Bayne & Schumer, *May 30*]; Jim Daley, Martha Bayne & Jason Schumer, *What Happened July 17?*, S. SIDE WKLY., <https://protesttimeline.southsideweekly.com/july-17/> [https://perma.cc/5VVA-LEZJ].

99. See, e.g., Wesley Lowery, *In Ferguson, Washington Post Reporter Wesley Lowery Gives Account of His Arrest*, WASH. POST (Aug. 14, 2014), https://www.washingtonpost.com/politics/in-ferguson-washington-post-reporter-wesley-lowery-gives-account-of-his-arrest/2014/08/13/0fe25c0e-2359-11e4-86ca-6f03cbd15c1a_story.html [https://perma.cc/B55S-LEKA (dark archive)].

subjected to police's force or threatened force in a given year.¹⁰⁰ Most of the people who experienced this force perceived it as excessive.¹⁰¹

Or, consider the practice of stop and frisk. Even after lawsuits brought huge reductions in the number of stops, police in just three cities seem to make nearly 200,000 stops per year. The Chicago Police Department ("CPD") stopped over 54,000 people in just the first half of 2016, down from 250,000 in a four-month period of 2014.¹⁰² NYPD made about 13,000 stops in 2019 and 10,000 stops in 2020, down from a high of over 685,000 in 2011.¹⁰³ And police in Philadelphia made almost 77,000 stops in 2019 after seeing drops in the number of stops greater than 30% in previous years.¹⁰⁴

While these numbers may seem stark, it is only by identifying what a frisk or stop actually looks like that one can contextualize the magnitude of this harm. Ice Cube once rapped that police would "search a n*gga down, grabbin his nuts."¹⁰⁵ As it turns out, he was not exaggerating. He was describing the police's training.¹⁰⁶ Too often these stops are "state-sanctioned sexual assault," with all of the harm the actions underlying that label entails.¹⁰⁷ But even frisks that do

100. See ERIKA HARRELL & ELIZABETH DAVIS, BUREAU OF JUST. STAT., NCJ 255730, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 3 (2020), <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf> [<https://perma.cc/C8BT-TTXV>].

101. *Id.* at 6.

102. See Russell L. Jones, *Stop-and-Frisk: Its Effect on African American Communities—A Tale of Three Cities*, 45 U. DAYTON L. REV. 357, 374–75 (2020); ARLANDER KEYS, THE CONSULTANT'S SECOND SEMI-ANNUAL REPORT 9 (2018), https://www.aclu-il.org/sites/default/files/field_documents/the_consultants_second_semi-annual_report.pdf [<https://perma.cc/TZ7N-2PKR>].

103. See N.Y. C.L. UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 4 (2019) [hereinafter DE BLASIO ERA], https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf [<https://perma.cc/TY4N-XPS2>]; *Stop, Question, and Frisk Data*, NYPD, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page> [<https://perma.cc/7VR9-T6ZS>] (July 23, 2021) (drawing from the 2019 and 2020 Excel files).

104. Plaintiffs' Tenth Report to Court on Stop and Frisk Practices: Fourth Amendment Issues at 3–4, *Bailey v. City of Philadelphia*, No. 10-05952 (E.D. Pa. Apr. 20, 2020) [hereinafter Plaintiffs' Tenth Report], https://www.aclupa.org/sites/default/files/field_documents/104_plaintiffs_tenth_report_on_4th_amendment_issues.pdf [<https://perma.cc/8TF9-XPGM>].

105. NWA, *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

106. See Seth W. Stoughton, *Terry v. Ohio and the (Un)forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19, 29 (2017) ("The groin and buttocks bear special mention, as it had been drilled into me in training that criminals knew and took advantage of the fact that officers were naturally uncomfortable searching these areas.").

107. Alanna Vagianos, *Bloomberg's Stop-and-Frisk Was "State Sanctioned Sexual Assault" of Men of Color*, HUFFINGTON POST (Mar. 2, 2020, 4:47 PM), https://www.huffpost.com/entry/bloomberg-stop-and-frisk-sexual-assault_n_5e56d9aac5b68f79fdc45404 [<http://perma.cc/9685-AAUJ>] (describing a stop of a Black college student outside of a party wherein "an officer groped his private areas, thoroughly feeling around between his thighs and his testicles," after which the student said he "felt empty" the rest of the night"); see also, e.g., Josephine Ross, *What the #MeToo Campaign Teaches About Stop and Frisk*, 54 IDAHO L. REV. 543, 544 (2018); Paul Butler, *Sexual Torture: American Policing and the Harassment of Black Men*, GUARDIAN (Aug. 14, 2017, 7:00 AM), <https://www.theguardian.com/us-news/2017/aug/14/stop-and-frisk-policing-black-men-torture-sexual-harassment-paul-butler> [<https://perma.cc/UH5T-49R6>].

not amount to sexual assault are physically uncomfortable, to say the least. Professor Seth Stoughton describes his tactics as a former police officer as being designed to “physically control [a suspect’s] movement.”¹⁰⁸ These tactics included “grabbing the suspect’s thumbs or . . . interlaced fingers” while they were in a handcuffing position, twisting the person’s “wrists, thumbs, or fingers” to create tension, bending someone “far forward” over a car, “intentionally disrupting the suspect’s” balance, and at times actually handcuffing the person.¹⁰⁹

These stops, as uncomfortable (or worse) as they may be, flip the old adage—that it is better to let ten guilty people go free lest one innocent suffer—on its head. Analyses of stops regularly find that the vast majority of people stopped are innocent of any crime, and only rarely is any sort of contraband recovered. In 2017, 67% of people stopped by NYPD were not issued any summons or arrested, down from a high of 90% in earlier years.¹¹⁰ In Chicago, only 28% of stops in the measured period resulted in any enforcement action by the police.¹¹¹ And in Philadelphia, of nearly 4,000 stops in the sample provided by the police department, fewer than 200 recovered any type of contraband.¹¹²

Finally, I end this section where I began. Police killings, while seemingly unpredictable, when looked at in this context seem much closer to an expected, albeit extreme, manifestation of the violence that permeates our policing system.¹¹³ And even those killings are all too common. While there is no all-encompassing database of police killings, the *Washington Post* estimates that police shoot to death about 1,000 people per year.¹¹⁴ Like other police statistics, these killings are not equally distributed. Black Americans are killed at a rate of thirty-seven per million per year, more than twice the rate of white

108. Stoughton, *supra* note 106, at 25.

109. *Id.* at 25–26.

110. DE BLASIO ERA, *supra* note 103, at 25.

111. KEYS, *supra* note 102, at 16.

112. Plaintiffs’ Tenth Report, *supra* note 104, at 9.

113. America’s affinity for firearms might seem to blame for this fatality rate. But of the nearly 7,000 police killings the *Washington Post* has catalogued since 2015, some 429 involve people who were totally unarmed, and another 249 involve people holding a toy weapon. *See Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [http://perma.cc/2F7T-CU9A] (Jan. 7, 2022). Even if every police killing where the deceased had a gun was removed, the rate of killings by American police would still be noticeably higher than that in similar countries. *See* Alexi Jones & Wendy Sawyer, *Not Just “a Few Bad Apples”: U.S. Police Kill Civilians at Much Higher Rates than Other Countries*, PRISON POL’Y INITIATIVE (June 5, 2020), <https://www.prisonpolicy.org/blog/2020/06/05/policekillings/> [https://perma.cc/NCF3-6HCD] (finding that U.S. police kill civilians at a rate of 33.5 killings per 10 million, while the next closest country, Canada, has police that kill at a rate of 9.8 killings per 10 million; removing U.S. police killings involving a suspect armed with a gun would lower the U.S. rate to approximately 14.1 killings per 10 million (33.5 * .41)).

114. *See Fatal Force*, *supra* note 113.

Americans.¹¹⁵ And Black people are even more disproportionately represented among those who are killed by police while unarmed than they are among police killings generally.¹¹⁶

Still, fewer than two thousand people per year may not sound like much in a country of over 330 million. But consider this number in the context of homicides more generally. According to one study, which calculated police killings as occurring at the rate of 1,500 per year, police homicides accounted for around 10% of all homicides in the United States in a given year.¹¹⁷ But even that does not tell the whole story. Most homicides are committed by someone who knows their victim.¹¹⁸ When compared to the killings that many people seem to fear most—those committed by a stranger—the picture is materially worse as fully one-third of stranger-killings in a year are committed by police.¹¹⁹

Second, contrast this mass of state-sanctioned death against one of the only other sources of state-enacted killing, the actual death penalty. That penalty often requires years, even decades, of process to be imposed.¹²⁰ Short time frames between conviction and execution are so difficult to square with notions of due process that the Supreme Court's acquiescence to the Department of Justice's quest to kill *thirteen* people in *six months* was described by Justice Sotomayor as "justice on the fly"¹²¹ and "not justice."¹²² Indeed, in the forty-three-year era of the modern death penalty, fewer than 1,600 people have been executed.¹²³ That is about one-and-a-half years of fatal cop shootings.

115. *Id.* (reporting rates of police killings of 37 per million for Black people, 28 per million for Hispanic people, 15 per million for white people, and 5 per million for people classified as "Other").

116. *Id.* (reporting that Black people represent 1,557 of 6,842 people (23%) in the database but 137 of 429 (32%) unarmed people shot and killed by police).

117. See Patrick Ball, *Violence in Blue*, GRANTA (June 8, 2020), https://granta.com/violence-in-blue/#_ftnref9 [<https://perma.cc/NP6D-RVBD>]; see also KRISTIAN LUM & PATRICK BALL, HUM. RTS. DATA ANALYSIS GRP., ESTIMATING UNDOCUMENTED HOMICIDES WITH TWO LISTS AND LIST DEPENDENCE (2015), <https://hrdag.org/wp-content/uploads/2015/07/2015-hrdag-estimating-undoc-homicides.pdf> [<https://perma.cc/QE6J-QT35>].

118. Ball, *supra* note 117.

119. *Id.*

120. See, e.g., *United States v. Higgs*, 141 S. Ct. 645, 646 (2021) (mem.) (Breyer, J., dissenting) (noting that people executed during the Justice Department's six-month execution spree had been convicted twenty-one (Daniel Lee), twenty (Brandon Bernard), sixteen (Alfred Bourgeois), sixteen (Wesley Purkey), twelve (Lisa Montgomery), and twenty years (Dustin Higgs) before their executions).

121. *Id.* at 652 (Sotomayor, J., dissenting) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).

122. *Id.* at 647.

123. *Executions Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> [<https://perma.cc/5QVA-AGV7>] (listing executions from January 17, 1977, through December 11, 2020).

2. Psychological Harm

What starts with the body creeps into the mind. Before delving more deeply into what I have labeled “psychological” harm, a note about how I use that term is warranted. I use the term psychological harm as a contrast to the direct, physical harm discussed above. “Psychological harm” in this Article refers to those harms that manifest as a result of police action, but which are not directly physically inflicted on an individual by a police officer. Instead, the harm is indirect, such as that caused by, for example, observing a police killing. I do not intend to insinuate that these harms do not have physical effects. They do, and they can be devastating.

While a significant amount of empirical research supports the idea that police violence causes immense psychological harm, again, perhaps the most vivid example of the phenomenon occurred as a result of summer 2020. During Derek Chauvin’s trial for killing George Floyd, Darnella Frazier, the teenager who recorded Floyd’s death, took the stand. She described the lasting effect of having witnessed Floyd die, “It’s been nights I’ve stayed up apologizing to George Floyd for not doing more and not physically interacting and not saving his life.”¹²⁴ Ms. Frazier was only one of several bystanders, including several other children, who gave tearstained testimony at Chauvin’s trial.¹²⁵ But Frazier’s interactions with the Minneapolis police would unfortunately not be through yet. Only months after she gave that testimony, a police officer killed her uncle, crashing into him at an intersection while in a high-speed chase with a robbery suspect.¹²⁶ As she noted in a Facebook post soon after, part of the pain caused by her uncle’s death was that “he had NOTHING to do with” the police or the robbery.¹²⁷

Frazier’s experiences highlight part of what makes the harms discussed thus far, both physical and psychological, fit well within the emergency definition. Not only are these harms widespread, they are wildly unpredictable. Frazier has committed no crime, but she will likely never be the same after Minneapolis police subjected her to the murder of one man and then killed her uncle the next year. Likewise, her uncle was killed while doing nothing more than driving at an intersection. And as previously discussed, the vast majority of people subjected to police stops and frisks are innocent, allowed to go on their way. While, as the next section will discuss, certain populations are more

124. Eric Levenson & Aaron Cooper, *Firefighter, 9-Year-Old and Teens Give Powerful Testimony in Derek Chauvin Trial*, CNN (Mar. 30, 2021), <https://www.cnn.com/2021/03/30/us/derek-chauvin-trial-day-2/index.html> [<https://perma.cc/C9C8-VSUH>].

125. *Id.*

126. Nicholas Bogel-Burroughs, *Bystander Killed in Police Crash Is Uncle of Teen Who Filmed George Floyd’s Death*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/07/07/us/darnella-frazier-uncle-minneapolis-police.html> [<https://perma.cc/UTM5-5H5H> (dark archive)].

127. *Id.*

likely to fall victim to these police harms, predicting exactly who the victim will be and when seems nearly impossible. Indeed, this seems true even at the jurisdictional level. While major cities like New York or Chicago might be expected to have some nonzero number of high-profile police violence, few would have predicted Minneapolis or Louisville as the core of international protests.

It is perhaps this unpredictability that helps to explain why researchers have consistently identified negative impacts on those who witness, but are not themselves subjected to, police violence. While observing these sorts of secondary effects of police violence are a relatively new area of study, the findings consistently point in a single direction. Exposure to police violence has a significant negative effect on large parts of the population.

In one study, for example, exposure to police killings of unarmed Black people was estimated to contribute an additional fifty-five million excess poor mental health days among Black American adults.¹²⁸ By comparison, diabetes was responsible for approximately seventy-five million such days among the same population.¹²⁹

These effects extend beyond generalized mental health. Another study found statistically significant increases in late preterm birth among pregnant people exposed to police violence within their census tract during their pregnancy, with even greater increases in moderate preterm birth among Black women when there was a Black person killed by the police.¹³⁰ One of the authors of the piece hypothesized that the effects may be even worse than their study showed.¹³¹ Given the history of studies showing male babies are more sensitive to in utero stress, it was surprising that this study showed stronger associations when mothers were pregnant with female babies.¹³² This raised the possibility that “that there might be some miscarriage happening that we’re not capturing because we were only able to use the birth records If there is early fetal loss that’s happening, that could explain why we’re seeing these really strong associations in the female births.”¹³³

128. Jacob Bor, Atheendar S. Venkataramani, David R. Williams & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 308 (2018).

129. *Id.*

130. See Dana E. Goin, Anu Manchikanti Gomez, Kriszta Farkas, Catherine Duarte, Deborah Karasek, Brittany D. Chambers, Andrea V. Jackson & Jennifer Ahern, *Occurrence of Fatal Police Violence During Pregnancy and Hazard of Preterm Birth in California*, 35 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 469, 473 (2021).

131. Julia Craven, *How Police Killings Might Be Affecting Preterm Birth*, SLATE (Mar. 30, 2021, 4:01 PM), <http://slate.com/news-and-politics/2021/03/how-police-killing-might-be-affecting-preterm-birth.html> [https://perma.cc/2M6P-NXR7].

132. *Id.*

133. *Id.*

And still another study found that exposure to police killings had significant short-, medium-, and long-term effects on educational achievement.¹³⁴ “In the days immediately after a police killing, absenteeism spikes among nearby students.”¹³⁵ Then, these students experience GPA drops that last for several semesters; they are more likely to be diagnosed “with emotional disturbance—a chronic learning disability associated with PTSD and depression—and twice as likely to report feeling unsafe in their neighborhoods the following year.”¹³⁶ Finally, students exposed as ninth graders see drops in high school graduation and college enrollment rates of 3.5% and 2.5%, respectively.¹³⁷ Smaller, but still significant, effects occur in students exposed to police killings in tenth and eleventh grades as well.¹³⁸ Interestingly, these results “are driven entirely by [B]lack and Hispanic students in response to police killings of other underrepresented minorities.”¹³⁹

These studies are only the tip of the iceberg. Other work has found links between increases in post-traumatic stress and the people of Ferguson after police killed Michael Brown,¹⁴⁰ and that young Black men’s descriptions of exposure to police violence fit the DSM-V criteria for trauma exposure.¹⁴¹ And numerous other studies and personal reports have identified that repeated exposure to police killings is causing Black people vicarious trauma, as well as police exposure causing numerous other negative effects.¹⁴²

134. Desmond Ang, *The Effects of Police Violence on Inner-City Students*, 136 Q.J. ECON. 115, 117–18 (2021).

135. *Id.* at 117.

136. *Id.*

137. *Id.*

138. *Id.* at 117–18.

139. *Id.* at 118.

140. Jennifer M. First, Laura Danforth, Cynthia M. Frisby, Benjamin R. Warner, Marcus W. Ferguson, Jr. & J. Brian Houston, *Posttraumatic Stress Related to the Killing of Michael Brown and Resulting Civil Unrest in Ferguson, Missouri: Roles of Protest Engagement, Media Use, Race, and Resilience*, 11 J. SOC’Y FOR SOC. WORK & RSCH. 369, 369 (2020).

141. Jocelyn R. Smith Lee & Michael A. Robinson, “*That’s My Number One Fear in Life. It’s the Police*”: Examining Young Black Men’s Exposures to Trauma and Loss Resulting from Police Violence and Police Killings, 45 J. BLACK PSYCH. 143, 171–73 (2019).

142. See, e.g., Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103, 1128 & n.166 (2020); Deion S. Hawkins, “*After Philando, I Had To Take a Sick Day To Recover*”: Psychological Distress, Trauma and Police Brutality in the Black Community, HEALTH COMM’N, Apr. 26, 2021, at 1, 1; see also Abigail A. Sewell, Kevin A. Jefferson & Hedwig Lee, *Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City*, 159 SOC. SCI. & MED. 1, 1 (2016) (“[M]en exhibit more non-specific psychological distress and more severe feelings of nervousness, effort, and worthlessness in aggressively surveilled neighborhoods.”); Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 J. URB. HEALTH S42, S42 (2016) (finding broad negative mental and physical health consequences in those neighborhoods with more invasive police contact).

3. Sociological Harm

The final head on the policing-emergency Cerberus is sociological harm. This is the harm caused by the police's tendency to aid in the maintenance of racial, economic, and other hierarchies that undermine our professed devotion to equality. Numerous examples of this harm have already presented themselves. Police disproportionately stop, frisk, and kill unarmed Black people. Black and Hispanic students suffer educational setbacks from exposure to police killings while white and Asian students do not. Black mothers and their babies suffer negative effects from exposure to police killings that white mothers and babies do not. Many Black people feel that the police are inescapable.¹⁴³ All of these help to maintain the United States' racial hierarchy. But police's involvement in sociological harm extends far beyond this and is often even more direct. The sociological harm of policing is not merely a byproduct, it sometimes appears to be the point.¹⁴⁴ Once again, an episode from summer 2020 shows this well.

While I have largely painted the summer 2020 protests and uprisings positively, I do not mean to say they were entirely peaceful. They were not. Martin Luther King Jr. famously said that a "riot is the language of the unheard."¹⁴⁵ Some in the uprisings took that language to heart and turned up the volume. While some people may have been looters, acting solely to satisfy their own greed and self-interest, much of the violence and destruction simply cannot fit that description. Protestors burned police precincts to the ground,¹⁴⁶ trashed cop cars,¹⁴⁷ and defaced and destroyed monuments to colonizers and oppressors around the country¹⁴⁸ and, indeed, around the world.¹⁴⁹

143. See Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1475 & n.2 (2021) (describing and citing the "long line of scholarship [that] documents how traffic stops . . . enable racial profiling on roads and highways and disproportionately target people of color as well as the poor").

144. See generally Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) [hereinafter Butler, *The System Is Working*] (describing how problems like police violence and the widespread arrests of Black people for petty offenses are integral features of policing and punishment in the United States).

145. Martin Luther King, Jr., *The Other America*, Speech at Stanford University (Apr. 14, 1967), <https://www.crmvet.org/docs/otheram.htm> [<https://perma.cc/G593-3RN9>].

146. *Minneapolis Police Station Torched amid George Floyd Protest*, POLITICO (May 29, 2020, 7:10 AM), <https://www.politico.com/news/2020/05/29/minneapolis-police-protest-george-floyd-288361> [<https://perma.cc/BUX5-RSAK>].

147. Azi Paybarah & Nikita Stewart, *Symbol of N.Y.C. Unrest: A Burning Police Car*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/nyregion/police-cars-nyc-protests.html> [<https://perma.cc/WCL8-48T7> (dark archive)].

148. Alan Taylor, *The Statues Brought Down Since the George Floyd Protests Began*, ATLANTIC (July 2, 2020), <https://www.theatlantic.com/photo/2020/07/photos-statues-removed-george-floyd-protests-began/613774/> [<https://perma.cc/25K3-8VMR> (dark archive)].

149. Nora McGreevy, *Toppled Statue of British Slave Trader Goes on View at Bristol Museum*, SMITHSONIAN MAG. (June 7, 2021), <https://www.smithsonianmag.com/smart-news/protesters-throw-slavers-statue-bristol-harbor-make-waves-across-britain-180975060/> [<https://perma.cc/7L6X-7A3R>].

Police around the country responded to this destruction in various ways, some with relative calm and some with violence. But perhaps the most visually striking government and police response to protestor violence and looting happened in Chicago. And it is there that I turn to demonstrate the police's sociological harm—the harm of hierarchy.

In Chicago, after protests and again after the high-end stores along the city's "Magnificent Mile" were looted, Mayor Lori Lightfoot ordered public transit closed, streets blocked, and the bridges over the Chicago River lifted, physically separating Chicago's disproportionately Black, Brown, and poor South and West Sides from its wealthier, whiter downtown business district and North Side.¹⁵⁰ When combined with her issuance of a curfew to begin thirty-five minutes after her press conference, the effect was to strand protestors who needed to travel from one side of the city to the other to return home, and to make those same protestors subject to arrest for violating the curfew.¹⁵¹ Allegations of police kettling and harassment of those who tried to aid stranded protestors followed.¹⁵² This would not be the last time Mayor Lightfoot raised the bridges to separate the city, doing so again in the wake of other protests as well as the 2020 presidential election.¹⁵³ For many, this striking visual—white, wealthy neighborhoods being protected from trapped protestors by police and, effectively, a moat—was simply the latest manifestation of police's long history of being enforcers for our society's racial, economic, and other upper classes.¹⁵⁴

In earlier times, the police's role in hierarchy maintenance was patently obvious. Lynchings nearly universally involved acquiescence by law

150. See Maya Dukmasova, *Chicago's Mayor Turns City's Infrastructure into Weapons Against Protesters*, APPEAL (Nov. 13, 2020), <https://theappeal.org/chicago-mayor-bridges-protest/> [https://perma.cc/M5U8-HCX3] (noting that Mayor Lightfoot first raised the bridges after protests on May 30 but then repeatedly used the tactic throughout the summer and into the autumn election season).

151. Kelly Bauer & Bob Chiarito, *Chicago Curfew Set at 9 P.M. amid Protests for George Floyd*, BLOCK CLUB CHI. (May 30, 2020, 8:28 PM), <https://blockclubchicago.org/2020/05/30/chicago-curfew-set-at-9-p-m-amid-protests-for-george-floyd/> [https://perma.cc/3DQC-F89D] (quoting Mayor Lightfoot as saying the curfew gave police the power to "clean out and clear out" the downtown area); Bayne & Schumer, *May 30*, *supra* note 98.

152. See Bayne & Schumer, *May 30*, *supra* note 98 (discussing police kettling); Jim Dayley & Kiran Misra, *City Cited a School for Feeding Protestors*, S. SIDE WKLY. (June 8, 2020), <https://southsideweekly.com/city-cited-chicago-freedom-school-feeding-protester/> [http://perma.cc/743V-GVHW] (reporting that the Chicago Freedom School, a nonprofit organization, was cited by the police for "operating a retail food establishment" after police gained entry to the building the night of the protests and photographed pizza boxes "clearly emblazoned with the logo of [a] pizzeria" in the organization's kitchen).

153. See Dukmasova, *supra* note 150. It was not lost on observers during the election that the raised bridges helped to cordon off Trump Tower. *Id.*

154. See, e.g., Butler, *The System Is Working*, *supra* note 144, at 1469 ("[T]he system [of law and policing] is working the way it is supposed to, as a means to control African-Americans and devalue their lives . . .").

enforcement, and they often involved active law enforcement participation.¹⁵⁵ Likewise, the police's role in maintaining racial segregation through the mid-twentieth century is essentially undeniable. The photographs of Southern police turning dogs, weapons, and hoses on civil rights protestors from that era are ubiquitous.¹⁵⁶ But police played their role in creating and maintaining racial segregation in the North and West as well.¹⁵⁷

This segregative role continues today. Monica Bell, for instance, has catalogued “six mechanisms that link policing and residential segregation: mass criminalization, patrolling borders, coordinating with other bureaucracies, constructing jurisdiction, constructing neighborhood reputations (as high-crime or as racist), and distributing racialized economic value”¹⁵⁸ In this work, Bell joins a line of scholars interrogating the connection between police and the construction of place, particularly race-based place.¹⁵⁹

But police do not merely work to uphold racial hierarchy along the Black-white axis. Other scholars have explored the police's role in racial place-based differential treatment among Asian and Latinx communities as well.¹⁶⁰ Native

155. See Jesse Carr, *History of Police Involvement with Lynching*, ST. SANCTIONED, <https://statesanctioned.com/history-of-police-involvement-with-lynching/> [http://perma.cc/RG4A-MXNF] (Feb. 11, 2021) (noting that “as many as 75%” of lynchings involved either the direct or indirect assistance of law enforcement).

156. See, e.g., Charles Moore, *Untitled [Police Dogs Are Turned onto Protesters by Order of Eugene “Bull” Connor, Commissioner of Public Safety, During a Civil Rights Demonstration, Birmingham, Alabama]* (photograph), in PRINCETON U. ART MUSEUM, <https://artmuseum.princeton.edu/collections/objects/137003> [https://perma.cc/296C-WGL8].

157. See, e.g., Matthew Fleischer, *How White People Used Police To Make L.A. One of the Most Segregated Cities in America*, L.A. TIMES (Aug. 11, 2020, 12:26 PM), <https://www.latimes.com/opinion/story/2020-08-11/white-people-used-police-brutality-los-angeles-most-segregated-city-in-america> [https://perma.cc/H5R8-8VVQ (dark archive)]; Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 162 (2001) (noting that northern “police were often slow to respond to acts of white violence against blacks and in some instances allowed whites to engage in terrorist attacks against black homeowners”).

158. See Bell, *Anti-Segregation Policing*, *supra* note 83, at 689.

159. See, e.g., Jeannine Bell, *The Hidden Fences Shaping Resegregation*, 54 HARV. C.R.-C.L. L. REV. 813, 816–18 (2019); Fagan & Ash, *supra* note 20, at 132; Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1493–95 (2016); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164–65 (2015); Capers, *Policing, Race, and Place*, *supra* note 20, at 60–72; see also Jeffrey A. Fagan, *Policing and Segregation*, N.Y.U. FURMAN CTR. (July 2017), <http://furmancenter.org/research/iri/essay/policing-and-segregation> [https://perma.cc/V85Y-SCXB] (“The combination of criminal sanctions and mounting fees tends to reinforce both social and spatial boundaries, and in turn deepen racial and economic concentrations in ‘poverty traps.’ In effect, the new policing reinforces segregation by imposing a criminal justice tax on everyday movements and activities.” (footnote omitted)).

160. See, e.g., Bass, *supra* note 157, at 157 (discussing policing in Chinatown, the possible sacrifice of Koreatown in order to protect more affluent white neighborhoods, and the history of Mexican American-LAPD relations).

American reservations, meanwhile, are explicitly subjected to differential police treatment through a doctrinal labyrinth of jurisdictional hurdles.¹⁶¹

Importantly, this maintenance of racial hierarchy crosses economic and socio-professional boundaries. Indeed, several law professors have written about how police interactions have confirmed their inability to outperform their place in this country's racial hierarchy.¹⁶² And even Black police officers have written about how they, like so many Black children, are given "the talk" about deferring to police lest they be killed.¹⁶³

While this discussion has focused on police's role in maintaining racial and ethnic hierarchies, their actions extend far beyond just racial lines. Policing plays a role in economic stratification, as well as in maintaining subordination along lines of immigration status, gender, and sexuality. Focusing on Ferguson, Missouri, and New York City, New York, Jeffrey Fagan and Elliott Ash, for example, have explored how the aggressive policing of particular communities has created significant "economic consequences [that] go beyond the criminal stigma and the weight of [legal financial obligations] to include burdens on work, family, and housing that can multiply the disadvantage by spilling over to family members."¹⁶⁴ Commentators have likewise written extensively about the police's role in controlling immigration, essentially creating the new field of study called "crimmigration."¹⁶⁵ Here, police may play an especially outsized role because immigration proceedings can be triggered with only an arrest.¹⁶⁶

Finally, no discussion of the police's role in maintaining hierarchy would be complete without mentioning gender and sexuality. While I cannot give a

161. See, e.g., Elizabeth Reese, *Affirmation of Inherent Tribal Power To Police Blurs Civil and Criminal Indian Law Tests*, SCOTUSBLOG (June 7, 2021, 10:29 PM), <https://www.scotusblog.com/2021/06/affirmation-of-inherent-tribal-power-to-police-blurs-civil-and-criminal-indian-law-tests/> [https://perma.cc/CDX2-ZC7Z] (describing the Court's recent opinion in *United States v. Cooley*, 141 S. Ct. 1638 (2021), as attempting to "do no harm" to what others have called the "indefensible morass" of laws governing "authority over criminal conduct on reservations").

162. See PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 1–19 (2009); Carbado, (*E*)*Racing*, *supra* note 20, at 952–64.

163. See Andre McGregor, *I Was a Black FBI Agent. White Cops Didn't Always See Me as Equal*, CNN (June 8, 2020, 6:30 AM), <https://amp.cnn.com/cnn/2020/06/08/opinions/black-police-fbi-racism-mcgregor/index.html> [https://perma.cc/WN5Z-U9LN]. McGregor, a Black former FBI agent, describes how he was told that if he stopped a robbery, he "needed to put my gun down once I saw the red and blue lights pulling up, lie on the ground with my arms extended, let the cops handcuff me alongside the criminal, and they will sort out who I actually was later." *Id.* McGregor also recounts how, when showing his FBI credentials when stopped on duty by local police, the officer asked, "Do you have another ID?" *Id.*

164. Fagan & Ash, *supra* note 20, at 54.

165. See Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 700 (2017); see also, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1211 (2013); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 132–35 (2013).

166. See, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 827–33 (2015) (explaining "how arrests operate as an immigration-screening device").

fulsome analysis of this phenomenon in this piece, one aspect of policing that is especially salient in this area is especially worth highlighting because it is emblematic of how police operate generally. That is the role of underenforcement.

While much of this discussion has focused on ways that police overenforce the law to the detriment of subordinated communities, especially in the gender and sexuality spaces, police also help to ensure subordination through underenforcement. While there is much debate about the abolition of police, at the present time, for too many people they remain the only option for protection. In fewer places is that clear than in the sexual and domestic violence contexts. Infamously, police have not treated rape seriously in a variety of ways, from dismissing or shifting blame to victims who come forward, to simply ignoring them or failing to do even basic investigation.¹⁶⁷ Likewise, police have often been woefully unhelpful when dealing with gendered domestic violence. Too often men who committed violence against their female partner would not even be arrested when police were called. So, women's movements successfully advanced pro-arrest policies for batterers. But even this pro-carceral success seems to have backfired; with the advent of these policies the number of men arrested for domestic violence offences increased by over 100%, but the number of women arrested increased by over 500%.¹⁶⁸ "Follow-up investigations of women arrested under these laws reveal that they are often victims of violence who are subject to patterns of battery at the hands of their partners."¹⁶⁹ Unfortunately and unsurprisingly, the police's role in maintaining gendered hierarchy was and is intersectional.¹⁷⁰ And this discussion only begins to scratch the surface of the police's role in upholding gendered and sexual hierarchies.¹⁷¹

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167. See Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631, 1657–60 (2012) (describing these phenomena).

168. See Shabnam Javdani, Naomi Sadeh & Edelyn Verona, *Gendered Social Forces: A Review of the Impact of Institutionalized Factors on Women and Girls' Criminal Justice Trajectories*, 17 PSYCH. PUB. POL'Y & L. 161, 193–95 (2011).

169. *Id.* at 194.

170. See generally Kali Nicole Gross, *African American Women, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25 (2015) (examining how racialized and gendered notions of protection contributed to Black women's disproportionate incarceration in the late nineteenth and early twentieth centuries and influenced the relationship among Black womanhood, violence, and mass incarceration).

171. For additional issues, see, for example, Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CALIF. L. REV. 1487, 1494–99 (2020) (sexual violence committed by police); Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 72–78 (2013) (mistreatment of transgender persons); Scott W. Stern, *Rethinking Complicity in the Surveillance of Sex Workers: Policing and Prostitution in America's Model City*, 31 YALE J.L. & FEMINISM 411 *passim* (2020) (role of police in regulating sex work); Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 242–47 (2015) (masculine culture of police work).

I end this section describing the policing emergency with an observation. I have framed this discussion partially as a case study of the summer 2020 uprisings because that, I believe, is the greatest example of policing's status as an emergency and of that emergency's intractability. The summer 2020 protests—possibly the largest protest movement in American history—did not sufficiently motivate our traditional mechanisms of government to solve this emergency. Minneapolis Police, the same department that killed George Floyd, killed another man during a traffic stop shortly before the 2021 New Year.¹⁷² In Columbus, Ohio, two men were killed within a month of each other after the protests. One man, Casey Goodson Jr., was outside his own home and seemingly holding a sandwich.¹⁷³ The other, Andre Maurice Hill, was stopped while parked in his own car and holding a cellphone.¹⁷⁴ And despite the massive outcry and attention paid to police abolition throughout the summer, New York City and Austin, Texas, were the only large cities to cut police budgets by more than 10% in a Bloomberg CityLab analysis.¹⁷⁵ That same analysis showed that more than half of the cities in its dataset *increased* spending or kept it unchanged, and “the difference between police spending as a share of the general funds fell less than 1% from last year.”¹⁷⁶

So, the policing emergency continues apace. That emergency is, at its core, one of violence. It is tied to race, class, gender, sexuality, socioeconomic status, and numerous other lines of subjugation within our society, but its core remains as violence. This emergency seemingly has a history as long as that of the police themselves.¹⁷⁷ And it continues to take new and disturbing turns, with many police observers, including the FBI, warning of white supremacist infiltration of police departments,¹⁷⁸ and dozens of police officers from around the country

172. See Daniel Politi, *Minneapolis Police Release Bodycam Footage of Fatal Shooting in Traffic Stop*, SLATE (Jan. 1, 2021, 12:09 PM), <https://slate.com/news-and-politics/2021/01/minneapolis-police-bodycam-shooting-stop-dolal-idd.html> [<https://perma.cc/3XA5-MPJT>].

173. Wright, *supra* note 11.

174. *Id.*

175. Holder et al., *supra* note 24.

176. *Id.*; see also Fola Akinnibi, Sarah Holder & Christopher Cannon, *Cities Say They Want To Defund the Police. Their Budgets Say Otherwise.*, BLOOMBERG (Jan. 12, 2021), <https://www.bloomberg.com/graphics/2021-city-budget-police-funding/> [<https://perma.cc/TW8W-5DUX> (dark archive)] (“Even as the 50 largest U.S. cities reduced their 2021 police budgets by 5.2% in aggregate—often as part of broader pandemic cost-cutting initiatives—law enforcement spending as a share of general expenditures rose slightly to 13.7% from 13.6%, according to data compiled by Bloomberg CityLab. And many cities like Minneapolis and Seattle have watered down or put on pause changes that were proposed or even passed at the height of the 2020 demonstrations against racism and police brutality.”).

177. See Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/4MYS-3A7H> (dark archive)] (“The government of slavery was not a rule of law. It was a rule of police.”).

178. See Associated Press, *Army Vet Risked His Life To Expose Who Was in the KKK*, NPR (Dec. 22, 2021, 7:04 AM), <https://www.npr.org/2021/12/22/1066645155/army-vet-risked-his-life-to-expose-who-was-in-the-kkk> [<https://perma.cc/C5TM-M5FX>]; Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug.

taking part in a violent attempted insurrection at the Capitol building in Washington, D.C.¹⁷⁹ With the policing emergency's core established, Section I.C will complicate this picture by introducing a closer-to-the-ground problem for reformers: thousands of local police departments.

C. *Identifying Local Emergencies*

What Section I.B describes—the physical, psychological, and sociological harms caused by state-sanctioned violence from law enforcement—is the core of the policing emergency. That core emergency stems from the system of policing that has developed and been implemented throughout the United States, and given international protests, seemingly throughout other countries as well.

But especially in the United States, where policing is handled primarily at the local and county levels, this emergency may have thousands of local variants.¹⁸⁰ Nevertheless, most of these variants will relate broadly to one of five categories: excessive force, corruption, lack of accountability, cover-ups, and supremacist ties or behaviors.¹⁸¹ A state or local official attempting to determine whether the policing emergency has manifested in a particular agency, and if so, how, can look to these five categories to evaluate the agency and tailor her response.

These identifiers have two origins. First, they help to solidify the three types of harm discussed above into more easily observable phenomena within a given jurisdiction.¹⁸² Second, they mimic the objections that both traditional and radical reformers have made to the police. Campaign Zero, the organization

27, 2020), <http://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [https://perma.cc/3LJZ-3BNC]; Kenya Downs, *FBI Warned of White Supremacists in Law Enforcement 10 Years Ago. Has Anything Changed?*, PBS NEWSHOUR (Oct. 21, 2016, 4:10 PM), <https://www.pbs.org/newshour/nation/fbi-white-supremacists-in-law-enforcement> [https://perma.cc/2MBA-4ZRN]; FBI COUNTERTERRORISM DIV., WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3 (2006), <http://s3.documentcloud.org/documents/402521/doc-26-white-supremacist-infiltration.pdf> [https://perma.cc/7W84-PRSW].

179. See Eric Westervelt, *Off-Duty Police Officers Investigated, Charged with Participating in Capitol Riot*, NPR (Jan. 15, 2021, 1:07 PM), <https://www.npr.org/2021/01/15/956896923/police-officers-across-nation-face-federal-charges-for-involvement-in-capitol-ri> [https://perma.cc/RWH3-VXEG].

180. See SHELLEY S. HYLAND & ELIZABETH DAVIS, BUREAU JUST. STAT., NCJ 252835, LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 1 (Jan. 27, 2021), <https://bjs.ojp.gov/content/pub/pdf/lpd16p.pdf> [https://perma.cc/2VY5-85WS] (noting that over 12,000 local police departments existed throughout the United States as of June 30, 2016).

181. I call this last category “supremacist” because it may stand in for a variety of supremacist groups. In American policing, this will most likely mean white supremacist. But ties to groups preaching the supremacy of any race, class, religion, gender, sexuality, etc., should be cause for concern, especially in a pluralist country like the United States.

182. Cf. Bell, *Anti-Segregation Policing*, *supra* note 83, at 690 (identifying six mechanisms of pro-segregative policing because “[t]hey are flexible categories that aim to organize the exceedingly complex world of segregative policing into a tractable, analyzable structure”).

responsible for the #8Can'tWait campaign,¹⁸³ for example, dedicates significant attention to limiting the police's ability to use force—either through demilitarization or through changes to police policies—and to holding police to account when they do use force by, for example, increasing community oversight and removing parts of police contracts that undermine accountability.¹⁸⁴ Their abolitionist counterpart, #8toAbolition, meanwhile, focuses on both the violent and supremacist nature of policing, stating that “[p]risons, police, and prosecutors work closely together to sustain white supremacist, capitalist, ableist, and cisheteropatriarchal systems of extraction and death.”¹⁸⁵ #8toAbolition argues for “deplatform[ing] white supremacist public officials,” for “repeal[ing] all laws that hide, excuse, or enable police misconduct,” and terminating and not rehiring officers who have used excessive force.¹⁸⁶

Beyond these two groups, I note that the largest public outcry against police, both in summer 2020 and earlier, has been fueled by the police's use of excessive force, corrupt cover-ups, and the failure to hold police accountable for their actions. Indeed, some events have encapsulated all of these categories. Officer Jason Van Dyke's killing of Laquan McDonald, for example, involved the use of excessive force, police reports filled out by other officers lying about the facts of the incident to protect Van Dyke, officers sabotaging the equipment that records their interactions, and a supervisor disposing of evidence; of the sixteen officers the inspector general found engaged in covering-up this shooting, only half were either fired or faced criminal charges, with only Van Dyke being convicted.¹⁸⁷

Commentators, too, have focused on variations of these themes. Monica Bell, for instance, has explained how policing perpetuates racial segregation, and

183. In the midst of the summer 2020 uprisings, #8Can'tWait introduced eight policy reforms that they claimed would reduce police violence. Alex Shultz, *DeRay Mckesson on the 8 Reforms That Could Dramatically Reduce Police Violence*, GQ (June 3, 2020), <https://www.gq.com/story/deray-mckesson-interview-8-cant-wait> [<https://perma.cc/D6W6-YS6D>]. They subsequently apologized when they received criticism that these technocratic reforms distracted from the revolutionary potential of the moment. See Wilson, *supra* note 91.

184. See *Solutions*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions#solutionsoverview> [<https://perma.cc/9NRQ-ASRN>].

185. #8TOABOLITION, *supra* note 83.

186. 1. *Defund Police*, 8TOABOLITION, <https://www.8toabolition.com/defund-the-police> [<https://perma.cc/Z2UA-X5V2>].

187. See Morgan Winsor, *4 Chicago Police Officers Fired over Alleged Cover-Up of Laquan McDonald Shooting*, ABC NEWS (July 19, 2019, 5:47 AM), <https://abcnews.go.com/US/chicago-police-officers-fired-alleged-cover-laquan-mcdonald/story?id=6443306> [<http://perma.cc/B7EH-4W8A>]; Ray Sanchez & Omar Jimenez, *16 Police Officers Participated in an Elaborate Cover-Up After Laquan McDonald's Death, Report Alleges*, CNN (Oct. 10, 2019, 8:17 PM), <https://www.cnn.com/2019/10/10/us/chicago-inspector-general-laquan-mcdonald-shooting> [<https://perma.cc/Y3FL-EUMS>].

has attempted to remake policing into an antisegregative force.¹⁸⁸ Joanna Schwartz has found that police seem immune to accountability through litigation, with even successful lawsuits largely ignored unless they generate sufficient public attention.¹⁸⁹ Other scholars have focused on issues of excessive force like taser use and abuse,¹⁹⁰ accountability and corruption problems like the Blue Wall of Silence¹⁹¹ or the power of police unions,¹⁹² and the white supremacist affiliations of law enforcement.¹⁹³ All of which is to say, though these five categories have not previously been named and listed as such, they are well grounded in both the activism and academic discussion surrounding the policing emergency.

Before delving into each category, a note of caution. These categories are not meant to be an exhaustive taxonomy. Just as there are over 15,000 law enforcement agencies in the United States, there may be 15,000 different ways that the policing emergency manifests. A benefit of addressing the policing emergency through emergency managers at the state and local levels is that these different manifestations are likely to be tied to local history, culture, and custom, and an emergency manager operating at the local level will be able to adjust her tactics to account for those local differences.

Excessive Force. A pattern of excessive force is the most obvious signifier of the violence-based emergency. Here, deciding whether force is excessive and whether a pattern of it exists could be made by reference to constitutional law. And indeed, if there are significant legal judgments or settlements related to the police's use of excessive force, that is an excellent signal that the policing emergency has taken root in a department. For example, the CPD and NYPD each cost their city's taxpayers \$4 million in excessive force lawsuits in 2019.¹⁹⁴

188. See generally Bell, *Anti-Segregation Policing*, *supra* note 83 (explaining how policing perpetuates residential segregation and offering an alternative legal framework based on fair housing law and consent decrees as well as practical approaches that police departments could take to advance an antisegregation agenda).

189. See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1076–77 (2010).

190. See generally Michelle E. McStravick, Note, *The Shocking Truth: Law Enforcement's Use and Abuse of Tasers and the Need for Reform*, 56 VILL. L. REV. 363 (2011) (analyzing the lack of uniform guidelines to instruct officers when the use of a taser is appropriate).

191. See, e.g., Huq & McAdams, *supra* note 35, at 221.

192. See generally Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333 (2020) (analyzing what the common critiques of police unions should mean for policing reform and the future of public-sector unionism).

193. Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1091–97 (1996).

194. CITY OF CHI., REPORT ON CHICAGO POLICE DEPARTMENT 2019 LITIGATION 3 (Oct. 1, 2020), <https://www.chicago.gov/content/dam/city/sites/police-reform/docs/PoliceLitigationReport-Revised10-1-2020.pdf> [<https://perma.cc/YM5X-UJXL>]; Christina Carrega, *Millions in Lawsuit Settlements Are Another Hidden Cost of Police Misconduct, Legal Experts Say*, ABC NEWS (June 14, 2020, 10:12 AM), <https://abcnews.go.com/US/millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540> [<https://perma.cc/JF5L-3ZSK>].

However, because of the many difficulties in bringing a successful excessive force claim—from finding a lawyer to take one’s case to overcoming legal hurdles both procedural and substantive—it is likely that a focus on judgments or settlements will understate a department’s excessive force problem. Instead, it is likely more accurate to determine what force policed communities believe is excessive¹⁹⁵ or to compare the force used by a department to other, less violent groups performing the same work.¹⁹⁶

Corruption. Corruption is an emergency signifier because it can breed violence.¹⁹⁷ Because corruption is, by its nature, activity outside of the bounds of the law, enforcing the rules of this black market often requires violence.¹⁹⁸ The Baltimore Police Department provides the most recent, egregious example of this. There, a corrupt squad of officers ran a criminal racket so egregious that it would make Alonzo Harris¹⁹⁹ blush. They robbed; they sold guns and drugs; and they framed potentially thousands of people.²⁰⁰ One officer even kept “a grappling hook with a rope, sledgehammer, machete, [and] masks” in his patrol car in case he came across someone to rob.²⁰¹ That such a group could exist on a police force, and that they could operate for years, is an obvious example of the policing emergency at work.

Lack of Accountability. In turn, a lack of accountability enables the continuation of corrupt and violent regimes. Even if, for example, there are relatively few officers who account for the vast majority of the police force’s violence, an inability to hold those officers accountable ensures not only that their own violence continues, but could delegitimize the entire force in the eyes of the community and attract recruits who would like to do violence to policed communities without consequence. Police union contracts are the most obvious

195. See Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 209–11 (discussing the importance of community views on deciding whether police behavior should be allowed).

196. See, e.g., Li Cohen, *Health Care Workers Replaced Denver Cops in Handling Hundreds of Mental Health and Substance Abuse Cases — and Officials Say It Saved Lives*, CBS NEWS (Feb. 6, 2021, 12:04 AM), <https://www.cbsnews.com/news/denver-health-professionals-replaced-cops-in-handling-hundreds-of-low-level-incidents-for-6-months-and-successfully-did-so-with-no-arrests/> [http://perma.cc/E5UN-2PMV].

197. See Thomas W. Dunfee & Timothy L. Fort, *Corporate Hypergoals, Sustainable Peace, and the Adapted Firm*, 36 VAND. J. TRANSNAT’L L. 563, 586 (2003) (noting that “[a] recent study showed a direct correlation between corruption and violence” and explaining why this correlation may exist).

198. See, e.g., Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 616–17 (2001) (finding a link between drug prohibition and increased homicide rates across countries).

199. TRAINING DAY (Village Roadshow Pictures 2001).

200. Ray Sanchez, *Former Baltimore Officers Convicted in Corruption Trial*, CNN (Feb. 12, 2018, 8:24 PM), <https://www.cnn.com/2018/02/12/us/baltimore-police-corruption-trial/index.html> [http://perma.cc/Z5DS-DYWV].

201. *Id.*

example of this pervasive lack of accountability.²⁰² Among myriad ways that they inhibit accountability, they may delay officer interrogations after incidents, require destroying personnel records, or even limit the length of investigations.²⁰³ Officers in several jurisdictions, for example, cannot be interviewed about a use-of-force incident for at least forty-eight hours after it occurs, creating the possibility of diminished memories, at best, or coordinated shifts in their story, at worst.²⁰⁴

Cover-Ups. Cover-ups, perhaps most infamously the Blue Wall of Silence, are differentiated from a lack of accountability because they suggest a broader systemic and cultural failure within a police department. While a lack of accountability may come from something like a collective bargaining agreement, something that does not require the bad act of any individual officer, cover-ups are different. They involve choices made by officers to protect the bad acts of their fellows. CPD has had numerous egregious examples of the harms that flow from cover-ups. One former officer who refused to find another officer's shooting justified described the culture as "like the film *Serpico*" because fellow officers would not respond to calls for aid from those who did not maintain the code of silence.²⁰⁵ And after Officer Jason Van Dyke murdered Laquan McDonald, an Inspector General's report found that sixteen other officers helped to cover up that crime.²⁰⁶

Supremacy. Finally, supremacist ties and behaviors suggest the presence of the policing emergency for reasons both historical and practical. Historically, and some argue through the present day,²⁰⁷ police have played an important role in the maintenance and perpetuation of white supremacy, colonialism, cis-heteronormativity, patriarchy, ableism, economic inequality, and the general

202. See generally Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015) [hereinafter Rushin, *Structural Reform Litigation*] (explaining how police unions commonly attempt to block reforms that might "increase oversight or otherwise burden" police officers).

203. *Id.* at 1377.

204. See Jaeah Lee, *Why Cops Are Told To Keep Quiet After a Shooting*, MOTHER JONES (Aug. 12, 2015), <https://www.motherjones.com/politics/2015/08/why-do-police-departments-delay-interviewing-officers-involved-shootings/> [<https://perma.cc/XCQ7-5KNS>]; see also Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (empirically examining the scope of police indemnification and finding that only ".02% of the over \$730 million spent by cities, counties, and states" in her dataset was actually paid by police officers).

205. Bob Chiarito, *What Happens When Chicago Cops Speak Up About Police Misconduct? Their Lives Are Ruined, Whistleblowers Say*, BLOCK CLUB CHI. (Sept. 10, 2020), <https://blockclubchicago.org/2020/09/10/what-happens-when-chicago-cops-speak-up-about-police-misconduct-their-lives-are-ruined-whistleblowers-say/> [<https://perma.cc/WF57-APNA>].

206. See Chip Mitchell & Patrick Smith, *Lightfoot Releases Records on Police 'Cover-Up' for Officer Who Killed Laquan McDonald*, NPR (Oct. 10, 2019), <https://www.npr.org/local/309/2019/10/10/768890035/lightfoot-releases-records-on-police-cover-up-for-officer-who-killed-laquan-mc-donald> [<https://perma.cc/F4V8-QJAZ>].

207. See #8TOABOLITION, *supra* note 83 ("At its root, policing and prisons are systems designed to uphold oppression.").

maintenance of an unequal hierarchical society.²⁰⁸ Indeed, some activists and academics argue that this sort of hierarchy maintenance is, if not the reason for policing's current form, one of its primary effects.²⁰⁹ As the Kerner Commission found over fifty years ago, "To some Negroes police have come to symbolize white power, white racism and white repression. And the fact is that many police do reflect and express these white attitudes."²¹⁰ This history stretches further, with one researcher finding that "as many as 75%" of lynchings involved either the direct or indirect assistance of law enforcement,²¹¹ and historians linking the creation of U.S.-style police to slave patrols.²¹² But even without this historical link, modern supremacist movements—and especially white supremacist movements—have been responsible for numerous acts of mass violence,²¹³ and are described "as the most lethal domestic terrorist threat to the United States."²¹⁴ They have previously shown a desire to use police's power to enact their potentially genocidal goals.²¹⁵ Finding ties to these groups within a department thus suggests another way that the policing emergency may have manifested.

II. EMERGENCY MANAGERS

Numerous states have enacted laws that allow them to rescue failing cities through emergency managers, or through emergency manager-like processes. This part builds on the existing taxonomies of emergency managers to discuss how those laws function throughout the country.²¹⁶ After discussing the

208. See *supra* Section I.C.3.

209. See, e.g., Capers, *Policing, Race, and Place*, *supra* note 20, at 46 ("[R]acial incongruity in assessing whether reasonable suspicion exists to justify a *Terry* stop. As a result of this practice, law-abiding minorities entering predominantly white neighborhoods are frequently stopped and questioned as to the reason for their presence in the neighborhood."); Gruber, *supra* note 20, at 873 (describing "bluelining" as "maintaining raced and classed spatial and social segregation through the threat and application of violence").

210. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968), https://belonging.berkeley.edu/sites/default/files/kerner_commission_full_report.pdf?file=1&force=1 [<https://perma.cc/TD74-EGXK>].

211. Carr, *supra* note 155.

212. See Lepore, *supra* note 177.

213. See, e.g., Talia Lavin, *The Boundaries of Whiteness Are Protected with Blood and Bullets*, NATION (Aug. 5, 2019), <https://www.thenation.com/article/archive/replacement-theory-racism-white-supremacy/> [<https://perma.cc/JNS6-MN36>] (discussing how the white supremacist "great replacement" theory inspired four mass shootings in less than a year).

214. German, *supra* note 178.

215. *Id.*; see also *supra* note 178 and accompanying text (discussing FBI warnings about infiltration of the police by white supremacist groups).

216. See Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1435 (2014) [hereinafter Gillette, *Dictatorships*]; Omer Kimhi, *A Tale of Four Cities—Models of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881 (2012) [hereinafter Kimhi, *Four Cities*]; Anthony G. Cahill & Joseph A. James, *Responding to Municipal Fiscal Distress: An Emerging Issue for State Governments in the 1990s*, 52 PUB. ADMIN. REV. 88, 91 (1992).

functioning of these emergency managers, this part discusses the literature surrounding them, focusing on the interaction between emergency managers and democracy, as well as the use of emergency managers in the educational realm.

A. *The Spectrum of Emergency Managers: From Oversight to Dictatorial Control*

What is an emergency manager? As this Article uses the term, emergency managers are individuals or small groups empowered to fix some designated emergency in a locality that the usual operation of local government has failed to address.²¹⁷ These managers are given their powers by a higher level of government to oversee, or to take over in more aggressive cases, some lower level of government. Historically, these managers have operated in two contexts. In the fiscal realm, states have empowered them to address budgetary crises in localities. In the educational realm, emergency managers have been used to attempt to rescue financially and academically failing schools. In this educational context, managers have been empowered by both state- and city-level officials, like mayors, to usurp the more localized functioning of the school system.

Emergency managers' powers fall into three rough buckets. At their least intrusive, emergency managers simply provide oversight and advice to a locality. In intermediate cases, emergency managers may have some powers to intervene in the functioning of local government, but that local government nevertheless remains intact. In their most extreme manifestations, emergency managers can entirely replace a locality's government, usurping all of its powers. Although this Article separates them, it is important to note that emergency managers' powers tend to be additive. Most emergency manager laws provide for oversight of the distressed community. And emergency manager laws that provide for some limited intervention into the locality's elected government usually also provide for oversight. Of course, an emergency manager given near-dictatorial powers will also have the power of oversight, as well as all of the previously described limited interventionary powers. Moreover, an emergency manager's powers are not necessarily fixed for all times and situations. Some laws, instead, grant or take away powers from emergency managers depending on how dire the locality's status is at that moment.²¹⁸

217. Because their history involves groups as well as individuals, some past commentators have used the term "takeover boards." See, e.g., Gillette, *Dictatorships*, *supra* note 216, at 1378–79.

218. See, e.g., *Sullivan v. Nassau Cnty. Interim Fin. Auth.*, 959 F.3d 54, 57 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1063 (2021) (describing how Section 3650 of the New York Public Authorities Law allows the Nassau County Interim Finance Authority to gain additional powers when certain budgetary requirements are not met in Nassau County); see also Gillette, *Dictatorships*, *supra* note 216, at 1391 (discussing graduated interventions).

1. Oversight and Limited Intervention

Oversight, monitoring, and the provision of expert advice are near-universal facets of emergency manager regimes.²¹⁹ These powers are, generally speaking, exactly what they sound like. In the fiscal context, some states provide continuous oversight, while others intervene only once a crisis already appears imminent.²²⁰ Ideally, states judge the need for oversight based on a preestablished objective measure.²²¹

Often, state-level expert advice and oversight is necessary because of breakdowns in local government.²²² These breakdowns can range from a simple lack of local expertise to address a complex fiscal problem to the intentional wrongdoing of local officials.²²³ Wherever a locality might fall on this scale, oversight can perform an important corrective function when the regular operation of the local democratic process has produced an untenable result. Presumably, then, after the state has provided oversight and advice, the local politicians and populace can course correct by acting on better information. Sometimes, this is exactly what happens.²²⁴

But if the locality is unable or refuses to correct its mistakes, then oversight also provides another important function by providing information to the state. Indeed, it appears that some states have enacted ongoing or early oversight

219. See PEW CHARITABLE TRS., THE STATE ROLE IN LOCAL GOVERNMENT FINANCIAL DISTRESS 17–18 (2013) [hereinafter STATE ROLE], https://www.pewtrusts.org/-/media/assets/2016/04/pew_state_role_in_local_government_financial_distres.pdf [<http://perma.cc/SN4X-EDDW>] (noting that all states but New Hampshire allow for the supervision of finances and provision of technical assistance).

220. Compare STATE ROLE, *supra* note 219, at 30–32 (discussing the North Carolina Local Government Commission's ongoing oversight), with 53 PA. STAT. AND CONS. STAT. ANN. § 11701.102-A (Westlaw through 2022 Reg. Sess. Act 8) (allowing municipalities to request guidance in their financial planning from the state as a “preemptive step”), and N.Y. PUB. AUTH. LAW § 3669(1) (McKinney 2021) (giving the Nassau County Interim Finance Authority additional powers when, among other metrics, “the county shall have incurred a major operating funds deficit of one percent or more”).

221. See, e.g., STATE ROLE, *supra* note 219, at 30–32 (discussing reliance on North Carolina towns’ “fund balance,” the difference between its assets and liabilities). See generally N.C. GEN. STAT. §§ 159-1 to 159-180 (LEXIS through Sess. Laws 2021-192 (end) of the 2021 Reg. Sess. of the Gen. Assemb.) (detailing North Carolina’s Local Government Commission, its powers, and the various options for state aid to localities).

222. See STATE ROLE, *supra* note 219, at 32.

223. See, e.g., Tresa Baldas, *Kwame Kilpatrick: Detroit Bankruptcy Wasn’t My Fault*, DETROIT FREE PRESS (June 15, 2018, 6:12 PM), <https://www.freep.com/story/news/local/michigan/detroit/2018/06/15/kilpatrick-detroit-bankruptcy-sentence-archer/705523002/> [<https://perma.cc/PA3S-L9JR>] (noting Kilpatrick’s decision to restructure Detroit’s pension debt, which “soured when U.S. interest rates plummeted, sticking the city with a \$50 million-per-year bill”); STATE ROLE, *supra* note 219, at 32 (noting that the town board of Maxton, North Carolina, laid off police officers and raised taxes and fees after state officials warned them the town would run out of money).

224. See, e.g., STATE ROLE, *supra* note 219, at 32.

regimes for exactly this reason.²²⁵ By providing early oversight and technical services, the state can identify those localities most at risk for fiscal distress and encourage (or force) them to course correct before more drastic steps are necessary.²²⁶

While most emergency manager powers usurp local authority, oversight, especially in its nonmandatory forms, can be purely democracy enhancing. Without disempowering elected officials, expert advice and analysis can provide new information to elected leaders, enabling them to better serve their constituents, and provide information to constituents about the effectiveness (and honesty) of their elected officials.²²⁷

Historically, most emergency managers fall between the extremes of pure oversight and dictatorial control.²²⁸ They are empowered to override local officials' will on some, but not all, issues, and they ultimately do not have the power to make structural changes to local government. There are any number of limited powers that this type of emergency manager might have. A state could imbue her with virtually any power that the state has. For example, past emergency managers have been able to break union contracts,²²⁹ to hire and fire governmental employees,²³⁰ or to control municipal budgeting²³¹ and assets.²³²

225. *See id.* at 30–32 (discussing how North Carolina has avoided fiscally troubled localities through the use of active state oversight).

226. *See id.*

227. *See* Gillette, *Dictatorships*, *supra* note 216, at 1405–12 (discussing the recurring problem of lack of budgetary transparency in financially distressed cities and that problem's effect on constituents' democratic participation).

228. *See id.* at 1391–95 (discussing takeover boards with the power to approve municipal decisions but not displace municipal decision makers).

229. *See* U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25 (1977) (“[A]n impairment [of the obligations of private contracts] may be constitutional if it is reasonable and necessary to serve an important public purpose.”); *see also* Stephen F. Belfort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 1–2 (2011); Stephen F. Belfort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1252–55 (1985) (discussing statutory preemption of collectively bargained agreements); *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006) (affirming the dismissal of a Contract Clause claim based on a wage freeze). Notably, “State[s] or political subdivisions thereof” are exempt from the National Labor Relations Act. Pub. L. No. 74-198, 49 Stat. 449, 450 (codified as amended at 29 U.S.C. § 152(2)).

230. *Compare* *Savage v. City of Pontiac*, 483 F. App’x 943, 944 (6th Cir. 2012) (affirming a due process challenge to a firing by an emergency manager because he exceeded the authority provided him by statute), *with* MICH. COMP. LAWS ANN. § 141.1552(i), (ff) (Westlaw through P.A.2022, No. 4, of the 2022 Reg. Sess., 101st Leg.) (expanding emergency managers’ authority to control municipal government staffing levels).

231. *See* STATE ROLE, *supra* note 219, at 17 (finding that, as of early 2013, fourteen of twenty states with intervention systems provided for emergency financing while nineteen of twenty provided for “[s]upervis[ing] [f]inances . . . [i]ncluding [a]pproving [b]udgets”).

232. *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1167–73 (2014) [hereinafter Anderson, *The New Minimal Cities*] (discussing the increasingly commonplace sale of public assets as a means for cities to alleviate fiscal crises).

2. The (Benevolent?) Technocratic Dictator

Unlike previously discussed managers—who may exercise some powers of local government while leaving elected officials in place—dictatorial emergency managers take over the *entire* government. In effect, they become the dictator of the distressed city. Unaccountable to the residents they oversee or the local politicians they replace, everyone under their authority is left hoping that the manager is more Cincinnatus than Caligula. As Louis Schimmel, former emergency manager of Pontiac, Michigan, said in response to being asked whether the law empowering him gave power to a “dictator”: “I guess I’m the tyrant in Pontiac, then, if that’s the way it is.”²³³

Perhaps the most famous example of these dictatorial managers occurred in Detroit, Michigan. There, after significant political battles over their use,²³⁴ Republican Governor Rick Snyder appointed Kevyn Orr as emergency manager to see Detroit through its fiscal troubles.²³⁵ Upon his appointment Orr was imbued with the power of the mayor and city council, all of whom were effectively booted from office.²³⁶ While not garnering universal praise,²³⁷ Orr’s

233. Paul Abowd, *Michigan’s Hostile Takeover*, MOTHER JONES (Feb. 15, 2012), <https://www.motherjones.com/politics/2012/02/michigan-emergency-manager-pontiac-detroit/#correction> [https://perma.cc/PU5U-GGJ8].

234. See *id.*

235. See Nathan Bomey, John Gallagher & Mark Stryker, *How Detroit Was Reborn*, DETROIT FREE PRESS (Jan. 22, 2015, 5:37 PM), <https://www.freep.com/story/news/local/detroit-bankruptcy/2014/11/09/detroit-bankruptcy-rosen-orr-snyder/18724267/> [https://perma.cc/AE22-MLSG]; Monica Davey, *Billions in Debt, Detroit Faces Millions in Bills for Bankruptcy*, N.Y. TIMES (Oct. 7, 2013), <https://www.nytimes.com/2013/10/08/us/billions-in-debt-detroit-faces-millions-in-bills-for-bankruptcy.html?auth=login-email&login=email> [https://perma.cc/J8CC-A8VA (dark archive)].

236. Orr quickly reinstated these local politicians to handle the day-to-day running of the city, though he effectively remained their boss. See Emergency Manager, City of Detroit, Order No. 1 (Mar. 25, 2013) [hereinafter Detroit Emergency Manager Order], https://detroitmi.gov/sites/detroitmi.localhost/files/migrated_docs/emergency-manager-reports/Order1.pdf [https://perma.cc/R2VP-CA7R].

237. See, e.g., Susan Tompor, *Even 5 Years Later, Retirees Feel the Effects of Detroit’s Bankruptcy*, DETROIT FREE PRESS (July 18, 2018), <https://www.freep.com/story/money/personal-finance/susan-tompor/2018/07/18/detroit-bankruptcy-retirees-pension/759446002/> [https://perma.cc/K8JC-2K73]; Rose Hackman, *What Happens When Detroit Shuts Off the Water of 100,000 People*, ATLANTIC (July 17, 2014), <https://www.theatlantic.com/business/archive/2014/07/what-happens-when-detroit-shuts-off-the-water-of-100000-people/374548/> [https://perma.cc/7E6M-8HRL (dark archive)] (noting a statement from the United Nations that the water shutoffs may violate the human right to water); Ned Resnikoff, *Detroit City Council Votes To Remove Emergency Manager*, MSNBC (Sept. 25, 2014), <https://www.msnbc.com/msnbc/detroit-city-council-votes-remove-emergency-manager-msna421081> [https://perma.cc/577E-AK6H]. Technically, the council voted to keep Orr on until the end of the city’s bankruptcy proceedings, but the council’s resolution required Orr to return the running of the city back to elected officials immediately. Resnikoff, *supra*.

tenure and shepherding the city through bankruptcy was viewed as a success in many corners.²³⁸

Despite their place in the popular consciousness, the use of these dictator-style managers has, for most of this country's history, been relatively rare. States employed them in the 1930s, when the Great Depression wrecked municipal finances and caused many local governments to default on their obligations.²³⁹ Since the Great Depression, these total state takeovers have remained few and far between. The most prominent examples prior to the Great Recession are Massachusetts' takeover of Chelsea in 1991, and the 1996 expansion of the control board's powers over Washington, D.C.²⁴⁰

In both of those cases, and generally from the Great Depression through the turn of the millennium, these dictatorial takeovers have been largely ad hoc. But in the Great Recession and its aftermath some states began to codify this once extreme, ad hoc procedure. Specifically, in 2012 and 2014, Rhode Island and Michigan passed laws that allowed emergency managers to completely displace local officials.²⁴¹

A brief look at these statutes shows that Kevyn Orr's tenure in Detroit was not atypical in terms of who these most powerful managers are meant to be and how they operate. First, both statutes explicitly state that the manager (or receiver, as Rhode Island calls the position) shall have all of the powers of the local governing bodies.²⁴² Beyond this, both statutes make clear that a manager's powers trump those of any local elected officials.²⁴³

Rhode Island and Michigan imagine different relationships between the manager and local officials, although this difference may be one more of form than of substance. Rhode Island provides that local officials "shall continue to

238. See, e.g., Opinion, *Kevyn Orr Was the Right Man for Detroit*, DETROIT NEWS (Nov. 11, 2014), <https://www.detroitnews.com/story/opinion/editorials/2014/11/11/detroit-rises-kevyn-orr/18814737/> [<https://perma.cc/LU2A-TUG5>] [hereinafter *The Right Man*].

239. See David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, 25 PUBLIUS 55, 57 (1995) (finding that during the Great Depression, "[a]s a last resort, several states took complete control of specific cities facing financial emergencies, placing them in receivership").

240. Gillette, *Dictatorships*, *supra* note 216, at 1395–96 (discussing these Massachusetts and Washington, D.C., takeovers); see also Berman, *supra* note 239, at 62–64 (discussing the takeover of Chelsea); Stephen R. Cook, *Tough Love in the District: Management Reform Under the District of Columbia Financial Responsibility and Management Assistance Act*, 47 AM. U. L. REV. 993, 1010–11 (1998) ("The new Section 207(d)(1) allows the [District of Columbia Financial Responsibility and Management Assistance Authority] to 'stand in the shoes' of the Mayor or any department or agency head and issue any orders within their power to issue.").

241. See 45 R.I. GEN. LAWS § 45-9-7(c) (LEXIS through Ch. 429 (all legislation) of the 2021 Sess.); MICH. COMP. LAWS ANN. §§ 141.1547(1)(b), 141.1549(2) (Westlaw through P.A.2022, No. 4, of the 2022 Reg. Sess., 101st Leg.); see also Gillette, *Dictatorships*, *supra* note 216, at 1394–96 (discussing these laws).

242. 45 R.I. GEN. LAWS § 45-9-7(b)–(c); *id.* § 45-9-18; MICH. COMP. LAWS ANN. § 141.1549(2).

243. 45 R.I. GEN. LAWS ANN. § 45-9-7(c); MICH. COMP. LAWS ANN. § 141.1549(2).

be elected . . . and shall serve in an advisory capacity to the receiver.”²⁴⁴ Michigan does not even allow local officials a defined advisory role, instead taking away all powers “except as may be specifically authorized in writing by the emergency manager.”²⁴⁵ The Detroit example shows, however, that Michigan managers likely see some benefit to keeping local officials in their (advisory) positions. Orr’s first act as emergency manager was to restore the salary and benefits of the mayor and city council in recognition of their “vital role in the collaborative process of addressing Detroit’s financial emergency.”²⁴⁶

But Orr did not have to do this—along with their many other powers, Michigan’s emergency manager statute allows managers to hire any staff or other professional assistance “as the emergency manager considers necessary to fulfill his or her appointment.”²⁴⁷ This power makes practical sense. To the extent that the manager is brought in to fix problems caused by a lack of expertise, incompetence, or corruption by local officials, it seems foolhardy to require the manager to employ those same officials to clean up their mess. But with no obvious statutory limit, this power could allow an emergency manager to replace an entire city’s worth of workers.

These statutes also highlight two final questions: Who are these emergency managers, and what *can’t* they do? As to who these people are, they have two qualities worth highlighting. First, despite the ostensibly and ideally apolitical nature of emergency managers, they are, above all, political appointees. Both the Rhode Island and Michigan statutes give some political actor the ability to remove the emergency manager at will.²⁴⁸ This means that while emergency managers are politically unaccountable to the people under their purview, they are politically accountable through their appointing authority. In a place like Detroit, where the racial and political demographics of the city are opposite those of the state, this creates the difficult situation of an emergency manager subject to removal by a political actor who may have substantially different priorities than the people she oversees.²⁴⁹

244. 45 R.I. GEN. LAWS ANN. § 45-9-7(c).

245. MICH. COMP. LAWS ANN. § 141.1549(2).

246. Detroit Emergency Manager Order, *supra* note 236.

247. MICH. COMP. LAWS ANN. § 141.1549(4).

248. See 45 R.I. GEN. LAWS ANN. § 45-9-7(a) (“The director of revenue may, at any time, and without cause, remove the receiver and appoint a successor, or terminate the receivership.”); MICH. COMP. LAWS ANN. § 141.1549(3)(d) (“Except as otherwise provided in this subdivision, the emergency manager shall serve at the pleasure of the governor.”).

249. This situation, where an emergency manager is imposed on a locality by those in power who are of a different political party, race, or both, is not uncommon or limited only to Michigan. See McKillop Bradford Erlandson, Note, *Revisiting Progressive Federalism: Voice, Exit, and Endless Money*, 68 U. MIA. L. REV. 853, 872 (2014) (“Communities deemed eligible for this sort of hostile takeover are generally under minority rule, politically out of step with the governor, and lack the economic power at the state level to defend themselves.”); see also DOMINGO MOREL, TAKEOVER: RACE, EDUCATION, AND AMERICAN DEMOCRACY 12 (2018) (concluding after a systematic study of every school district

Beyond this political reality, emergency managers all seem to be technocrats,²⁵⁰ usually with subject-matter expertise in business or law.²⁵¹ Rhode Island does not list statutory requirements for its emergency managers, but its highest profile one was the receiver for Central Falls, Robert G. Flanders, Jr. At the time of his appointment, he was a former Associate Justice of the Rhode Island Supreme Court and had developed a practice based on a variety of commercial disputes through experience at a number of prestigious law firms.²⁵² Perhaps unsurprisingly, Justice Flanders was also a graduate of two prestigious schools—Brown University and Harvard Law School.²⁵³

Michigan, meanwhile, builds minimum technocratic requirements into its statute. It states that “[t]he emergency manager shall have a minimum of 5 years’ experience and demonstrable expertise in business, financial, or local or state budgetary matters.”²⁵⁴ Unlike this expertise requirement, any ties to the place that the manager is about to overtake are optional.²⁵⁵ Unsurprisingly, the people appointed to be emergency managers in Michigan bear the traditional markers of technocratic excellence. Kevyn Orr, for example, graduated from the University of Michigan Law School and was a partner at Jones Day before his appointment.²⁵⁶

to be taken over by its state “that race, economics, and politics are equally important factors associated with state takeovers . . . [and] increases in black political empowerment in cities are associated with the increased likelihood of a state takeover”); Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 590 (2012) [hereinafter Anderson, *Democratic Dissolution*] (finding that the proportion of African Americans governed by an emergency manager in Michigan “climbs to 57% if one assesses the share of the African-American population currently governed by an emergency manager either in their city or in their school district”).

250. I use the word technocrat here to mean a person with significant subject-matter expertise gained through traditional avenues of education and professional experience. *Technocrat*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/technocrat> [<http://perma.cc/7M2A-V6XQ>]. I primarily use the term as a contrast with the community-based experts that I discuss as potential emergency managers in Section III.E.

251. See Gillette, *Dictatorships*, *supra* note 216, at 1420 & n.234 (discussing numerous technocratic appointees to emergency management positions including, amongst others, an investment banking partner, “a former federal judge and law firm partner; the former Secretary of the U.S. Department of Housing and Urban Development; a political science professor; the head of New York Telephone; a stock broker; an investment banker; and the head of a New York City-based business”).

252. See Robert G. Flanders, Jr., WHELAN CORRENTE & FLANDERS LLP, <https://whelancorrente.com/our-attorneys/robert-g-flanders-jr/> [<https://perma.cc/R23B-GEQ5>].

253. *Id.*

254. MICH. COMP. LAWS ANN. § 141.1549(3)(a) (Westlaw through P.A.2022, No. 4, of the 2022 Reg. Sess., 101st Leg.).

255. *Id.* § 141.1549(3)(b) (“The emergency manager may, but need not, be a resident of the local government.”).

256. See Kevyn D. Orr, JONES DAY, <https://www.jonesday.com/en/lawyers/o/kevyn-orr?tab=experience> [<https://perma.cc/8YP9-MUPR>].

Finally, is there anything these emergency managers can't do? Not really. As discussed in Part IV, there may be limits in both state and federal constitutional law that limit what even a dictatorial emergency manager can do.

But it bears noting that these most powerful emergency managers have been empowered by *new* state statutes. As such, those empowering statutes can and do contain clauses giving the manager's actions precedence over conflicting statutes.²⁵⁷ In practice, this means that an emergency manager may be *more powerful* than the local elected government, which could be constrained by any manner of preexisting state laws.

Beyond this, Michigan does put some express limits on an emergency manager's power to take unilateral action that appears designed to prevent corruption.²⁵⁸ Perhaps most consequentially, the manager's ability to sell certain public utilities or to dissolve a municipal government are subject to a vote by the local government's electors.²⁵⁹ Michigan also requires its emergency managers to go through additional procedural steps when doling out contracts or selling assets valued above \$50,000.²⁶⁰ These things, however, are merely procedural checks on a Michigan manager's power, not substantive limitations.

Absolute limits on a manager's power are few and far between. A Rhode Island receiver cannot, for example, directly abrogate union contracts.²⁶¹ (They have altered those contracts through more indirect ways.²⁶²) And there is only one thing that a Michigan emergency manager absolutely cannot do: despite having the power to "reject, modify, or terminate" collective bargaining agreements, she cannot impair "[a] provision of an existing collective bargaining agreement that authorizes the payment of a benefit upon the death of a police officer or firefighter that occurs in the line of duty."²⁶³

257. See, e.g., 45 R.I. GEN. LAWS § 45-9-12 (LEXIS through Ch. 429 (all legislation) of the 2021 Sess.) ("Notwithstanding any general or special law to the contrary, unless otherwise specified, the provisions of this chapter shall supersede any conflicting provisions of the city, town, or fire district's charter, local ordinance, rule or regulation.").

258. See MICH. COMP. LAWS § 141.1552 (specifically delineating a number of powers, and limits on those powers, of an emergency manager). Rhode Island does not explicitly limit its receivers' ability to take unilateral action along these anticorruption lines. See Guy R. Bissonnette, *Rhode Island Municipal Insolvency Lite*, 60 R.I. BAR J. 19, 20–21 (2012).

259. MICH. COMP. LAWS § 141.1552(4) (selling or utilizing assets of utilities furnishing light, heat, or power); *id.* § 141.1552(1)(cc) (dissolving a municipal government).

260. *Id.* § 141.1552(3) (requiring either competitive bidding or state treasurer review on contracts valued above \$50,000); *id.* § 141.1555(1) (requiring state treasurer approval of local government assets valued above \$50,000).

261. See 45 R.I. GEN. LAWS § 45-9-9.

262. See Bissonnette, *supra* note 258, at 21 (noting that the Central Falls receiver "insist[ed] on changes in staffing, wages, benefits, etc. with the various municipal unions based on economic necessity" and ultimately abrogated those contracts through his power to take the city into municipal bankruptcy).

263. MICH. COMP. LAWS ANN. § 141.1555(2).

3. Beginning and Ending Emergency Manager Control

How an emergency manager's control begins and ends warrants special, if brief, mention. The triggers to begin and end emergency manager control can broadly be categorized as either objective or political. What I will call "objective triggers" begin or end an emergency manager's control based on an objective metric at least nominally outside of the political control of elected officials. By contrast, "political triggers" begin or end an emergency manager's control through the democratic process. Importantly, there is no inherent requirement that each of these triggers be used in isolation. Indeed, an emergency manager's appointment or removal may well be tied to some combination of these possibilities.²⁶⁴

Objective triggers are simply those that are based on something measurable. For example, North Carolina's Local Government Commission relies primarily on a local government's fund balance, which is the difference between its assets and liabilities.²⁶⁵ Other states use time-based objective triggers. Pennsylvania, for example, terminates a municipality's "distressed status" after, at most, five years.²⁶⁶

By using the term "objective" I do not intend to suggest that these triggers are politically incorruptible. Both Michigan and Rhode Island use nominally objective triggers that leave significant discretion to the person making the appointment or termination decision.²⁶⁷

By contrast, political triggers provide an explicit democratic check on emergency managers. That democratic check can come from above—meaning from the government entity that created the emergency manager—or from below—meaning from those whom the emergency manager oversees.

Political triggers from above can be truly discretionary exercises of political power. In both Michigan and Rhode Island, the most powerful emergency manager regimes, the emergency manager is subject to at-will removal by some state official.²⁶⁸ And at least in Michigan, emergency managers

264. See, e.g., *id.* § 141.1549(6)(c) (allowing an emergency manager to be removed by a two-thirds vote of the local government if she has served for at least eighteen months).

265. STATE ROLE, *supra* note 219, at 30–31.

266. See 53 PA. STAT. AND CONS. STAT. ANN. § 11701.254(b)(2) (Westlaw through 2022 Reg. Sess. Act 8).

267. See MICH. COMP. LAWS ANN. § 141.1549(6)(b) (stating that an emergency manager shall serve "[u]ntil the financial emergency is rectified"); 45 R.I. GEN. LAWS § 45-9-7(a) (allowing appointment of a receiver when a previously established budget commission "concludes that its powers are insufficient to restore fiscal stability" and provides "a statement of the reasons why it has been unable to restore fiscal stability to the city, town, or fire district").

268. See 45 R.I. GEN. LAWS § 45-9-7(a) ("The director of revenue may, at any time, and without cause, remove the receiver and appoint a successor, or terminate the receivership."); MICH. COMP. LAWS § 141.1549(3)(d) ("Except as otherwise provided in this subdivision, the emergency manager shall serve at the pleasure of the governor.").

may be very aware at whose pleasure they serve. As Michael Stampfler, one of the emergency managers for Pontiac, Michigan, recounted, the political pressures he felt were “enormous,” and “phone calls from the Deputy State Treasurer, whose boss is appointed by the Governor, are not uncommon to make powerful ‘suggestions’ on how the Emergency Manager should do his job.”²⁶⁹

By comparison, political checks on emergency managers from below are limited, if they exist at all. Michigan’s emergency manager statute allows localities to remove an emergency manager after eighteen months of her control. But that vote requires a supermajority and does not remove state oversight totally, instead shifting it into a less intrusive form.²⁷⁰ Rhode Island does not even provide this sort of limited removal from below.

B. *Discussions of Emergency Managers and Democracy*

Despite existing for several decades, the emergency manager phenomenon was largely ignored by the legal academy until recently.²⁷¹ While some scholars have focused on the functioning of these boards generally,²⁷² commentators have taken particular interest in the effects emergency control may have on aspects of democracy.²⁷³ Within that particular interest, scholars have primarily focused

269. Erlandson, *supra* note 249, at 873–74.

270. See MICH. COMP. LAWS ANN. § 141.1549(6)(c).

271. See Kimhi, *Four Cities*, *supra* note 216, at 883–84 (explaining that there had been “almost no literature on the way states handle local fiscal crises and the way state boards function”).

272. See, e.g., Heather M. Forrest, *State Court Receivership Alternative to Chapter 9*, 29 AM. BANKR. INST. J. 8, 83 (2010); Clayton P. Gillette, *Bondholders and Financially Stressed Municipalities*, 39 FORDHAM URB. L.J. 639, 652 (2012); Clayton P. Gillette, *Fiscal Federalism, Political Will, and the Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 320–21 (2012); Kimhi, *Four Cities*, *supra* note 216, at 883–84; Omer Kimhi, *Reviving Cities, Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 654–55 (2008); Cook, *supra* note 240, at 993; Note, *Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 HARV. L. REV. 733 *passim* (1996).

273. See, e.g., Juliet M. Moringiello, *Dispossessing Resident Voice: Municipal Receiverships and the Public Trust*, 53 U. MICH. J.L. REFORM 733, 743–44 (2020); Sydney L. Hawthorne, *Do Desperate Times Call for Desperate Measures in the Context of Democracy? Michigan’s Emergency Manager Law & the Voting Rights Act*, 41 N.Y.U. REV. L. & SOC. CHANGE 181, 209–10 (2017); Collin Weyers, Note, *Death by Denominator: Reconsidering Constitutional Intra-State Deference in an Age of “Emergency Management,”* 2018 WIS. L. REV. 1261, 1271–73; Lora Krsulich, Note, *Polluted Politics*, 105 CALIF. L. REV. 501, 509–10 (2017); Gillette, *Dictatorships*, *supra* note 216, at 1397–98; Anderson, *The New Minimal Cities*, *supra* note 232, at 1154; Chris Lewis, *Does Michigan’s Emergency-Manager Law Disenfranchise Black Citizens?*, ATLANTIC (May 9, 2013), <http://www.theatlantic.com/politics/archive/2013/05/does-michigans-emergency-manager-law-disenfranchise-black-citizens/275639/> [<https://perma.cc/7HHA-TLFP> (dark archive)]; Anderson, *Democratic Dissolution*, *supra* note 249, at 577; Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 879 (2012) [hereinafter Schragger, *Democracy and Debt*]; Richard C. Schragger, *Citizens Versus Bondholders*, 39 FORDHAM URB. L.J. 787, 801–02 (2012) [hereinafter Schragger, *Citizens Versus Bondholders*]; Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1134–37 (2012); John C. Philo, *Local Government Fiscal Emergencies and the Disenfranchisement of Victims of the Global Recession*, 13 J.L. SOC’Y 71, 87 (2011).

on Michigan and Rhode Island, which feature the strongest, dictatorial form of emergency manager.²⁷⁴

Virtually every scholar to discuss the issue recognizes the antidemocratic potential of strong emergency managers, as well as how that antidemocratic potential plays out in practice.²⁷⁵ As in Detroit, emergency managers have often been used by Republican-run states to take over economically poor Democratic cities and school districts with large Black and Brown populations.²⁷⁶ And as I have just discussed, in the strongest form of emergency manager oversight, the state truly does take over these cities, totally displacing the city's elected officials.

For most scholars to grapple with the issue, the antidemocratic nature of emergency managers makes them a tool to be scorned.²⁷⁷ Michelle Wilde Anderson labels cities forced to undergo dictatorial emergency management as subject to “democratic dissolution.”²⁷⁸ In doing so, she invokes the idea of true dissolution of a municipality, the “death of the legal corporate form and the associated municipal government.”²⁷⁹ But she argues that true dissolution, unlike democratic dissolution, has the function of merging a struggling municipality with a larger area in order to pool resources and “improve economies of scale in service provision.”²⁸⁰ And unlike the imposition of an emergency manager, true dissolutions have not been done without the consent of the locality.²⁸¹ As Anderson recognizes, in many ways a true dissolution has the same benefits and drawbacks of earlier, less intrusive, emergency management regimes wherein the state would provide additional resources in exchange for some additional budgetary oversight powers or control.²⁸²

274. See, e.g., Anderson, *Democratic Dissolution*, *supra* note 249, at 581.

275. See, e.g., Gillette, *Dictatorships*, *supra* note 216, at 1409 (recognizing in the midst of a defense of emergency managers that “as unelected bodies, takeover boards necessarily violate procedural democratic norms, regardless of the quality of services they deliver”).

276. See *supra* note 249 and accompanying text.

277. See Schragger, *Democracy and Debt*, *supra* note 273, at 879 n.80; Schragger, *Citizens Versus Bondholders*, *supra* note 273, at 801. See generally Krsulich, *supra* note 273; Anderson, *Democratic Dissolution*, *supra* note 249.

278. Anderson, *Democratic Dissolution*, *supra* note 249, at 581.

279. *Id.* at 601; see also *id.* at 600–01 (“In the context of local government law, dissolution refers to the termination or revocation of an incorporated municipality’s charter and the reversion of the city’s territory to dependence on county or township government.”). For a more in-depth discussion of true dissolution, see generally Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012).

280. Anderson, *Democratic Dissolution*, *supra* note 249, at 601.

281. *Id.* at 601–02.

282. *Id.* at 603; cf. *Sullivan v. Nassau Cnty. Interim Fin. Auth.*, 959 F.3d 54, 57 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1063 (2021) (noting that the State of New York provided Nassau County with approximately \$100 million along with the creation of the financial control board); Krsulich, *supra* note 273, at 516 (noting that New York State provided over \$10 billion in bonds loaned to New York City when it engaged in emergency oversight in the 1970s).

But Anderson argues that democratic dissolution is dissolution without these benefits. Neither Michigan nor Rhode Island requires local consent before an emergency manager is imposed by the state, and neither state provides additional resources when emergency managers take control. In this way, democratic dissolution is an incomplete dissolution. The municipal entity remains intact but has its democratic self-rule reconsolidated at the state level.²⁸³

According to Anderson, “The core problem with the statutes in Michigan and Rhode Island is that legislators fell prey to the illusion that by entirely sacrificing one of these value sets, local democracy, they could ameliorate local fiscal crisis.”²⁸⁴ To accomplish this feat, these laws “consolidate all local authority in a single unelected official,” empower the governor to be the sole arbiter of that selected official’s performance, withdraw local transparency and public accountability mechanisms, and “do not require local consent.”²⁸⁵

These problems are exacerbated because it is not clear that emergency managers of this type are effective. They are not merely number crunchers who come in to clean up after wasteful, incompetent, or corrupt local officials. Instead, they must solve complicated problems with structural roots, and they must do so on a relatively quick timeline. This opens a host of issues, including fire sales of assets, special interest capture of the manager herself, risking “severe collateral damage to local health, safety, and welfare values” in the name of fiscal health,²⁸⁶ and the possibility that “critical political legitimacy and participation assets at the local level may be damaged, with heightened local-state political polarization and lower rates of local electoral participation.”²⁸⁷ While these downsides range between possible and nearly certain, Anderson notes that empirical support is lacking that a Michigan- or Rhode Island-style emergency manager can achieve the goal of mitigating the contagion effects of a municipal default.²⁸⁸

Others have echoed and expanded on these criticisms. Lora Krsulich argues that states should turn away from emergency managers toward alternative solutions like administrative law because emergency manager-based solutions are not backed by strong evidence, may exacerbate existing racial inequalities, are subject to political gamesmanship, and do not solve the problem of the limited flexibility inherent in city budgeting.²⁸⁹ Richard Schragger has

283. See Anderson, *Democratic Dissolution*, *supra* note 249, at 601–03.

284. *Id.* at 605. Anderson argues that the “most critical” values at play are: (1) “local health, safety, and welfare”; (2) “democratic values”; (3) “public integrity”; (4) “efficiency”; and (5) “the management of negative externalities affecting other cities and the state (including the credit worthiness of these governments).” *Id.*

285. *Id.* at 606–08.

286. *Id.* at 609–12.

287. *Id.* at 614.

288. See *id.* at 613.

289. Krsulich, *supra* note 273, at 508–10.

called these emergency manager laws “punitive,” and argues that they come about in part because of a “political gap between cities and state legislatures” wherein Republican governors suffer little political consequence for their takeover of Democratic cities.²⁹⁰ Elsewhere, he posits that emergency manager laws like Michigan’s may impose “conditions of assistance [that are] so onerous as to undermine local self-government.”²⁹¹

Clayton P. Gillette, however, significantly complicates this otherwise overwhelmingly negative picture.²⁹² Gillette notes that the antidemocratic critique of emergency managers, even in their strongest form, focuses less on the expressive function of democratic participation and more on a belief that emergency managers will take steps out of line with the wishes of those they oversee.²⁹³ Under this framing, the antidemocratic critique relies in substantial part on the assumption that local officials have faithfully represented their constituents’ interests. But that assumption does not obviously hold. Gillette observes that localities facing fiscal distress often face significant population loss. This raises the possibility that, as Gillette argues, “residents believe that they are not receiving public goods and services that are worth the tax price necessary to obtain them.”²⁹⁴ In turn, it may be that those who remain in a distressed locality do so not because of political satisfaction, but because they face overwhelming exit costs.²⁹⁵ Beyond this, Gillette also finds that many historical and recent examples of state takeovers are preceded by budgetary opacity. That lack of transparency suggests local officials may be, instead of acceding to resident preferences, hiding the proverbial ball to protect their own political fortunes.²⁹⁶

Having established that the democratic critique of emergency management may be overstated, Gillette makes the positive argument that a properly constructed emergency management regime can be democracy enhancing.²⁹⁷ Emergency management would have this effect because the

290. Schragger, *Citizens Versus Bondholders*, *supra* note 273, at 801–02.

291. Schragger, *Democracy and Debt*, *supra* note 273, at 879 n.80.

292. See Gillette, *Dictatorships*, *supra* note 216, at 1399.

293. As Gillette notes, voters can continue to vote for national, state, and even local elected officials even while under the oversight of an emergency manager. The only difference is that those local officials will have diminished responsibilities and power. See *id.*

294. *Id.* at 1402.

295. *Id.*; see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956). The Tieboutian model is, of course, not without its limits. See, e.g., Gillette, *Dictatorships*, *supra* note 216, at 1402 n.145 (citing Dennis Epple & Allan Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197, 1216 (1981), for the proposition that “immobility of land permits self-interested local officials to usurp land rents even with inter-jurisdictional competition”).

296. Gillette, *Dictatorships*, *supra* note 216, at 1405–12.

297. Cf. *infra* Part IV (discussing the reasons that an emergency management regime in the policing context may be democracy-enhancing).

consolidated government of a strong emergency management regime could subvert the ability for powerful constituencies to gain disproportionate benefits in the typically fragmented decision-making process of local government,²⁹⁸ or more radically, emergency management could create structural changes to government.²⁹⁹ These changes would expose local residents to structural governance possibilities they otherwise would not have experienced, leaving them better informed at the conclusion of the emergency manager's tenure and so better able to consider whether keeping the newly imposed structure or returning to their former system was ideal.³⁰⁰

These theoretical possibilities, however, may not reflect reality because instead of neutral benevolent dictators,

takeover boards are necessarily political bodies comprising individuals appointed by state executives who may have an underlying agenda. Given the political nature of all the relevant actors, it would be incongruous to assume that local decision-making processes distorted by political interests will be replaced by one devoid of political motivations that tend to deviate from majority preferences.³⁰¹

To align this political reality with the theoretical ideal, Gillette identifies two key factors necessary to an emergency manager regime's success: defining a clear set of objectives for the manager to acceptably pursue,³⁰² and constraining the emergency manager—whether through transparency requirements, the possibility of termination, or other measures—so that she takes actions consistent with a benevolent dictator instead of her own self-interest.³⁰³

Ultimately, Gillette, Anderson, and the other commentators to engage with the emergency manager phenomenon recognize the power of emergency management to affect democratic principles and process, as well as substantive change. Where they differ most strenuously is in their conclusions regarding whether the tool of emergency management can be democracy enhancing and whether, despite any effect it may have on democratic principles or process, any substantive changes emergency management may cause are beneficial to society or a solution to the problems the emergency management set out to solve. I do not contend to settle these debates once and for all. Instead, as I will discuss further in Parts III and IV, I posit that the democratic and substantive effects of emergency management are likely to differ in the policing context.

298. Gillette, *Dictatorships*, *supra* note 216, at 1420–33.

299. *Id.* at 1420, 1433–45.

300. *Id.*

301. *Id.* at 1446.

302. *Id.* at 1446–54.

303. *Id.* at 1446, 1454–61.

C. *Educational Emergency Managers: From Fiscal Crises to Failing Schools*

While emergency managers have been used to rectify fiscal crises since the Great Depression, more recently, they have also been used to fix school systems with poor academic performance.³⁰⁴ This new development was first used in 1989, gained more widespread use leading up to the new millennium, and gained federal approval through the No Child Left Behind Act of 2001 (“NCLB”),³⁰⁵ which contained several provisions that encouraged state takeover of local school districts.³⁰⁶

The legal academy has paid insufficient attention to the lessons we might learn from this relatively modern use of emergency manager oversight. Commentators discussing emergency management have certainly mentioned the takeovers of “academically bankrupt” school districts.³⁰⁷ But those scholars have not discussed the different lessons that we might learn from this expansion of emergency manager use.

By contrast, there are scholars who have recognized and discussed the use of emergency managers for academically failing school districts.³⁰⁸ But instead of connecting their work to the broader literature and history of emergency management, they have narrowly focused on areas within the education field. In doing so, they have insufficiently recognized how the expansion of emergency manager use from the fiscal to the educational arena suggests the possibility of emergency managers as a trans-substantive tool.

304. See Mayraj Fahim, *No Magic Solution Available for Improved Education in U.S. Cities*, CITY MAYORS (Sept. 19, 2005), http://www.citymayors.com/education/cityschools_usa.html [https://perma.cc/4JXC-C62H] (noting that the first full operational takeover of a school district by a state occurred in New Jersey in 1989, and the tactic did not gain prominence over fiscal takeovers until the period from 1995–2000); see also Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 927 & nn.176–79 (2011).

305. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

306. As Oluwole and Green describe,

[t]hree of the NCLB’s corrective actions could provide authority for State takeover of school districts: (1) replacement of district personnel ‘relevant to the failure to make adequate yearly progress’; (2) appointment of a trustee or receiver through the state department of education to manage the district’s affairs; and (3) restructure or dissolution of the school district.

Joseph O. Oluwole & Preston C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343, 346 (2009) (footnotes omitted) (citing 20 U.S.C. § 6316(c)(10)(C)(iii), (v)–(vi)). NCLB has since been repealed by the Every Student Succeeds Act, Pub. L. No. 114-85, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.), but that Act did not forbid or otherwise hamper states’ and cities’ ability to take over their school districts.

307. See, e.g., Fahim, *supra* note 304 (using this phrase).

308. See, e.g., MOREL, *supra* note 249, at 2; Oluwole & Green, *supra* note 306, at 343; Morgan Craven, Paula Johnson & Terrence Wilson, *Eradicating the School-to-Prison Pipeline Through a Comprehensive Approach to School Equity*, 42 U. ARK. LITTLE ROCK L. REV. 703, 712–15 (2020); Bowman, *supra* note 304, at 925–30.

This use of emergency management to attempt to rectify an underperforming public good has important lessons for emergency managers' use as tools for police reform, as well as for their use in other contexts. Perhaps most importantly, the apparent failure of school-district emergency managers to create lasting improvements in student educational outcomes suggests that emergency managers are not the silver bullet solution that reformers might wish them to be. Instead, in both the fiscal and educational context, emergency managers appear to perform best when targeting specific problems within institutions that the institutions' normal participants can or will not solve.

Beyond this, educational emergencies also exemplify another possibility for the structure of emergency management. While fiscal emergency managers are almost always appointed by a state government to oversee a locality, educational emergency managers have sometimes been appointed by city officials to oversee that city's school system.³⁰⁹

Indeed, the shift toward using emergency manager takeovers to alleviate academic problems is rife with potential lessons for the use of emergency managers more broadly. A true taxonomy of the role emergency managers have played in education reform is beyond the scope of this Article.³¹⁰ However, there are some basic lessons and pitfalls of which anyone seeking to use emergency managers for police reform should be aware.

First, while emergency managers in the education realm have widely been considered successful at solving fiscal problems within a school district, their success in increasing academic performance is much more dubious.³¹¹ As Kristi L. Bowman explained, "this is not surprising—accomplishing the former is much more straightforward than addressing the countless factors which influence the latter."³¹² But this is not to say that there has been *no* success. Both the Jersey City School District³¹³ and Logan County, West Virginia, saw test score gains after being placed under emergency manager control.³¹⁴

309. See generally MICHAEL W. KIRST, MAYORAL INFLUENCE, NEW REGIMES, AND PUBLIC SCHOOL GOVERNANCE (2002), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1054&context=cpre_researchreports [<https://perma.cc/FE56-UPGX>] (discussing the structure and outcomes of mayoral takeovers of school districts); Fahim, *supra* note 304 (noting the mayoral takeovers of school districts in Boston and Chicago).

310. For a thorough overview of the then-current state and national law in this area, see generally Oluwole & Green, *supra* note 306. For an updated fifty-state survey of state responses to the Every Student Succeeds Act, see Thompson Reuters, *State Implementation of No Child Left Behind/Every Student Succeeds Act*, 0040 SURVEYS 11 (2021).

311. See MOREL, *supra* note 249, at 11; see also Craven et al., *supra* note 308, at 714 ("State takeovers of local school boards have not been shown to result in significant improvements in reading and math scores, attendance, or graduation rates post-takeover."); Bowman, *supra* note 304, at 927 ("[T]he consensus in the limited literature is that fiscal stability is much easier to achieve than academic improvement.").

312. Bowman, *supra* note 304, at 927.

313. Fahim, *supra* note 304.

314. *Id.*

More broadly, mayoral takeovers of school districts have been “linked to increases in student achievement at the elementary grades [and] gains in achievement are especially large for the lowest performing schools.”³¹⁵ Mayoral takeovers, however, may be “less effective for upper grades, where the cumulative effects of many years of poor schooling are not easily reversible.”³¹⁶ State takeovers, meanwhile, may cause student achievement to suffer if they bring about “administrative and political turmoil.”³¹⁷ Even so, “[a]fter a period of adjustment . . . state takeovers may also be able to produce positive achievement gains.”³¹⁸ As these broad-stroke conclusions suggest, takeovers of school districts may, but do not always, lead to academic improvements.³¹⁹

Second, takeovers may have other benefits that contribute to student learning, specifically increased resources and the end of gridlock. Mayoral takeover in Sacramento, for example, “ended the bickering and deadlock that plagued the [school] district’s governance for years” and led to “renewed confidence and interest in the schools” that translated into “the district’s first bond measure for school repairs in more than 20 years.”³²⁰ Similarly, in Chicago, mayoral control led to increased funding for schools through the mayor’s newfound willingness to support their budgets.³²¹ Other cities saw similar increases in access to resources thanks to mayoral power and influence.³²²

Third, beyond their effectiveness as tools in nonfiscal contexts, the use of takeovers to address struggling schools provides further examples of the structural issues that arise when using emergency managers. Just as in the fiscal context, the level of control seized in an educational takeover varies. Some takeovers have not been takeovers at all. Instead, these low-control incidents have involved a threatened takeover; the primary exertion of power comes from the state or city’s influence, such as endorsing candidates for the school board.³²³ But there are high control takeovers akin to the Michigan-style dictatorial emergency manager. In these, the takeover may involve the alteration of

315. KENNETH K. WONG & FRANCIS X. SHEN, DOES SCHOOL DISTRICT TAKEOVER WORK? ASSESSING THE EFFECTIVENESS OF CITY AND STATE TAKEOVER AS A SCHOOL REFORM STRATEGY 14 (2001), <https://files.eric.ed.gov/fulltext/ED468271.pdf> [<https://perma.cc/MY69-JJ5F>].

316. *Id.*

317. *Id.*

318. *Id.*

319. See MOREL, *supra* note 249, at 3 (noting that the evidence of takeovers’ effectiveness at the time they became a popular tool “[a]t best . . . was mixed and inconclusive”).

320. KIRST, *supra* note 309, at 8 (quoting Alan Richard, *Sacramento Mayor’s Legacy: Improved Schools*, EDUC. WEEK (Feb. 2, 2000), <https://www.edweek.org/leadership/sacramento-mayors-legacy-improved-schools/2000/02> [<https://perma.cc/A4AN-JAYV>]).

321. *Id.* at 10.

322. See *id.* at 8–10.

323. *Id.* at 4–8.

bargaining rights, total control over the school board, or other substantial involuntary changes.³²⁴

Likewise, educational takeovers suggest the possibility for tailoring the expertise needed for an emergency manager. Unlike in the fiscal context, educational managers have come from a wider variety of backgrounds because takeovers under the auspices of academic distress have varied goals, and so the type of manager needed depends on those goals. In Chicago, the takeover had “a strong emphasis . . . on improving the efficiency of the public schools.”³²⁵ Reflecting that focus, the mayor chose “a business-style CEO” to lead the district.³²⁶ Meanwhile, the takeover in Boston was more focused on standards and curriculum issues, so the mayor appointed “a strong educator-leader” with previous experience as a school district superintendent.³²⁷

Finally, perhaps the biggest difference between fiscal and academic takeovers—and the most important lesson they provide—comes from observing their duration. In both fiscal and academic takeovers, when there is minimal level of intrusion into the locality, the “takeover” may last for lengthy periods of time, or indeed it may be a permanent fixture in the relationship between the state and its locality. As described above, North Carolina, for example, keeps watch over local finances on an ongoing basis.³²⁸

But in the education realm, highly intrusive takeovers regularly last for years, if they end at all. The State of Rhode Island took over the Central Falls School District in 1991 and maintains that control today,³²⁹ and New Jersey’s control of Newark’s schools lasted for twenty-five years.³³⁰ Chicago, with a mayoral takeover that began in the 1990s, does not seem like it will fully return to an elected schoolboard until 2027 at the earliest.³³¹ As these examples show, at least in the education context, a perceived emergency can give rise to

324. *Id.* at 7–8.

325. *Id.* at 9.

326. *Id.* at 10.

327. *Id.*

328. See *supra* note 221 (discussing the North Carolina advisory board).

329. MOREL, *supra* note 249, at 40–44 (noting that the state took over the Central Falls School District in 1991 and maintained control in 2016); Ashley Cullinane, *Central Falls Schools To Start Aug. 2, Plan Could Differ from Remainder of State*, NBC 10 NEWS (July 23, 2020), <https://turnto10.com/news/coronavirus/reopening-schools/central-falls-schools-to-start-aug-27-plan-could-differ-from-remainder-of-state> [<https://perma.cc/8RXU-3BGF>] (noting that the district “remains under state financial control”).

330. Adam Clark, *N.J.’s Takeover of Newark Schools Is Officially Over — 25 Years Later*, NJ.COM, <https://www.nj.com/education/2020/07/njs-takeover-of-newark-schools-is-officially-over-25-years-later.html> [<https://perma.cc/G7QR-BMBH>] (July 2, 2020, 8:39 AM).

331. See Cassie Walker Burke, *Chicago Elected School Board Bill Will Head to Governor, Despite Lingering Questions*, CHALKBEAT CHI. (June 16, 2021, 6:22 PM), <https://chicago.chalkbeat.org/2021/6/16/22537184/chicago-elected-school-board-bill-clears-hurdle-but-questions-remain> [<http://perma.cc/3PCB-R9A4>].

permanent structural changes in the relationships between local and state governments, or between those governments and the people that they govern.

III. EMERGENCY MANAGERS FOR THE POLICING EMERGENCY

How can, and why should, emergency managers be brought to bear on this policing emergency? Recognizing the diversity inherent in the thousands of law enforcement agencies across the country, I do not attempt to provide a one-size-fits-all answer to this question. Instead, this part provides a set of guideposts and questions that will help policymakers to build an emergency manager law that addresses their localized version of this emergency. First, though, it will answer the threshold question of why emergency managers should be used.

A. *Why Emergency Managers?*

There is nothing that an emergency manager can do that a sufficiently motivated legislature and executive could not. This is because an emergency manager, even at its most powerful, is simply the full emergency powers of the state funneled into a single person or small group of people.

However, there are four major reasons to use an emergency manager in the policing context. The first is a simple jurisdictional match. Policing in most cases is a local enterprise.³³² Because an emergency manager is assigned to a particular locality, they can be attuned to that local variation in a way that more universal tools may not be.

Three other reasons require more discussion. First, both the passage of emergency manager legislation and the emergency manager form itself can alter the political landscape in a way that allows for the enactment of reform that would not be possible through the normal political process. Second, in some localities, a policing emergency manager may serve the same negative externality-reducing functions as emergency managers in the fiscal context. And third, because the emergency manager is ideally less concerned with the political ramifications of her actions, imbuing her with the emergency powers of the state can allow her to make “hard choices,” fulfilling goals that political actors have the power and personal desire, but not the political will, to accomplish.³³³

332. See *supra* Section I.D.

333. It is for these reasons that policing emergency management avoids the inside/outside problem. See generally Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013) (discussing the inside/outside problem). Even if emergency managers should largely be viewed as delegates of their appointing authority, these reasons—and especially the possibility for sunrise effects and “hard choices”—suggest that an emergency manager may nevertheless be willing to make decisions that an elected official would not directly make.

1. Solving Structural Problems

A prime reason for the use of emergency managers is their ability to solve structural problems. Indeed, both emergency managers themselves as well as the passage of emergency manager legislation can shift the political landscape.

One way passing an emergency manager statute might do this is through sunrise lawmaking.³³⁴ Sunrise lawmaking is the passage of a statute or other piece of law that does not go into effect immediately.³³⁵ Sunrise lawmaking has several benefits that make it especially amenable to use in the policing emergency manager context. It allows lawmakers to act with an eye toward the future, thereby (hopefully) invoking their better angels because they may not have to live under the regime they would create nor would they have to deal with the political blowback of that regime.³³⁶ Similarly, sunrise lawmaking may defuse the political opposition because legislation would not go into effect immediately and so would present only an uncertain and hypothetical threat to the status quo. Moreover, an emergency manager statute with sunrise effects could be triggered by some future police behavior, giving police the opportunity to alter their own behavior before being put under an emergency manager's supervision. Once police know what would trigger emergency manager oversight, they can make the changes necessary to avoid those triggers if they so choose.

But the benefits of emergency managers extend far beyond the potential advantages of sunrise lawmaking. Perhaps their greatest benefit is the ability to cut through the tangled web of state and local laws, regulations, and customs that protect police from reform. It does this in two ways: first, by taking advantage of its status as an *emergency* tool; second, by creating a manager at the state level, that manager can have the full powers of the state, and those powers can take precedence over previously enacted state and local legislation.

As discussed in Section I.A, when a government labels something an “emergency” that is not simply a rhetorical device. Instead, it can unlock an expanded amount of power while also leading the courts to grant deference to

334. See generally Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Constitutional, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015) (offering a theoretical account of sunrise lawmaking focused on the constitutional context); Saul Levmore & Frank Fagan, *Legislative Sunrises: Transitions, Veiled Commitments, and Carbon Taxes*, in *THE TIMING OF LAWMAKING* 130, 132–33 (Saul Levmore & Frank Fagan eds., 2017).

335. See Herz-Roiphe & Grewal, *supra* note 334, at 1979; see also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 474 (2012) (calling sunrise lawmaking “a different species of rules that should properly go into effect—that should ‘sunrise’—only after a substantial time delay”).

336. See Herz-Roiphe & Grewal, *supra* note 334, at 2002–03 (suggesting that, contrary to James Madison's belief that it is “in vain” to hope that ‘enlightened statesmen’ will pursue the ‘public good’ because of their personal interests, sunrise lawmaking may act to put lawmakers behind something like John Rawls’ veil of ignorance).

the exercise of that power. This emergency status may be especially necessary when dealing with police, who may be protected by constitutional provisions,³³⁷ as well as so-called “home rule” and special legislation state constitutional provisions that protect the autonomy of a locality.³³⁸ But even constitutional provisions can give way when the government provides a sufficiently weighty reason for its action.³³⁹ And there is precedent for courts deferring to state action in the home-rule context as well.³⁴⁰

Second, by passing new legislation to create emergency managers, states can clear the field of most, if not all, of the older state laws, local laws, municipal charters, and other legal impediments that serve to make reforming the police procedurally complex. This is because of two basic features of the potential state law. First, localities are creatures of the state, and so absent something like a constitutional home-rule provision, the state can do with the locality what it wishes up to and including dissolving that locality. Second, earlier governments cannot, generally speaking,³⁴¹ bind later ones. Here, this means that the legislature passing an emergency manager law can include provisions that give the emergency manager’s powers precedence over any other preexisting law.³⁴² Combined, these elements allow an emergency manager to take steps to fix the policing emergency that would be impossible through the standard local political process.

Once an emergency manager is empowered, the structure of emergency manager oversight also makes it a distinctly useful tool. As both Anderson and Gillette have noted, emergency management serves to shift political power up and away from local democratic politics.³⁴³ In the fiscal context, this has meant shifting from the city to the state. In the education context, it may mean shifting from a local school board to the mayor. That newly consolidated power is then given to the emergency manager.

337. See *infra* Section IV.B.

338. See Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1364–66 (2021). See generally DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 14 (2001) (examining the powers and functions of municipalities and counties that operate under home rule within each state). O’Rourke et al. discuss how some states have gotten around special legislation provisions, but the Michigan and Rhode Island examples provide another. There, the states created legislation that could create an emergency manager for any place in the state, but then empowered some agency or political actor to determine which locality actually needed the emergency manager oversight.

339. See *infra* Section IV.B (discussing the Contract Clause).

340. See O’Rourke et al., *supra* note 338, at 1364–65.

341. Provisions like the Contract Clause are the exceptions that prove this rule.

342. See, e.g., 45 R.I. GEN. LAWS § 45-9-12 (LEXIS through Ch. 429 (all legislation) of the 2021 Sess.).

343. See Anderson, *Democratic Dissolution*, *supra* note 249, at 602; Gillette, *Dictatorships*, *supra* note 216, at 1376–78.

This creates two important disruptions in the traditional police-reform process. First, the shift from the local to some higher political body makes those political actors responsible for reform more removed from the political power of a local police department. While Anderson and numerous others have decried the removal of local democratic accountability in the fiscal context, here it serves to disempower the police—a powerful interest group that has too often fought to ward off even minor reforms that would benefit the public or increase accountability.³⁴⁴

Second, by then shifting that power to an emergency manager, it makes reform efforts much more resistant to political pressure and gamesmanship. One of the key benefits of an emergency manager is the unitary nature of the position.³⁴⁵ Emergency management decreases the fragmentation of local government, removing many of the possible choke points that people opposing reform can use to maintain the status quo.³⁴⁶

A simple illustration will show how this works. Imagine a small city attempting to implement some police reform, say a community oversight board. That reform will almost certainly need to pass through at least one committee—chaired by one individual, with several other members, and likely several other staff to serve the committee’s membership—and then go to a vote of the city council, and finally be signed by the mayor. Each of those points and each of those people represent a “vetogate”—an opportunity for police lobbying to stop the bill, or at the least, to weaken it.³⁴⁷

By contrast, while an emergency manager may well listen to the police’s ideas, the political pressure she would feel to implement those ideas should be greatly reduced, if not eliminated. While the police may exercise some influence over the manager’s appointing authority, an emergency manager does not have to worry about running for another term, and as I will soon discuss, should not be beholden to any particular constituency.

Streamlining the process for enacting changes is especially important in the police reform context because, in addition to the problems created by fragmentation within government, there is additional fragmentation caused by the many possible reforms that need to be enacted and the diverging philosophies among reformers. While these levels of fragmentation have analogs in the education or fiscal context, the difference here is that police are

344. See O’Rourke et al., *supra* note 338, at 1343–54.

345. This unitary nature is lessened, but not eliminated, by having an emergency board instead of a single manager.

346. Cf. Gillette, *Dictatorships*, *supra* note 216, at 1420–22 (discussing fragmentation within local governments as a cause of fiscal distress).

347. See, e.g., William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–53 (2008); Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 725 & n.44 (2012) (discussing how bicameralism serves as an “absolute vetogate”).

an especially powerful and unified interest group.³⁴⁸ This makes them well positioned to resist substantive reforms that may gather only a portion of the pro-reform coalition.

Beyond emergency managers' ability to cut through fragmentation, the push to pass an emergency manager law, as well as a manager's tenure, could be unifying for reformers. Because of the previously discussed fragmentation, directly passed substantive reforms are likely to draw varying degrees of buy-in from potential interest groups and stakeholders, depending on the link between each group's specialty and the reform. But an emergency manager can serve as a lightning rod. Because an emergency manager has the ability to pass many reforms, considering or implementing one could unify reformers. It may of course also unify those opposed to reform. But as the summer of 2020 showed, in a political economy that would allow for the passage of a policing emergency manager law, and especially a strong emergency manager law, it is likely that the reformers would have the upper hand in a proverbial one-on-one battle.

2. Externalities

Beyond their structural-problem-solving potential, there are localities where a policing emergency manager can have the same externality-reducing function as fiscal emergency managers. This is for several reasons. The most obvious is the simple fact that people regularly travel across multiple police jurisdictions. Because policing is a local exercise, this means that there are people who will interact with a police force, who have no say in how that force is run. An emergency manager can help fix the negative effects of this democratic deficit. Second, and relatedly, the various psychological and sociological harms discussed in Section I.C are not limited by the jurisdictional boundaries of a department, and so a police department's actions could have significant statewide, or even national, effects. Finally, the liability for a police force's civil rights violations could overwhelm a local fisc, creating the potential that some larger unit of government—the county, state, or even a more solvent nearby locality—will be pressured into assuming responsibility.

Perhaps the paradigmatic example of this last phenomenon is East Cleveland, Ohio. The East Cleveland Police Department has engaged in what can only be described as flagrant legal violations over the years and now has the enormous liabilities to match. One Ohio jury awarded a plaintiff sideswiped by

348. See, e.g., Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 721 (2017) (analyzing “fifty years’ worth of instances in which cities have implemented reforms to reduce police violence and improve police-community relations” and finding that “[a]ll of the proposed reforms involved the cooperation of the rank-and-file, and many involved active cooperation with the union”).

a police cruiser going over seventy miles per hour over \$11 million.³⁴⁹ Another jury awarded three wrongfully convicted men \$5 million each.³⁵⁰ Still another man was awarded \$50 million after East Cleveland police beat him while he was in handcuffs and then locked him in a storage room for four days without food or a restroom.³⁵¹

As heinous as these cases are, other governments in Ohio likely would not be affected by them if it were not for the fact that East Cleveland is, to be blunt, broke.³⁵² So broke, in fact, that the city's law director once said if several wrongfully convicted men suing the city won, "They would just have to get behind the other judgment holders."³⁵³ Virtually assured that they cannot collect from East Cleveland, civil rights litigants have turned to pushing for the state to cover East Cleveland's debts.³⁵⁴ East Cleveland, too, has long pushed to merge with neighboring Cleveland as a potential solution to its financial shortfalls, shortfalls that have been massively exacerbated by civil rights judgments.³⁵⁵ Higher levels of Ohio government—whether the state, the county, or even the city of Cleveland—thus have a significant incentive to solve the policing emergency in East Cleveland.

As Gillette has noted, that incentive to prevent externalities has long motivated (or at least justified), the use of emergency managers in the fiscal context.³⁵⁶ Here, it has the additional benefit of expanding the range of political actors who might be willing to create a policing-emergency-manager regime. While a policing emergency manager in many scenarios is likely to be a liberal-led reform, under this externality paradigm, conservatives too may approve, or

349. Phil Trexler, *Ohio Taxpayers May Pay East Cleveland Legal Bill*, WKYC (Apr. 12, 2019, 12:08 AM), <https://www.wkyc.com/article/news/investigations/the-investigator-ohio-taxpayers-may-pay-east-cleveland-legal-bill/95-dfbac413-b6e2-4c75-9b6a-fe504487a3b5> [<https://perma.cc/B467-GYCM>].

350. Cory Shaffer, *Judge Finds East Cleveland Law Director Acted Unethically in Wrongful Imprisonment Case, Disqualifies Her from Representing Police Officers*, CLEVELAND.COM (May 13, 2020, 1:30 PM), <https://www.cleveland.com/court-justice/2020/05/judge-finds-east-cleveland-law-director-acted-unethically-in-wrongful-imprisonment-case-disqualifies-her-from-representing-police-officers.html> [<https://perma.cc/Z892-HCQ8>].

351. Cory Shaffer, *Jury Awards \$50 Million to Man Beaten, Locked in East Cleveland Police Department Storage Room*, CLEVELAND.COM (Aug. 9, 2019, 5:21 PM), <https://www.cleveland.com/court-justice/2019/08/jury-awards-50-million-to-man-beaten-locked-in-east-cleveland-police-department-storage-room.html> [<https://perma.cc/G2SM-DSW7>].

352. See Alexia Fernandez Campbell, *A Suburb on the Brink of Bankruptcy*, ATLANTIC (June 8, 2016), <https://www.theatlantic.com/business/archive/2016/06/a-suburb-on-the-brink-of-bankruptcy/486188/> [<https://perma.cc/C2PM-8586> (dark archive)].

353. Eric Heisig, *Federal Judge Sanctions East Cleveland for Suggesting Comatose Detective Should Be Deposed in Lawsuit*, CLEVELAND.COM, https://www.cleveland.com/court-justice/2017/11/federal-judge-sanctions-east_c.html [<https://perma.cc/M6TC-CP8M>] (Jan. 11, 2019, 2:47 PM).

354. See Trexler, *supra* note 349.

355. See Campbell, *supra* note 352.

356. See Gillette, *Dictatorships*, *supra* note 216, at 1445.

even champion, it. Indeed, this same sort of fiscal justification has led to bipartisan efforts to reduce mass incarceration.³⁵⁷

3. Hard Choices

Finally, and perhaps most importantly, an emergency manager is likely to accomplish necessary reforms that political actors have the power and personal desire, but not the political will, to complete. One might call this the “hard choices” function of emergency management.³⁵⁸ While it may be the most important function, it is also the most controversial. Ideally, politically accountable actors would take the actions necessary to best advance the public interest. But especially in the policing context, for a variety of reasons that does not happen.

Police, as I have discussed, have been especially resistant to reforms. As numerous commentators have noted, police exist in a distorted political marketplace. Federal attempts at reform are limited even in the best of times.³⁵⁹ And there is reason to think that those reforms, while initially successful, do not stick without continued buy-in from police leadership.³⁶⁰ Moreover, the federal consent decree process can be financially costly and, because of that cost, may lead to public backlash as taxes are raised or services are cut.³⁶¹ Past attempts at state-level reform have often been no better.³⁶² Those people most affected by the police’s brutality, in turn, are disproportionately excluded from democratic processes.³⁶³ And police unions then magnify these problems by putting up roadblocks to officer accountability through both their negotiated contracts and lobbying for statutory protection like officer bills of rights.³⁶⁴

357. See John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 951–52 (2016).

358. The hard choices function of emergency management has some similarity to its ability to cut through structural impediments. See *supra* Section III.A.1. But the hard-choices function differs in focus. While structural impediments are about simplifying complexity that stifles reform, hard choices are about a lack of political willpower to act in the public interest. These two obstacles, however, often work in concert, and there is not always a hard line between them.

359. See Sunita Patel, *Toward Democratic Police Reform: A Vision for Community Engagement Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 794–95 (2016) (noting that the Obama DOJ opened thirty-six investigations into police departments).

360. See Rushin, *Structural Reform Litigation*, *supra* note 202, at 410–11.

361. See O’Rourke et al., *supra* note 338, at 1345.

362. *Id.*

363. *Id.* at 1345–46 (citing Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2142–44 (2017)).

364. *Id.* at 1347; see also *Fair Police Contracts*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/contracts/> [https://perma.cc/U9CS-WGLW]; Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1208–09 (2017).

Moreover, the very constitutional doctrine attempting to regulate police may instead serve to further insulate them from political pressure.³⁶⁵

And those are just the *legal* ways that the political marketplace around police has been distorted. As discussed above, too often police work amongst and perpetuate a culture of cover-up: where perjury is so common that it has a cute name—“testilying”³⁶⁶—documents are falsified; and those who dare to speak out, whether officer or civilian, are retaliated against.³⁶⁷

This twisted political landscape has several ramifications. Most obviously, it means that passing lasting substantive reforms through the traditional political process is likely to be more difficult than one would otherwise expect. But just as importantly, it means that even if political actors have both the *desire* and the *power* to pass reforms, they may not be able to cross the political minefield necessary to enact those reforms.

A sufficiently empowered emergency manager could overcome all of these hurdles. Both contractual and statutory officer bills of rights could be overridden. An obstinate police chief could be replaced with a more reform-minded one. Incentives for the rank and file could be realigned to ensure those who engage in wrongful or illegal behavior, such as perpetuating the code of silence, face consequences, and those who live up to the motto that police “protect and serve” are rewarded. And an emergency manager could give cover to those political actors who might desire change, but nevertheless do not have the political will to enact it. Indeed, this last phenomenon has been observed in the context of forced police reform elsewhere.³⁶⁸ More radically, an emergency manager could begin the process of fundamentally rethinking what we mean when we talk about public safety and make tangible changes to further that new vision.³⁶⁹

I have suggested reasons that an emergency manager may be a more feasible tool for police reform than those we have previously utilized. But I end this section by noting that despite these reasons, the process of addressing the policing emergency through an emergency manager is, like virtually all police reform, a gargantuan political lift. In some places, especially given the political

365. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–94 (2006).

366. See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008).

367. See *infra* notes 398–400 and accompanying text; see also CIV. RTS. DIV., U.S. DEP’T OF JUST. & U.S. ATT’Y’S OFF. N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 51 (2017) [hereinafter CHICAGO DOJ REPORT], <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/983X-ZT49>].

368. See Rushin, *Structural Reform Litigation*, *supra* note 202, at 1404 (noting that DOJ civil rights litigation “also appears to be uniquely successful because it provides police chiefs with legal cover to implement top-down reforms”).

369. Cf. Gillette, *Dictatorships*, *supra* note 216, at 1395–404 (discussing the potential for structural changes to government during an emergency manager’s tenure); Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. (forthcoming 2022) (manuscript at 11–13) (on file with author).

valence of and structural issues within states versus cities,³⁷⁰ it may well be impossible.

Nevertheless, I note that the question of political feasibility is distinct from that of legal and theoretical possibility. This Article is concerned primarily with the latter issues both because the novelty of the proposal means that it is impossible to predict the exact political economy necessary for its success and because the political likelihood of a policing emergency manager in any given place will depend on both the specifics of the proposal and the vagaries of state and local politics in that place at that time.

The rest of this part will turn to the questions that political actors should ask as they attempt to empower policing emergency managers. In answering these questions, I seek to shed light on the various benefits, drawbacks, and trade-offs that are inherent to policing emergency managers.³⁷¹

B. *What Goals?*

At its core, the policing emergency is about one word: violence. Solving the policing emergency, then, would seem to require reducing the police's ability to inflict violence. Success for an emergency manager, concurrently, would mean that unnecessary police violence has been lessened, if not eliminated, and that when police do wrongfully commit violence, they face appropriate consequences.

But there are numerous pathways to achieving that broad goal. Some argue that better training is the answer.³⁷² Others suggest that building stronger bonds between police and the communities they serve is the path.³⁷³ Still others say that democratic control over the police,³⁷⁴ or defunding or abolishing the police

370. See, e.g., Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities' Principles of Home Rule for the Twenty-First Century*, 100 N.C. L. REV. (forthcoming 2022) (manuscript at 1); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 107 (2018) (identifying a lack of civil society oversight at the state level).

371. While current emergency manager statutes, or perhaps even emergency statutes more generally, might allow for some of the benefits of a dedicated policing emergency manager statute, as these questions will show, the potential position of policing emergency manager is a sufficiently distinct enterprise such that creating a new statute is ideal. See *infra* note 442 and accompanying text.

372. See, e.g., Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> [<https://perma.cc/ECN2-LPW8> (dark archive)].

373. See *Community Policing*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=81> [<https://perma.cc/Z8BQ-CE3C>] (defining community policing as “[a] philosophy promoting organizational strategies that support the systematic use of partnerships and problem-solving techniques between the police and the community”).

374. See, e.g., Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1367 (2017) (offering “a full-throated defense of the democratic criminal justice vision”).

entirely,³⁷⁵ is necessary. These are far from all of the possibilities,³⁷⁶ and each of these positions has its detractors.³⁷⁷

The choice between these many approaches is far beyond the scope of this Article. Further still, which policy choices an emergency manager is empowered to pursue, and which will be most effective, likely depends on the political economy of each place that wishes to create an emergency manager.

There are, however, two nonsubstantive goals that an emergency manager should pursue. First, she should ensure that her chosen solutions do not unintentionally increase or entrench the police's power. Second, she should work to prevent backsliding after her tenure.

One of the most potent lessons from modern abolitionist teachings is that not all reforms are created equal. Too often, attempts to "fix" the police instead result in expanding their power. Calls for training, for example, can simply expand police budgets without changes to police behavior,³⁷⁸ and attempts to diversify the force can lead to expanding the force while making minimal substantive changes to how the police operate.³⁷⁹

To counter this, I suggest that emergency managers focus on implementing what Ruth Wilson Gilmore and others have called "non-

375. See, e.g., Kaba, *supra* note 90 (advocating for abolishing the police).

376. See, e.g., Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities To Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1532–35 (2017) (discussing the power and appeal of procedural justice, as well as President Barack Obama's Task Force on Twenty-First Century Policing, which "made recommendations to build trust and legitimacy of policing, the foundational pillar on which all of our other recommendations rested").

377. See, e.g., Phillip Atiba Goff, *A Better Solution for Starbucks*, N.Y. TIMES (May 30, 2018), <http://www.nytimes.com/2018/05/30/opinion/starbucks-unconscious-bias-training.html> [<http://perma.cc/K7SA-434X> (dark archive)] (arguing that "[i]nstead of training sessions, Starbucks could make more of a difference by helping cities fund non-police options for people worried about suspicious behaviors"); Philip V. McHarris, *Community Policing Is Not the Answer*, APPEAL (Dec. 2, 2019), <https://theappeal.org/community-policing-is-not-the-answer/> [<https://perma.cc/H36N-AA9G>]; John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 739–807 (2020); Paul H. Robinson, Opinion, *Don't Abolish the Police. It Didn't Work for 1960s Communes and It Won't Work for Us.*, USA TODAY (June 21, 2020, 6:00 PM), <https://www.usatoday.com/story/opinion/2020/06/21/abolishing-police-unworkable-1960-s-communes-2020-cities-column/3216029001/> [<http://perma.cc/VX6D-KTA9>].

378. See Patrick S. Forscher, Calvin K. Lai, Jordan R. Axt, Charles R. Ebersole, Michelle Herman, Patricia G. Devine & Brian A. Nosek, *A Meta-Analysis of Procedures To Change Implicit Measures*, 117 J. PERSONALITY & SOC. PSYCH. 522, 544–45 (2019); Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 306 (2015).

379. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 78 (2017) (discussing how some Black officers in Washington, D.C., were disdainful of the Black people they policed). *But see* Bocar A. Ba, Dean Knox, Jonathan Mummolo & Roman Rivera, *The Role of Officer Race and Gender in Police–Civilian Interactions in Chicago*, 371 SCIENCE 696, 696 (2021) (finding that Black, Hispanic, and female officers in Chicago make fewer stops and arrests and use less force than white and male officers, though racial disparities are not eliminated).

reformist reforms.”³⁸⁰ Non-reformist reforms are “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”³⁸¹ By expressing the goal that an emergency manager operate within the framework of non-reformist reforms, emergency managers will be able to focus on changes that “will undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system.”³⁸²

Non-reformist reforms’ focus on radical systemic change may seem incompatible with some forms of the emergency manager, such as one that primarily provides oversight or expert advice with no or limited powers to intervene. But policing, for a variety of reasons, has shown itself especially able to reinforce and protect itself from a full accounting of its wrongs, even in the face of massive public opposition.³⁸³ Even an independent oversight body is likely to need to undertake systemic changes—such as tearing down the infamous Blue Wall of Silence—in order to fulfill its transparency and advising functions.

Indeed, an emergency manager might choose to pursue policies that are both favored by traditional reformers and ultimately non-reformist. An example of such reforms is curtailing the police’s ability to use force through changes to a use-of-force policy, combined with shifting review for violations of that policy to an empowered citizen’s oversight board. These policies are non-reformist because they shift power away from the police—the power to take certain violent actions and the power to say those actions were justified—thereby undermining the prevailing status quo. But, they are also the sort of internal governance and democratization changes that traditional reformers have long sought.

Second, and relatedly, emergency managers should have the express goal of preventing backsliding to the pre-emergency manager status quo. Backsliding

380. See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION GLOBALIZING CALIFORNIA* 242 (2007); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98–106 (2020) (citing ANDRE GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967) (discussing non-reformist reforms)).

381. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/RV4D-LEF2> (dark archive)]; see also GILMORE, *supra* note 380, at 242 (similarly defining non-reformist reforms as “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization”).

382. Akbar, *supra* note 380, at 104.

383. See O’Rourke et al., *supra* note 338, at 1337–54 (discussing structural obstacles to police reform, including lack of political will, police unions, police culture, and policy trade-offs inherent in reform).

is a problem that past structural reform litigation has faced, and so an emergency manager should stay especially attuned to the possibility.³⁸⁴

This goal would require emergency managers to engage in reforms that are “sticky,” meaning those difficult to overturn through normal processes. The most obvious way to do this is by requiring a supermajority to undo the emergency manager’s work.³⁸⁵ But as the police themselves have shown, stickiness can also be created through institutional design. The Minneapolis example shows this clearly. Despite amassing the political will to get the majority of the city council to vote to disband the police department, they were stopped by an unelected commission.³⁸⁶ After that, the original political will for major change largely dissipated.³⁸⁷ Other examples abound throughout the United States’ governmental structures.³⁸⁸

C. *What Powers?*

If a policing emergency manager has been given the goal of eliminating the physical, psychological, and sociological harms that flow from police violence to the greatest extent possible, what powers does she need to meet this goal? That answer depends on how she has been told to accomplish her goals. An emergency manager’s substantive powers can broadly be put into the continuum discussed above: from those that allow her to provide oversight and advice to giving her full dictatorial control. An emergency manager can likely reduce police violence with any of these powers. Regardless of which substantive powers she has, however, an emergency manager will also need both truth-seeking powers and the power to remove structural blockades to reform in order to have any hope of substantive change.

384. See Rushin, *supra* note 202, at 1410–12.

385. See, e.g., MICH. COMP. LAWS ANN. § 141.1549(6)(c) (Westlaw through P.A.2022, No. 4, of the 2022 Reg. Sess., 101st Leg.) (requiring a two-thirds vote to remove the emergency manager); see also, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047–50 (2004) (describing a proposal for increasingly large supermajorities to vote to continue a state of emergency); Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 632 (2006) (discussing Ackerman’s “supermajoritarian escalator” proposal).

386. Herndon, *supra* note 24.

387. Martin Kaste, *Minneapolis Voters Reject a Measure To Replace the City’s Police Department*, NPR, <https://www.npr.org/2021/11/02/1051617581/minneapolis-police-vote> [<https://perma.cc/383Y-XAUE>] (Nov. 3, 2021, 12:25 AM).

388. See, e.g., Herz-Roiphe & Grewal, *supra* note 334, at 1983–84 (“Our frequently derided ‘do-nothing Congress,’ for example, does not ‘do nothing’ because it finds the status quo ideal—it does nothing because it is incapable of actively choosing anything.”); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2230 (2013) (describing an instance of congressional gridlock where a single Senator was able to stop more than eighty pieces of legislation that had early enjoyed bipartisan support).

1. Substantive Powers

Oversight and advice powers allow an emergency manager to identify problems within the police force and to recommend changes before those problems fester and become worse. If, for example, community police meetings begin to become combustible or sparsely attended, an emergency manager could recommend steps to remedy the problem before the entire community-policing program falls into desuetude.³⁸⁹ And as noted above, effectively implemented oversight powers will likely require structural changes to the systems and culture that protect police officers from accountability. More than any other manager, however, an emergency manager charged primarily with oversight and advising a police force would need to rely on her powers of persuasion, and so some expertise that police, politicians, and the community would respect, along with the need to be able to communicate with these varying constituencies, is vital. This expertise need not sit entirely within one person. For these reasons an emergency manager charged with oversight and advice might instead be best constituted as a multimember board with representatives from varying constituencies.

Moving from oversight and advice to the ability to unilaterally implement change, perhaps the most useful power an emergency manager tackling the policing emergency can have is the ability to change a police department's use-of-force policy and the discipline that accompanies violations of that policy.³⁹⁰ In a way, this seems obvious. If the core of the emergency is violence, the ability to control when police use violence seems crucial. But key to this power is not only the ability to set the policy, but also to set and ensure discipline. It is a mainstay of deterrence theory that certainty of punishment is more valuable to controlling behavior than uncertain, but severe, consequences.³⁹¹ Assuming that police are relatively rational actors, it seems unlikely that any utility they gain from committing violence in all but the most extreme scenarios outweighs the

389. See, e.g., Nissa Rhee, Manny Ramos & Andrea Salcedo, *The Rise and Fall of Community Policing in Chicago*, CHI. READER (Sept. 22, 2016), <https://www.chicagoreader.com/chicago/caps-cpd-community-policing-analysis/Content?oid=23635982> [<https://perma.cc/CS5D-AUDH>] (relaying the story of Chicago's failed foray into community policing).

390. At its most powerful, this would include the power to disarm officers in some or all situations, such as setting a use-of-force policy that disallows the use of certain weapons. While this may seem extreme, it may not make a huge difference in the day-to-day lives of officers given that nearly three-quarters of them have never fired their service weapon outside of training. See Rich Morin & Andrew Mercer, *A Closer Look at Police Officers Who Have Fired Their Weapon on Duty*, PEW RSCH. CTR. (Feb. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/02/08/a-closer-look-at-police-officers-who-have-fired-their-weapon-on-duty/> [<https://perma.cc/CAN2-6SSX>].

391. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 n.21 (1963) ("It is of course a commonplace of classical criminal-law theory that certainty and immediacy of punishment are more crucial elements of effective deterrence than its severity.").

possibility of certain and material discipline, such as an inability to be promoted, firing, or referring them for criminal prosecution.

Even if an emergency manager cannot rewrite the use-of-force policy unilaterally, there are numerous other powers that a state might like to imbue an emergency manager with short of giving her dictatorial control. For example, the ability to contravene the collective bargaining agreement to create new disciplinary procedures would at least ensure that the current use-of-force policy is being followed strictly and that officers are not escaping the consequences of their actions through opaque or tilted disciplinary procedures.³⁹²

But to truly end the policing emergency, an emergency manager will likely need near dictatorial control over not only the police, but also issues of public safety more broadly. Remember, the policing emergency is not only about the flashpoints that lead to massive protests and public outcry. Instead, the policing emergency is about the broader harms—physical, psychological, and sociological—that police cause. Fixing this emergency likely requires not only the power to destroy, but the power to create. I argued earlier that one of a policing emergency manager’s goals should be to ensure that the changes she brings about are not subject to immediate backsliding. It seems that nothing could create a greater risk of backsliding than removing or disempowering police—often the only avenue the state provides to safeguard a person’s safety and security—while replacing them with nothing.³⁹³

A policing emergency manager, then, would ideally be empowered to create non-police alternatives to the many public safety issues that arise that do not require the omnipresent threat of violence. Doing so would require an emergency manager to have the power to either retrain police to respond to calls not as law enforcement, but as social workers, mental health counselors, or as all-around nonviolent problem solvers, or to hire new people in their place.³⁹⁴ Retraining would allow police to retain positions as city workers, thereby preventing the massive displacement that the alternative—firing the police and hiring people who already have that training—would cause. Of course, some police would not (or could not) take on these new tasks, and so the emergency

392. See, e.g., O’Rourke et al., *supra* note 338, at 1348–49 (“Several classic studies describe the culture of rank-and-file policing as one of violence and hostility toward those who seek to check it. Updating this literature, Professor Barbara Armacost has shown how the organizational structures of modern police departments incentivize aggressive policing while facilitating systemic misconduct.”).

393. See FORMAN, *supra* note 379, at 122–23 (arguing that the growth of Black carcerality in Washington, D.C., was in part due to it being the only option presented despite a desire for broader social reforms).

394. See, e.g., #8TOABOLITION, *supra* note 83 (highlighting several “community-led models of building safety and collective care” that seek to address problems as wide-ranging as community violence, sexual assault, and housing).

manager would also need the power to terminate them (or to move them to some other government job) and to hire new people in their stead.

Importantly, even if an emergency manager is not fully empowered to *solve* the policing emergency, there are many steps she might take towards ameliorating it. Foremost among them would be to remove police from situations where they are unnecessary. Routine traffic enforcement does not require an armed officer to be present and in fact can be more effectively handled without police intervention in many cases.³⁹⁵ Mental health calls and safety checks similarly do not seem to require an armed response.³⁹⁶ Yet both scenarios have turned deadly when police became involved.³⁹⁷

2. Removing Structural Blockades and Truth-Seeking Powers

The power to cut through structural blockades and to seek the truth is necessary for any emergency manager, but is especially necessary for a policing emergency manager. Much has been written about the many legal and cultural impediments to holding police accountable for their actions.³⁹⁸ The “Blue Wall of Silence,” the culture of police to jealously guard each other’s secrets and harshly punish anyone who does not fall in line, is infamous.³⁹⁹ As the president

395. See Sarah A. Seo, *A Path to Non-Police Enforcement of Civil Traffic Violations*, JUST. COLLAB. INST. (Aug. 24, 2020), <https://tjcinstitute.com/research/a-path-to-non-police-enforcement-of-civil-traffic-violations/> [https://perma.cc/MC8Y-QGVW] (arguing for removing armed police from civil traffic enforcement and increasing the use of automation); TRANSP. ALTS., THE CASE FOR SELF-ENFORCING STREETS 12–19 (2020), <https://static1.squarespace.com/static/5cab9d9b65a707a9b36f4b6c/t/5eec1235fe73d720da412589/1592529462229/CaseForSelfEnforcingStreets.pdf> [https://perma.cc/XYH5-7L5U] (arguing for increasing safety of public streets through city planning and automation). See generally SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019) (examining how the rise of the car led to more intrusive policing and serious consequences for racial equality in the criminal justice system).

396. See, e.g., Cohen, *supra* note 196.

397. Charles Kinsey. See *Police in Fla. Shoot Caretaker Next to Autistic Man Playing in Street*, CBS NEWS (July 20, 2016, 10:56 PM), <https://www.cbsnews.com/news/police-in-florida-shoot-caretaker-next-to-autistic-man-playing-in-the-street/> [https://perma.cc/W5LS-WCW5]. Atatiana Jefferson. See Maria Trahan Martinez, Nicholas Bogel-Burroughs & Dave Montgomery, *Woman Was Playing Video Game with Her Nephew When Shot by Fort Worth Police*, N.Y. TIMES (Oct. 13, 2019), <https://www.nytimes.com/2019/10/13/us/fort-worth-texas-shooting-jefferson.html> [https://perma.cc/9HRJ-XXQA (dark archive)] (reporting on the police shooting of Atatiana Jefferson, who was shot in her home after a neighbor called to report two doors ajar).

398. See, e.g., Huq & McAdams, *supra* note 35, at 240–52 (discussing legal attacks on delay privileges for police officers); Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1039 (1996) (discussing “testilying,” the police’s ability to lie under oath and get away with it); Allison Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 760 (1993) (discussing the failures of 42 U.S.C. § 1983).

399. See, e.g., Nicole Gonzalez Van Cleve, *The Chicago Culture That Created Jason Van Dyke*, ATLANTIC (Oct. 9, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/laquan-mcdonalds-death-almost-didnt-come-light/572476/> [https://perma.cc/4Y59-QV79 (dark archive)] (describing a culture of officers shading testimony at best, outright lying at worst, and intimidating anyone who tried to stop them); see also CHICAGO DOJ REPORT, *supra* note 367, at 46–93 (describing numerous ways

of the police officer's union for the Chicago Police Department explained, "there's a code of silence everywhere, everybody has it . . . so why would the [Chicago Police] be any different."⁴⁰⁰ Some impediments, like qualified immunity, are largely outside of any emergency manager's control.⁴⁰¹ There is little, after all, that a state-created emergency manager can do about the state of Fourth Amendment law or other constitutional doctrines.

But impediments that an emergency manager cannot touch are few and far between. Most of the structural impediments to reform are creatures either of state and local law or of culture. As discussed above, with some limitations, both state and local governments can abrogate most contracts, including collective bargaining agreements, when the public good demands it.⁴⁰² This is a power that can be passed on to an emergency manager. An emergency manager, in turn, could use this power to defang those provisions of the collective bargaining agreement that shield officers from accountability. Similarly, as in Michigan,⁴⁰³ an emergency manager's enabling statute could supersede other state or local laws—like a law enforcement officer's bill of rights⁴⁰⁴—that might provide police with enhanced procedural protections that too often serve to allow them to escape accountability.

Even cultural impediments are not beyond an emergency manager's touch. Here, broad truth-seeking powers, combined with the power to hire, fire, and discipline, are most useful. Any policing emergency will require the power to subpoena both documents and testimony, as well as the power to act on that information and to make discovered information public. In turn, managers will also need the power to protect officers from retaliation who cooperate with their

the Chicago Police Department and city created deficient accountability mechanisms); *id.* at 75 (quoting one sergeant as saying "if someone comes forward as a whistleblower in the Department, they are dead on the street").

400. Van Cleve, *supra* note 399, at 74 (alterations in original).

401. See generally Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1 (2015) (analyzing the doctrinal instruments federal courts use to allocate scarce adjudicative resources over competing demands for constitutional remedies). But see Adam Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. (forthcoming 2022) (arguing that qualified immunity may be less of an impediment to accountability than it is often portrayed).

402. But see *Kanerva v. Weems*, 13 N.E.3d 1228, 1244 (Ill. 2014) (holding that the Illinois Constitution's Pension and Retirement Rights Clause, ILL. CONST. art. XIII, § 5, prohibited the legislature from altering certain state employee health benefits). While this Article brackets state constitutional issues, cases like *Kanerva* display how any state wishing to utilize an emergency manager will have to grapple with the intricacies of state constitutional law, in addition to federal constitutional challenges.

403. See, e.g., MICH. COMP. LAWS ANN. § 141.1552(i), (ff) (Westlaw through P.A.2022, No. 4, of the 2022 Reg. Sess., 101st Leg.).

404. See Rebecca Tan, *There's a Reason It's Hard To Discipline Police. It Starts with a Bill of Rights 47 Years Ago.*, WASH. POST (Aug. 29, 2020), <https://www.washingtonpost.com/history/2020/08/29/police-bill-of-rights-officers-discipline-maryland/> [<https://perma.cc/K33C-LFEF> (dark archive)] (discussing the advent of the "Law Enforcement Officers Bill of Rights").

investigations, and to discipline those who seek to obfuscate or retaliate. If a police department is sufficiently obstinate, this may mean that mass turnover is necessary and an emergency manager should have the power to take that step.⁴⁰⁵

A final note about an emergency manager's powers: While the education context shows that emergency managers can be created by governments on either the state or the local level, the nature of local power, which is derived from the state, means that state-created emergency managers will always be more powerful than those created on the local level. More importantly, this means that a locality creating an emergency manager must always be mindful of its subordinate role and of the possibility that the state will undermine its attempts.⁴⁰⁶ In places where the state and city have different political allegiances, this lurking threat from the state can serve as a significant check on what an emergency manager may be empowered to do.

D. *What Limits?*

Once a city or state has chosen the goals and powers of its emergency manager, what limits should it place on those powers? There are three types of limits that might constrict an emergency manager: express limits; political checks; and the end of the emergency manager's tenure. Express limits on an emergency manager's power should be rare. Because emergency managers are called to address emergencies, the governments empowering them should recognize that actions that would be considered drastic in a nonemergency situation may be necessary. It therefore seems advisable not to rule out options *ex ante*. Michigan provides an example of the sort of protection from extreme action that an emergency manager might understandably be prevented from taking: it forbids emergency managers from cancelling death benefits for the survivors of police officers and firefighters killed in the line of duty.⁴⁰⁷ Similar express limits might seek to protect actions that cannot be undone after an

405. Compare the successes and failures of progressive district attorneys in Philadelphia, where Larry Krasner was able to fire assistant district attorneys hostile to his efforts, and in Los Angeles, where antireform lower-level district attorneys with civil service protections sued newly elected District Attorney George Gascon to stop his reforms. See Chris Palmer, Julie Shaw & Mensah M. Dean, *Krasner Dismisses 31 from Philly DA's Office in Dramatic First-Week Shakeup*, PHILA. INQUIRER (Jan. 5, 2018), <https://www.inquirer.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html-2> [<https://perma.cc/ZSM7-Q9QC>]; Eric Leonard & Andrew Blankstein, *Prosecutors To Ask Court To Stop Some of New District Attorney's Reform Directives*, NBC 4 (Dec. 29, 2020), <https://www.nbclosangeles.com/news/local/prosecutors-to-ask-court-to-stop-some-of-new-district-attorneys-reform-directives/2495114/> [<https://perma.cc/V2HG-UK9X>] (discussing the restraining order sought by the Association of Deputy District Attorneys to stop some of newly elected District Attorney George Gascon's reform efforts).

406. See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1383–92 (2020); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1170–83 (2018) [hereinafter Schragger, *The Attack on American Cities*].

407. MICH. COMP. LAWS ANN. § 141.1555(2) (Westlaw through P.A.2022, No. 4, of the 2022 Reg. Sess., 101st Leg.).

emergency manager's tenure, like destroying or selling something of natural or historical significance.

Political checks on an emergency manager's actions should also be relatively rare, though not as rare as express limits. As discussed above, political checks on an emergency manager can come from above—meaning from whoever created and appointed the emergency manager—or from below—from the people over whom the emergency manager exercises her power.⁴⁰⁸

While a number of emergency manager statutes have significant political checks from above, allowing the governor or other appointing official to remove the emergency manager at will, this can create a corrupting influence. Having this sort of strong political check ensures that instead of being the dispassionate, technocratic expert an idealized emergency manager is meant to be, the emergency manager becomes another appointed political agent.⁴⁰⁹ This sort of strong political check from above is especially problematic in places where the state and locality have opposing politics. There, the emergency manager is in its most antidemocratic form. Instead, political checks from above, to the extent they exist at all, should only exist to review an emergency manager's decisions that would be most prone to corruption. For example, the issuing of large government contracts or sale of government assets should be subject to review.⁴¹⁰

Political checks from below are rarer than those from above in the educational and fiscal contexts, perhaps for obvious reasons. The regular democratic process in the locality has led to the emergency, and so the emergency manager needs to be able to subvert and ignore that process. But the policing emergency context is different. Here, part of the failure of the democratic process is that the police have become democratically unaccountable and antidemocratic. Therefore, introducing political checks from below may help to fix the emergency. Much of the literature arguing for the democratization of criminal law suggests exactly this step.⁴¹¹ But community-focused political checks on *the police* should not be confused with political checks on *the emergency manager*. The former are within democratizers' ken, the latter

408. Perhaps the most important "political" check on an emergency manager is having a process to remove her for cause. This check can be subsumed into one of the other political checks, if, for example, the appointing official has the ability to remove the emergency manager at will. *See, e.g.*, 45 R.I. GEN. LAWS § 45-9-7(a) (LEXIS through Ch. 429 (all legislation) of the 2021 Sess.) (allowing the director of revenue to remove the receiver "at any time, and without cause"). A termination-for-cause limitation, however, seems so obviously necessary as to not merit further discussion.

409. *See* Gillette, *Dictatorships*, *supra* note 216, at 1446 (discussing the "more realistic[]" assumption "that takeover boards are necessarily political bodies comprising individuals appointed by state executives who may have an underlying agenda").

410. *See, e.g.*, MICH. COMP. LAWS ANN. § 141.1552(3) (requiring either competitive bidding or state treasurer review on contracts valued above \$50,000); *id.* § 141.1555(1) (requiring state treasurer approval of local government assets valued above \$50,000).

411. *See, e.g.*, Kleinfeld, *supra* note 374, at 1367.

may stifle a manager's ability to make structural or large changes, becoming a hindrance to everyone's goals.

Finally, an emergency manager's power is limited by the ability to end her tenure.⁴¹² Here, while there are multiple possibilities for what may trigger the end of an emergency manager's tenure, one option seems to stand above the rest. That option is a temporal minimum, followed by a political check from below. This is functionally Michigan's system, and in the policing context adopting it nearly in full makes sense. A sufficiently long period of time—Michigan allows eighteen months—when the emergency manager does not have to worry about being removed allows her to take action as her mandate and expertise command. Then, once she has had enough time to implement changes and for the locality to see those changes' effects, either the locality's elected officials or its citizens can vote to decide whether to continue her tenure.

Alternately, an emergency manager's tenure might end based on some predecided objective metrics. In the policing emergency context, this means finding metrics that signify long-lasting decreases in police violence and the harms that flow from it. As discussed above regarding non-reformist reforms and stickiness, that a metric account for the lastingness of the change is key. For example, an emergency manager's tenure should not end because the amount of police violence dropped if the only reason for that drop was a work slowdown. While a slowdown may have the intended effect of reducing the opportunity for police to engage in violence,⁴¹³ it represents at most a temporary reprieve from the norm.

However a state or locality chooses to end an emergency manager's tenure, what is most important is that they do ensure her tenure ends. An extended or even semipermanent emergency manager may be appropriate if that manager's role is to oversee or provide expert advice to the local government.⁴¹⁴ But, as the history of educational emergency managers shows, without a clear end point for an emergency manager's tenure, what began as a seizure of local control to deal with an emergency can become the new normal.⁴¹⁵

E. *Who Should the Manager Be?*

Finally, once a government has decided what an emergency manager's goals, powers, and limits are, it must figure out who should fill the position.

412. See Gillette, *Dictatorships*, *supra* note 216, at 1456–61.

413. See Christopher M. Sullivan & Zachary P. O'Keeffe, *Evidence That Curtailing Proactive Policing Can Reduce Major Crime*, 1 NATURE HUM. BEHAV. 730, 733 (2017) (examining the NYPD slowdown of 2015 and finding that reports of major crimes fell by 3–6% during that slowdown).

414. See STATE ROLE, *supra* note 219, at 30–32 (discussing the North Carolina Local Government Commission).

415. See, e.g., MOREL, *supra* note 249, at 40–44 (noting that the state took over the Central Falls School District in 1991 and maintained control in 2016); Clark, *supra* note 330 (discussing the twenty-five-year takeover of Newark schools by New Jersey).

Here, there are two major decisions: Should the emergency manager be an individual or a board? And what qualifications should the emergency manager have?

There are clear trade-offs between having an individual emergency manager and a board. While an individual manager can act swiftly, she will necessarily have a narrower field of expertise than a board. By contrast, while a board presents an opportunity to have representation from diverse constituencies with varying expertise, the greater number of perspectives increases the chances of gridlock and may generally slow the decision-making process. For these reasons, as a manager's powers shift from providing oversight and advice to dictatorial control, the likelihood that a board will be the ideal choice over a single person shifts as well. The board's broader base of knowledge is especially useful when its primary goal is to advise others, while the individual's ability to act swiftly and decisively is more valuable when she has many potential choices that she must make.⁴¹⁶

Choosing which qualifications to search for in an emergency manager is similarly a game of trade-offs, though at least in some jurisdictions, it may be possible to have it all. The two broad categories of qualifications most relevant to choosing an emergency manager are subject-matter expertise and knowledge of the community.⁴¹⁷ To be clear, by community I do not refer simply to everyone within a locality's borders. Instead, I refer primarily to those from a locality's community—most likely Black or Brown and economically deprived—who are most heavily policed.

Subject-matter expertise is most likely to come from academics, long-serving law enforcement officers, lawyers, judges, or other professionals who have operated within or been exposed to the carceral system. Knowledge of the community is likely to be held by community leaders of civic organizations, religious leaders, politicians, or even by lifelong citizens. The overlap between these two groups may not be large, but it is not nonexistent. There are likely to be subject-matter experts who came from or work within the relevant communities and whom people in the community trust. This is, nevertheless, a

416. The major downside of a having an individual versus a board, limited expertise, can be blunted by hiring a panel of expert advisers to aid the individual emergency manager. Indeed, like any person serving in what is essentially an executive function, forming a "cabinet" of sorts will likely be necessary.

417. A third category, management training, is also important given the scale of the task a policing emergency manager would be asked to undertake. Management training is not so important, however, that it should allow those without either subject-matter expertise or community knowledge to be considered. See, e.g., Ron Fonger, *Near Total Authority of Emergency Managers Impacted Flint Water Crisis, UM Study Says*, MLIVE (Apr. 29, 2020, 4:47 PM), <https://www.mlive.com/news/flint/2021/09/ems-helped-cause-the-flint-water-crisis-and-changed-other-michigan-water-systems-um-study-shows.html> [<https://perma.cc/SX6U-Q4LT>] (noting that Flint's emergency manager had no expertise in public health and quoting that emergency manager as saying that despite his total control over the city's operations, "his job here was 'strictly finance' and 'did not include ensuring safe drinking water'").

balancing act. An especially prodigious subject-matter expert with no community ties may be the necessary person to address a complex system like a police department. Or a noted community leader may be ideal because they are able to understand the history of the police in the community with a depth that no subject-matter expert can match.

Ultimately, regardless whether the emergency manager is chosen for her subject-matter expertise, her community knowledge, or some combination of the two, the ideal emergency manager will be neutral between interest groups. For this reason, it is best that whoever is chosen is not a repeat player within the locality's carceral system. Choosing an active prosecutor, defense attorney, police officer, or community leader with ties to a single organization, enhances the possibility that the emergency manager will serve her interest group, or worse, her own personal interests, instead of fixing the system as a whole.⁴¹⁸

IV. THE ANTIDEMOCRATIC OBJECTION AND OTHER LIMITS

A. *The Antidemocratic Objection*

There are many potential objections to what an emergency manager might do. But most of those objections are tied to the substantive decisions an emergency manager makes, as opposed to the use of an emergency manager as a tool to make those decisions. Examples of this difference abound in the fiscal and educational contexts. Objections to the privatization of city services, sale of public assets, or the proliferation of charter schools are not intrinsically linked to emergency management, even if they are the choices that emergency managers have often made.⁴¹⁹ Policing emergency managers will almost certainly face similar substantive objections, but addressing each of those is beyond this Article's scope. There is, however, one class of objection that is tied to emergency managers *as a tool* in the policing context. That objection is that emergency managers are antidemocratic.

The core objection from democracy argues that emergency managers are an inherently antidemocratic force, and that their antidemocratic nature enables them to take actions that a polity would never choose for itself and that are ultimately harmful. Worse still, in a world in which states and cities have opposing politics, and especially where one political party controls the state-level government through antidemocratic means like gerrymandering or voter suppression, the state can use emergency managers to further usurp the political power that cities possess.⁴²⁰

418. See Gillette, *Dictatorships*, *supra* note 216, at 1454–56 (discussing the possibility of self-serving behavior by takeover boards).

419. See *supra* Section II.C.

420. Cf. Schragger, *The Attack on American Cities*, *supra* note 406, at 1167–68.

The policing context adds another layer to this critique. An emergency manager, this objection suggests, adds *another* antidemocratic layer to an already antidemocratic institution. While the entire criminal legal system has been criticized by scholars as antidemocratic,⁴²¹ as Jocelyn Simonson has argued, “in policing [the antidemocratic problem] is especially acute because of the domination inherent in the everyday nature of modern policing.”⁴²² Unlike budgets controlled by local elected officials, or public schools controlled by elected school boards, police are already minimally democratically accountable at best. Even sheriffs, who are usually elected, rarely face any real democratic pushback.⁴²³ Those elections have been undercovered by news organizations,⁴²⁴ and the incumbency advantage for a sitting sheriff is often insurmountable.⁴²⁵ And the accountability of police leaders does not necessarily transfer to democratic accountability for the many police officers who interact with the citizenry. When cities have attempted to increase democratic responsiveness through community oversight boards, they have almost uniformly failed to create significant change.⁴²⁶ Beyond this, police are also troublingly

421. See, e.g., Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 550 (exploring the “democracy deficit” in the criminal legal system and “call[ing] for a democracy-enhancing theory of criminal law and procedure, which refocuses the traditional justifications of retributivism, deterrence, and rehabilitation by prioritizing self-governance”); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017) (arguing that “the law enforcement bureaucracy is designed to operate in an anti-democratic manner” and so “needs an abolitionist . . . approach”); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1453 (2005) (discussing how “[c]riminal defendants . . . are . . . silenced by constitutional doctrines, criminal rules, and their attorneys”).

422. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 806 (2021).

423. See James Tomberlin, Note, “Don’t Elect Me”: *Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 142–45 (2018) (discussing the failures of elections as an accountability mechanism for sheriffs, including lack of saliency and structural advantages that increase the incumbency advantage).

424. See Lindsey Meeks, *Undercovered, Underinformed: Local News, Local Elections, and U.S. Sheriffs*, 21 JOURNALISM STUD. 1609, 1609–10 (2020) (finding that local newspapers’ coverage of sheriff’s elections was not comprehensive, especially when the sheriff’s election occurred during a presidential or midterm election year).

425. See Michael Zoorob, *There’s (Rarely) a New Sheriff in Town: The Incumbency Advantage for County Sheriffs* 17 (Nov. 12, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3485700 [<https://perma.cc/6HD4-D3TH>] (finding that an elected sheriff’s average tenure greatly exceeds the average tenure of an appointed police chief); Tomberlin, *supra* note 423, at 143–44 (noting that one scholar has estimated that the average sheriff serves for twenty-four years).

426. See Jamie Smith Hopkins & Kristine Villanueva, *Community Groups Have Consistently Failed To Improve Policing. These Advocates Are Pushing a New Way.*, MOTHER JONES (June 11, 2020), <https://www.motherjones.com/crime-justice/2020/06/we-want-community-oversight-wth-real-power-civilian-oversight-groups-struggle-to-improve-policing/> [<https://perma.cc/N5CF-WF86>]; Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 633–35 (discussing the genesis and failures of civilian oversight boards before concluding that structural barriers lead to “only . . . very limited . . . citizen participation in policing”); Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards To Oversee Police*, 46 SETON HALL L. REV. 1033, 1035 (2016)

antidemocratic in other ways, as contact with them has been linked to decreased civic participation.⁴²⁷

The objection from democracy has significant force. Because an emergency manager is appointed, she is at best only indirectly democratically accountable. And even then, she may be totally unaccountable to the people over whom she has control if those people have insufficient political power to influence the state-level elected official who appointed the manager. Further, the risk of capture by pro-status quo forces is real.⁴²⁸ Police are the exact sort of “small, motivated group[]” that could subvert the ability of an emergency manager to act for the public good.⁴²⁹ And a captured emergency manager could do significant harm. She could waste the political will it took to create the emergency manager position. Worse, she could further entrench or even magnify the power, policies, and culture that have led to the current policing emergency.

While the objection from democracy cannot be dismissed, its force is not overwhelming. First, the objection from democracy can too easily conflate democracy with majoritarian decision-making. Equally vital to a democracy is the protection of the rights, security, and well-being of its minority inhabitants.⁴³⁰ Regardless of their views on how to reform policing, the various minority (or otherwise subjugated) groups discussed in Section I.B.3 would certainly prefer a world where their government’s police did not further their subjugation. A policing emergency manager can and should be focused on making changes that lessen these sorts of sociological harms.

This reverses a policing emergency manager’s relationship with these minority groups’ substantive preferences from the fiscal and educational contexts. In the fiscal context, emergency managers have historically reduced services for these groups in order to financially benefit disproportionately majority-group third parties.⁴³¹ Likewise, in the educational context, the

(“[T]hese [civilian oversight] institutions . . . have often times failed to adequately oversee local law enforcement agencies, and that many of these regimes were rigged to fail in the first place given their limited mandates and authorities.”); see also Sharon R. Fairley, *Survey Says?: U.S. Cities Double Down on Civilian Oversight of Police Challenges and Controversy*, 2020 CARDOZO L. REV. DE NOVO 1, 33–49 (discussing impediments to effective civilian oversight).

427. See *infra* note 435 and accompanying text.

428. See J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1554 (2018) [hereinafter Anderson, *Court Capture*] (defining capture as “the situation where regulators have been co-opted by organized interest groups to adopt policies that run contrary to the public interest”); see also Gillette, *Dictatorships*, *supra* note 216, at 1455–56 (describing takeover board members who were perceived as acting for the constituencies they profited from instead of the public good).

429. See Anderson, *Court Capture*, *supra* note 428, at 1552.

430. See generally THE FEDERALIST NOS. 10, 51 (James Madison).

431. See, e.g., Gillette, *Dictatorships*, *supra* note 216, at 1412–19; Anderson, *Democratic Dissolution*, *supra* note 249, at 585–86. Gillette and others discuss this problem through the lens of “contagion,” meaning the need to protect the rest of the state from the possible spread of the taken-over city’s fiscal troubles. While fiscal contagion is a real phenomenon, the disparate use of emergency managers in

democratic critique has rested in part on the idea that emergency managers are forcing groups into creating education systems that they would not choose for themselves.⁴³²

Second, even if the democratic objection is solely about the power of engaging in representative democracy, as opposed to achieving certain substantive outcomes, emergency managers do not have to be, and rarely are, totally democratically unaccountable to the people they oversee.⁴³³ Democratic accountability is not all or nothing. Certainly, there are trade-offs between a manager who is empowered to do whatever she believes is best and one who must go through even a limited democratic process before acting. An unaccountable manager will likely be able to act more swiftly and to undertake more radical changes. Adding a layer of oversight with veto power over the emergency manager's decisions may also increase the opportunity for capture. But these are trade-offs that anyone creating an emergency manager will be able to consider. Democratic accountability could also be built into an emergency manager statute through the people's ability to end an emergency manager's tenure or to decide whom to appoint as an emergency manager through something like a snap election.⁴³⁴

Third, and perhaps most importantly, the democratic critique is significantly blunted when one considers the democracy-enhancing possibilities that a policing emergency manager creates. Police differ from other areas where emergency management has been used because police are themselves an antidemocratic force. Police contact specifically, and criminal justice contact more broadly, has been linked to decreased civic participation for both the directly affected person and their close contacts.⁴³⁵ While one view of an

heavily minority cities combined with the comparative demographics of the surrounding suburbs and state does lead to fiscal emergency management being a tool that can protect whiter and wealthier interests at minority and poor people's expense.

432. See, e.g., MOREL, *supra* note 249, at 9–10.

433. See *supra* Part III. As the Michigan example shows, emergency managers have historically also been politically accountable to the person who has the power to remove them. See *supra* note 269 and accompanying text.

434. See, e.g., Russell Goldman, *Key Points About a Snap Election in Britain*, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/world/europe/britain-snap-election-brex-it-theresa-may-questions.html> [<https://perma.cc/Z4VE-9BW8> (dark archive)] (explaining that a “snap election” is one called outside of the usual election cycle) *Error! Hyperlink reference not valid.* This snap election function has the additional benefit of not leaving the appointment of the manager to a single political authority.

435. See Michael Leo Owens & Hannah L. Walker, *The Civic Voluntarism of “Custodial Citizens”: Involuntary Criminal Justice Contact, Associational Life, and Political Participation*, 16 PERSPS. ON POL. 990, 1004 (2018) (finding that the negative effect of criminal justice contact on voting is not ameliorated by contact with civil society organizations, although the effect on nonvoting civic participation is lessened); Ariel White, *Family Matters? Voting Behavior in Households with Criminal Justice Contact*, 113 AM. POL. SCI. REV. 607, 607 (2019) (finding “a short-term demobilization effect for people who see household members convicted or jailed in the weeks before the election,” but not finding a lasting effect); Vesla Weaver & Amy Lerman, *Political Consequences of the Carceral State*, 104

emergency manager is that it adds a further antidemocratic layer to the already antidemocratic police, another is that an emergency manager may be necessary to *undo* the antidemocratic status quo. To paraphrase the late William Stuntz, “John Hart Ely had it about right: [an emergency manager] adds the most value when it advances interests that the political process will not advance on its own.”⁴³⁶

The reasons for this are several. To the extent that an emergency manager is tasked with reducing unwanted and unwarranted contact with the police, there will be, by definition, fewer people who suffer the antidemocratic effects of police stops and criminal justice contact more broadly.

But an emergency manager could go significantly farther than this. There is no reason that an emergency manager could not create the sorts of community-based accountability and oversight mechanisms that objectors from democracy propose.⁴³⁷ While a period of emergency management could be a time for staid, technocratic reforms, it does not have to be so limited. As Gillette argues, perhaps the greatest untapped potential of emergency managers is to alter the structures of government in ways that regular politics would not allow.⁴³⁸

At their most powerful, emergency managers represent the concentration of the full emergency powers of a state or local government into a singular person who is not only unaccountable to many of the traditional powers-that-be but is expressly tasked with altering the status quo. In the fiscal or education contexts, this antagonism to the status quo has meant increasing privatization, selling public assets, and otherwise decreasing the role of government that is directly accountable to the citizens under the emergency manager’s purview. But emergency management does not have to be these things. Especially in the policing context, antagonism to the status quo could mean *increasing* the citizenry’s role in policing decisions both large—like deciding whether a

AM. POL. SCI. REV. 817, 825 (2010) (finding that “even a minor encounter with the police that did not result in arrest is associated with a reduced likelihood of turning out in an election”). *But see* Hannah L. Walker, *Extending the Effects of the Carceral State: Proximal Contact, Political Participation, and Race*, 67 POL. RSCH. Q. 809, 810 (2014) (finding that proximal contact with the criminal justice system “increases one’s likelihood of high participation in political activities other than voting, compared with those without proximal contact”).

436. Stuntz, *supra* note 365, at 818–23.

437. Indeed, given the majoritarian support for a number of not-yet-enacted police reforms, see, for example, Li Zhou, *Where Americans Stand on Policing Today*, VOX (Apr. 9, 2021, 9:10 AM), <https://www.vox.com/22372342/police-reform-derek-chauvin> [<http://perma.cc/4AKY-HMP7>]; Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes,’* GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [<http://perma.cc/MUS2-TCYZ>], it may be possible for an emergency manager to make major changes solely by implementing those reforms with majoritarian support that have not been enacted due to the vagaries of the local political process.

438. *See* Gillette, *Dictatorships*, *supra* note 216, at 1419–20.

department should continue to exist—and small—such as holding a singular officer accountable for a disciplinary issue.

An emergency manager's tenure is a time with the potential for radical, structural change. When that change is intended to fix an antidemocratic institution like policing, even if the emergency manager's decisions are not democratically made, she can leave a more democratic society in her wake.

B. *Limits on Emergency Powers*

Although emergency managers may seem all powerful, there are some external constraints that anyone wishing to utilize a policing emergency manager should take account of. Here, while I briefly discuss legislative hurdles, I focus primarily on the federal constitutional protections given to police union contracts. That is because these unions and their contracts have regularly been fronted as one of the largest impediments to reform.⁴³⁹

Legislatures will often act as a backstop for the exercise of an executive's emergency powers.⁴⁴⁰ Emergency statutes may also prohibit taking certain actions, such as limiting the right to bear arms or of the press, even during an emergency.⁴⁴¹ But because the creation of an effective policing emergency manager will likely require the passage of new legislation,⁴⁴² preexisting legislative limits on emergency powers can be superseded.

What cannot be superseded are the courts and Constitution.⁴⁴³ The courts have most recently grappled with emergency government actions in the

439. See Levin, *supra* note 192, at 1340–54.

440. See *Legislative Oversight of Emergency Executive Powers*, *supra* note 59.

441. *Id.*

442. See *supra* Part III. It may be possible for some states to use existing emergency powers to create policing emergency managers. But because no emergency statute, indeed not even any existing emergency manager statute, was made for this scenario, the use of an existing statute is likely to require shoehorning a policing emergency manager's actions into an ill-fitting statute. That would almost certainly invite greater, and potentially more successful, litigation as the policing emergency manager stretches the old statute's intended purposes. Moreover, if an executive acted unilaterally under a broad provision of emergency authority, they might quickly find their work undone. Many emergency statutes either provide significantly shorter time horizons, often thirty days, for the exercise of emergency powers by an executive, as compared to the year or more that emergency managers often need. See *Legislative Oversight of Emergency Executive Powers*, *supra* note 59. Or, statutes contain legislative checks that could cut an emergency manager's tenure short were a governor to create one unilaterally. See *id.* Governors taking unilateral emergency action may also expose themselves to significant political blowback. See, e.g., Jeremy B. White, *Too Little, Too Late? Schools Deal May Not Alter Newsom Recall Politics*, POLITICO (Mar. 4, 2021, 3:34 PM), <https://www.politico.com/states/california/story/2021/03/01/too-little-too-late-schools-deal-may-not-alter-newsom-recall-politics-1366306> [<https://perma.cc/PJ6X-WYD6>] (noting that proponents of recalling California governor Gavin Newsom “capitaliz[ed] on widespread discontent that spiked during a second lockdown this winter”).

443. Because this Article is focused on emergency managers generally, as opposed to an emergency manager for a particular location, a fulsome analysis of state constitutional hurdles is beyond its scope. Nevertheless, state constitutions are also likely to provide checks on emergency powers, and anyone wishing to use emergency managers should investigate those checks thoroughly. Notably, however,

COVID-19 context.⁴⁴⁴ The Supreme Court's action in these cases suggests an increasing unwillingness to defer to a government's use of emergency powers.⁴⁴⁵ But that lack of deference may be tied to the First Amendment implications of those cases, not a signal of greater scrutiny of emergency power generally.⁴⁴⁶ Historically, the courts have deferred to the political branches choices during emergencies,⁴⁴⁷ and that pattern held here, as courts generally deferred to their political counterparts when dealing with COVID-19.⁴⁴⁸

Regardless of the Court's view of emergency powers generally, the Contract Clause may present a particular judicial impediment to a policing emergency manager. That is because many of the obstacles to changing policing arise through union contracts.⁴⁴⁹ And challenges to an emergency manager's actions have often taken the form of Contract Clause challenges.⁴⁵⁰

The Contract Clause states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁴⁵¹ Despite the clause's strict language, the Supreme Court has long recognized that "[t]he Legislature cannot 'bargain away the public health or the public morals,'" and states "retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts," as well as "to protect the public safety."⁴⁵²

The Court treats impairments of private and public contracts differently, giving significant deference to impairments of private contracts and applying more scrutiny to a contract where "the State's self-interest is at stake," that is, when the state is impairing a contract to which it is a party.⁴⁵³ But even then, the standard is only whether the impairment "is reasonable and necessary to serve an important public purpose."⁴⁵⁴ More specifically, the Court has said that

courts have an uneven history of enforcing such limits in the face of an emergency. See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2565–66 (2003) (noting that "the conventional wisdom is that courts function poorly as guardians of liberty in times of crisis").

444. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716–23 (2021).

445. See *id.*; *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (mem.) (2021).

446. See Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (on file with author); Kenny Mok & Eric Posner, *Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic 3* (Aug. 1, 2021) (unpublished manuscript) (on file with author).

447. See Cole, *supra* note 443, at 2566.

448. See Mok & Posner, *supra* note 446, at 3 (finding that plaintiffs challenging nonreligious COVID-19 restrictions won only 14.4% of the time).

449. See *infra* Section II.B.2.

450. See, e.g., *Sullivan v. Nassau Cnty. Interim Fin. Auth.*, 959 F.3d 54, 62 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 1063 (2021); *Welch v. Brown*, 551 F. App'x 804, 808 (6th Cir. 2014); *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 431 (6th Cir. 2014).

451. U.S. CONST. art. I, § 10, cl. 1.

452. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 436 (1934).

453. *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25–26 (1977).

454. *Id.*

states should not “impose a drastic impairment when an evident and more moderate course would serve its purposes equally well,” that they must not “consider impairing the obligations of its own contracts on a par with other policy alternatives,” and that the impairment must be “reasonable in light of the surrounding circumstances.”⁴⁵⁵

The policing emergency is likely to sit at the core of this “important public purpose” test. The creation of a policing emergency manager is a government declaration of emergency, and as discussed below, is a measure that should have limited duration. Both of these factors were key to the Court’s decision in *Home Building & Loan Ass’n v. Blaisdell*,⁴⁵⁶ and they have continued to be recognized as significantly weighing in favor of upholding the state action.⁴⁵⁷

But beyond this, the contractual impairments likely to be made by a policing emergency manager are different in kind from those that the Court has previously evaluated. Previous cases involving contracts where the government was a party uniformly dealt with contractual impairments that saved the government money.⁴⁵⁸ That is unlikely to be the case here. Instead, the government would be attempting to better effectuate one of its core purposes: providing for the safety of its citizens.⁴⁵⁹ Any cost savings, such as that from terminating bad officers, would be incidental.⁴⁶⁰

In light of this uncertainty, courts may take several paths. The first is a traditional Contracts Clause analysis, as discussed above. Assuming that there is a significant contractual impairment,⁴⁶¹ a court would ask whether that impairment was reasonable and necessary to further an important public purpose.

455. *Id.* at 30–31.

456. 290 U.S. 398, 436.

457. *See U.S. Tr. Co. of N.Y.*, 431 U.S. at 23 n.19.

458. *See, e.g., Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 413 n.14 (1983) (“When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.”).

459. *See generally* Friedman, *supra* note 369 (arguing that public safety, or the government’s obligation to ensure people are safe, should be understood more capaciously than it currently is).

460. The one obvious exception to this would be if a city or state based their declaration of an emergency on the amount of civil rights settlements a police department was responsible for. But even then, the fact that the police department was at least arguably responsible for significant deprivations of citizens’ constitutional rights significantly complicates the economic analysis that the Court has previously undertaken.

461. There may not be a significant impairment for every contractual alteration a policing emergency manager makes. *See, e.g., Conn. State Police Union v. Rovella*, No. 20-CV-01147, 2020 WL 6042071, at *9 (D. Conn. Oct. 13, 2020) (noting that while changes to wages in collectively bargained agreements constituted a substantial impairment, “[i]t [was] unclear whether the same reasoning should apply to” a records disclosure provision).

Alternately, because the impairment is outside the financial realm, courts may engage the reserved-powers doctrine.⁴⁶² In short, that doctrine says that a state cannot contract away certain “essential attribute[s] of its sovereignty.”⁴⁶³ It cannot, for example, “bargain away the police power”⁴⁶⁴ or the power of eminent domain.⁴⁶⁵ When the state is a contracting party, that doctrine focuses on “a determination of the State’s power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment.”⁴⁶⁶

How this doctrine would operate in this scenario is an open question. The Court has hinted that it wishes to move away from the “formalistic distinctions”⁴⁶⁷ “among the various powers of the State”⁴⁶⁸ that drove its earlier reserved-powers jurisprudence.⁴⁶⁹ At a minimum, it seems likely that nonfinancial decisions that go to the core of the police’s impact on public safety—things like whether and how police are armed and what powers of the state they may enforce—fall within the core police powers of the state that cannot be contracted away under the reserved-powers doctrine.

In sum, though both statutes and the Constitution provide some bounds on what political actors may do under their declaration of an emergency, those limits still allow significant room for political decision making.

CONCLUSION

There is a policing emergency in the United States. We have created a system of policing that inflicts massive amounts of harm to the people it is ostensibly designed to protect. That harm extends beyond the people directly hurt by the police’s physical violence. It causes indirect and psychological problems to those who observe it and even causes sociological harms, harms that maintain the hierarchies which undermine our attempts at equality.

This Article has argued that governments can and should recognize this emergency in their jurisdictions. By doing so, they can unlock a broader range of powers to address the policing emergency than are available in the usual course and can lead courts to defer to the exercise of those powers. Governments have numerous emergency tools in their arsenal, and exploring the full slate of

462. See *U.S. Tr. Co. of N.Y.*, 431 U.S. at 22–24; see also *United States v. Winstar Corp.*, 518 U.S. 839, 888–89 (1996).

463. *U.S. Trust Co. of N.Y.*, 431 U.S. at 21.

464. *Stone v. Mississippi*, 101 U.S. 814, 817 (1880).

465. See *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 549 (1848); see also *U.S. Trust Co. of N.Y.*, 431 U.S. at 23–24 & nn.20–21.

466. *U.S. Trust Co. of N.Y.*, 431 U.S. at 23.

467. *Id.* at 24.

468. *Id.* at 23.

469. See, e.g., *W. River Bridge Co.*, 47 U.S. at 549 (eminent domain); *Stone*, 101 U.S. at 817 (police power).

those tools is an area for future research. This Article, however, has focused on one, emergency managers.

Emergency managers are individuals or boards imbued with a state or local government's emergency powers to fix a designated crisis in a subunit of the empowering government. States have long used them to address cities in fiscal crisis, and both states and cities have used them to address academically and fiscally failing school districts.

A policing emergency manager can be empowered to cut through the many structural and political obstacles to police reform. Freed from the vagaries of local politics, a policing emergency manager can take necessary, even radical, actions in the public interest that politically accountable leaders never would. While past commentators have criticized these managers as antidemocratic, the policing context flips that criticism on its head. Because policing itself is an institution insulated from political accountability with significant antidemocratic effects, in this context an emergency manager could be significantly democracy enhancing.

Ultimately, what the application of emergency managers to the fiscal, educational, and policing contexts shows is that emergency managers are a tool. One that can be used for good or ill. Future research can and should situate this tool outside of these subject-specific contexts into the broader conversation occurring in the nascent but growing literature recognizing the modern power struggles between states and their localities.⁴⁷⁰

There is no guarantee that an emergency manager will be a panacea. But when even millions of people taking to the streets in the wake of George Floyd's murder was not enough to spark significant widespread change, it is clear that we need more tools. When turned towards the problem of the policing emergency, an emergency manager could be a powerful tool for good.

470. See, e.g., Anderson, *The New Minimal Cities*, *supra* note 232; Schragger, *The Attack on American Cities*, *supra* note 406; Sellers & Scharff, *supra* note 406; Emily S.P. Baxter, Note, *Protecting Local Authority in State Constitutions and Challenging Intrastate Preemption*, 52 U. MICH. J.L. REFORM 947 (2019); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); Weyers, *supra* note 273; Alejandro E. Camacho & Nicholas J. Marantz, *Beyond Preemption, Toward Metropolitan Governance*, 39 STAN. ENVTL. L.J. 125 (2020).

