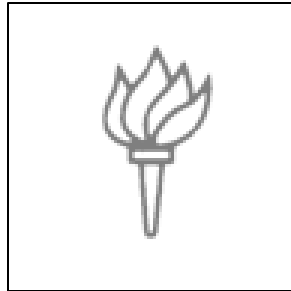


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What is Public Safety?

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WHAT IS PUBLIC SAFETY?

*Barry Friedman**

For literally hundreds of years, political leaders and thinkers have deemed public safety the first duty of government. But they have defined public safety rather narrowly, primarily in terms of the “protection” function – protecting individuals from violent harm to person or property from third parties (and also from natural elements). As the first duty, the protection function is privileged. Witness today how we valorize police and other first responders, defer to their decisions without sufficient scrutiny, and even immunize their mistakes.

Yet, is protection really all there is to public safety? For most people, being safe depends on much more: food, clean water and air, housing, a basic income and the means to obtain it--an education and a job. It might include health care, health insurance, and the freedom from discrimination.

This Article argues that if individual safety includes some or all of these additional elements, then public safety—the government’s obligation to ensure people are safe—should be understood far more capaciously than it is at present. At its analytic core, the Article shows that there is nothing particularly different about the protection function that justifies treating it as government’s first job, while the other vital functions of government are relegated to second-class status. It details the extensive harms that occur by focusing narrowly on public safety as protection. And it explores critically the many reasons that, although protection is not special, we nonetheless neglect all the other elements of individual safety.

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INTRODUCTION

Public safety is the first duty of government.¹ So it has been said, from at least the Enlightenment onwards, by many of history's greatest

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thinkers, among them the founders of the American republic.² Today, politicians and pundits regularly extol the central role of government in assuring we are safe.³

But what is meant by “public safety?” What precisely does it entail to be safe? And more to the present point, what is required as part of government’s obligation to assure that each and every one of us is safe?

The answer to the question “what is public safety?” may seem simple, evident even, but it is not. At the same time, recent events—a pandemic, the economic turmoil it has unleashed, rising homicide rates in major cities, and widespread protests over police violence accompanied by calls to defund the police—all underscore the importance of answering the question correctly.

When public safety is discussed in the public sphere, it typically has been assumed to mean freedom from injury to one’s person, and to one’s property, in particular from violent crime or events.⁴ It is true that people do not feel safe and secure if they are threatened by violent injury. Indeed, protests against the police are grounded in the notion that the police themselves are causing just this sort of harm.⁵

Surely, though, being safe means far more than freedom from sudden, violent, physical harm. People also do not feel safe if they are forced to sleep on the streets, to forage in trash cans for food, or are facing starvation. If they are lacking an education and cannot earn a living or find a job. They do not feel safe if they are confronting grievous illness, or if they face health care costs they cannot afford.⁶

¹ See Steven Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 512-20 (1991) (outlining the history of government’s obligation to provide safety and security.).

² See, e.g., THE FEDERALIST NO. 3, 42 (John Jay) (Clinton Rossiter ed., 1961) (“Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first.”); Hobbes, ELEMENTS OF LAW, NATURAL AND POLITIC 110 (Ferdinand Tönnies ed., Frank Cass & Co. 1969) (1640) (“The end for which one man giveth up . . . the right of protecting and defending himself by his own power . . . is the security which he expecteth thereby, of protection and defense from those to whom he doth so relinquish it.”); John Locke, SECOND TREATISE ON GOVERNMENT § 134 (1690) (“[T]he great end of men’s entering into society, being the enjoyment of their properties in peace and security, and the great instrument and means of that being the laws established in that society . . .”).

³ See *infra* Part I, A.

⁴ See *infra* Part I, B.

⁵ *Two Views On the Future of American Policing*, PBS NEWS HOUR (June 8, 2020 6:45 PM), <https://www.pbs.org/newshour/show/2-views-on-the-future-of-american-policing> (interview with Charlene Carruthers of the Movement for Black Lives; “[t]he police are not keeping us safe” and are instead threatening the lives of communities).

⁶ See *infra* Part II.

If safety itself reaches beyond violent physical harm, then perhaps government's obligation to provide for public safety does so as well, and thus needs to be understood more capaciously than it is at present. That is what this Article is about. It argues that the sort of focused attention given government's "first duty" needs to expand to include many of the other circumstances that threaten individual safety beyond violent harm. Although it may not be government's responsibility to ameliorate all of these threats, there is good reason to believe that at least some of them are. It universally was the conclusion that government had failed the people of Flint, Michigan in its obligation to provide them clean water; government conceded as much.⁷ Government similarly was understood to have failed in the time it took restore power to the people of Puerto Rico following Hurricane Maria.⁸ And government by common consensus is responsible for addressing the pandemic we currently are experiencing (even as there is disagreement about what exactly government should be doing, and which government should be doing it).⁹

But how far does (or should) government's obligation to provide public safety extend? If clean water, does it also include clean air? If electricity, what about food, or housing—or education and job opportunity for that matter? If fighting pandemics, what about health care in general? Many of these things seem equally basic to assuring human safety, but government's role in addressing them hardly garners the same consensus as does protection from physical violence.

One might think, perhaps, that the question itself makes a fetish of a name: what can it possibly matter if something is deemed "public safety" or not? Education may be important; so too those other things. But government already plays a role in providing them. Why should anyone care in particular

⁷ Rick Snyder, Mich. Governor, State of the State Address (Jan. 19, 2016), https://www.michigan.gov/documents/snyder/Prepared+remarks_511427_7.pdf?20160120074639 (last visited Aug. 16, 2019) (stating that Michigan residents "expect" and "deserve clean, safe water" and that "[g]overnment failed" its citizens by failing to provide it).

⁸ See, e.g., Scott Clement et al, *Puerto Rico After Maria: Residents See a Failure at All Levels of Government*, WASH. POST, Sept. 12, 2018, <https://www.washingtonpost.com/news/national/wp/2018/09/12/feature/residents-see-a-failure-at-all-levels-of-government/>.

⁹ See, e.g., Christopher Weaver et al, *America Needed Coronavirus Tests. The Government Failed.*, WALL ST. J. (Mar. 19, 2020 7:05 AM), <https://www.wsj.com/articles/how-washington-failed-to-build-a-robust-coronavirus-testing-system-11584552147> (holding the federal government responsible for lack of Covid-19 testing); Jonathan Turley, *Governors Should Focus on Tackling Coronavirus Rather Than Shift Blame*, THE HILL (Mar. 28, 2020, 10:00 AM), <https://thehill.com/opinion/white-house/489968-governors-should-focus-on-tackling-coronavirus-rather-than-shift-blame> (arguing that governors have the "responsibility" to handle and "prepare for public health emergencies").

if food or water or education or health care are called matters of “public safety,” as opposed to, say, “welfare” or “human flourishing,” or “thriving?”

The answer is that there is a rhetorical and generative force to discussing things in terms of safety that gets lost when described in other ways. “Safety” has an urgency to it that “flourishing” or “well-being” simply do not. It is precisely this sort of urgency that drives and prioritizes what government must do. If public safety is the *first* job of government, everything else becomes secondary. Perhaps even optional. We privilege what we deem to be part of public safety, and the rest must fight for its place on the agenda.¹⁰

That importance of some necessity being deemed “public safety” is apparent from our practice. From time immemorial to the present, public safety has been understood to mean what I will call (and others have called) the “protection” function – guarding people from violent injury to person or property caused by third parties, and perhaps by nature—and this has been seen as job one.¹¹ Society pours enormous resources into assuring it. We promise it to everyone, and while there clearly are substantial shortfalls in actually affording it even-handedly, no one seriously contests the universality of the guarantee. Society valorizes those who provide it, in particular the police, and until very, very recently seemed loath to second guess their choices, even when—quite frankly—doing so might make good sense. Government puts so much faith in this basic function, that it turns over to our “protection” workers all sorts of other problems—from homelessness, to substance abuse, to mental illness—for which their skills do not seem particularly apt. (This suggests we may already have a capacious understanding of public safety, but a narrow sense of how to achieve it.)

On the other hand, all else beyond the protection function remain contested. We fight over the terms of the social “safety” net (though note the name we give it). Governments guarantee everyone an education, but struggle to avoid the obligation of funding it adequately. Rather than thinking of housing the homeless, we criminalize them through laws banning sleeping in the park, camping, or even giving food to needy people. Health insurance remains a political brawl.¹²

And for this reason, too many in this wealthy country are not safe. And many more do not feel safe. Never mind the creeping fear of a pandemic. Countless people are food insecure or homeless, millions confront an educational system so profoundly inadequate as to deny them any real chance of assuring for themselves the basic necessities of life, let alone of getting

¹⁰ See *infra* Part III.

¹¹ See *infra* Part I.

¹² See *infra* Part III.

ahead, and plenty of people cannot afford basic health care.¹³ Some of these may be part of the public safety that government must provide, and some may not, but that is the point: until we ask the question, we cannot know. Until we rethink what constitutes safety, we will not direct government sufficiently.

Despite the seeming centrality of this question, there is a paucity of academic literature addressing it. To be sure, there are vast literatures arguing this or that is a right government must provide or a benefit that it should.¹⁴ And in the wake of the killing of George Floyd, and widespread national protests and disorder, this very issue of what public safety means has risen to the fore, popularized by the movement to “defund” the police, and asserting that budgets should be redirected from the protection movement to community need.¹⁵ But there is almost no scholarship that discusses what is meant—or should be meant—by the concept of “public safety,” or why the protection function is on the list, but other essential items are not. This Article provides a legal and theoretical challenge to prevailing notions of what deserves primacy from government. It supports claims being made on the streets today about the need to reallocate societal resources.

To be clear, although this Article is critical of the protection function, this is not an article about how to fix policing—a question I take up in companion piece, entitled *Disaggregating the Policing Function*.¹⁶

¹³ See *infra* Part II.

¹⁴ See generally HUMAN RIGHTS AND 21ST CENTURY CHALLENGES (Dapo Akande, Jakko Kuosmanen, Helen McDermott, and Dominic Roser, eds) (2020). Indeed, there is hugely important scholarship reconceiving these issues in deeply thoughtful and impactful ways, such as around the “capabilities” of people that government should develop, see Martha C. Nussbaum, CREATING CAPABILITIES (2011); the the notion of what counts as a civil right, see Robin L. West, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION (2019).

¹⁵ See, e.g., Mariame Kabe, 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> (“We should redirect the billions that now to to police departments toward providing health care, housing, education, and good jobs.”); Alondra Cano, *My Minneapolis Colleagues and I Are on Our Way to Revamping Police, Healing the Community*, USA TODAY, (June 13, 2020 6:19 AM), <https://www.usatoday.com/story/opinion/policing/2020/06/12/after-floyd-video-changed-police-reformist-abolitionist/3177414001/> (calling for a “new model of public safety” that encompasses non-protective safety functions, such as housing, schooling, employment access and healthcare). See also Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Cal. L. Rev. 1781 (2020) (providing overview of abolitionist critique of policing and discussing what it means for real reform); Alex S. Vitale, THE END OF POLICING (2017) (arguing for alternatives to policing to make society safer); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. (forthcoming 2021) (noting that calls for police reform reflect concerns that a focus on policing denies people their collective input into what safety should mean).

¹⁶ Barry Friedman, *Disaggregating the Policing Function*, __ U. Pa. L.Rev. __ (2021) (forthcoming).

Where this Article argues that we must define public safety more capaciously, to avoid the harms of focusing so singularly on the protection function, *Disaggregating the Policing Function* explains how to change policing in the United States today to ensure people are safe *from* the police when police exercise the protection function. *Disaggregating* notes the mismatch between the host of social problems officers are called upon daily to address, and their training primarily as the proponents of force and law. It suggests how we can reduce the footprint of policing substantially to avoid the harms from responding to calls for help with force and with law, and in that way better serve people in urgent need.

Here, the lens is broader, on all of government. This Article asks whether, in according primacy to what those responsible for the protection function do, have we defined public safety too narrowly? Have we failed to recognize government's profound obligation to ensure that its people truly are safe.

The argument begins, in Part I, by laying out two points of wide consensus. Public safety is the primary responsibility of government. And public safety typically is understood as the protection function.

Part II then raises the question of what it means to be safe. This is neither a philosophical exploration, nor one of basic human rights, questions that have been written about by authors more competent on those subjects than I. Rather, the question in this Part is intensely pragmatic: what is it that individuals actually require to be safe? This Part invites readers to engage in a thought experiment, asking just how far the idea of safety could extend. Taken to its logical extreme, safety might reach more broadly than basic necessities such as food and water, to education, to jobs, and even perhaps to public transportation to get to those jobs. The hopefully inescapable point of this Part is that we as a society define *public* safety—i.e., government's obligation to provide safety—too narrowly, by focusing primarily on the protection function, when safety itself involves much more.

Part III explains how privileging the protection function over much else leaves many unsafe—on both sides of the coin. Many people are not safe because of government neglect beyond the protection function: from hunger and malnutrition, from lack of housing, from subpar education, from no health care, and more. But people also are unsafe because of privileging the protection function in ways that renders it unaccountable. To achieve safety, we must strive for balance.

Part IV does the core analytic work of the piece, challenging the notion that the protection function deserves the encomium of “public safety,” while functions of government addressed to other safety needs do not. Its goal is not to deny that protection is important—it assuredly is—but to make clear that the primary justifications for according primacy to protection fail

to explain excluding the other vital safety functions government equally could address. These justifications include (1) the foundational nature of freedom from crime and violence, in that without it, the state cannot get up and running; (2) the naked power of government; (3) the notion that protection is the “special obligation” of government; (4) the possibility that government ought to have a monopoly over protection, but not other aspects of individual safety, either because (a) protection is a public good that government must provide while other aspects of public safety are not, or (b) because leaving protection in private hands creates externalities that other elements of public safety do not; (5) the practical capacity and capability of government; and (6) the idea that government has created a “dependence” on it for the protection function.

Part V concludes by identifying a set of obstacles that might explain why, despite the essential nature of many other government functions, we do not prioritize them. Rather than being uplifting, Part V underscores how difficult it will be to shift societal priorities. These obstacles include a Constitution so outdated that it does not include affirmative rights; our federal system, which allows a shell game of denying responsibility for people’s safety; the fact that the more well-to-do among us can opt out of government services, lowering the general will to provide a sufficient baseline of effectiveness; a lack of altruism toward racial minorities; and simple individual greed. One pervasive factor is social disagreement about the role of government, which has direct implications for how we think about public safety, including our over-reliance on criminalization, and under-reliance on much else that people need.

Wherever one ultimately comes out on what public safety entails, what seems unacceptable to not to ask, and to fail to question why some governmental functions are privileged over others that seem just as vital. Public safety *is* the first job of government. It is foundational. Government must, above all else, aspire to do this job, and do it well. But ascribing that role to the protection function alone not only creates its own harms, it cheats many other roles government can and should be playing more vigorously in assuring people are safe.

PART I: THE PRIMACY OF PROTECTION

A. *Government's First Job is Public Safety*

In 1991, Steven Heyman published an article entitled *The First Duty of Government*.¹⁷ The article was a stunning rebuke to the Supreme Court's 1989 decision in *DeShaney v. Winnebago County*, which held that the Constitution provided only "negative" rights, but imposed no affirmative obligations on government in the United States.¹⁸ Heyman's is a copious account, drawing on the words of key actors and foundational texts, to show government's fundamental and essential role in assuring protection for its citizens from physical violence. Among the many he quotes is Lyman Trumbull, the author of the Thirteenth Amendment and chair of the Senate Judiciary Committee during Reconstruction, who explained the classical view that individuals traded their liberty for "the protection which civil government gives him."¹⁹

As Heyman made clear, Reconstruction was but one moment in a long lineage of recognition that the primary responsibility of government was assuring safety for person and property under its jurisdiction.²⁰ Prior to the Enlightenment, the conception of governance was one of "reciprocal natural obligation:" subjects owed the sovereign allegiance, for which the sovereign "was bound 'to govern and protect his subjects.'"²¹ Come Enlightenment, the theory shifted from one of obligation to one of consent; people left the state of nature specifically in exchange for government guaranteeing them safety and security for themselves and their property. As Hobbes put it, "[t]he end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security which he expecteth thereby, of protection and defense from those to whom he doth so relinquish it."²² Enlightenment philosophers were unequivocal in stressing the centrality of "security." Bentham called security "the principal, indeed the paramount, object" of government, and the "main object of law."²³ Blackstone, the chronicler of the common law, stated that a state is simply "a

¹⁷ Heyman, *supra* note 1.

¹⁸ 489 U.S. at 202; Heyman, *supra* note __, at 509. See *infra* notes ___-___ and accompanying text for an extensive discussion of *DeShaney*.

¹⁹ Heyman, *supra* note __, at 547 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull)).

²⁰ See Heyman, *supra* note __, at 512-30 (detailing the long history of government's affirmative obligations to provide safety and security to individuals and society).

²¹ Heyman, *supra* note __, at 513 (quoting *Calvin v. Smith*, 77 Eng. Rep. 377, (K.B. 1608)).

²³ Bentham, *LEGISLATION*, *supra* note __, at 124, 142.

collective body, composed by a multitude of individuals, united for their safety and convenience”²⁴

The Framers of our Constitution likewise recognized the primary role of government in assuring the safety and security of its subjects. *The Federalist Papers*, in explaining and defending the Constitution, made this clear. Madison, in Federalist 10, declared “the first object of government” the “protection” of “the faculties of men” and “the rights of property.”²⁵ Jay said the same in Federalist 3, that “[a]mong the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first.”²⁶ On this score the Anti-Federalists concurred.²⁷ State constitutions similarly talked of the role of government in assuring the “security” of the people.²⁸

Today it is no different; leaders in the modern era repeatedly assure us that government’s chief responsibility is keeping the people safe. Hillary Clinton, in accepting the 2016 presidential nomination, said “Keeping the nation safe and honoring the people who do that work will be my highest priority.”²⁹ This theme is the same at the state and local level. Arnold Schwarzenegger, former Governor of California, is quoted repeatedly as saying “Government’s first duty and highest obligation is public safety.”³⁰ Jacksonville’s Mayor in 2019, published an early-year blog post, “Public safety is my first priority.”³¹ So too in Orlando, the “top priority is public safety.”³²

The point is so basic, that to go on any longer would surely be to haul coals to Newcastle. Safety is government’s first job, and no one seems really to feel differently.

²⁴ Blackstone, *supra* note __, at 52.

²⁵ Federalist No. 10, *supra* note __, at 78.

²⁶ Federalist No. 3, *supra* note __, at 42.

²⁷ Brutus, Anti-Federalist No. 23, *supra* note __, at 532 (“The preservation of internal peace and good order, and the due administration of law and justice, ought to be the first care of every government.”).

²⁸ See, e.g., Mass. Const. of 1780, pmbl. (“It is the duty of the people, therefore, in framing a constitution of government, to provide . . . for an impartial interpretation and faithful execution of [laws]; that every man may, at all times, find his security in them.”); Pa. Const. of 1776, pmbl (“[A]ll government ought to be instituted and supported for the security and protection of the community. . . .”) Va. Declaration of Rights, § 1 (“Government is, or ought to be, instituted for the common benefit, protection and security of the people.”)

²⁹ Clinton, Nomination Acceptance Speech, *supra* note __.

³⁰ This quote, while often referenced and widely attributed to Schwarzenegger, may be apocryphal. See, e.g., PRESS-ENTERPRISE, *supra* note __ (noting a politician who claimed Schwarzenegger regularly said this).

³¹ Curry, *supra* note __.

³² “Public safety,” *supra* note __.

B. *Public Safety as Protection*

Nor is there any doubt—and this is the important thing—that when these figures speak of public safety, what they have in mind is the protection function. There are outliers, some few who explicitly deem public safety to involve a broader set of responsibilities.³³ But for the most part, when people talk about government’s first job being public safety, they mean one primary thing: protecting people from injury to person or property, resulting mostly from the actions of third parties.

Take Heyman’s article: his subtitle is *Protection, Liberty, and the Fourteenth Amendment*. The central argument is that “one of the central purposes” of the Fourteenth Amendment was “the government’s duty to protect individuals from violence.”³⁴ Perhaps no text was quoted more often in those Reconstruction debates than Justice Bushrod Washington’s famous statement in *Corfield v. Coryell* regarding the “privileges and immunities of the citizens of the United States,” in which Washington put first and foremost “[p]rotection by the government” to the end of allowing people life, liberty, property, the pursuit “of happiness and safety.”³⁵ Hence the Fourteenth Amendment’s guarantee of “equal protection of the laws” to all citizens of the United States.³⁶ This made sense in the historical context: night riders terrorized the freedmen, threatening and bringing physical violence, making a mockery of government’s ability to protect them.³⁷

From the Enlightenment through adoption of our Constitution, when people spoke of public safety, they meant the protection function. As Hobbes put it, “a man may . . . account himself in the estate of security, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves.”³⁸ Safety involved protecting property as well as the person, of course. The “boon beyond all price” was the law’s ability to secure to us what is ours, to know that our property is safe.³⁹ For Locke, the “great

³³ See, e.g., Bing, *supra* note __ (including buses with traditional aspects of the protection function); Cainion *supra* note (arguing food security and housing are part of safety); *De Blasio, supra* note (including access to medical services in “safety”).

³⁴ Heyman, *supra* note , at 509-10.

³⁵ Heyman, *supra* note , at 555 (quoting 6 F. Cas. 546, 551-552 (C.C.E.D. Pa. 1825) (No. 3230)).

³⁶ U.S. CONST. amend. XIV, § 1.

³⁷ Kidada E. Williams, *The Wounds That Cried Out: Reckoning with African Americans’ Testimonies of Trauma and Suffering From Night Riding*, in *THE WORLD THE CIVIL WAR MADE* (Gregory P. Downs & Kate Masur, eds., 2015) (describing night riding).

³⁸ Hobbes, *ELEMENTS OF LAW, supra* note , at 110.

³⁹ Bentham, *LEGISLATION, supra* note , at 130.

end of men's entering into society" was "the enjoyment of their properties in peace and safety."⁴⁰

The same was true in our founding era. The Constitution itself was created to "insure Domestic tranquility, and provide for the common defence."⁴¹ Said the Anti-Federalist Brutus, "The preservation of internal peace and order, and the due administration of justice, ought to be the first care of every government."⁴²

When political figures in the modern era talk about public safety, they almost invariably are referring to the protection function as well. Sometimes the threats are foreign ones, sometimes domestic. Goldwater, running for president in 1964, stressed the need to "keep the streets safe from bullies and marauders."⁴³ This was a theme Richard Nixon used to catapult himself into the White House: "the first civil right of every American is to be free from domestic violence, and that right must be guaranteed in this country."⁴⁴ When discussing his immigration policy, Donald Trump emphasized that an executive order he issued "empowers ICE officers to target and remove those who pose a threat to public safety."⁴⁵ This conception hardly came only from the right. Bill Clinton explained that criminal justice reform needed to focus on helping society "prevent crime, punish criminals, and restore a sense of safety and security to the American people."⁴⁶ For the last several decades, we have seemed perpetually in a state of crisis about the need to provide protection against these sorts of threats.⁴⁷

When we look at how government advertises itself, public safety once again is equated with the protection function. Examine the web pages of state and municipal "public safety" agencies, and what appears is the police, as well as fire departments and emergency medical services. On the "public safety" section of its website, for example, Sacramento says that "[k]eeping

⁴⁰ Locke, ON GOVERNMENT, *supra* note , at § 134.

⁴¹ U.S. CONST. pmb.

⁴² Brutus, Anti-Federalist No. 23, *supra* note , at 532.

⁴³ Goldwater, Nomination Acceptance Speech, *supra* note .

⁴⁴ Nixon, Nomination Acceptance Speech, *supra* note .

⁴⁵ Trump, Speech at the Department of Homeland Security, *supra* note .

⁴⁶ Clinton, Remarks upon Signing the Violent Crime Control Act, *supra* note .

⁴⁷ See David Garland, THE CULTURE OF CONTROL 12, 19 (2001) ("Protecting the public has become the dominant theme of penal policy;" describing modernity's structuring of life around addressing threats to physical safety, regularly called a "crisis" though that seems inapt for long-enduring phenomenon); Jonathan Simon, GOVERNING THROUGH CRIME (2007) (describing how focus on crime as a problem pervades every aspect of American life)

your family safe is a top priority for Sacramento’s public safety family – EMS, Fire, Police, and Emergency Management.”⁴⁸

What constitutes the protection function itself will morph and change over time, of course. The threats we encounter will mutate, and so will our response. Chief among them are “advances” in technology, which enhance the ability of people to bring us harm. Terrorists can get here from far away, as can communicable diseases. But, it turns out, they don’t even have to make the trip: cybercrime and cyberthreats may soon be the biggest problems we face, and for that the hackers can work from home.⁴⁹ Threats to our safety often come in new forms.

Whatever those threats, government’s primary job is public safety. And, by common consensus, public safety means protection—the protection of person and property from sudden or violent injury. That is how we’ve seen it, for hundreds of years.

PART II. WHAT IS “SAFETY?”

Nonetheless, this single-minded fixation on the protection function ignores many other aspects of what people consider equally important to being safe. In a kindred piece to this one, exploring the concept of “security,” Jeremy Waldron makes the point that “nobody wants to be blown up.”⁵⁰ He’s surely correct, but they don’t particularly want to starve to death, either. So, what does it mean to be safe, beyond the bounds of physical violence or threats to property? The ultimate aim of this Article is to talk about *public* safety—which is to say, the extent of the *government’s* role in assuring we are safe. There undoubtedly are some aspects of safety that are not at all the government’s responsibility. Yet, it’s impossible to define the scope of government’s obligation around safety without first knowing the domain of what safety itself might include. That is the question this Part takes up.

⁴⁸ *Public Safety*, CITY OF SACRAMENTO, <https://www.cityofsacramento.org/Living-Here/PublicSafety> (last accessed July 26, 2020); see also *Public Safety Department*, SAINT LOUIS, <https://www.stlouis-mo.gov/government/departments/public-safety/> (last accessed July 26, 2020) (“The Department of Public Safety is the largest municipal government department in the City of St. Louis overseeing the Fire Department, the Metropolitan Police Department . . .”).

⁴⁹ See Internet Crime Report, *supra* note , at 3 (FBI reporting on vast extent of cybercrime); Dustin Volz & Robert McMillan, *Hack Suggests New Scope, Sophistication for Cyberattacks*, WALL ST. J. (Dec. 17, 2020), https://www.wsj.com/articles/hack-suggests-new-scope-sophistication-for-cyberattacks-11608251360?mod=article_inline (describing the 2020 “previously undetected cyber espionage campaign that may stretch back years” that affected “18,000 companies and government agencies”).

⁵⁰ Jeremy Waldron, *Safety and Security*, 85 NEB. L.REV 454, 461 (2006).

A. *Safety v. Security*

Writing in the aftermath of the terrorist attacks of September 11, 2001, at a time of great debate about the security-liberty tradeoff, Jeremy Waldron pointed out the impossibility of balancing the two without a clear understanding of what is at stake on each side of the scale, and in particular what “security” encompasses.⁵¹ He was surprised, when he went looking, about how few people had written, particularly in philosophy, about what the content of “security” was precisely. And so just as I here explore the content of “safety,” Waldron took up the question, “what do we mean by *security*?”⁵²

But what is the relationship between safety and security? The two words often are used interchangeably. Are they the same thing?

What Waldron’s discussion suggests, and I agree, is that security is the “cocoon” around safety. Safety defines the substance of what we hope to achieve. Security tells us in terms of temporality and probability how safe we really are with regard to this substantive core. As befits a discussion of preventing terrorism post 9/11, Waldron’s focus was on “pure safety,” i.e., avoiding physical harm—what I’m calling the “protection” function here.⁵³ But in exploring the meaning of “pure safety” he quickly moves off of actual harm, to the umbra around it. He talks about being free of the “fear” of violent harm occurring, of wanting some sort of “assurance or guarantee” that it will not.⁵⁴ In other words, one could be safe at this moment, but not secure if there is concern whether it will last. And if one feels insecure about the future, then perhaps one is indeed not safe (or feels unsafe) at present.

Understood thus, safety is the nut, and security its shell. As in the nuts-and-shells of real life, the two often go together. For that reason, although I will speak primarily about safety, and what constitutes safety, I will at times refer to security as well, capturing both the nut, and the shell that protects it.

⁵¹ Waldron, *supra* note __ at 455.

⁵² Waldron, *supra* note __ at 455.

⁵³ See Waldron, *supra* note __ at 463 (“The pure safety conception may be defective, but no attempt to remedy its defects can possibly be adequate if such attempt cuts the concept adrift from the element of physical safety.”).

⁵⁴ Waldron, *supra* note __ at 462. He even toys with the notion that “security” is not even a thing unto itself, but simply is “adjectival,” in that it describes a “mode in which other goods are enjoyed.” *Id.* at 471.

B. *The Elements of Safety and Security*

We've seen that historically the core of safety is understood as avoiding injury to person or property on account of the actions of others. It's not just threats to person and property from third parties of course; natural disasters jeopardize our safety too.⁵⁵ One's house can be destroyed as easily by lightening as by arson. Floods and wildfires and earthquakes and wind; all of nature is at times our enemy, and safety requires holding it back, finding refuge, or fortifying against it.

But what else is on the list? What follows is a thought experiment—how far does the web of safety extend?

1. Basic subsistence

There are a set of human needs that transcend even physical safety from violence, and without which there is no sense in which we are safe. The psychologist A.H. Maslow is noted for creating a hierarchical pyramid of human needs.⁵⁶ As the needs at one level are satisfied, we seek out the next. The sort of concern about violence to which the protection function is directed obviously is on Maslow's pyramid. He refers to simply as "safety."⁵⁷

But safety is second on Maslow's list, behind what he calls "physiological' needs," or what we might think of as basic subsistence.⁵⁸ "A person who is lacking food, safety, love, and esteem would most probably hunger for food more strongly than anything else."⁵⁹ That much seems obvious: our bodies simply cannot survive without food. Eritha 'Akile' Cainion, a candidate for City Council in St. Petersburg, Florida, took issue with the notion that "public safety" was or ought to be all about policing (particularly when it was Black communities being policed). "When there's a situation of the south side, starving, homeless . . . there's nothing about that environment that is safe."⁶⁰

⁵⁵ See Waldron, *supra* note __ at 488, n.89 (noting that the Department of Homeland Security "has responsibility not just for protection against terrorist threats, but also for protection against natural disasters like Hurricane Katrina").

⁵⁶ See Uriel Abolof, *Why We Need Maslow in the Twenty-First Century*, 54 SOC'Y 508, 508–509 (2017) (noting that Maslow's theory "has resonated powerfully in scholarship across disciplines" and remains relevant 75 years later).

⁵⁷ A. H. Maslow, *A Theory of Human Motivation*, 50(4) PSYCHOL. REV. 370-396 (1943).

⁵⁸ Maslow, *supra* note __ at 376.

⁵⁹ Maslow, *supra* note __ at 373.

⁶⁰ Eritha Akile Cainion, Letter to the Editor, *What is public safety?*, WEEKLY CHALLENGER, July 27, 2017, <http://theweeklychallenger.com/what-is-public-safety/>.

If food is on the list, though, isn't clean water as well? In 2014, the Mayor of Flint, Michigan declared "[w]ater is an absolute vital service that most everyone takes for granted."⁶¹ He did this while announcing that to save money, Flint was disconnecting from Detroit's water supply and turning to the Flint River. Soon thereafter evidence emerged that Flint's water was dangerous to drink.⁶² The approximately 96,000 residents of Flint were subjected to lead levels in their water supply more than ten times the national action level set by the Environmental Protection Agency.⁶³ There is no *safe* level of lead in drinking water.⁶⁴ Lead poses particular risks to children and their long-term development.⁶⁵ As a consequence, "the city's lead crisis has migrated from its homes to its schools, where neurological and behavioral problems . . . threaten[] to overwhelm the education system."⁶⁶ People without clean water are destined to become ill, if they survive at all.

2. Housing

Housing, too, would seem pretty basic to any conception of safety.⁶⁷ Admittedly, unlike food or water, one can live without housing. Plenty of people do. As we will see, in this country they number at least in the hundreds of thousands.⁶⁸

⁶¹ Dominic Adams, *Closing the Valve on History: Flint Cuts Water Flow from Detroit After Nearly 50 Years*, MLive (Apr. 25, 2014), https://www.mlive.com/news/flint/2014/04/closing_the_valve_on_history_f.html.

⁶² *Flint Water Crisis Fast Facts*, CNN (July 2, 2019), <https://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html>.

⁶³ Complaint for Declaratory & Injunctive Relief at 19, 34, Concerned Pastors for Soc. Action v. Khouri, 217 F.Supp.3d 960 (E.D. Mich. 2016) (No. 16-10277).

⁶⁴ Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26460-01 (establishing that zero is the maximum contaminant level goal for lead).

⁶⁵ *Lead: Standard Surveillance Definitions & Classifications*, Centers for Disease Control & Prevention (Nov. 18, 2016), <https://www.cdc.gov/nceh/lead/data/definitions.htm>.

⁶⁶ Erica L. Green, *Flint's Children Suffer in Class after Year of Drinking the Lead-Poisoned Water*, N.Y. TIMES, Nov. 6, 2019, <https://www.nytimes.com/2019/11/06/us/politics/flint-michigan-schools.html?searchResultPosition=1>.

⁶⁷ See Barry Friedman, *Police and Public Safety: The Case of Homelessness*, Lecture, Ariz. State Univ 27 (forthcoming) (arguing for a capacious understanding of public safety that "imposes an affirmative requirement on society to help the homeless").

⁶⁸ In 2019, this number was at least 567,715. Off. of Cmty. Plan. & Dev., U.S. Dep't of Hous. & Urb. Dev., *The 2019 Annual Homeless Assessment Report to Congress*, <https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf>. See also NAT'L L. CENTER ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12 (2014) (noting that the actual number of homeless people is higher than these statistics often represent).

But without housing, people fall prey to the elements, and also to those that would do them ill, the very things the protection function is designed to protect against. There's a reason Akile Cainion referred to a lack of food and of housing in the same breath. The noun "shelter" refers to "temporary protection from bad weather or danger;" as a verb it is to "protect or shield from something harmful."⁶⁹ People who live on the street are victimized more often, and become ill or die more frequently and quickly than others.⁷⁰

3. Health and Well-Being

If food and water are basic to safety—and it is difficult to see how they are not—there are extensions of these that also jeopardize our well-being.

We've seen how the lack of food is a threat to safety, but so too is malnourishment, even if food is sufficiently plentiful. In many places in the United States—prior to the pandemic at least—this may have been the biggest threat around food.⁷¹ High calorie unhealthy food is cheap, heavily-marketed, and oftentimes all that is available in marginalized communities that effectively are food deserts – i.e., there is no full service grocery stores within a reasonable distance, and as a result less access to fruits, vegetables, and healthy food, but in their place purveyors of high fat low-nutrition substitutes.⁷² Unlike the past, where obesity was a marker of wealth, now obesity is the hallmark of poverty. With weight issues comes a host of health

⁶⁹ *Shelter*, Oxford English Dictionary (2d ed. 1989).

⁷⁰ See, e.g., Lydie A. Lebrun-Harris et al., Health Status and Health Care Experiences Among Homeless Patients in Federally Supported Health Centers: Findings from the 2009 Patient Survey, 48 Health Serv Res. 992 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3681240/> (finding that homeless patients were two times more likely to have unmet medical care needs as domiciled patients); Barrett A. Lee & Christopher J. Schreck, *Danger on the Streets: Marginality and Victimization Among Homeless People*, 48 AM. BEHAV. SCI. 1055, 1067-68 (2005) (finding that 54% of homeless people sampled had experienced some form of direct or indirect violence, such as theft and assault, and arguing that such experiences occur precisely because homelessness increases victimization).

⁷¹ Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969 (2013).

⁷² Diller, *supra* note __, at 986. Emily Broad Lieb and Margot Pollans argue that the panoply of food-related illnesses and problems require an entirely new definition of "food safety" that would encompass not only the traditional attention to food risks posed by immediate ingestion, but whole diet, food additives, and issues like agricultural pollution and food and packaging waste. Emily Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CAL. L. REV 1173 (2019).

problems from type-2 diabetes and heart disease to infant mortality, all threatening individual's lives and thus their basic safety.⁷³

Similarly, if clean water is an issue, what about the air we breathe? Clean air may seem more remote and immediate than water—perhaps that is why it consistently has been a contentious regulatory issue—but breathing's pretty basic.⁷⁴ Air pollution not only threatens long-term health, it can make functioning in the short term well-nigh impossible. In 1952, smog shut London down for four days and killed thousands of people.⁷⁵ Similarly, during Thanksgiving weekend of 1966, ground-level smog in New York City caused an estimated 168 deaths and health problems for some ten percent of city residents.⁷⁶

Likewise, if a lack of wholesome food or water threatens our health, what about our health itself? Those facing life-threatening illnesses are unlikely to deem themselves safe and secure. The threat of imminent, and perhaps painful, death and its accompanying dread, make many more people insecure on a daily basis than does a home invader or an attack on the street.⁷⁷

If health is basic to safety, what about the health care required to maintain it? Although how access to health care ought to be guaranteed is a matter of deep political disagreement, there is a growing consensus that personal safety and security requires that access.⁷⁸ Besides, without health

⁷³ See Diller, *supra* note __, at 981-82 (connecting obesity to malnutrition and a greater likelihood for diseases and infant mortality). See generally Lauren M. Dinour et al, *The Food Insecurity-Obesity Paradox: A Review of the Literature and the Role Food Stamps May Play*, 107 J. AM. DIETETIC ASS'N 1952 (2007) (examining the relationship between food insecurity and obesity).

⁷⁴ On the contentiousness of the Clean Air Act, see Diane Katz, *Coming Clean on Regulatory Costs and Benefits*, Report (The Heritage Found., Mar. 3, 2011), <https://www.heritage.org/government-regulation/report/coming-clean-regulatory-costs-and-benefits> (arguing that the Act's costs outweigh its benefits).

⁷⁵ London Fog Lasts for 3D Day, Special to the N.Y. Times, N.Y. TIMES, Dec. 7, 1952; Ass. Press, London Fog Is Bottled Up for Los Angeles Sampling, N.Y. TIMES, July 21, 1952.

⁷⁶ David Bird, *November Smog Killed 168 Here*, N.Y. TIMES (Oct. 27, 1967), <https://timesmachine.nytimes.com/timesmachine/1967/10/27/82162296.pdf>; *10% Here Suffered Effects of Smog*, Private Study Finds, N.Y. TIMES (Dec. 10, 1966), <https://timesmachine.nytimes.com/timesmachine/1966/12/10/82974341.pdf>.

⁷⁷ See Tolbert et al., *supra* note __ (“[m]ore than three quarters (75.6%) of uninsured nonelderly adults say they are very or somewhat worried about paying medical bills if they get sick or have an accident”); Williams, *supra* note __ (“[w]ithout health insurance coverage, a serious accident . . . can result in poor credit or even bankruptcy;” quoting expert claiming leading cause of personal bankruptcy is medical debt).

⁷⁸ Einer Elhauge, *Allocating Health Care Morally*, 82 CAL. L. REV. 1449, 1465-66, 1465 n.37 (noting “widespread (though not universal) consensus” on the notion that everyone has a right to some level of healthcare access); Matthew Sheffield, *Poll: Most Americans Want Universal Healthcare But Don't Want to Abolish Private Insurance*, THE HILL, Feb. 7, 2019,

insurance, or other access to health providers, people are forced to forego necessary care, or trade it against other necessities such as food and housing.⁷⁹

4. Opportunity

Are people safe if they are condemned to live in poverty, with little hope of betterment for themselves and their offspring? It's difficult to obtain food and housing without money. And it's difficult to obtain money without some of the basic building blocks of opportunity.

Here, consensus around what constitutes safety may begin to crumble—the question being whether it should. Many of the elements from here on out are essential means to incontestable safety ends.

Is it possible to be safe today without an education? It is education that allows people to be gainfully employed, to provide for themselves rather than exist on the government's dole. Education serves other valuable purposes—building citizens, supporting personal growth. But without education it is a challenge, if not impossible, to make one's way in the world, to provide even basic subsistence for oneself and one's dependents.

But if education is on the list, then what about jobs themselves? Without work people cannot feed, clothe, or house themselves, let alone their dependents. In his memoir, former Speaker of the House of Representatives Paul Ryan describes the feeling in his hometown of Janesville, Wisconsin, of “uncertainty, insecurity, and the sense that something has gone wrong,” as jobs slip away and people face bleak economic futures.⁸⁰ Note his use of the word “insecurity” – it is difficult to be or feel safe without work.

Safety entails not just any job, but a job sufficient to earn a real living, and provide personal and family security. The Hamilton Project, a division of the Brookings Institute, estimates that four out of ten people among the working-age group living below the poverty level are employed, but still can't make enough to break out of poverty.⁸¹ People who cannot afford the very basic necessities of life, such as food and housing, are not safe.

<https://thehill.com/hilltv/what-americas-thinking/428958-poll-voters-want-the-government-to-provide-healthcare-for>.

⁷⁹ See Elhauge, *supra* note __, at 1543 (noting “tradeoffs between health care and other social goods”).

⁸⁰ Ryan, *supra* note __, at 36.

⁸¹ Jay Shambaugh, Lauren Bauer & Audrey Breitwieser, *Who Is Poor in the United States? A Hamilton Project Annual Report* (Brookings Inst.), Oct. 2017, https://www.hamiltonproject.org/assets/files/who_poor_2017_annual_report.pdf.

Indeed, safety's tentacles reach beyond poverty to the many people who live one emergency away from financial disaster. Poverty is a precarious thing, as is evident from the whiplash of the coronavirus pandemic. People who are getting by can tumble quickly when confronted with a sudden need that was unanticipated, or for which they lacked the means to save.⁸²

5. Evolving Notions of Safety

When asked what safety entails, transportation might not appear on most people's list. We tend to think of getting around as our own problem. Yet, in speaking to the collapse of municipal services in Detroit, Mayor David Bing lumped together the classic aspects of the protection function—police, fire and emergency medical services, streetlights—with . . . buses. “[Y]ou need a bus system that you can rely on to get to work, to school and to the doctor on time.”⁸³ Note how he tied transportation to the very basic elements of safety: jobs, education, and medical care.

Just as the notion of the protection function itself will evolve—there weren't organized police at the time the country was founded—so too will the understanding of what safety encompasses. The Americans With Disabilities Act signaled national recognition that for too many people, basic necessities, from elevators to telephones, to transportation, remained out of reach.⁸⁴ People exposed to hate online, do not feel safe.⁸⁵ The ancestors spoke of physical threats to person and property, but what of emotional and dignitary harms?⁸⁶ Discrimination threatens our safety.⁸⁷ Concerns about discrimination extend to people of color, to women, to the disabled, to LGBTQ individuals. People feel threatened if they are treated unequally

⁸² Projected Poverty Impacts of COVID-19 (Coronavirus), WORLD BANK (June 8, 2020).

⁸³ Jeff T. Wattrick, *Text of Detroit Mayor Dave Bing's Financial Crisis Speech*, MLIVE (Nov. 17, 2011) (updated Jan. 21, 2019), https://www.mlive.com/news/detroit/2011/11/text_of_detroit_mayor_dave_bin.html.

⁸⁴ See Robert L. Burgdorf Jr., *Why I Wrote the Americans With Disabilities Act*, WASH. POST (July 24, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/> (noting how the Act was written with an eye toward improving education, public transportation, accessibility to public parks and streets, and medical treatment, among other reasons).

⁸⁵ Danielle Keats Citron, *Hate Crimes in Cyberspace* (2014).

⁸⁶ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193-95 (1890)

⁸⁷ See Katy Steinmetz, *LGBT Americans Say They Feel Less Safe Under President Trump: Poll*, TIME (July 10, 2017 9:00 AM), <https://time.com/4842910/donald-trump-lesbian-gay-bisexual-lgbt-poll-safe/> (reporting that discrimination incidents generate feelings of unsafety).

because of their identity.⁸⁸ Are all these now part of the safety we all wish to enjoy—to be free of such concerns?

* * *

Some aspects of this list may seem to be reaching too far as to what “safety” requires; other things may appear to be missing. Stop on the list wherever you wish, or add to it as you choose: the point is simply that there are many things that threaten us in similar ways, and with the same ultimate effects, as physical violence.

There are, concededly, differences between some of the items on this list—though only some of them—and protection. It may be the immediacy of the harm. Or the malign nature of the threat. The question, though, is why things like immediacy or the nature of the cause should matter to government’s response. People equally are concerned with freezing to death from lack of housing as they are from physical violence, and for many people the former is more immediate than the latter. Besides, immediacy is a curse but also a blessing: economists whose work has them measuring the damages from injuries and death recognize that an important element is “dread.”⁸⁹ Sometimes drawn-out threats to our well-being are even more deleterious than immediate ones. And we don’t really believe malign threats are the only ones worthy of “protection,” as within the protection function often falls natural disaster relief.

PART III. WHY DOES IT MATTER?

One might agree on the importance or centrality of many things on the safety list, and even believe government bears responsibility for them, and yet resist the notion that there’s any need to change our understanding of what constitutes “public safety.” After all, government already attends in some fashion to many of the things just discussed, including education, clean water, and even transportation. Why should we care if one of them—and only one—is called “public safety.”

It’s because, as this Part explains, being a, if not the, primary focus of government matters. We pursue it single-mindedly, while we contest the importance of government in most if not all other dimensions. And this imbalance that results in real harm for countless people, including from the protection function itself.

⁸⁸ Danielle Keats Citron, *Hate Crimes in Cyberspace* (2014).

⁸⁹ George S. Tolley et al., *State-of-the-Art Health Values*, in *VALUING HEALTH FOR POLICY: AN ECONOMIC APPROACH* 323, 339-44 (George S. Tolley et al. eds.1994). *See also* Richard Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 *Colum. L. Rev.* 941, 972 (1999) (arguing that the dread in anticipating harm should be factored into valuations of damages for loss of life).

A. *The Importance of Being Protection*

We've already seen how for centuries the protection function has been deemed job one of government. But this is not a simple matter of rhetoric. When it comes to protection and public safety, we talk the talk, and walk the walk. We spend over \$100 billion annually on public safety, excluding the military and domestic anti-terrorism.⁹⁰ Municipal governments in many places devote twenty percent or more of their operating budgets to public safety, while other vital functions are cheated.⁹¹ And even if something like education garners greater funding in any particular jurisdiction, there is still the question of right-sizing. We may spend far more than is necessary on protection, and far less on other things than the require.⁹² Yet, cutting the policing budget can be a lot like touching a third rail.⁹³

We valorize those who provide us with public safety in ways we rarely do other government employees. President Trump told the Fraternal Order of Police: "We will always support – and you people know that better than anybody, you know – the incredible men and women of law enforcement. I will always have your back."⁹⁴ That valorization of the police comes from both sides of the aisle. At a 1996 speech to the International Association of Chiefs of Police, former U.S. Attorney General Janet Reno stated: "You all are just miracle workers. You do so very much to bring communities together, to protect this nation, to build trust, and it is an honor

⁹⁰ See Bertlatsky, *supra* note ____ ("The United States spends about \$115 billion on policing a year "; number does not include military spending); Friedman & Janszky, *Policing's Information Problem*, *supra* note ____, at 2 (noting that the over \$100 billion spent on policing does not include counter-terrorism efforts).

⁹¹ See Sullivan & Baranauckas, *supra* note ____ (reporting that many cities allocate 20% or more of their total operating budget for policing).

⁹² See, e.g., CITY OF BOSTON, *Fiscal Year 2021* (Aug. 7, 2020) <https://www.boston.gov/finance/fiscal-year-2021> (last visited Jan. 10, 2021) (showing that Boston will spend 41% of its operating budget on education and 19% on public safety)

⁹³ See Sam Adler-Bell, *How Police Unions Bully Politicians*, NEW REPUBLIC (Oct. 20, 2020), <https://newrepublic.com/article/159706/police-unions-bully-politicians-new-york-deblasio> (describing tactics used by police unions to counter attempts to defund departments); Doubek, *supra* note ____ (quoting Mayor Muriel Bowser as saying that she was "not at all" reconsidering her proposed budget, which increased police spending); Jackman, *supra* note ____ (reporting that the African American Mayors Association, a group of Black mayors in the U.S., "does not favor 'defunding the police.'").

⁹⁴ Trump, *supra* note ____.

and a privilege to work with you.”⁹⁵ This reverence reaches almost religious fervor for some. Attorney General Jeff Sessions told the Fraternal Order: “You [the police] are the thin blue line that stands between law-abiding people and criminals ---- between sanctity and lawlessness We have your back. We ‘BACK THE BLUE.’”⁹⁶

There’s nothing wrong with praise, of course, except when this valorization turns into a kind of unthinking deference, whether deserved or not. Those responsible for the protection function tout their expertise but then defend it behind a wall of non-transparency.⁹⁷ And, as many have documented, we tend not to second-guess protection officials.⁹⁸ The Supreme Court even has suggested a certain degree of deference is mandatory.⁹⁹ Whether this is deserved is another question altogether. Police continue to engage in tactics that have been proven not to work, and fail to

⁹⁵ Reno, *supra* note ____.

⁹⁶ Sessions, *supra* note ____.

⁹⁷ See, e.g., Friedman, *Secret Policing*, *supra* note ____, at 118-20 (discussing the strategies police employ to keep their work under a blanket of absolute secrecy); Pamela Seyffert, *Can Professional Civilian Oversight Improve Community Police Relations*, POLICE CHIEF MAGAZINE (Sept. 13, 2017), <https://www.policechiefmagazine.org/can-professional-civilian-oversight-improve-community-police-relations/> (reporting that “[t]he culture of policing is a guarded one. . . .” and that many officers resist efforts at transparency through civilian complaint review boards because “[o]fficers and managers alike have a hard time believing that a civilian can understand the complexities of police work without having specific training in the field.”).

⁹⁸ See, e.g., Lvovsky, *supra* note ____, at 2067-68 (identifying how narratives of police expertise led to expansive judicial deference to the opinion of police); Moran, *supra* note ____, at 955-56 (“The American legal system, from the United States Supreme Court case law down to municipal ordinances, is tremendously deferential to police officers’ actions”); Chemerinsky, *supra* note ____ (“The problem is that the law gives too much deference to police conduct and does not do nearly enough to hold police accountable.”).

⁹⁹ See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (writing that “the ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer at the scene [because] police officers are often forced to make split-second judgements – in circumstances that are tense”); *Ornelas v. U.S.*, 517 U.S. 690, 700 (1996) (holding that, in its *de novo* review of determinations of reasonable suspicion and probable cause, appeals courts “should give due weight to inferences drawn from . . . local law enforcement officers” because police officers have a wealth of experience in drawing inferences of probable cause).

follow basic protocols that do.¹⁰⁰ They adopt tactics and technologies with little consideration of social costs.¹⁰¹

Still, there is virtually no supervision of protection agencies.¹⁰² They resist any sort of control; it took widespread protests in all fifty states to begin to achieve even basic reform.¹⁰³ Unlike other agencies of government, there is very little “front-end” supervision of the police, which is to say legislative or administrative rulemaking, standard-setting, and the like.¹⁰⁴ It is at best ironic that those who have the power to do the most harm in society are controlled and reviewed the least.

So ingrained is the mindset that public safety = protection, that we turn over many real problems of public safety—the kinds of basic safety described in the last Part—to police, who simply do not have the skills to do the job.¹⁰⁵ Police are first responders, and too often the only responders, and so we ask them to deal with substance abuse, with mental illness, and with

¹⁰⁰ See Friedman and Janzsky, *supra* note ___, at 9 (discussing how police maintain adherence to discredited random patrol while neglecting hot spot policing); Lum, *supra* note ___, at 3 (noting that despite the promise of evidence-based practices such as hot-spot policing, there is “little real indication that hot-spot policing is institutionalized in daily police work.”). RA* add F&J to list and find jump cite – on my website

¹⁰¹ See Ponomarenko & Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, *supra* note ___, at 317 (describing how in deciding whether to adopt policing technology such as license plate readers, police chiefs are much less likely to consider social costs such as community trust than other factors such as budgetary restrictions and the technology’s efficacy).

¹⁰² Many cities have “civilian review boards” but these are notoriously ineffective. See Lynch, *supra* note ___ (outlining several issues with civilian review boards, including lack of funding and the often politicized selection process).

¹⁰³ See Sidhu, *supra* note ___ (listing a number of new state and local laws that were passed to reform police in the wake of George Floyd’s murder).

¹⁰⁴ See, e.g., Ponomarenko & Friedman, *Democratic Accountability and Policing*, *supra* note ___, at 9 (“One of the reasons accountability is such a concern in policing today is because the existing mechanisms of accountability are focused primarily on the back end, with very little on the front end.”); Slobogin, *supra* note ___, at 1725, 1775 (remarking that law enforcement agencies should be treated like other administrative agencies and that they should be subject to the central features of the APA, such as the rulemaking requirements).

¹⁰⁵ See, e.g., Quattlebaum & Tyler, *supra* note ___, at 1024-25 (describing how police officers “are trained as generalists who deploy force to compel compliance . . .” even though “that skill set is not central to much of their daily jobs . . .” which instead involves “‘social welfare’ functions”); Jones, *supra* note ___ (“In the U.S., the police are the answer for everything. . . . [including] mediating domestic-violence disputes, for wellness checks, though they are not trained to sooth people in crisis.”); Stoughton, Noble, & Alpert, *supra* note ___ (arguing that because we use criminal law to confront a variety of social ills, “police [are] over-involv[ed] in matters that would be far better left to other government institutions . . . including school discipline, poverty, homelessness, and substance abuse.”).

homelessness, along with other social ills to which they are not suited.¹⁰⁶ This is one of the primary complaints of the movement to defund the police.¹⁰⁷

This tendency to turn all matter of social ills over protection agencies, and at the same time not to question their tactics, leads to considerable harm. Some are the harms of commission—the stops, searches, uses of force, the shootings, and extreme surveillance, that impose serious costs with dubious benefits.¹⁰⁸ Some are the harms of omission, the failure to learn or police well that leave many communities ultimately unprotected, even from tragic crime and gun violence.¹⁰⁹ Yet, in the face of all these failings, what we do finally is immunize public safety agencies, so that neither they nor individual officers pay a price for the errors they make and misdeeds they commit.¹¹⁰

¹⁰⁶ See Friedman, *Disaggregating the Policing Function*, *supra* note ___, at 11-14 (explaining how police are constantly called to respond to situations involving domestic violence, substance abuse, mental illness, and homelessness, but that they are not trained to adequately address the core causes of these issues).

¹⁰⁷ See Tonya Mosley, *Defunding the Police Can Achieve 'Real Accountability and Justice,' Black Lives Matter Co-Founder Says*, WBUR (June 3, 2020), <https://www.wbur.org/hereandnow/2020/06/03/black-lives-matter-co-founder> (quoting Patrisse Cullors, co-founder of Black Lives Matter as saying, “Why is law enforcement the first responders for a mental health crisis . . . ? domestic violence issues . . . ? [and] homelessness? [T]hose are the first places we can look into.”).

¹⁰⁸ See, e.g., Sullivan et al., *supra* note __ (finding that “in each of the past four years police nationwide have shot and killed almost the same number of people – nearly 1,000” and that four percent of those who were shot were unarmed); Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html> (recounting huge numbers of arrests in Baltimore in 2005 for minor offenses or offenses never charged); Sullivan & O’Keefe, *supra* note ___, at 730 (concluding, after analyzing several years of NYPD data, that “proactive policing,” which “disrupts communal life” and is defined as prioritizing “high rates of police stops, criminal summonses and aggressive low-level arrests” does not prevent crime and instead “incites more severe criminal acts.”).

¹⁰⁹ See, e.g., Natapoff, *supra* note ___, at 1723 (describing how underenforcement “takes various forms” such as “unsolved homicides, permitted open-air drug markets, slow or nonexistent 911 responses, and tolerance of pervasive, low levels of violence, property crimes, and public disorder”); GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, *supra* note ___, at 5 (arguing that under-protection from the police contributes to gun violence by making communities “less likely to report shootings, cooperate with the police, and serve as witnesses.”).

¹¹⁰ See, e.g., Schwartz, *supra* note ___, at 956-57 (“[E]vidence suggests that police litigation costs are often paid from a city’s general budget . . . with limited or no direct impact on the finances of the police department.”); ACLU, *supra* note __ (characterizing qualified immunity as a “loophole allowing government officials to escape accountability for violating constitutional rights”); Cato Institute, *supra* note __ (“The end result [of qualified immunity jurisprudence] is that police may get away with egregious unlawful conduct . . .”).

In short, devote enormous resources to protection, assign a wide variety of tasks to protection workers that they are ill-equipped to perform, rarely hold those responsible for protection liable when things go wrong, and provide almost no supervision. You have to be regarded as pretty special to get this sort of deference in life.

B. Second Fiddle for the Rest of Safety

Yet, when it comes to the other aspects of what people might consider critical to their safety, not only is this sort of deference not shown, but there is not even consensus that government has a role to play.

There is a long history of contest in this country over the sorts of social benefits and programs that would be necessary to assure safety to people along the dimensions identified in the previous Part.¹¹¹ This contest grew loud during the Populist and Progressive eras, and reached full voice in the New Deal fights over the expansion of government. There was a brief moment of relative consensus around LBJ's War on Poverty, but that quickly collapsed.¹¹²

The presidency of Bill Clinton highlighted the breadth of resistance to government aid for basic safety outside of protection. Clinton, a Democrat whose strategy was "triangulation" in order to pull in more moderate voters, had what were perceived as two great legislative victories. The first was "welfare reform," in which the insistence was to force people off of welfare and require they work to retain benefits.¹¹³ This was built on a longstanding skepticism of those on public relief, grounded perhaps in "persistent beliefs among substantial numbers of white voters that such policies disproportionately benefit black Americans or are unfair to hard-working taxpaying families."¹¹⁴ The second was a "crime bill" that addressed drug

¹¹¹ See Skocpol, *supra* note ____, at 312-21. (outlining the evolution of the American welfare state from the late 1800s to the 1990s and the political forces driving each step).

¹¹² See, e.g., Dumenil, *supra* note ____, at 503-511 (tracing the battle waged over the attempt to establish a federal department of education in the 1920s); MCDONNELL, *supra* note ____ (documenting the debate over the passage of the Housing Act of 1937, the first major federal public housing legislation); HINTON, *supra* note ____, at 13-14 (exploring how LBJ's War on Crime, which funneled massive amounts of resources to police forces, undermined the War on Poverty's goals to support education, health, housing and welfare programs).

¹¹³ See Carcasson, *supra* note ____, at 655 ("[T]he Personal Responsibility and Work Opportunity Reconciliation Act. . . . [eliminated] a 61-year-old federal entitlement . . . replacing it with time limits, work requirements, and block grants . . .").

¹¹⁴ Kagan, *supra* note ____, at 185.

problems by putting some 100,000 police on the streets, contributing to the mass incarceration we face today.¹¹⁵

Whereas it is difficult to challenge legislation granting resources for protection, government resources to assure other safety functions constantly are in danger of being cut.¹¹⁶ Over the last three decades, spending on prisons and jails at the state and local level increased at three times the rate of public education funding.¹¹⁷ The tendency to fund protection resources at an exorbitantly higher rate than other safety functions is a characteristic of both the left and the right.¹¹⁸ Yet, evidence suggests that a well-funded safety net actually protects poor families.¹¹⁹

This attitude of skepticism toward government's safety role in non-protection functions is manifest in the contrast between our valorization of protection workers and all others. There are plenty of folks outside of protection agencies who work hard to keep us safe—and who do not receive nearly the same praise. They too have difficult and at times unpleasant jobs. And they face similar dangers.¹²⁰ (For all the hype, being a police officer is not nearly the most dangerous of jobs.)¹²¹ Social workers often deal with the very same mentally ill or homeless persons as the police, people who can be volatile and violent at times.¹²² As is so painfully obvious during the present pandemic, doctors and other medical personnel rush into danger zones to

¹¹⁵ Justice Dep't, *supra* note ____ (describing how crime bill facilitated “putting 100,000 police on America’s streets.”); Ofer, *supra* note ____ (“The federal crime bill . . . encouraged mass incarceration to grow even further.”).

¹¹⁶ Alexander, *supra* note ____, at 57 (“[T]he dramatic shift toward punitiveness resulted in a massive reallocation of public resources. By 1996, the penal budget doubled the amount that had been allocated to AFDC or food stamps. Similarly, funding that had once been used for public housing was being redirected to prison construction.”).

¹¹⁷ U.S. DEP’T OF EDUC., *supra* note ____.

¹¹⁸ See Alexander, *supra* note ____, at 253 (“Obama’s budget for law enforcement is actually worse than the Bush administration’s in terms of dollars devoted to prevention and drug treatment as opposed to law enforcement.”).

¹¹⁹ See DeParle, *supra* note ____ (documenting that the CARES Act, which will likely result in a \$460 billion increase in spending on the safety net this year has “prevented the rise in poverty that experts predicted [due to COVID-19] . . . [and] done much to protect the needy . . .”).

¹²⁰ See Phillips, *supra* note ____, at 1663 (“A survey of all staff members at a forensic psychiatric hospital showed that . . . the annual incidence of physical assault was 70%. Among psychiatric aides, the rate is 69 times the national rate of violence in the workplace.”).

¹²¹ See Kiersz & Hoff, *supra* note ____ (reporting that, according to Bureau of Labor Statistics, in 2018, police and sheriff’s patrol officers have the 16th deadliest job in the U.S., behind jobs such as logging and fishing).

¹²² See Nat’l Ass’n of Social Workers, *supra* note ____ (explaining that social workers, in providing essential mental health care services to individuals, are subject to increasing “tragic incidences of violence. . .”).

render aid, including exposing themselves to illness and disease.¹²³ The degree to which they are getting their due today only highlights how, typically, these sorts of workers don't.

As a result of the imbalance between protection and all the rest, far too many people—literally millions of people, in this wealthy country—are not safe, in too many ways.

Start with the most primary of needs. Water's pretty basic. But Flint is not alone. During the summer of 2019, it was Newark, New Jersey, where the approximately 285,000 residents of Newark were exposed to elevated levels of lead in their water supply because of using some 18,000 "ancient" lead service lines.¹²⁴ One study found that in 2015, nearly 21 million Americans were getting water from systems that violated the EPA's water quality standards.¹²⁵ So too is food. Yet, some 11% of American households (over 37 million people) experience food insecurity—i.e., they "were uncertain of having, or unable to acquire, enough food to meet the needs of all their members because they had insufficient money or other resources" — at times during the year.¹²⁶

Housing is a similar story. The federal Department of Housing and Urban Development put the number of homeless in January 2018 at over half a million people, of whom some 200,000 were "unsheltered."¹²⁷ This doesn't count all the people couch surfing or "doubled up" with friends and family, or in hospitals, mental health, and substance abuse centers, and also jails and prisons, nor all of those who avoid being counted or can't be located during the yearly count.¹²⁸

Problems with the air we breathe threaten many of us, and after serious progress we are slipping again. From 2016 to 2018, nearly 46% of the U.S. population, a figure that has consistently increased since 2013, lived in places with unhealthy ozone or particle pollution, putting them at risk for respiratory issues, heart attacks, neurological damage, and premature death.¹²⁹ Progress on climate change also is reversing, leading to higher

¹²³ See Schwirtz, *supra* note ____ ("The coronavirus pandemic . . . is beginning to take a toll on those who are most needed to combat it: the doctors, nurses and other workers at hospitals Medical workers are still showing up day after day . . .").

¹²⁴ Corasaniti, *supra* note ____.

¹²⁵ Allaire, Wu, & Lall, *supra* note ____, at 2079.

¹²⁶ U.S. Dep't of Agric., *supra* note ____.

¹²⁷ OFFICE OF CMTY. PLANNING & DEV., U.S. DEP'T OF HOUS. & URBAN DEV., THE 2018 HOMELESSNESS ASSESSMENT REPORT, *supra* note ____, at 10 exhibit 1.1.

¹²⁸ See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note ____, at 12 (detailing who is included in HUD's point-in-time homelessness count).

¹²⁹ AMERICAN LUNG ASSOC., *supra* note ____, at 5; ENVTL. PROT. AGENCY, OUR NATION'S AIR, *supra* note ____.

temperatures and more wildfires, making the more conventional air pollution problems targeted by the Clean Air Act even more intractable.¹³⁰

A lack of health care similarly afflicts too many, particularly the poor.¹³¹ Even after passage of the Affordable Care Act, more than 27 million people still lack coverage.¹³² Those without health insurance skip preventative health services like blood pressure checks or mammograms, don't get treatment or drugs medical personnel do recommend, have a higher risk of being diagnosed with late-stage forms of diseases like cancer, and—unsurprisingly—have higher mortality rates.¹³³

The shortcomings of our system of public education are nothing short of appalling. According to the Programme for International Student Assessment (PISA), America now ranks 37th out of 78 countries in math and 18th in science. The U.S. Department of Education concluded in 2019 that two out of three eighth graders failed to meet reading proficiency standards set by the Department, and only 34 percent of eighth graders were deemed proficient in math.¹³⁴ The ongoing litigation in *Gary B. v. Whitmer* describes how the schools in an entire American city—Detroit—are failing students to an appalling degree. Students attend school in dilapidated buildings, often without books or even real teachers “As a result, in Detroit public schools “illiteracy is the norm” while “[p]roficiency rates . . . hover near zero percent in core curricular areas.”¹³⁵

The current poverty rate of 11.8% of the country's population is just over 38 million people, including some 13 million children, and that is before the present pandemic.¹³⁶ One quarter of Philadelphia's residents (about

¹³⁰ See Nadja Popovich, Livia Albeck-Ripka, & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List.*, July 15, 2020, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html>; AMERICAN LUNG ASSOC., *supra* note ____, at 10 (reporting that climate change, which causes “warmer weather, different rain patterns and major wildfires” contributes to “continued challenges to long-term progress in reducing harmful air pollution under the Clean Air Act”).

¹³¹ See Garfield et. al., *supra* note ____, at 1 (“Those most at risk of being uninsured include low-income individuals . . .”).

¹³² Garfield et. al., *supra* note ____, at 1.

¹³³ See Garfield et. al., *supra* note ____, at 13-15 (summarizing how lack of health insurance impacts health care access).

¹³⁴ U.S. DEP'T OF EDUC., INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, RESULTS FROM THE 2019 MATHEMATICS AND READING ASSESSMENTS 2 (2019), https://www.nationsreportcard.gov/mathematics/supportive_files/2019_infographic.pdf.

¹³⁵ Brief of Appellants, *supra* note ____, at 8-11.

¹³⁶ JESSICA SEMEGA ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018 at 1 (2019),

400,000 people) live in poverty.¹³⁷ Being really poor means the only hot meal your kid gets is the free one at school lunch; not getting cavities fixed or seeking out and securing charity before a debilitatingly painful dental problem can be relieved; running out of propane in winter to heat the storage room you live in; jumping a turnstile because you lack money to get to and from your job training program—only to get hit with a fine that means you barely are able to feed your family that week.¹³⁸ The Hamilton Project estimates that four out of ten people living below the poverty level are employed, but still can't make enough to break out of poverty.¹³⁹

* * *

In short, there's a terrible mismatch. Protection, the first job of government, is overvalued to the point that evades serious scrutiny, though its performance in many critical ways is woeful. Yet, we neglect to pay sufficient attention to many other aspects of safety, to the point where millions are in jeopardy. To say things are out of balance seems to understate the obvious by a sharp degree.

PART IV. WHAT SHOULD WE UNDERSTAND *PUBLIC SAFETY* TO BE? (OR: IS PROTECTION REALLY DIFFERENT?)

Much like in Oscar Wilde's classic play, "The Importance of Being Earnest," it turns out—for good and for ill—it does matter if something is deemed public safety.¹⁴⁰ Yet, as we have seen, the "protection" function garners that appellation, but not much else that is vital to individual safety.

<https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf>;
CHILDREN'S DEFENSE FUND, ENDING CHILD POVERTY NOW 3 (2019),
<https://www.childrensdefense.org/wp-content/uploads/2019/04/Ending-Child-Poverty-2019.pdf>.

¹³⁷ OCTAVIA HOWELL, PEW CHARITABLE TRUSTS, PHILADELPHIA'S POOR: EXPERIENCES FROM BELOW THE POVERTY LINE 1 (2018), <https://www.pewtrusts.org/-/media/assets/2018/09/phillypovertyreport2018.pdf>.

¹³⁸ See, e.g., Elisha Brown, *She Jumped a Turnstile. The Fine Pushed Her to the Breaking Point.*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/neediest-cases/jumped-turnstile-breaking-point.html> (relating Jasmin Perez's horror story of jumping a turnstile); John Otis, *Eliminating Dental Woes Without Worrisome Debt*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/neediest-cases/dental-needs-community-health-advocates.html> (quoting Community Health Advocates attorney: "Access to dental service is our top need").

¹³⁹ See Lauren Bauer, Emily Moss, & Jay Shambaugh, *Who Was Poor in the U.S. in 2018*, HAMILTON PROJECT (Dec. 5, 2019), https://www.hamiltonproject.org/blog/who_was_poor_in_the_u.s_in_2018 ("Considering only those living in poverty who were of working age, about 40 percent were labor force participants.").

¹⁴⁰ OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST 152 (Cambridge 1996) (1899).

One reasonably wonders: why? Is there something about protection that actually makes it government's first job, as opposed to all the other functions government does or might perform to keep people safe? In this Part, we will explore a collection of possible arguments for why the protection function is special, or different. All of them fail.

To be clear, the goal here is not to discount the importance of protection. It's critical, and if there is any shame it is that government doesn't perform the job better, and more evenly. The point of this part is simply that nothing particularly distinguishes protection from all the other elements of public safety. If we were consistent, they too would get equal concern from government.

A. *Foundational*

It may simply be a category error to confuse the protection function as it operates today with the classical understanding of public safety. The ancients did indeed call public safety the first job of government, but what they meant by this—and indeed by protection in this context—bears little relationship to the ordinary domestic policing function extolled and privileged today. Our rhetoric seems to have shifted without noticing it, in a way that undercuts any special role for protection.

In the classical account, public safety referred to the existence condition for the state itself. People leave (left) the state of nature to be assured of protection from physical violence to person and property.¹⁴¹ But the physical violence they referred to was not quotidian criminality; it was protection from marauders—largely from without, but also from within—that challenged the very notion that there was an entity capable of functioning as a state. If the state can't do this, it can't do anything else.¹⁴² So, this was

¹⁴¹ See LOCKE, SECOND TREATISE, *supra* note __, at § 95 (explaining that individuals give up their natural liberty in exchange for “comfortable, safe, and peaceable living one amongst another” and “secure enjoyment of their properties”); 1 BLACKSTONE, COMMENTARIES, *supra* note __, at 125 (describing society's primary purpose as being the protection of individuals' ability to enjoy their natural rights).

¹⁴² See HOBBS, LEVIATHAN, *supra* note __, at 200 (arguing that the sovereign must be exempt from civil laws because, otherwise, “he cannot perform the office [individuals] have put him into, which is to defend them both from foreign enemies and from the injuries of one another; and consequently there is no longer a Commonwealth.”); LOCKE, SECOND TREATISE, *supra* note __, at § 211 (explaining that foreign force is usually the only way a society is dissolved, and “where the society is dissolved, the government cannot remain”).

indeed the government's first job – both as a duty to the people within its boundaries, and also definitionally to signal and assure it was a functioning government.

The very language of our Constitution mirrors this understanding. The only place “public safety” appears =is in the Suspension Clause, which reads: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”¹⁴³ Respecting liberty—what habeas is all about—is a fundamental obligation of the state, but all bets are off in two cases: “invasion” (from the outside) or “rebellion” (from the inside), both of which threaten the state's very existence.

To the extent this is the proper understanding of public safety, the “first” duty takes on a different meaning altogether from the way many refer to it today. Protection is “first” in that it is essential to the existence of the state. But it is not necessarily, at any given moment, the most important priority of the state. If the state is under attack, public safety both is the first duty and the top priority; otherwise, the duty remains, but the state may focus its energy in another, or many other, directions. Including things like providing basic necessities to the needy. In most places in the United States, at most times since the American Revolution, the very existence of the state has not been threatened—the Civil War being quite clearly an exception.¹⁴⁴

If this is the proper understanding of public safety, then it is just a confusion to equate ordinary domestic policing with the first duty. There may be times when domestic police take part in performing this state-preserving function. Perhaps that was the case on 9/11, at least until we understood what was going on. But otherwise, the police are charged with keeping order and addressing daily crime.

If anything, this classical understanding of public safety underscores the troubling spillover that occurs between the military, which indeed is charged with performing this “first duty,” and the domestic police, which are not. Police love to take on a military bearing, and there are far too many

¹⁴³ U.S. CONST. art. I, § 9, cl. 2.

¹⁴⁴ See, e.g., Abraham Lincoln, Proclamation No. 104 (Sept. 15, 1863) <https://www.presidency.ucsb.edu/documents/proclamation-104-suspending-the-writ-habeas-corpus-throughout-the-united-states> (last visited Jan. 5, 2021) (suspending the writ of habeas corpus throughout the United States). See also Ulysses S. Grant, Proclamation No. 201 (Oct. 17, 1871) <https://www.presidency.ucsb.edu/documents/proclamation-201-suspending-the-writ-habeas-corpus-certain-counties-south-carolina> (last visited Jan. 5, 2021) (suspending the writ of habeas corpus in nine counties in South Carolina during Reconstruction); *Duncan v. Kahanamoku*, 327 U.S. 304, 308 n.2 (1946) (noting that President Roosevelt approved a request to suspend the writ of habeas corpus in Hawaii, which was not yet a state, after Pearl Harbor was attacked). I am writing this the day after the President of the United States stirred a mob to storm the United States Capitol.

Americans who are happy to treat them basically as such (note use of the word “civilian” in contrast to the police) but it simply is both inapt and inappropriate. It’s easy to see why the police like the comparison. If the military is indeed the front line of classical public safety, and are accorded certain privileges and valorization for this, why not bask in that glory? But the police are not the army, and we are not occupied by them. The framers of the Constitution were terrified of a standing army, and the Third Amendment, prohibiting the quartering of troops, was an attempt to guard against it.¹⁴⁵ The Posse Comitatus Act, and the Insurrection Act, are intended to prohibit the use of the actual military internally except when public safety is threatened in the classical sense.¹⁴⁶

This classical meaning of public safety hardly diminishes the importance of what the police do—providing physical protection to the citizenry on a daily basis—but it does put it in context. It is one of many functions that the state needs to provide. And how it measures up against the others may on the specific needs of specific communities at particular times. In truth, in communities that need the protection function the most on a daily basis, all the other elements of need also are present—and were they not, the need for the police likely would be diminished.

B. Authority

Perhaps justification comes not from the necessity for the protection function, but from government’s authority to provide it. But government is empowered to provide all the other aspects of safety equally as it is of protection. It’s elementary—government 101—that government possesses vast, vast authority—what we historically have called the power of “police.”¹⁴⁷ With that power, government *may* do almost anything, and hardly is limited to protection. Blackstone explained that the power of “public police

¹⁴⁵ See, e.g., James Madison, *Ratification without Conditional Amendments*, [24 June] 1788, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0110> (last visited Jan. 8, 2021) (“There can be no harm in declaring, that standing armies in time of peace, are dangerous to liberty, and ought to be avoided, as far as it may be consistent with the protection of the community.”).

¹⁴⁶ See Posse Comitatus Act, ch. 263, 20 Stat. 152 (1878) (current version at 18 U.S.C. § 1385 (2018)) (prohibiting the domestic use of the Army or Air Force without authorization from Congress); Insurrection Act of 1807, ch. 39, 2 Stat. 443 (1807) (current version at 10 U.S.C. §§ 251-255 (2018)) (providing exceptions to the Posse Comitatus Act during instances of insurrection, rebellion, or domestic violence).

¹⁴⁷ Markus Dubber and Santiago Legarre have done wonderful jobs of tracing the roots of the police power back at least as far as the sixteenth century. See Dubber, *supra* note __; Legarre, *supra* note __. See also Barnett, *supra* note __, at 483 (“The police power is the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts.”).

and oeconomy” encompassed “the due regulation and domestic order of the kingdom” including such broad things as “the rules of propriety, good neighbourhood, and good manners.”¹⁴⁸ The Supreme Court, in one of its earlier statements on the subject, in *New York v. City of Miln* (1837), similarly described the broad authority of the state:

*“the bounden and solemn duty . . . to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained [by the Constitution] . . . the authority of a state is complete, unqualified, and exclusive.”*¹⁴⁹

The police power not only is immense in theory, it’s been utilized for centuries in ways that sweep well beyond the protection function. Markus Dubber provides an accounting of some of the earliest “police” regulations; a list from Germany in 1530 contains police offenses involving, among others, “the sale of wool cloth,” “the sale of ginger,” “of Jews and their usury,” “flute players,” and on and on.¹⁵⁰ We did the same in the 18th century here, with regulations on “the exportation of flaxseed,” “gaming,” “sole leather,” “pot and pearl ashes.”¹⁵¹ It’s no different, today. New York’s administrative code, under the heading of “public safety,” contains criminal prohibitions on as diverse a set of items as “street shows” (you can’t put on a show out your window), “serial acts of public lewdness” (apparently you get to “intentionally expose the private or intimate” parts of your body so long as it is only once every three years), “allowing” children to have cell phones at school, possession of handcuff or thumb cuffs, and the like.¹⁵² Now, many of these have historical explanations, and some relate to the protection function; bans on street juggling may seem quaint, but apparently jugglers were believed a real threat at one time.¹⁵³ Still, from the time government really got going, the police power was extended to touch on virtually any problem of the moment, reaching well beyond protection.

¹⁴⁸ 4 BLACKSTONE, *supra* note __, at *162.

¹⁴⁹ *Miln*, 36 U.S. at 103 (emphasis added).

¹⁵⁰ Dubber, *supra* note __, at 1316.

¹⁵¹ Novak, *supra* note __, at 1076.

¹⁵² N.Y.C. ADMINISTRATIVE CODE §§ 10-114—10-166 (2020).

¹⁵³ *See* Dubber, *supra* note __, at 1287 (describing the prevalence of “idle unattached persons roaming the countryside” in the 1500s as the impetus for an English statute criminalizing street juggling).

Which is to say: if the question is what government *can* do to assure safety, protection is hardly special. To the contrary, government can do almost anything. The federal government is its own special case, of course, being limited to enumerated powers, yet its tentacles also reach far beyond protection.¹⁵⁴

C. *Special Obligation*

Perhaps, although having the power to do many things, government has some special obligation to perform the protection function. The cascade of statements we explored above, about the essential nature of assuring people are protected from third-party injury, suggests this. But the claim, evident though it might be, is not without its difficulties.

For starters, one has to question how special an obligation it possibly can be, when the Supreme Court has denied the government has a responsibility to perform it at all. In *DeShaney v. Winnebago County Department of Social Services*, the justices considered the case of Joshua DeShaney, a four-year-old boy battered into a senseless coma by his father.¹⁵⁵ The state had plenty of warning of the problem, and easily could anticipate the eventual outcome. Repeatedly family, doctors, others told the Department of Social Services what was going on. The Department investigated time and again and did nothing, despite clear evidence nothing was the wrong answer. As DeShaney's caseworker said, too late to help, "I just knew the phone would ring some day and Joshua would be dead."¹⁵⁶

DeShaney held, notoriously, that government has no affirmative obligation even to protect people. *Our* Constitution, the justices said, just keeps government from doing bad things.¹⁵⁷ The majority justices in *DeShaney*, led by Chief Justice Rehnquist, conceded that what happened to Joshua was "tragic."¹⁵⁸ (That alone seems the wrong word. Taking a wrong turn and driving in the dark off a cliff is tragic. Having the state watch you

¹⁵⁴ See U.S. CONST. art. I, § 8 (enumerating the powers of the legislative branch); *id.* amend. X (delegating all powers not enumerated in the Constitution to state governments); *U.S. v. Lopez*, 514 U.S. 549 (1995) ("The Constitution creates a Federal Government of enumerated powers.")..

¹⁵⁵ *DeShaney*, 489 U.S. at 193.

¹⁵⁶ *DeShaney*, 489 U.S. at 209 (Brennan, J., dissenting).

¹⁵⁷ *DeShaney*, 489 U.S. at 195.

¹⁵⁸ *DeShaney*, 489 U.S. at 191.

do it, with ample time to stop you, but sitting idly by, is something else altogether.) The Court pointed to the 14th Amendment itself: “No state shall *deny* the due process of the laws.” As the Court majority put it: “[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors.”¹⁵⁹

There’s every reason not to read too much into *DeShaney*. Perhaps it simply was a statement about the lack of a remedy when government fails, what Larry Sager would refer to as an underenforced constitutional norm.¹⁶⁰ (In fairness, though, the opinion does not read like this.) Or, it could be the plaintiffs just relied upon the wrong clause of the Constitution. Maybe Joshua wasn’t denied “due process,” but was denied “the equal protection of the laws,” and in the oddly formal world of legal proceedings, the failure to say the right magic words spelled doom.¹⁶¹ More fundamentally, the decision simply could be in error. The justices get things—big things—wrong all the time. Slavery, the right to marry whom one likes, racial and sex equality, the power of the government to set minimum wages and maximum hours for workers, one could go on and on and on about the Court’s many missteps.¹⁶² This surely seems one of them; as others have observed, our Constitution contains any number of positive rights.¹⁶³

Yet, the very fact that on a case with such egregious and dispiriting facts the nation’s top court, by a vote of 6-3, squarely held there was *no* obligation, surely tells us something about the obligation to provide protection.

Even if, contra the Supreme Court, protection is an obligation, there’s a good question how deep that obligation really runs. Jeremy Waldron offers up two ways of thinking about government’s role in assuring collective security—an aggregative and an egalitarian one. Under an aggregative system, government’s function is “maximizing” security – assuring the most

¹⁵⁹ *DeShaney*, 489 U.S. at 195.

¹⁶⁰ See generally Sager, *supra* note __ (describing underenforced constitutional norms as constitutional claims which the federal judiciary is reluctant to uphold to their full extent).

¹⁶¹ Cf. Friedman & Solow, *supra* note __, at 117-20 (describing how the Supreme Court has rejected arguments that the Equal Protection Clause obligates government to provide adequate education, but suggested that a right to education may exist in cases involving the Due Process Clause).

¹⁶² E.g. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that the Constitution does not contain “a fundamental right to engage in homosexual sodomy”); *Lochner v. New York*, 198 U.S. 45, 58 (1905) (holding that workplace safety laws violate the Due Process Clause); *Bradwell v. State*, 83 U.S. 130, 139 (1872) (upholding state statute limiting practice of law to male citizens); *Dred Scott v. Sandford*, 60 U.S. 393, 426-27 (1857) (holding that slaves are not American citizens).

¹⁶³ See generally David. P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986) (arguing that even within negative rights the case law imposes positive duties on government in many areas).

total or overall safety it can, while recognizing some people may have to give up their security so that others are made safe.¹⁶⁴ Waldron emphatically rejected this aggregative approach: government cannot make some safer at the expense of others.¹⁶⁵

But Waldron's egalitarian notion of government's obligation to provide security turns out to be quite sparse.¹⁶⁶ Either, "a legitimate regime must bring each person's safety up to at least a certain level."¹⁶⁷

Or, "the regime must make a substantial positive difference to each person's safety, even though the actual level of safety for each may vary according to background circumstances and baseline."¹⁶⁸ One can only hope it is the former, not the latter. If individual safety can vary based on "background circumstances and baseline," and that's just not government's problem, then some people are going to be a whole lot safer than others.

Whereas both doctrine and philosophical examination cut any "special" obligation for the protection function down to size, history suggests government's obligations for other aspects of individual safety measure right up. Government, for example, long has been understood to have some responsibility for the needy. Take Bentham. He didn't have much truck with frittering away the public coffers on frivolities like the arts, but he nonetheless he believed "we may . . . lay it down as a general principle of legislation that a regular system of contribution should be established for the relief of the poor," those being people "who lack the necessaries of life."¹⁶⁹ He was hardly alone: many natural rights theorists felt the same. Here's Blackstone:

"The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. *For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the*

¹⁶⁴ Waldron, *supra* note __, at 477-78.

¹⁶⁵ See Waldron, *supra* note __, at 478-80 (describing shortcomings of maximizing approach and advocating for egalitarian approach).

¹⁶⁶ Ultimately, it becomes clear that what Waldron is offering up a theory of what government cannot do, not what it necessarily must. That's fair enough: Writing in the aftermath of 9/11, he was concerned we were harming some populations—especially Muslim ones in the United States—in an effort to keep the rest of us safe.

¹⁶⁷ Waldron, *supra* note __, at 492.

¹⁶⁸ Waldron, *supra* note __, at 492.

¹⁶⁹ 1 BENTHAM, *supra* note __, at 174.

community, by means of several statutes enacted for the relief of the poor”¹⁷⁰

And indeed, in the West the tradition of providing room and board for society’s most vulnerable in almshouses—typically through taxes—dates back to medieval times.¹⁷¹ True, the point of almshouses may have been to relieve ordinary citizens of the burden, but the point is the government took it upon itself.¹⁷² There long has been in this country an appreciation of the need to help those who cannot help themselves.¹⁷³ Today people on the left and the right politically profess to feel similarly. Paul Ryan, no fan of handouts, while advancing a minimal role of government, still said it was government’s role “to provide some basic protections to the vulnerable from the worst risks of modern life.”¹⁷⁴

All of which is to say, government may have a minimal obligation to protect the citizenry, indeed a crucial one, but so too it has an obligations to assure safety in other ways. And so, the question still remains whether there is some other source for giving the protection function primacy.

D. *Monopoly*

And perhaps there is – perhaps there is something so fundamental about the protection function that government has to have a monopoly over it, distinguishing it from the provision of other safety needs. The idea that government should have a monopoly on public safety is not a crazy one either, for what it is worth. Hobbes described security as being “[t]he end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power.”¹⁷⁵

Were this the case, though, it would require some justification. Why should government have a monopoly on the provision of the protection

¹⁷⁰ 1 Commentaries *131. See also LOCKE, SECOND TREATISE, *supra* note __, at § 25 (“[Men] have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence.”).

¹⁷¹ See generally NICHOLLS, *supra* note __, at 21-36 (discussing the development of English Poor Laws and almshouses in the 1500s).

¹⁷² See William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 116-117, 156-159 (1997) (discussing how in the late 1700s, towns cared for poor people when their families could not and larger communities used almshouses to house their poor).

¹⁷³ See *Historical Development*, *supra* note __ (describing the history of social welfare programs in America).

¹⁷⁴ RYAN, *supra* note __, at __. [NOTE: PAGE # TO BE FILLED IN LATER. QUOTE IS NEAR THE END OF CHAPTER 1]

¹⁷⁵ HOBBS, *supra* note __, at 110.

function, but not so many other elements of public safety? Here we will explore two possible justifications, one built on the idea of public goods, and one on externalities. At the heart of both is the notion that people can get their food, their housing, or even their education from a multiplicity of sources, but protection is government's first job simply because of the impossibility or costs of private provision. Once again, though, these arguments will not serve to distinguish protection.

1. Public Good

Public goods, according to economists, have two characteristics that ensure market failure around their provision, making government action requisite.¹⁷⁶ First, they are non-excludable: if the good is made available, you can't keep folks out, or force them to pay to take advantage. Second, they are non-rivalrous, meaning no matter how many folks take advantage, there's still enough to keep going around.¹⁷⁷ As a result, Tiebout explains, "[a] public good is one which should be produced, but for which there is no feasible method of charging the consumers."¹⁷⁸

The classic example of a public good is a defense against ballistic missiles.¹⁷⁹ It's hard for market providers to charge for public goods, because folks will free ride and still take advantage. The answer, economic theory says, is government stepping in, taxing everyone, and providing the good for everyone's benefit.¹⁸⁰

The protection function is, for some, high on the list of public goods. Here's Mancur Olson, who's unequivocal:

"The basic and most elementary goods or services provided by government, like defense and police protection, and the

¹⁷⁶ See MUSGRAVE, *supra* note __, at 44 (defining public goods as those which require public production); Samuelson, *supra* note __ (describing the concept of "collective consumption goods" funded by public expenditures and enjoyed in common).

¹⁷⁷ See Cowen, *supra* note __, at 54 (describing non-rivalrous consumption and non-excludability as the defining elements of public goods); Hummel, *supra* note __, at 89 (same); Samuelson, *supra* note __, at 387 ("[E]ach individual's consumption of [a public good] leads to no subtraction from any other individual's consumption of that good . . .").

¹⁷⁸ Tiebout, *supra* note __, at 417.

¹⁷⁹ See Coyne, *supra* note __, at 374 ("[T]he idea of a national missile defense shield. . . is often used to illustrate the supposed publicness of national defense. . . [I]t is non-rivalrous and non-excludable from the standpoint of the nation.").

¹⁸⁰ See Brooks, *supra* note __, at 388 ("The standard solution for such a collective action problem is for the government to compel taxation, and provide the public good for everyone."); Hummel, *supra* note __, at 93 ("[U]nless taxation or some other coercive levy forces people to contribute, [non-excludable goods] would be inadequately funded and therefore under-produced.").

system of law and order generally, are such that they go to everyone, or practically everyone in the nation. *It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services, the police, and the courts to those who did not voluntarily pay their share of the costs of government.*¹⁸¹

The problem is that the protection function actually is not a public good. Is protection excludable? Sure: people can live in gated communities, or hire guards. Scholars document the pervasive role private security forces play, and have played, from department store guards to private detectives, to personal security companies.¹⁸² Even government seems quite plainly capable of protecting the residents of some communities but not others. Is public safety non-rivalrous? Hardly. There's only so much to go around, as anyone who's waited two hours for officers to arrive after calling 911 quickly realizes. Sometimes those calls aren't answered at all.¹⁸³ Besides, Olson's just wrong on his "if indeed it were possible" to deny services to the non-paying point. That may be true of ballistic missile defense, but we charge user fees for things around the protection function all the time.¹⁸⁴ Some jurisdictions even charge arrestees for the honor of being arrested.¹⁸⁵ Whether this is sane or despicable is another question, but it's doable. We could certainly charge for 911 if we wanted, and maybe we should if calls turn out to be frivolous, in order to curtail unnecessary usage.¹⁸⁶

¹⁸¹ OLSON, *supra* note __, at 14. *See also* Hummel, *supra* note __, at 111 (characterizing the creation of a government-run police and court system as a public good).

¹⁸² *See* Fairfax, *supra* note __, at 273-75 (describing the trend of private security firms performing services traditionally performed by public police); Sklansky, *supra* note __, at 1213-15 (describing the Pinkerton National Detective Agency's infamous specialization in anti-labor assignments during the 1880s and 1890s). RA*

¹⁸³ Ed Gallek, *More Than 2,000 Cleveland Police 911 Calls Went Unanswered in June: I-Team*, FOX8: I-TEAM (June 17, 2020, 5:45 PM), <https://fox8.com/news/i-team/i-team-more-than-2000-cleveland-police-911-calls-went-unanswered-in-june>; Ted Booker, *10,000 911 Calls Go Unanswered in St. Joseph County Last Year*, SOUTH BEND TRIB. (June 28, 2017), <https://www.businessinsider.com/the-most-dangerous-jobs-in-america-2018-7>.

¹⁸⁴ *See Court Fees and Getting Court Fees Paid*, LAWHELP, <https://www.lawhelp.org/resource/court-fees-and-getting-court-fees-paid> (last visited July 24, 2020) (describing categories of common court costs).

¹⁸⁵ *See* Markadonatos v. Vill. of Woodridge, 760 F.3d 545, 545-52 (7th Cir. 2014) (upholding defendant municipality's practice of charging an administrative fee "upon completion of any custodial arrest/booking procedure").

¹⁸⁶ *Cf.* Erwin A. Blackstone et al., *Evaluation of Alternative Policies to Combat False Emergency Calls*, 28 EVALUATION & PROGRAM PLAN. 233, 317 (2004) (arguing that "consumers of false alarm response [should be required] to pay for the cost of the service rendered."). The partial public goods argument fails too. People can lock themselves in a

On the other hand, there are other aspects of public safety beyond protection that unequivocally are public goods. One of them is clean air. Like a ballistic missile defense system, it's hard if not impossible to exclude people from breathing clean air, and if available it is abundant. Charging for it is difficult, so government deploys its regulatory authority to ensure we have access.¹⁸⁷

In short, the public goods argument works for some elements of public safety, but not for the protection function. Protection is not a public good. Private entities can and do provide it.

2. Externalities

There's a weaker form of this argument, which is that government has a special role to play when activities performed by private entities create externalities that government provision could avoid.¹⁸⁸ Which is to say, even if we allow others to provide certain functions, private provision imposes costs on the rest of us. So we are better off if government does the job, in order to avoid those externalities.

This is hardly a crazy argument either. If I purchase or create my own food or housing, that may not impose a burden of any sort on others. If I privatize my personal security, on the other hand, I may interfere with people's liberty wrongly, or even do them injury.¹⁸⁹ We can't very well have people running around shooting each other up whenever they feel wronged. That's why, as Max Weber famously concluded "[A] state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."¹⁹⁰

gated community, and provide private security, thereby avoiding free riding. But the Equal Protection Clause prohibits government from providing protection to some but not others – though in reality the provision of security may be very uneven.

¹⁸⁷ See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J. L. ECON. & ORG. 59, 59-60 (1992) (describing how environmental regulation produces public goods such as clean air).

¹⁸⁸ See Cornes & Sandler, *supra* note __, at 6 (describing how issues with externalities can justify government intervention in the provision of public goods).

¹⁸⁹ See generally Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379 (2006) (arguing that, due to increases in homicide and suicide rates, marginal social cost of household gun ownership ranges from \$100 to \$1800).

¹⁹⁰ WEBER, *supra* note __, at 78; see also JOHN SCHWARZMANTEL, *DEMOCRACY AND POLITICAL VIOLENCE* 62 (2011) (“[Some claim] the state functions as a societal policeman, which through its agents makes it impossible for citizens to use violence against each other, or at the very least punishes those who illegitimately use physical force to achieve their ends.”).

This, however, would be radically inconsistent with our practice. People buy, possess, and use guns all the time for self-protection.¹⁹¹ As we saw above, even the core policing function, the state's ultimate use of force, often is taken up by private hands. Elizabeth Joh recounts in detail how "privately paid police behave like law enforcement officers: detaining individuals, conducting searches, investigating crimes, and maintaining order."¹⁹² If anything, the privatization of safety at present is so pervasive that scholars like Ian Loader and Neil Walker worry—echoing Weber—that we tilt too far in that direction, threatening the core of what it even means to be a government.¹⁹³

Not only can private individuals provide security for themselves and others, but under existing law using guns for self-defense is a right. Some states permit people to "stand their ground" in the face of threats, allowing them to engage in sanctioned private violence.¹⁹⁴ The Supreme Court's interpretation of the Second Amendment as including a right to possess weapons for self-defense undercuts the monopoly argument altogether.¹⁹⁵ If Hobbes is right, the Supreme Court may well be wrong. At least where government is doing its job with regard to public safety—and "doing its job" does not mean there won't be the occasional fail—maybe we don't actually have a right to carry our weapon about, brandishing it at all who seem threatening. It's ironic, to say the least, that we criminalize using guns for self-defense in communities that seem to fail Hobbes' caveat, in that government is unable to halt violence, and allow them in places that seem

¹⁹¹ The evidence is thin that self-protection incidents justify themselves. See David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007-2011*, 79 PREVENTIVE MED. 22 (2015) (finding that self-defense gun use is very rare and "little evidence that self-defense gun use reduces the likelihood of victim injury during a crime.").

¹⁹² Joh, *supra* note __, at 50.

¹⁹³ See Loader & Walker, *supra* note __, at 26. ("Our sense of safety and security is, in short, like conviviality, *irreducibly social*, deeply implicated in our relationship with others.") Waldron doesn't buy this, and I agree. See Waldron, *supra* note __, at 502. Safety and security can be experienced together, but at bottom either I'm safe or I'm not and that is what I focus on. Which is not to say that our safety could not be enhanced by communal conduct, such as patrolling streets. See Fennell, *supra* note __, at 14-16 (arguing residents acting collectively are more likely to improve neighborhood safety than security systems or stricter law enforcement).

¹⁹⁴ See e.g. FLA. STAT. § 776.012 (2020) (excusing the use of force by citizens acting in self-defense); MICH. COMP. LAWS § 780.972 (2020) (same); S.D. CODIFIED LAWS § 22-18-4 (2020) (same).

¹⁹⁵ See *McDonald*, 561 U.S. at 767-68 (overturning a handgun ban on the grounds that the Second Amendment protects the right to bear arms in self-defense); *Heller*, 554 U.S. at 628-29 ("[B]anning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family would fail constitutional muster.") (citation omitted).

perfectly pacified. But that's not how the Supreme Court sees it, and popular opinion seems to support the Court.¹⁹⁶

Not only is there a right to private protection, externalities notwithstanding, but the government's provision of security also can have serious externalities, whopping ones. That is certainly the perception of those—including people living in very violent and crime-ridden communities—who argue we should defund the police or abolish them altogether.¹⁹⁷

In any event, if externalities were what justified government stepping in and pushing others out, that is true in spades for many of the other aspects of individual safety that take a lower place in the hierarchy. Consider homelessness, which many view as imposing enormous externalities. People complain vociferously about those without shelter living on the street: they raise issues of hygiene, of interference with use of public spaces, and even seem to advance the deeply dubious justification that they don't want to have to see people in need.¹⁹⁸ Think what you will of these arguments, they seem to present the very sort of externalities government should help address. (Of course, government sometimes does address them, albeit using the police, which only serves to create a replacement set of externalities, and does not really address the problem.)¹⁹⁹

Or take the failure to educate people, which is so beset with externalities that some people even denote it a public good. It's not really—look how quickly a school system can get overwhelmed with too many students. But the externalities are vast: uneducated people can't participate in a meaningful way in democracy, they can't provide for themselves, they

¹⁹⁶ See *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> (last visited July 31, 2020) (finding that 73% of adults believe the Second Amendment guarantees the rights of Americans to own guns).

¹⁹⁷ See Tracey L. Meares & Vesla M. Weaver, *Abolish the Police? Is Policing a Public Good Gone Bad?*, BOS. REVIEW (Aug. 1, 2017), <http://bostonreview.net/podcast-law-justice/tracey-l-meares-vesla-m-weaver-abolish-police> (discussing how communities impacted by crime and violence may still prefer less or no police presence, due to the negative effects of policing); *Defund the Police*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/defund-the-police/> (last visited Aug. 7, 2020) (calling for a pivot from “massive spending on police that don't keep us safe to a massive investment in a shared vision of community safety that actually works.”).

¹⁹⁸ See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1174-84 (1996) (describing harms of “street nuisances,” including decreased public usage of public spaces, fears of communicable disease, and worsening of race relations); Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 373 (2000) (describing concerns raised by activists who favor increasing the legal regulation of behavior in public spaces)..

¹⁹⁹ See Friedman, *Unsheltered*, *supra* note __, at 11-14 (describing harms of enforcing regulations against the homeless).

become a burden on the rest of us.²⁰⁰ Still, even though education is considered an important part of government's work, we don't consider it government's first job, and in many jurisdictions it is a struggle to get government to spend the money the job requires.²⁰¹

There's every reason, therefore, to call into question whether economic arguments like public goods and externalities can justify the government having a monopoly on the protection function at least so long as it involves policing.

3. The True Meaning of Protection

Having said that, there is a very different way for government to provide protection, and in this sense government does have at least a quasi-monopoly. Government performs its protection function not by keeping the streets safe with cops, but by retaining the ultimate authority to define right and wrong conduct, and to punish violations. This power rests firmly on concerns about externalities, as Robert Nozick famously argued in *Anarchy, State, and Utopia*. Absent government power, "private and personal enforcement of one's rights . . . leads to feuds, to an endless series of acts of retaliation and exactions of compensation."²⁰²

In the classical model, government's role was to assure protection not so much by mobilized police forces, as by *passing laws*, and then controlling the remedies—including punishment—for violations. This is what Hobbes and Bentham, and Locke, and many others had in mind for the state's role in providing public safety.²⁰³ As Locke said, "political power" was the "RIGHT of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property."²⁰⁴ The very point of civil society, he stressed, was "setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may

²⁰⁰ See BURTON A. WEISBROD, EXTERNAL BENEFITS OF PUBLIC EDUCATION 80 (1964) ("The real *benefits* of education are the real *costs* of noneducation. . . . Inadequate education is associated with high unemployment. . . and low income. . . and these are likely to encourage crime."); Fennell, *supra* note __, at 8 ("The public consumption of [public] goods throughout the relevant community generates larger public benefits – an educated populace or a safe populace. . . . [T]heir absence, or low quality, will be felt as a "public bad."").

²⁰¹ See, e.g., Heise, *supra* note __, at 93-105 (describing litigation efforts which seek to force state governments to adequately fund public schools).

²⁰² Nozick, *supra* note __, at 11.

²⁰³ E.g. 1 BENTHAM, *supra* note __, at 143 (describing law and legislation as the only means through which humans have been able to create a durable form of security); HOBBS, *supra* note __, at 108 (stating that men join in a body politic to make laws for their security); LOCKE, *supra* note __, at § 89 (stating that by joining in society, individuals authorize the collective to make laws applicable to them for the good and safety of all);

²⁰⁴ LOCKE, *supra* note __, at § 3.

arise, and which every one of the society ought to obey.”²⁰⁵ The availability of these remedies would serve as a deterrent to others injuring us, and thus violating our basic rights. As Hobbes put it, laws were needed to “make known the common measure by which every man is to know what is his, and what another’s” and to compel observance because “it is no less, but much more necessary to prevent violence and rapine, than to punish the same when it is committed.”²⁰⁶

Although the policing aspect of the protection function is not, as we have seen, a public good, the lawmaking and enforcement function is. It is more like missile defense: a blanket that at least in theory covers us all. And to the extent it doesn’t actually work that way in practice, such as in violent communities, that’s a clear indicator of governmental failure.

This power can and could be delegated of course. Well into the 19th century, and in some places into the 20th, the very decision to prosecute some matters criminally rested in private hands.²⁰⁷ On a victim’s say-so the accused even could be committed to jail pending trial, unless bailed.²⁰⁸ Private counsel was retained to prosecute a case should a defendant be bound over.²⁰⁹ As late as the 1950s, twenty-eight states depended on private prosecution of misdemeanors.²¹⁰ Today there are many varieties of private dispute resolution, such as mediation or arbitration. Governments delegate to homeowners associations the power adopt enforceable rules, or defer to penalties imposed by a religious tribunal.²¹¹ “Restorative justice,” often means putting in private hands the imposition of remedies to resolve even what are public crimes.²¹²

²⁰⁵ LOCKE, *supra* note __, at § 90.

²⁰⁶ HOBBS, *supra* note __, at 112.

²⁰⁷ See Capers, *supra* note __, at 15–19 (describing how private prosecution was common from the colonial period through the Civil War); Steinberg, *supra* note __, at 586 (describing the commonality of private prosecution for misdemeanors in the 1950s and the influence of victims on the charging process).

²⁰⁸ STEINBERG, *supra* note __, at 39.

²⁰⁹ Steinberg, *supra* note __, at 577.

²¹⁰ Steinberg, *supra* note __, at 586.

²¹¹ Michael Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CINCINNATI L. REV. 839, 840-46 (2013) (describing the powers wielded by homeowners associations and the extent to which judges defer to their decisions); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177-181 (2007) (describing how courts enforce decisions made by Christian, Muslim, and Jewish tribunals on issues such as divorce, employment disputes, and contract claims).

²¹² See John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2272-75 (2018) (discussing retail companies’ use of restorative justice programs, instead of criminal prosecution, to address shoplifting); Nondiscrimination on the Basis of Sex in Education

At bottom, though, this authority only is delegated: the ultimate power to make and enforce law remains in government hands. As Nozick explains, nodding to the choice of people to use state mechanisms despite the existence of private forms, “[o]nly the state can enforce a judgment against the will of one of the parties.”²¹³

This classical understanding of what public safety means undercuts entirely the publicly-held notion about protection being job one of government. When people stand in front of flags and bunting and give speeches about government’s role in achieving public safety, they hardly are valorizing judges, let alone executioners and corrections officers. They mean the cops riding around in fast cars, carrying guns, doing regular policing. Yet these folks have very little role—aside from serving the occasional warrant, or supervising the attachment of property—in achieving a law-and-remedy based understanding of protection.

More fundamentally, once we reduce protection to the lawmaking function, that hardly sets it apart from almost everything else government does or could do in the name of assuring individual safety. Many regulatory efforts, whether around government benefits, or clean water and clean air, involve law establishing rights, entitlements, and obligations, which can be adjudicated. And violators of the rules are subject to remedies, be it injunction, damages, fines, or imprisonment. This is just how government works. It does not set protection apart.

E. Capacity and Capability

This does raise another way that protection might possibly be special, though, which relates to capacity. Government’s capacity to provide public safety simply may be limited. Is there then something about the protection function that makes government more capable of providing it, as opposed to the other elements of individual safety, whether along the lines of capacity or ability? Which is to say, it’s not clear it is most important, but it might be easiest to provide.

As for capacity, the answer seems simple: no. Providing government functions takes resources, but how those resources are allocated is simply a political decision about taxation and expenditure. In theory government could spend for food, or transportation, and not for protection. One might deem doing so foolish—apparently enough do that we accord primacy to

Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,100 (May 19, 2020) (to be codified at 34 C.F.R. 106) (permitting universities to use informal resolution processes, such as mediation, to resolve campus sexual assault complaints).

²¹³ Nozick, *supra* note ___, at 14.

protection over food, housing, or health care. But that's purely a function of aggregated preferences of the electorate, something we take up in Part V.

The same is true of capability. It's difficult to see what makes the state uniquely capable of providing the protection function. Other than lawmaking, much of it has been provided privately at times. It's true that over time we moved to a system of public provision, but that doesn't mean the state is particularly good at protection, as opposed to other safety functions. If anything, we are living in a time of ample evidence that the protection function is severely broken.

There assuredly are those who prefer to rely on private institutions for some of the other functions of public safety, but it's hard to make a persuasive argument that the state is unsuited to those tasks vis a vis protection, or that in fact the private provision of them is successful. There's a real strain of antipathy among some in the United States to "big government" and a prevalent sense that help should come in the form of volunteerism and private charity. George H. W. Bush saw "one thousand points of light" — "all the community organizations that are spread like stars throughout the Nation, doing good."²¹⁴ This reflects a strong ideological strain that believes private philanthropy is the answer to want, not government intervention.

Although charitable purpose and performance are altogether commendable, as an argument about capability this one has real difficulties. Private philanthropy is much too patchwork and dependent on happenstance to be the answer to basic necessity.²¹⁵ Some givers may want to feed the hungry or work in a soup kitchen, others may prefer their name on a plaque outside an academic building. No one is coordinating those gifts, and seeing that people don't fall through the cracks—unless it is government, at least in some of the areas. Besides, in terms of human dignity there's a significant difference between being forced to accept charity, or invited to accept an "entitlement" that is yours. Charity undoubtedly makes the giver feel good, and recipients usually are grateful. But for the truly needy, it's unclear that gratitude ought to be demanded (even if always offered).

F. Dependence

There's one final argument that might support an obligation on government to provide protection, but not other elements of safety: that of

²¹⁴ *Inaugural Address of George Bush*, AVALON PROJECT, https://avalon.law.yale.edu/20th_century/bush.asp (last visited Aug. 5, 2020)

²¹⁵ See Mike Konczal, *The Voluntarism Fantasy*, DEMOCRACY J., <https://democracyjournal.org/magazine/32/the-voluntarism-fantasy> (last visited Aug. 5, 2020) (arguing for the necessity of public social insurance programs and documenting decreases in voluntary charity during economic crises).

dependence. The idea here is that government can't just promise to do something, then drop the ball. This argument, ironically, finds root in *DeShaney*. As we've seen, the Supreme Court denied any affirmative obligation on government to watch out for Joshua. However, the majority justices acknowledged precedents holding that if Joshua had been a dependent of the government, then the obligation would have arisen to care for him. The classic example—albeit one honored too often in the breach, and horrifically during this pandemic—is that if a person is in carceral custody then the government is obliged to provide sufficient medical care.²¹⁶ The same is true of other institutions such as for the mentally disabled, foster care, and other instances in which government plays a custodial role. As the Court puts it, these cases “stand . . . for the proposition that when the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”²¹⁷

Perhaps then, *DeShaney*'s factual holding to one side, the oft-stated role of the state in protecting people has created some sort of dependency to do the job. Sure, some people have purchased guns, and intend to defend their homes against intruders. But many of us relied on the government doing its job to protect our person and property.

But if there is something to dependence, then surely the government can create reliance interests in ways other than by taking people into custody. The government promises to do lots of things for us, and in undertaking to do these things, we often give up our ability to provide for ourselves. A simple clear example is undertaking to provide potable drinking water, which the government has promised many people and failed them, such as in Flint. Education is another obvious example: all fifty states not only promise to provide it, they mandate that students partake (and again too often failed).

It seems only appropriate that if government makes a solemn promise to provide us with things essential to our safety, and creates reliance thereby, then the government must make good on its promise. Perhaps with warning from the government we have to take back that responsibility and once again

²¹⁶ See *DeShaney*, 489 U.S. at 198-202 (discussing cases such as *Estelle v. Gamble*, *Youngberg v. Romero*, and *Revere v. Massachusetts General Hospital*). But see Roni Caryn Rabin, *Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?*, N.Y. TIMES (Nov. 30, 2020) <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html> (explaining that federal guidelines do not list inmates as a high-priority group for receiving COVID-19 immunizations, even though some of the largest outbreaks have occurred in prisons); *Barnes v. Ahlman*, 140 S. Ct. 2620, 2621-22 (2020) (Sotomayor, J., dissenting) (detailing conditions at a jail during a COVID-19 outbreak, including reports that inmates were denied COVID-19 tests despite being symptomatic).

²¹⁷ *DeShaney*, 489 U.S. at 199-200.

become self-sufficient. In the face of a promise, though, and reliance, the government has got to perform.

If this is the case, then many functions beyond protection fall on the dependence side of the line. Water, as we have seen. Clean air. Education for sure. Perhaps soon health care. Protection surely is not special in this regard.

* * *

We've looked at a set of rationales for why protection might be deemed the first duty of government, but not many other aspects of individual safety. Although some of them do justify including protection as a critical part of public safety, what's telling is that they don't necessarily exclude many other elements of individual safety, nor particularly privilege the protection function.

PART V. OBSTACLES

Credit where credit is due. In a country of over 300 million people, with a complex interlocking (but sometimes competing) governmental structure, we have provided the means for people to be and feel safe in many ways. Prior to the pandemic, and hopefully after it recedes, the majority of us are fed, and protected from all but the most random acts of violence and serious crime. We sleep under roofs, our kids go to relatively decent schools, and we lead ordinary lives. Nothing here is meant to minimize what an extraordinary achievement that alone represents.

But though that may well be the norm, there is, as we saw from Part III, substantial deviation as well. Far too many people—literally millions of people, in this wealthy country—are not safe, in too many ways. They suffer, they starve, they live on the street, they are without education, they cannot find work, they struggle to get by, they become ill and don't have care, not because we couldn't help—but because we don't.

The question this final Part takes up is why as a society we don't do better, what are the sorts of obstacles we face to achieving public safety for those who do not currently experience safe lives. Unfortunately, there's no magic bullet, no set of shazam recommendations to fix this. Rather, there are a set of difficult-to-overcome obstacles that keep us from stepping up our game. Some are understandable, some less so, but they exist nonetheless. Which is not to say change is impossible—but it is going to be immeasurably difficult, and perhaps incremental improvement is all we can hope for. This Part is about facing reality with eyes wide open.

A. *Our Elderly Constitution*

Begin with our Constitution, a document written so long ago that it just didn't occur to put positive or affirmative social rights in, although that's what many modern constitutions do.²¹⁸ It might be education, or meeting the most basic needs of the destitute, or health care.²¹⁹ Whether in South Africa, or India, or in those of the United States that guarantee a public education, these provisions do exist.²²⁰

Just because something is guaranteed in a constitution does not necessarily make it so. It's hard to look at places that have affirmative social rights and think, yes, they've solved that problem, cracked that nut. Too often, affirmative rights are honored at least in part—sometimes in significant part—in the breach.²²¹

What constitutionalizing accomplishes, though, is to facilitate a dialogue—or maybe just a power struggle—that gets courts into the game of demanding that government do better.²²² Some states' experience with public education is just one example.²²³ The same is true in countries that have far fewer resources than we do, but through this sort of constitutional dialogue have done a plausible job of assuring basic public services essential

²¹⁸ See Versteed & Zackin, *supra* note X, at 1681-1682 (“No less than 87 percent of all current national constitutions contain at least one explicit socioeconomic right, and over half contain at least three such provisions.”).

²¹⁹ Versteed & Zackin, *supra* note X, at 1681 (most national constitutions “contain explicit socioeconomic rights, such as the right to education, health care, housing, social security, work, workplace safety, water, and food”).

²²⁰ See Versteed & Zackin, *supra* note X (stating that the US constitution's absence of positive rights distinguishes it from the constitutions of India, South Africa, and most US states).

²²¹ Despite South Africa's justiciable right to education, the World Bank reports poor educational quality and unequal educational opportunities in the country and identifies these shortcomings as contributors to wealth inequality. See S. AFR. CONST., ch. 2, §29, 1996; THE WORLD BANK, OVERCOMING POVERTY AND INEQUALITY IN SOUTH AFRICA: AN ASSESSMENT OF DRIVERS, CONSTRAINTS, AND OPPORTUNITIES (2018); All India Reserve Bank Employees' Ass'n v. Reserve Bank India, AIR 1966 SC 305 (India) (observing a disconnect between India's constitutionally guaranteed living wage and the reality of meager and insufficient wages in the country).

²²² See Usman, *supra* note X, at 1529 (observing that judicial interaction with positive rights manifests as increased constitutional dialogue with the legislature); see, e.g., Bateup, *supra* note X, at 3 (stating that “aggressive” actions of Canada's courts resulted in the federal government redefining marriage to include LGBT partnerships, just one example of Canada's robust constitutional dialogue).

²²³ See Heise, *supra* note X (discussing school funding in states like Texas and Massachusetts).

to human safety.²²⁴ Having things said in a Constitution also plays an important expressive function, in terms of empowering social movements, legislators, and others who seek to promote government action.²²⁵

On these terms, our Constitution fails utterly.²²⁶ It's hard to imagine a constitution written today—even here in these United States—that would not have at least some nod to some of these aspects of basic safety such as education or meeting the needs of the truly destitute.

B. *The Federalism Shuffle*

There's another aspect of the Constitution that's largely been neglected so far and that also undercuts our ability to be safe, which is our federal system. Under our system of government, responsibilities are divided between the national and state governments.²²⁷ And in truth (though “federalism” often remains the descriptor), much of the division includes local governments as well.²²⁸

Too much can be made of this division with regard to the topic of public safety, however. For example, although “policing” often is treated as the quintessential function of local government, the fact is the national government subsidizes it, enforces constitutional safeguards around it, and has ample power to do almost anything necessary to clean up policing's act.²²⁹ So too could the states, as the raft of policing regulation now being

²²⁴ See, e.g. McGraw, *supra* note X, at 183-184 (describing Argentinian Court of Appeals decision requiring provision of clean water); Stripati, *supra* note X, at 110 (describing how Indian Supreme Court imposed judicially enforceable obligation to provide emergency medical treatment)

²²⁵ See generally Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: the Case of the de facto ERA*, 94 Cal. L. Rev. 1323 (2006)

²²⁶ See MacNaughton, *supra* note X, at 752 (arguing that our constitution of negative rights has “deformed the development of the law and has led judges to rely on formalistic logic games rather than real principles of justice”).

²²⁷ See U.S. CONST. art. I, § 8 (enumerating the powers of the legislative branch); *id.* amend. X (delegating to state governments all powers not enumerated in the Constitution).

²²⁸ See THE FEDERALIST No. 39 (James Madison) (Michael A. Genovese ed., 2009) (explaining relationship between national and state power); Richard Briffault, *Our Localism—Part I: The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6–10 (1990) (describing the “state-local relationship”).

²²⁹ See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”). See generally *Civil Rights Division*, U.S. DEPT. OF JUST., <https://civilrights.justice.gov> (last

adopted indicates.²³⁰ And the national government engages in plenty of “protection” on its own—including in ways that are deeply deserving of criticism.²³¹

Similar arguments could be made about many other aspects of safety. Education is a state and local responsibility, but the feds do plenty here too and could do more.²³² The national government deals with housing availability, but so too the states and localities.²³³ “Our Federalism” is a marble cake of mixed responsibilities, and to the extent the marbling is off, it could simply be adjusted.²³⁴

The problem, though, is that federalism often used as a dodge, a shell game to avoid addressing a problem at any particular level of government, and instead point fingers at another level for failing to take action. For people in need, it’s three-card monte, and picking the right card to solve the problem often is just too elusive. Witness the pandemic; the federal government said it was the states’ responsibility, and vice versa.²³⁵ Similarly, on the woes of

visited Feb. 2, 2021) (outlining ways in which the Civil Rights Division may help protect people from discrimination on various grounds); *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, BUREAU OF JUSTICE ASSISTANCE, <https://bja.ojp.gov/program/jag/overview> (last visited Feb. 1, 2021). See also Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Power of Local Law Enforcement* (2021) (manuscript in preparation).

²³⁰ See *supra* note ___ (describing recent legislative efforts).

²³¹ See, e.g., Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (codified as amended at 42 U.S.C. 5121 et seq.) (detailing the scope of authority for the Federal Emergency Management Agency (FEMA) and ways in which FEMA may help mitigate crises). *But see, e.g.*, George Bach, *Federalism and the State Police Power: Why Immigration and Customs Enforcement Must Stay away from State Courthouses*, 54 WILLAMETTE L. REV. 323, 323 (2018) (describing how Trump-administration policies resulted in ICE “agents appear[ing] at state and local courthouses to detain undocumented immigrants as they arrive for court”).]

²³² See Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 965-66, 969-70 (2015) (describing the federal government’s role in establishing education standards and addressing achievement gaps, despite providing only 10.2% of education budgets).

²³³ See Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1215-18 (2019) (explaining how the federal government and local agencies share responsibility for operating public housing).

²³⁴ See Morton Grodzins, *The Federal System*, in GOALS FOR AMERICANS: COMPRISING THE REPORT OF THE PRESIDENT’S COMMISSION ON NATIONAL GOALS AND CHAPTERS SUBMITTED FOR THE CONSIDERATION OF THE COMMISSION 265 (1960) (“As colors are mixed in the marble cake, so functions are mixed in the American federal system.”).

²³⁵ See, e.g., Michael D. Shear et al., *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (Jul. 18, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html> (describing how the federal government and state governments clashed over who should be responsible for coordinating a response to the COVID-19 pandemic).

the New York subway system.²³⁶ So long as the system is there to be played, it will be, and all the worse for those who really need government's help.²³⁷

C *The Opt-Out Problem*

It's not just what our Constitution fails to provide, though: it's also what it allows. In critical areas, we permit those who are able to opt out of government services, or enhance what the government offers up, in ways that suck the energy out of collective efforts to do better. Were it not for this, our civic debates about the various elements of public safety might look very different.

Education is a prime example. *Brown v. Board of Education* exacerbated white flight by those determined to avoid busing or sending their children to desegregated schools.²³⁸ White flight gutted the tax base for many public schools; people with money either enrolled their kids in private schools or moved to suburbs and helped fund affluent school districts.²³⁹ The result is that those who can pay for their kids' fine educations get them.²⁴⁰ And because some people can ensure their kids get a good education, the incentive to see that others also do is deeply diminished.

It's not just education. It's health care, and even basic safety from crime and violence—the heart of the protection function. People live in gated communities, or geographically segregated communities where they can take charge of their own personal safety.²⁴¹ They drive to medical parks full of competent and available doctors, whose fees are covered by adequate if not ample insurance.²⁴²

²³⁶ See, e.g., Marc Santora & Emma G. Fitzsimmons, *Fight Over New York Subways Is as Much Political as It Is Financial*, N.Y. TIMES (Jul. 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/subway-delays-mta-lhota.html> (describing disputes between city and state leadership over funding the subway system).

²³⁷ See Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 DAEDALUS 25, 26 (1980) (noting that without a stronger sense of collective responsibility, “American institutional structure makes this kind of game-playing all too easy.”).

²³⁸ Orlich, *supra* note X, at 631 (explaining that the impacts of *Brown* included white flight from cities and busing policies); Ryan, *supra* note X, at 282 (arguing “desegregation plans themselves often added to existing patterns of white flight.”) (citing David J. Armor, *Forced Justice: School Desegregation and the Law 199-201* (1995)).

²³⁹ Beiser, *supra* note X, at 68.

²⁴⁰ See Ryan, *supra* note X, at 272-275 (providing data demonstrating that suburban students have substantially better educational outcomes than urban students).

²⁴¹ See Owens, *supra* note X, at 1129 (explaining that many gated communities privatize “police protection and communal services such as schools, recreation, and entertainment”).

²⁴² See generally, Dickman, *supra* note X, at 1431 (stating that the wealthiest Americans have access to substantially better healthcare, living on average ten to fifteen years longer than the poorest Americans).

This is not to say that allowing opt-out is wrong, or that it is remotely plausible to see this changing. Walker and Loader suggest we might do better to consider these collective goods, and foster them as such.²⁴³ But there's not much in our Constitution that's likely to allow us to limit private choices like these.²⁴⁴ So long as those who can are able to purchase what they need to be safe, the collective will to do better for others necessarily will falter.

D. *Self-Interest*

This points directly to the most obvious cause of our failing to ensure all are safe, which is self-interest. There's nothing necessarily wrong with self-interest, either; it makes the world go 'round.²⁴⁵ But our concern for ourselves can blind us to what is needed by other people—even if in helping others we might help ourselves, or helping is simply the right thing to do.

Sometimes self-interest arises in zero-sum situations around safety itself. As Justice Stevens said, dissenting in the gun rights case *McDonald v. Chicago*: “Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence.”²⁴⁶ There's a homeless person sleeping on a bench near your home. You don't feel safe. So, you call the police to remove him. Now he's not safe.²⁴⁷ There's scarcity—be it education dollars, or food, or police—and if they get it, you don't. Or at least it feels that way. To the extent safety either is, or

²⁴³ Loader & Walker, *supra* note __, at 26 (arguing that “security . . . [is] an irreducibly social accomplishment, and insecurity . . . [is] an irreducibly social failure”).

²⁴⁴ See, e.g., *Pierce*, 268 U.S. at 534-535 (holding that it's unconstitutional for the state to prevent children from attending private religious schools); *Meyer*, 262 U.S. at 400 (holding that is unconstitutional for the state to criminalize foreign language instruction at parochial schools).

²⁴⁵ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), (“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest . . .”).

²⁴⁶ *McDonald v. Chicago*, 561 U.W. 742, 891 (2010) (Stevens, J., dissenting).

²⁴⁷ Cf. Gwynne Hogan, “Please Get These Men Out”: Upper West Siders Campaign to Eject Homeless Residents, *Gothamist* (Aug. 7, 2020), https://gothamist.com/news/please-get-these-men-out-upper-west-siders-campaign-to-eject-homeless-residents?fbclid=IwAR3xbxr4v5MU4UZK-ULG6U2Wi4Telz8AuU5_qaZ03fhNbUkV-dwld7Qc3DM (reporting that the Facebook group “Upper West Siders for Safer Streets” is attempting to rid its neighborhood of temporary homeless shelters).

feels as though it is, a choice of yours over mine, we're simply not going to make easy progress.

Even if one's safety is not truly at risk, the perception of being unsafe can drive outcomes—although there reasonably ought to be limits here. To some degree perceptions surely matter; even if people are safe, a perception of a lack of safety renders them insecure. Still, there ought to be limits on the degree that perception drives government response, particularly when that perception departs significantly from reality. Apparently, huge numbers of our compatriots are made to feel unsafe because of the presence of immigrants, helped along by a fearmongering president.²⁴⁸ But if the data does not support the perception, we ought not to tolerate it.²⁴⁹ The same is true of constant calls to 911 about people doing nothing other than Living While Black.²⁵⁰ Again, actions taken to make some feel safe can cause others to feel, or actually be, unsafe. Unfortunately, our political process is not designed with adequate guardrails here.

Often, though, it's not safety v. safety; it's safety v. money. You're not safe because I don't want to devote my resources to seeing to it that you are safe. To be clear, money won't solve every problem. But there are going to be plenty of situations—housing and education are two obvious examples—in which more money could make a difference. (And before you cue up the lecture about dollars not being tantamount to educational outcomes, and how the United States spends more than other countries for less good performance, consider equalizing the resources that the country's richest school district spends to failing schools in Detroit, and see if there is progress.²⁵¹) The haves have and the have nots haven't, and we'd be net safer if the haves were willing to help out more, but they aren't. Which doesn't mean they have to. They are perfectly entitled to insist that it's their money and they need one more fancy meal or vacation or house. So long as they do, though, we can expect the status quo to stick.

²⁴⁸ See Gallup Polls, Immigration, <https://news.gallup.com/poll/1660/immigration.aspx> (reporting that as of 2019, 42% of Americans believe that immigrants have a negative impact on crime rates).

²⁴⁹ See Anti-Defamation League, Myths and Facts About Immigrants and Immigration (2019), <https://www.adl.org/media/6950/download> (“... [I]mmigrants ... are less likely than native-born citizens to commit crimes.”).

²⁵⁰ See P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018, 8:00 AM), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> (listing mundane activities by Black individuals that have prompted others to call the police, such as mowing the wrong lawn, selling bottled water, or golfing).

²⁵¹ See *Gary B.*, 957 F.3d at 616 (describing abysmal conditions in some of Detroit's public schools); *supra* notes X–X (discussing Gary B case).

E. *Othering, and the American Dilemma*

Self-interest is fueled further by a clan mentality that excludes caring about the “other,” exacerbated here by America’s longstanding blot: race. People at bottom are an understandable mixture of self-interest and altruism.²⁵² But any impulse to generosity seems to get strained the more distant people appear from us, and that includes cultural, racial, ethnic, and class differences. Voters, for example, are more supportive of welfare when the recipients are of their race, and less so if of another race.²⁵³ In particular, whites are less apt to support welfare benefits if they perceive the recipients to be Black.²⁵⁴

What is clear is that race consistently has been an obstacle to assuring full safety for everyone in the United States. Its roots run deep into slavery, through Redemption, and Jim Crow, and persist to the present day.²⁵⁵ Whatever may be the way each of us would work out our altruism-self-interest calculus in the abstract, it gets distorted horribly around race. The face of insecurity that ushered George Bush into office was Willie Horton, a Black man released from prison on furlough who went on to commit serious crimes, as though one person for an entire race spoke.²⁵⁶ The face of cutting welfare funds was the “welfare queens” – all too often portrayed as Black women – who took advantage of benefits programs to avoid work.²⁵⁷ Today,

²⁵² See KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM* 7 (Princeton Univ. Press, 1996) (defining normal human behavior as existing on the middle of a self-interest to altruism continuum); Kristen Renwick Monroe, *A Fat Lady in a Corset: Altruism and Social Theory*, 38 AM. J. POL. SCI. 861, 875 (1994) (human psyche is a “mixture between altruism and self-interest,” with the relative proportions varying across cultures).

²⁵³ See Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the US Have a European-Style Welfare State?* 30 (Harv. Inst. of Econ. Research, Discussion Paper No. 1933, 2001) (observing that people react negatively to those of another race receiving welfare, but positively when those of their own race receive welfare).

²⁵⁴ Allison Harell, Stuart Soroka & Shanto Iyengar, *Race, Prejudice, and Attitudes Toward Redistribution: A Comparative Experimental Approach* (“When whites associate welfare benefits with race (by identifying beneficiaries as black), they tend to be less generous toward welfare recipients and to view them as less deserving.”).

²⁵⁵ See MICHELLE ALEXANDER & CORNEL WEST, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New Press 2012) (oppression of Black people in America has manifested as slavery, Jim Crow laws, and now mass incarceration); IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (Bold Type Books 2017) (tracking racist ideology from the colonial era to slavery, Jim Crow and the present day)

²⁵⁶ See DOUG ROSSINOW, *THE REAGAN ERA: A HISTORY OF THE 1980s*, 245 (2015) (describing the Willie Horton controversy as “the burning core” of George H.W. Bush’s 1988 presidential campaign).

²⁵⁷ See *supra* note ___ and accompanying text.

immigrants, and Black and brown folks, are targets of a renaissance of bigotry, racism, and white nationalism.²⁵⁸

In short, bigotry contributes to our reluctance to step up and ensure people have what they need. And try as we might to get beyond that, we don't seem to be able to.

F. Social Disagreement Writ Large

Claims of self-interest are complicated by ideology. Many people resist providing more to others out of a set of views about government's proper role ought to be in assuring individual safety.²⁵⁹ What's tricky is that when ideology and self-interest run together, it can be difficult to tease one out from the other. Does principle properly restrict us from taking steps that would indeed make others safer? Or does principle simply a justification for not doing what we don't want to do anyway?

Some people genuinely dispute what safety entails; protection is in, but after that it breaks down. Others disagree on the nature of individual responsibility. People should provide for themselves. Pull themselves up by

²⁵⁸ Anti-Defamation League, *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.* (2018), <https://www.adl.org/media/12249/download>; Reverend Al Sharpton, *Eulogy for George Floyd* (2020), <https://www.rev.com/blog/transcripts/reverend-al-sharpton-george-floyd-funeral-eulogy-transcript-june-9> (contextualizing the murder of George Floyd with other violent attacks on Black Americans by police).

²⁵⁹ See REBECCA E. KLATCH, *WOMEN OF THE NEW RIGHT* 104 (Temple Univ. Press, 1987) (noting that some conservatives oppose welfare due to a belief that "the government has expanded dangerously beyond the limited role set forth in the constitution"); BALLARD C. CAMPBELL, *THE GROWTH OF AMERICAN GOVERNMENT* 286 (Ind. Univ. Press, 2015) (stating that concerns about the government's proper role and size have been obstacles to expansions to social services throughout American history).

their bootstraps.²⁶⁰ (To which others respond: it's not a handout, it's a hand up. People need help getting on their feet.²⁶¹)

There is a real strain of antipathy toward “big government.” Many people believe we are better off with a leaner state.²⁶² Part of this is built from perceptions of state incompetence: money given to bloated government is misused and wasted.²⁶³ Part derives from the view that with a larger state comes infringement on our liberty, and the fear of tyranny.²⁶⁴ Whichever:

²⁶⁰ See Noliwe M. Rooks, *The Myth of Bootstrapping*, TIME (Sept. 7, 2012), <https://ideas.time.com/2012/09/07/the-myth-of-bootstrapping/> (“The concept of bootstrapping dates back to at least the 1890s, when Horatio Alger wrote novels about boys who worked hard and rose up the social ladder from poverty.”); see, e.g., HORATIO ALGER, *RAGGED DICK* (1868) (“In this free country poverty in early life is no bar to a man’s advancement . . . Save your money, my lad, buy books, and determine to be somebody.”); Juan Williams, *Reagan, the South and Civil Rights*, NPR (June 10, 2004), <https://www.npr.org/templates/story/story.php?storyId=1953700> (“Even when [Reagan] was characterizing poor women as welfare queens driving around in pink Cadillacs, he said it was a merely matter of encouraging people to pull themselves up by the bootstraps.”); Bill Clinton, *Clinton’s Speech Accepting the Democratic Nomination for President*, N.Y. TIMES (Aug. 30, 1996), <https://www.nytimes.com/1996/08/30/us/clinton-s-speech-accepting-the-democratic-nomination-for-president.html> (positing that welfare-to-work requirements give Americans the chance to “take personal responsibility for themselves”).

²⁶¹ See, e.g., Derek Thompson, *Busting the Myth of ‘Welfare Makes People Lazy’*, THE ATLANTIC (Mar. 8, 2018), <https://www.theatlantic.com/business/archive/2018/03/welfare-childhood/555119/> (arguing that cash assistance isn’t a handout, but rather a “critical investment in the health and future careers of low-income kids”); Randi Weingarten, *A Hand Up Is Not a Handout*, HUFF POST (Apr. 18, 2014), https://www.huffpost.com/entry/a-hand-up-is-not-a-handou_b_4798243 (arguing that government assistance programs are necessary for struggling Americans to get on their feet).

²⁶² See Scott Clement, *People Want Smaller Government – And They Think Mitt Romney Does Too*, WASH. POST, (Aug. 27, 2012), <https://www.washingtonpost.com/news/the-fix/wp/2012/08/27/people-want-smaller-government-and-they-think-mitt-romney-does-too/> (citing poll data that over half of Americans think the US should have “smaller government with fewer services”); Jocelyn Kiley, *In Search of Libertarians*, PEW RESEARCH CENTER (Aug. 25, 2014), <https://www.pewresearch.org/fact-tank/2014/08/25/in-search-of-libertarians/> (reporting that within all income ranges, some individuals believe in “limiting the role of government”).

²⁶³ See AMY LERMAN, *GOOD ENOUGH FOR GOVERNMENT WORK* (2019) (“The tendency of Americans to associate ‘public’ with ineffective, inefficient, and low-quality services is a central feature of our modern political culture.”).

²⁶⁴ See John Stuart Mill, *On Liberty*, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT (Everyman’s Library Edition, 1950) (arguing that a government with excessive and centralized power can become tyrannical”); Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protest and Anti-Tax Rhetoric in America*, 50 BUFFALO L. REV. 819, 926 (2002) (explaining the anti-government belief that “every tax contains the potential to impinge on liberty” and “every tax is a symbol of potential tyranny.”).

help, if it comes at all, should come in the form of volunteerism and private charity.²⁶⁵

Coming full circle, there are those who have ideological disagreement with fueling the state through taxation and its redistributive effects. Part of this is about the size of the state. But part is simply about the propriety of the state taking any more from us than is necessary to keep minimal shop open.²⁶⁶ Of course, what's minimal and what's necessary are what we've been discussing all along. (And some just don't want to give up their money, period.)

The point is that absent a way to bring these disagreements to some sort of consensus, we get locked up on providing for individual safety. Maybe the reason protection wins out simply is because most of us see ourselves as needing it, as opposed to the other elements of safety and security.

G. Criminalization

“Locked up” is probably the right expression for where we are, because in the face of disagreement writ large over the role of government, the one thing people seem all too able to agree upon is cranking up the machinery of criminal justice to address all our problems.²⁶⁷ That's ironic, to say the least. Because criminalization often fails to solve the problems to which it is addressed, but is a leading cause of government harming individuals.²⁶⁸

The criminal law is a sledgehammer brought to problems, many of which require scalpels, or some other more discerning tool. Whenever something new and troubling raises its head, we are inclined to think “there should be a law against it.”²⁶⁹ And whenever we can't get a handle on

²⁶⁵ See MARTIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* (1994) (arguing that a social system relying on private charity organizations creates more social good than a welfare state); see also *supra* note X (on President George Bush's “thousand points of light.”)

²⁶⁶ See ROBERT NOZICK, *supra* note ___ (arguing for a minimal, night-watchman state responsible only for narrow and necessary protective functions).

²⁶⁷ See RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 110-11 (2019) (explaining that it is more politically beneficial for elected officials to react to crime punitively, as opposed to addressing the root causes of crime).

²⁶⁸ DeVeaux, *supra* note X, at 257 (“The experience of being locked in a cage has a psychological effect upon everyone made to endure it.”); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, 23-24 (Marc Mauer and Meda Chesney-Lind, eds., 2002) (describing non-carceral harms of criminalization, including ineligibility for food stamps and housing assistance).

²⁶⁹ See Alexy, *supra* note X, at 41 (“describing how Attorney General Edwin Meese noted that Congress tends to ‘pass a law whether it's necessary or not, if it's politically salient.’”).

something that feels threatening, we seem to pass laws simply cranking up the penalties for its commission.²⁷⁰ Our fetish for overcriminalization represents a deep retributive streak in our society. It also represents a tendency to seize onto simplistic, and superficially costless, solutions.²⁷¹

Fixing things like homelessness and substance abuse, and addressing mental illness, can be complicated and messy. It requires programs and training and hard work. Passing a law condemning the conduct that disturbs looks easy by comparison. In truth, though, the criminal law not only is a blunt instrument; often it is misplaced.

The *sine qua non* of the criminal law is culpability.²⁷² People are to be punished because they have done wrong. There are plenty of laws that criminalize without any bad intent.²⁷³ (Like sleeping or asking for money in public places.²⁷⁴) But that's the problem. People who are homeless, or who are addicted to drugs, often did not choose to be in that situation, and aren't responsible for it in any meaningful way. Yet, we toss them in jail by the thousands.²⁷⁵ It's not clear that is making anyone safer. Eventually they come out, still homeless, and still suffering from mental disabilities.

Even if the power's there, the truth is that the criminal law's *not* a cheap solution to problems of public safety. It's hugely costly. Police and

²⁷⁰ See JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127 (2017) (criminal punishments have dramatically increased despite stagnant crime severity); JONATHAN SIMON, MASS INCARCERATION: FROM SOCIAL POLICY TO SOCIAL PROBLEM 24-25 (2012) (politicians treated sentencing increases as a “generic and promising solution to the ubiquitous social problems facing California”).

²⁷¹ And possibly illegitimate ones. Randy Barnett and Evan Bernick argue that often the use of the criminal law exceeds the police power because it is arbitrary and beyond the bounds of harm. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004).

²⁷² See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L. J. 1533 (1997) (“Under the traditional, paradigmatic conception of the criminal law, the commission of a wrongful act must be accompanied by a culpable mental state . . .”).

²⁷³ See James R. Copland & Rafael A. Mangual, *Overcriminalizing America: An Overview and Model Legislation for States*, MANHATTAN INSTITUTE (Aug. 8, 2018), <https://www.manhattan-institute.org/html/overcriminalizing-america-overview-and-model-legislation-states-11399.html#notes> (arguing that to curb overcriminalization, criminal intent should be an element of regulatory crimes).

²⁷⁴ See National Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* 7-8 (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf (reporting that 27% of US cities prohibit sleeping in particular public places, and 74% of cities criminalize begging in particular public places).

²⁷⁵ See Barry Friedman, *Unsheltered*, *supra* note ___ at 18 (2020) (describing the widespread incarceration of the US' homeless population).

jails and prosecutors and judges and prisons are tremendously expensive.²⁷⁶ Laws like the First Step Act make it appear as though we're tempering our get-tough, retributive urges, when in fact much of the current de-incarceration movement is driven not by grace but by the fisc.²⁷⁷

To be clear, the criminal law has its place—and may even be underutilized at times. One such area is around conduct like cyber-stalking, which creates real harm, and yet is not taken seriously by many.²⁷⁸ The criminal law both serves an expressive function—making clear that threatened harms to vulnerable groups matters—and can ameliorate the problem.

But too often we use the carceral state to little good: locking up people (and releasing them) (and locking them up again) without really addressing conduct like homelessness or addiction that seems to make the rest of us feel unsafe. It is making those people unsafe as well.²⁷⁹

H. *Social Disagreement Writ Small*

The last thing we do, is we push our problems down to a level where we don't have to look at—or supervise—whatever is done to drive them out of sight. Oftentimes, the failure of public safety occurs not at the sort of high level of policy and direction that we have been discussing, but down on the ground, at the point where rubber hits the road.²⁸⁰ Where funds are disbursed

²⁷⁶ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1287 (2005) (“In the 1990s, get-tough policies led state spending on corrections to double from \$17.2 billion to almost \$35 billion.”);

Lewis & Lockwood, *supra* note X (“The Bureau of Justice Statistics reckons that the United States spends more than \$80 billion each year to keep roughly 2.3 million people behind bars.”).

²⁷⁷ See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277 (2005) (arguing that cost of incarceration and tight budgets have caused rethinking of carceral policies); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 620 (2012) (observing that many reforms of the criminal justice system have been driven by budgetary concerns).

²⁷⁸ See Franks, *supra* note __, at 229 (noting that “[t]he virtual world has not only reproduced the various forms of discrimination that exist in the physical world, but has allowed them to flourish in ways that would not be possible in the physical world,” and describing the harm particularly upon women); see generally CITRON, *supra* note __ (describing cyberstalking, the current laws that may hold perpetrators accountable, and suggesting legal reform).

²⁷⁹ See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 931-934 (2009) (describing prison conditions as cruel, degrading, harmful, and inhumane).

²⁸⁰ See KENNETH CULP DAVIS, *POLICE DISCRETION* (1975) (detailing discretion police exercise on the street and how it is used); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE – A PRELIMINARY INQUIRY* 9 (1969) (showing that the administrative-heavy state has come to rely on “billions” of discretionary decisions).

to a particular claimant, or not. Where the decision is made to toss that homeless person off the bench. Call this social disagreement writ small. In contrast to disagreements about policy, these are disagreements about implementation.

The two forms of social disagreement often are related. What can't be resolved at the top rolls (or gets pushed) down to the bottom. If something is too complex or contested for us to work out, make it someone else's problem. Leaving things undecided means that when the need for a decision arises, it falls into the hands of someone whose judgment may be lacking, or who lacks a good set of options.²⁸¹

Just as social disagreement writ large renders people unsafe, so too with social disagreement writ small. People aren't safe because, even though the apparatus of government is in place, it fails them in the here and now. That homeless person is still camped out on your stoop. Or they're out on the street because some shelter employee denies them entry for all the wrong reasons. A cop answers a call and botches it badly, and someone who should have been protected ends up injured, or even killed.²⁸²

When matters are not resolved clearly up top, people are at the whim of low-level functionaries, who may or may not be up to the job. There's going to be a certain amount of incompetence or confusion or sheer truculence in any system. Things go wrong.

Although these may seem nothing but the cumulative random acts of low-level bureaucratic employees, there are systemic causes. One of them is discretion. It's just hard to get discretion right.²⁸³ On the one hand, low-level

²⁸¹ See Cass Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1907 (noting that the deferring decisions imposes "burdens on subsequent decisionmakers, in a way that might lead to errors and arbitrariness," increasing unpredictability, lack of transparency and costs); Paul J. Jr. Larkin, *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 740 (2013) (noting that greater specialization among different agencies at the lower level of decision-making increases arbitrary overcriminalization).

²⁸² See, e.g., David Fitzpatrick & Drew Griffin, *Video Shows Albuquerque Police Killing Homeless Man*, CNN (June 22, 2014 12:05 PM), <https://www.cnn.com/2014/06/20/us/albuquerque-police-investigation/index.html> (shooting of mentally ill homeless man camping outside "because city homeless shelters were closed" was ruled a homicide); *US Police Shoot Homeless Man Dead in Los Angeles*, BBC NEWS, Mar. 2, 2015, <https://www.bbc.com/news/world-us-canada-31688942> (reporting police tasing and shooting of mentally ill homeless man); Ian Lovett, *California: Police Charged in Killing*, N.Y. TIMES, Sept. 22, 2011, <https://www.nytimes.com/2011/09/22/us/california-police-charged-in-killing.html?scp=4&sq=%22kelly%20thomas%22&st=cse> (reporting on the death of Kelly Thomas, a man who suffered from schizophrenia and, while homeless, was beaten to death by police in Orange County).

²⁸³ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496 (2003) (concluding that although

workers need a certain amount of discretion—otherwise people they are trying to help will get caught in the gears of bureaucratic insanity. On the other hand, too little guidance and functionaries are bound to mess it up, to make bad choices, to lack empathy or understanding, or just be overworked to the point of not being able to cope well. Discretion may be unavoidable, but it also may just be that we simply push them the hard decisions down to lower-level folks who get stuck with addressing them, lacking both the guidance and the resources to get it right. If we were willing to make better decisions up top, to resolve social disagreement there, we probably could make headway on the issue of discretion. The system's loaded with unbounded discretion, in part, because we're simply unable to agree how to bound it.

Accountability is the other part of the puzzle where writ small meets writ large. We're real big on talking about accountability, especially when it comes to needy people seeking handouts, but we're not very good at holding people responsible for failing to make other people safe. (Who lost their job as a result of what went wrong on 9/11?) Legal doctrine reflects this. Most government employees get a level of immunity from claims for recompense that tells them it's fine to act with impunity and just muck it up.²⁸⁴ Perhaps this grant of decisional autonomy is but the flip side of the failure to provide guidance and resources. If the folks up top can't figure out or resolve how to solve a problem, why take it out on the bureaucrats and functionaries who are left to struggle with it?

Still, the resultant effect of these forces often is unattractive. People are left high and dry, when they need help. Their situations get bungled and rather than receive what they need from government, they are injured, or fed red tape. And no one is responsible.

* * *

administrative discretion and delegation are necessary given a scarcity of resources, an excess of discretion generates arbitrariness and may have costs for systemic legitimacy); Frank Anechiarico & Stephen L. Lockwood, *The Responsibility of the Police Command for Street-Level Actions*, 12 LAW & POL'Y 331 (1990) (noting the obstacles to formulating a clearer standard of accountable discretion in street-level policing).

²⁸⁴ Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982) (upholding qualified immunity for high government officials). See Ruth Marcus, *The Supreme Court Invented Qualified Immunity. Now, a Judge's Blistering Opinion Shows Why It Must Go.*, WASH. POST (Aug. 5, 2020 6:22 PM), https://www.washingtonpost.com/opinions/the-supreme-court-invented-qualified-immunity-now-a-judges-blistering-opinion-shows-why-it-must-go/2020/08/05/f72778e6-d74a-11ea-930e-d88518c57dcc_story.html.

This diagnosis is not very uplifting. But it's real. People could be safer. They aren't, because of a set of factors that may explain our failures, but hardly excuse them.

AFTERWORD

Conclusions in law reviews are pretty tepid stuff, doing nothing other than summing up in a couple paragraphs what anyone who has read this far knows anyway.²⁸⁵ So I won't do that. Here, instead, is an afterword, a tiny germ of an idea that presents perhaps a ray of hope, or food for thought.

The problem, as must be clear, is that we have a hierarchy: protection, and then all else. As a result, we protect to the point of harm, and neglect much else.

One result of our hierarchy is silos. There is a Department of Public Safety, full of people with military bearing who focus on policing, and emergency response. And then there are Departments of Education, and Welfare, and the like.

What we need, one suspects, is to muster resources in an integrated fashion to those who need them. A way to bring attention to the most needy in our society, and move with laser-like fashion to try to help them. People who are needy often are needy along a set of dimensions. They aren't well-housed but hungry, well-educated but struggling financially. Rather, they need much more in the way of support than addressing one problem.

What if, instead of silos, we had a true Department of Public Safety. Or even just an official near the top of the government structure, whose job it was to address threats to public safety in a more holistic way. People or places where substantive expertise could come together, acknowledging that public safety is multi-faceted, and that to ensure people are safe we need to look at safety in all its dimensions. Eliminate the hierarchy and tackle the complicated problems that real people face.

The challenges of this idea are vast. I wrote these words prior to the killing of George Floyd, and the protests that followed. In their wake, however, the idea seemed to be getting some credence. A number of cities are taking steps to rethink first response, to bring help to those who need it,

²⁸⁵ See Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1366 (2018) (noting that conclusions "usually are regurgitations of what came before," and often "restat[e] in two paragraphs what [has been] said in thirty or more pages").

and without the use of force and law.²⁸⁶ At the same time, these ambitious ideas are running hard into real world disagreement and complexity.²⁸⁷ Wherever this leads, the hope—and the real job of this Article—job one—was to make clear how we privilege protection, and by doing so lack a sufficiently capacious understanding of what public safety really entails. Because if we can't even see this problem, we can't begin to fix it.

²⁸⁶ See, e.g., The Associated Press, *Proposal to Disband Minneapolis Police Blocked*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/aponline/2020/08/04/us/ap-us-george-floyd-minneapolis-police.html> (describing the proposed amendment to disband the Minneapolis Police Department and replace it with a “Department of Community Safety and Violence Prevention”); Joseph Goldstein & Kevin Armstrong, *Could This City Hold the Key to the Future of Policing in America?*, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/2020/07/12/nyregion/camden-police.html> (“In Albuquerque, N.M. a plan is underway to reduce the role of the police in calls involving homelessness, addiction and mental health problems.”); David Zahniser et al., *Los Angeles Cuts LAPD Spending, Taking Police Staffing to Its Lowest Level in 12 Years*, L.A. TIMES (July 1, 2020), <https://www.latimes.com/california/story/2020-07-01/lapd-budget-cuts-protesters-police-brutality> (reporting that two thirds of Los Angeles’ \$150 million police budget cut would be “funneled into services for Black, Latino and disenfranchised communities, such as hiring programs and summer youth jobs”); Marisa Kendall, *San Francisco Launches New Police-Alternative Program*, MERCURY NEWS (Nov. 30, 2020, 3:46 PM), <https://www.mercurynews.com/2020/11/30/san-francisco-launches-new-police-alternative-program/> (describing San Francisco’s “pilot program,” following calls to defund SFPD, in which “behavior health clinicians and peer specialists will respond to certain non-violent 911 calls in the city, instead of cops”).

²⁸⁷ See, e.g., Jenny Gross & John Eligon, *Minneapolis City Council Votes to Remove \$8 Million From Police Budget*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/minneapolis-police-funding.html> (describing that “[a]fter an attempt to change the city charter to allow for the elimination of the [Minneapolis] Police Department failed, some council members backtracked on their pledge” to defund the police department, and noting that the City Council voted to cut \$8 million from the city police budget); Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277 (2020) (concluding that, contrary to the calls of many advocates, police budget increases in communities of color could help to curb police violence and crime); Jeffrey C. Mays, *Who Opposes Defunding the N.Y.P.D.? These Black Lawmakers*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/nyregion/defund-police-nyc-council.html> (“Several Black City Council members have lashed out at progressives, comparing calls to defund the police to ‘colonization’ and ‘political gentrification.’”).