
ARTICLES

WHAT IS PUBLIC SAFETY?

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ABSTRACT

For 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 close scrutiny, and immunize them from liability for 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 that income through an education and a job. It might include health care, health insurance, and 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, this Article shows that there is nothing particularly

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different about the protection function that justifies treating it as government's primary responsibility, 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 why, although protection is not in fact special, we nonetheless neglect all the other elements of individual safety.

CONTENTS

INTRODUCTION	728
I. THE PRIMACY OF PROTECTION.....	734
A. <i>Government's First Job Is Public Safety</i>	734
B. <i>Public Safety as Protection</i>	736
II. WHAT IS "SAFETY".....	739
A. <i>Safety vs. Security</i>	739
B. <i>The Elements of Safety and Security</i>	740
1. Basic Subsistence	740
2. Housing	741
3. Health and Well-Being.....	742
4. Opportunity	744
5. Evolving Notions of Safety	745
III. WHY DOES IT MATTER?.....	746
A. <i>The Importance of Being Protection</i>	747
B. <i>Second Fiddle for the Rest of Safety</i>	751
IV. WHAT SHOULD WE UNDERSTAND PUBLIC SAFETY TO BE? (OR: IS PROTECTION REALLY DIFFERENT?)	757
A. <i>Foundational</i>	757
B. <i>Authority</i>	760
C. <i>Special Obligation</i>	761
D. <i>Monopoly</i>	764
1. Public Good.....	765
2. Externalities.....	767
3. The True Meaning of Protection	770
E. <i>Capacity and Capability</i>	773
F. <i>Dependence</i>	774
V. OBSTACLES.....	775
A. <i>Our Elderly Constitution</i>	776
B. <i>The Federalism Shuffle</i>	777
C. <i>The Opt-Out Problem</i>	779
D. <i>Self-Interest</i>	780
E. <i>Othering, and the American Dilemma</i>	782
F. <i>Social Disagreement Writ Large</i>	783
G. <i>Criminalization</i>	785
H. <i>Social Disagreement Writ Small</i>	787
AFTERWORD	789

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 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 and 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, forage in trash cans for food, or face starvation. Or if they are lacking an

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

² See, e.g., THE FEDERALIST NO. 3, at 10 (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."); THOMAS HOBBES, THE ELEMENTS OF LAW: NATURAL AND POLITIC 110 (Ferdinand Tönnies ed., Frank Cass & Co. 2d ed. 1969) (1650) ("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 defence from those to whom he doth so relinquish it."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 188 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690) ("The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society . . .").

³ See *infra* Section I.A (providing examples of government officials identifying public safety as their top priority).

⁴ See *infra* Section I.B (explaining historic and modern understanding of public safety as the protection function).

⁵ 2 *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> [<https://perma.cc/4TKX-P4R6>] (interview with Charlene Carruthers of the Movement for Black Lives explaining that "[t]he police are not keeping us safe" and that "[w]hat we're seeing happening with police departments is surveillance, violence and the death of our people").

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

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 to 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 if food or

⁶ See *infra* Part II (explaining elements of public safety and security).

⁷ Rick Snyder, Mich. Governor, Prepared Remarks on the Flint Water Crisis (Jan. 19, 2016) (transcript available at https://www.michigan.gov/documents/snyder/Prepared+remarks_511427_7.pdf?20160120074639 [<https://perma.cc/XL3V-XA5R>]) (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, Katie Zezima & Emily Guskin, *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/> ("Puerto Ricans sharply rebuke President Trump, along with the federal and local governments, for last year's response to Hurricane Maria . . .").

⁹ See, e.g., Christopher Weaver, Betsy McKay & Brianna Abbott, *America Needed Tests. The Government Failed.*, WALL ST. J., Mar. 19, 2020, at A1 (holding federal government responsible for lack of COVID-19 testing); Jonathan Turley, Opinion, *Governors Should Focus on Tackling Coronavirus Rather Than Shift Blame*, HILL (Mar. 28, 2020, 10:00 AM), <https://thehill.com/opinion/white-house/489968-governors-should-focus-on-tackling-coronavirus-rather-than-shift-blame> [<https://perma.cc/8EQD-XBQG>] (arguing that governors have "responsibility" to handle and "prepare for public health emergencies").

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 terms like “flourishing” or “well-being” simply do not. It is precisely this sort of urgency that drives and prioritizes what government should 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

The importance of 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 this “protection” function of public safety. We promise it to everyone, and while there clearly are substantial shortfalls in actually affording it evenhandedly, no one seriously contests the universality of the guarantee. Society valorizes those who provide it, in particular the police, and seems 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 all sorts of other problems to our “protection” workers—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 other aspects of public safety 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.¹² Rather than thinking of housing homeless people, we criminalize them through laws

¹⁰ See *infra* Part III (explaining why it is important to expand the notion of “public safety” beyond the protection function).

¹¹ See *infra* Part I (explaining the historic and modern understanding of public safety as the protection function).

¹² Linda Darling-Hammond, Opinion, *America’s School Funding Struggle: How We’re Robbing Our Future by Under-Investing in Our Children*, FORBES (Aug. 5, 2019, 1:43 PM), <https://www.forbes.com/sites/lindadarlinghammond/2019/08/05/americas-school-funding-struggle-how-were-robbing-our-future-by-under-investing-in-our-children/?sh=3e8927af5eaf> (describing how education is funded through property taxes with lackluster government attempts to offset inequalities).

banning sleeping in the park, camping, or even giving food to needy people.¹³ Health insurance remains a political brawl.¹⁴

For this reason, too many in this wealthy country are not safe. And many more do not feel safe. Never mind the waves of fear of this 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 ahead, and plenty of people cannot afford basic health care.¹⁵ Some of these issues 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 that “this or that” is a right government must provide or a benefit that it should.¹⁶ 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, which argues that budgets should be redirected from the protection movement to community need.¹⁷ But

¹³ See, e.g., BOS., MASS. CODE § 16-19.1 (2021) (prohibiting sleeping on public grounds without Mayor’s proclamation); BOISE, IDAHO CODE § 7-3A-2 (2021) (prohibiting camping in public spaces when shelter spaces are available); Ryan E. Little, Zack Demars, Nick McCool, Theresa Diffendal, Gina Scalpone, Aneurin Canham-Clyne & Riin Aljas, *In Many Cities, It’s Illegal to Beg for Food or Money*, NOWHERE TO GO (June 29, 2020), <https://homeless.cnsmaryland.org/2020/06/29/illegal-to-beg-for-food/> [<https://perma.cc/NC2R-XT3G>] (listing four California cities that prohibit food sharing with homeless individuals). See generally Barry Friedman, *Are Police the Key to Public Safety? The Case of the Unhoused*, 59 AM. CRIM. L. REV. (forthcoming 2022) (on file with *Boston University Law Review*) (highlighting futility of addressing systemic homelessness with enforcement by police).

¹⁴ See *infra* Part III (explaining how prioritizing the protection function leaves many unsafe in other ways).

¹⁵ See *infra* Part II.

¹⁶ See generally HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT (Dapo Akande, Jaakko Kuosmanen, Helen McDermott & Dominic Roser eds., 2020) (examining relationship between human rights and major modern issues of conflict and security, environment, and poverty). 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 and around what counts as a civil right. See generally MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011) (arguing for necessity of developing individual human capabilities); ROBIN L. WEST, *CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION* (2019) (arguing that civil rights law extends beyond nondiscrimination to include protection of legal rights that promote human flourishing).

¹⁷ See, e.g., Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES, June 14, 2020, at SR2 (“We should redirect the billions that now go to police departments toward providing health care, housing, education and good jobs.”); Alondra

there is insufficient scholarship (particularly in constitutional law) 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 a companion piece, entitled *Disaggregating the Policing Function*.¹⁸ 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.¹⁹ *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.²⁰ 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.²¹

Here, the lens is broader, on all of government. This Article asks, 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—perspectives that have been taken 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,

Cano, Opinion, *My Minneapolis Colleagues and I Are on Our Way to Ending Police System, Healing Community*, USA TODAY (June 16, 2020, 10:41 AM), <https://www.usatoday.com/story/opinion/policing/2020/06/12/after-floyd-video-changed-police-reformist-abolitionist/3177414001/> (calling for “new model of public safety” that encompasses nonprotective safety functions, such as housing, schooling, employment access, and healthcare); see also Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1814-23 (2020) (providing overview of abolitionist critique of policing and discussing what it means for real reform); ALEX S. VITALE, *THE END OF POLICING* 24-30 (2017) (arguing for alternatives to policing to make society safer); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 811-13 (2021) (noting that calls for police reform reflect concerns that focus on policing denies people their collective input into what safety should mean).

¹⁸ Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925 (2021).

¹⁹ *Id.*

²⁰ *Id.* at 930.

²¹ *Id.* at 985-91.

asking just how far the idea of safety could extend. Taken to its logical extreme, safety might extend beyond 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 project of government. Many people are unsafe because of government neglect beyond the protection function: from hunger and malnutrition, from lack of housing, from subpar education, from lack of 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 other functions of government addressed to 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 (A) the foundational nature of freedom from crime and violence, in that without it, the state cannot get up and running; (B) the naked power of government; (C) the notion that protection is the “special obligation” of government; (D) the possibility that government ought to have a monopoly over protection, but not other aspects of individual safety, either because (1) protection is a public good that government must provide while other aspects of public safety are not, or (2) because leaving protection in private hands creates externalities that other elements of public safety do not; (E) the practical capacity and capability of government; and (F) 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. Part V is hardly uplifting. Rather, it 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 obstacle is social disagreement about the role of government, which has direct implications for how we think about public safety, including our overreliance on criminalization and underreliance on much else that people need.

Wherever one ultimately comes out on what public safety entails, what seems unacceptable is 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 to help assure people are safe.

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*.²² The article was a stunning rebuke to the Supreme Court's 1989 decision in *DeShaney v. Winnebago County*,²³ which held that the Constitution provided only "negative" rights, but imposed no affirmative obligations on government in the United States.²⁴ 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.²⁵ 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."²⁶

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.²⁷ Prior to the Enlightenment, the conception of governance was one of "reciprocal obligations": subjects owed the sovereign allegiance, for which the sovereign "was bound 'to govern and protect his subjects.'"²⁸ 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 defence from those to whom he doth so relinquish it."²⁹ Enlightenment philosophers were unequivocal in stressing the centrality of

²² Heyman, *supra* note 1.

²³ 489 U.S. 189 (1989).

²⁴ *Id.* at 202. See *infra* Sections IV.C, IV.D for an extensive discussion of *DeShaney*.

²⁵ Heyman, *supra* note 1, at 509 ("Chief Justice Rehnquist maintained that nothing in the language or history of the Due Process Clause of the Fourteenth Amendment required a state to protect its citizens from private violence.").

²⁶ *Id.* at 547 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Lyman Trumbull)).

²⁷ See *id.* at 512-30 (detailing long history of government's affirmative obligations to provide safety and security to individuals and society).

²⁸ *Id.* at 513 (quoting Calvin's Case (1608) 77 Eng. Rep. 377, 382 (K.B.)).

²⁹ HOBBS, *supra* note 2, at 110.

“security.” Jeremy Bentham called security “the principal, indeed the paramount, object” of government, and the “main object of law.”³⁰ William Blackstone, the chronicler of the common law, stated that a state is simply “a collective body, composed by a multitude of individuals, united for their safety and convenience.”³¹

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. James Madison, in *Federalist No. 10*, declared “the first object of government” the “protection” of “the faculties of men” and “the rights of property.”³² Jay said the same in *Federalist No. 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.”³³ On this score the Anti-Federalists concurred.³⁴ State constitutions similarly talked of the role of government in assuring the “security” of the people.³⁵

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 democratic presidential nomination, said, “[k]eeping our nation safe and honoring the people who do that work will be my highest priority.”³⁶ This theme is the same at the state and local level. Arnold Schwarzenegger, former Governor of California, is quoted repeatedly as saying that “[g]overnment’s first duty and highest obligation is public safety.”³⁷

³⁰ JEREMY BENTHAM, BENTHAM’S THEORY OF LEGISLATION 124, 142 (Charles Milner Atkinson ed., trans., Oxford Univ. Press 1914) (1802) (translated and edited from Étienne Dumont’s 1802 French publication).

³¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *52.

³² THE FEDERALIST NO. 10, *supra* note 2, at 46 (James Madison).

³³ THE FEDERALIST NO. 3, *supra* note 2, at 10 (John Jay).

³⁴ Brutus, VII, N.Y. J., Jan. 3, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 401 (Herbert J. Storing ed., 1981) [hereinafter ANTI-FEDERALIST] (“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.”).

³⁵ 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 a 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, ch. 1 (“[G]overnment is, or ought to be, instituted for the common benefit, protection and security, of the people”).

³⁶ Hillary Clinton, Address Accepting the Presidential Nomination at the Democratic National Convention in Philadelphia, Pennsylvania (July 28, 2016) (transcript available at <https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-democratic-national-convention> [<https://perma.cc/3PMP-YEG8>]).

³⁷ This quote, while often referenced and widely attributed to Schwarzenegger, may be apocryphal. See, e.g., Jeffries Tells Governor to Back Off Firefighting Cuts, PRESS-ENTER. (May 7, 2009, 6:46 PM), <https://www.pe.com/2009/05/07/jeffries-tells-governor-to-back-off>

Jacksonville's Mayor published a blog post in early 2019, announcing that "[p]ublic safety is my first priority."³⁸ So too in Orlando, the mayor's "top priority is public safety."³⁹

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.

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, a few who explicitly deem public safety to involve a broader set of responsibilities.⁴⁰ 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 against violence."⁴¹ Perhaps no text was quoted more often in those Reconstruction debates than Justice Bushrod Washington's famous statement in *Corfield v. Coryell*⁴² regarding the "privileges and immunities of the citizens of the United States,"⁴³ in which Washington put first and foremost "[p]rotection by the government" to the end of allowing people life, liberty, property, and the

firefighting-cuts/ [https://perma.cc/TE7T-JYM5] (noting politician who claimed Schwarzenegger regularly said this).

³⁸ Press Release, Lenny Curry, Mayor of Jacksonville, Fla., Public Safety Is My First Priority (Jan. 28, 2019) (available at <https://www.coj.net/mayor/mayor-s-blog/january-2019/public-safety-is-my-first-priority> [https://perma.cc/S5L6-YAZK]).

³⁹ *Public Safety*, CITY OF ORLANDO, <https://www.orlando.gov/Our-Government/Mayor-City-Council/Buddy-Dyer/Mayors-Key-Priorities/Public-Safety> [https://perma.cc/GSE9-5GWD] (last visited Feb. 11, 2022).

⁴⁰ See, e.g., Dave Bing, Mayor of Detroit, Mich., Speech on Detroit's Financial Crisis (Nov. 17, 2011) (transcript available at https://www.mlive.com/news/detroit/2011/11/text_of_detroit_mayor_dave_bin.html [https://perma.cc/Z6AB-YGR5]) (including buses with traditional aspects of the protection function); Eritha "Akile" Cainion, Letter to the Editor, *What Is Public Safety?*, WKLY. CHALLENGER (July 27, 2017), <http://theweeklychallenger.com/what-is-public-safety/> [https://perma.cc/7CL4-56UF] (arguing that food security and housing are part of safety); Bill de Blasio, Mayor of N.Y.C., N.Y., State of the City Address (Feb. 10, 2014) (transcript available at <https://www.nytimes.com/2014/02/11/nyregion/text-of-bill-de-blasios-first-state-of-the-city-address.html>) (including access to medical services in "safety").

⁴¹ Heyman, *supra* note 1, at 509-10.

⁴² 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

⁴³ U.S. CONST. amend. XIV, § 1.

pursuit of “happiness and safety.”⁴⁴ Hence the Fourteenth Amendment’s guarantee of “equal protection of the laws” to all citizens of the United States.⁴⁵ This made sense in historical context: night riders terrorized the freedmen, threatening and bringing physical violence, making a mockery of government’s ability to protect them.⁴⁶

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.”⁴⁷ 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.⁴⁸ For Locke, the “great end of men’s entering into society” was “the enjoyment of their properties in peace and safety.”⁴⁹

The same was true in our founding era. The Constitution itself was created to “insure domestic tranquility, [and] provide for the common defence.”⁵⁰ Said the Anti-Federalist Brutus, “[t]he preservation of internal peace and good order, and the due administration of law and justice, ought to be the first care of every government.”⁵¹

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.”⁵² This was a theme Richard Nixon used to catapult himself into the White House: “[T]he first civil right of every American is to be free from domestic violence,” and that right must be guaranteed in this country.⁵³ When discussing his immigration policy, Donald Trump emphasized that an executive order he issued

⁴⁴ Heyman, *supra* note 1, at 555-56 (quoting *Corfield*, 6 F. Cas. at 551-52) (“[A]s John Hart Ely has observed, the Framers ‘repeatedly adverted to the *Corfield* discussion as the key to what they were writing.’” (quoting JOHN H. ELY, *DEMOCRACY AND DISTRUST* 29 (1980))).

⁴⁵ U.S. CONST. amend. XIV, § 1.

⁴⁶ 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* 159, 163 (Gregory P. Downs & Kate Masur eds., 2015).

⁴⁷ HOBBS, *supra* note 2, at 110.

⁴⁸ BENTHAM, *supra* note 30, at 130.

⁴⁹ LOCKE, *supra* note 2, at 188.

⁵⁰ U.S. CONST. pmbl.

⁵¹ ANTI-FEDERALIST, *supra* note 34, at 401.

⁵² Barry Goldwater, U.S. Presidential Nominee, 1964 Republican National Convention Nominee Acceptance Speech (July 16, 1964) (transcript available at <https://www.americanrhetoric.com/speeches/barrygoldwater1964rnc.htm> [<https://perma.cc/EV8G-SY2W>]).

⁵³ Remarks on Accepting the Presidential Nomination of the Republican National Convention, 1 PUB. PAPERS 791 (Aug. 23, 1972).

“empowers ICE officers to target and remove those who pose a threat to public safety.”⁵⁴ 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.”⁵⁵ 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.⁵⁶

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.⁵⁷ On the “public safety” section of its website, for example, Sacramento says that “[k]eeping your family and our community safe is a top priority for Sacramento’s public safety family – EMS, Fire, Police, and Emergency Management.”⁵⁸

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.⁵⁹

Whatever those threats, government’s primary job is public safety. And, by common consensus, public safety means protection—the protection of person

⁵⁴ Donald J. Trump, President of the U.S., Remarks to Employees at the Department of Homeland Security (Jan. 25, 2017) (transcript available at <https://www.c-span.org/video/?422704-1/president-trump-visits-homeland-security-department>).

⁵⁵ Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994, 2 PUB. PAPERS 1539 (Sept. 13, 1994).

⁵⁶ See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 12 (2001) (observing that protection of “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: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4 (2007) (describing how focus on crime as problem pervades every aspect of American life).

⁵⁷ See, e.g., *Public Safety*, CITY OF SACRAMENTO, <https://www.cityofsacramento.org/Living-Here/PublicSafety> [<https://perma.cc/R6ME-8KQM>] (last visited Feb. 11, 2022).

⁵⁸ *Id.*; see *Public Safety Department*, CITY OF ST. LOUIS, <https://www.stlouis-mo.gov/government/departments/public-safety/> [<https://perma.cc/M2VF-7Y4N>] (last visited Feb. 11, 2022) (“The Department of Public Safety is the largest municipal government department in the City of St. Louis overseeing the Fire Department[and] the Metropolitan Police Department . . .”).

⁵⁹ See FBI, *INTERNET CRIME REPORT 3* (2020) (reporting on vast extent of cybercrime); Dustin Volz & Robert McMillan, *U.S. Cyberattack Suggests More Sophisticated Hack*, WALL ST. J., Dec. 18, 2020, at A1 (describing “previously undetected cyber espionage campaign that may stretch back years” that affected “18,000 companies and government agencies”).

and property from sudden or violent injury. That is how we've seen it for hundreds of years.

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 "[n]obody wants to be blown up."⁶⁰ 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 *government's* role in assuring we are safe. There undoubtedly are some aspects of safety that are not at all 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.

A. *Safety vs. 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.⁶¹ He was surprised, when he went looking, about how few people had written, particularly in philosophy, about what the content of "security" was precisely.⁶² And so, just as I here explore the content of "safety," Waldron took up the question, "what do we mean by *security*?"⁶³

But what is the relationship between safety and security? The two words often are used interchangeably. Do they refer to 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 are with regard to the 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.⁶⁴ 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, of wanting some sort of "assurance

⁶⁰ Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 461 (2006).

⁶¹ *Id.* at 455.

⁶² *Id.* at 456.

⁶³ *Id.* at 455.

⁶⁴ *Id.* 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.").

or guarantee” that it will not occur.⁶⁵ In other words, one could be safe at this moment, but not secure if there is concern whether immediate safety will last. And if one feels insecure about the future, then perhaps one is 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.

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 caused by others. It’s not just threats to person and property from third parties of course; natural disasters jeopardize our safety too.⁶⁶ One’s house can be destroyed as easily by lightning 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? How far should it 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.⁶⁷ As the needs at one level are satisfied, we seek out the next.⁶⁸ The sort of concern about violence to which the protection function is directed obviously is on Maslow’s pyramid. He refers to it simply as “safety.”⁶⁹

But, notably, safety is *second* on Maslow’s list, behind what he calls “physiological needs,” or what we might think of as basic subsistence.⁷⁰ “A person who is lacking food, safety, love, and esteem would most probably hunger for food more strongly than for anything else.”⁷¹ That much seems obvious: our bodies simply cannot survive without nourishment. Eritha “Akile”

⁶⁵ *Id.* at 462 (arguing concept of “pure safety” inadequately addresses fear of future harm). 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 of enjoying other goods.” *Id.* at 471.

⁶⁶ *See id.* at 488 n.89 (noting that Department of Homeland Security “has responsibility not just for protection against terrorist threats, but also for protection against natural disasters like Hurricane Katrina”).

⁶⁷ *See* Uriel Abulof, *Introduction: Why We Need Maslow in the Twenty-First Century*, 54 SOCIETY 508, 508-09 (2017) (noting that Maslow’s theory “has resonated powerfully in scholarship across disciplines” and remains relevant seventy-five years later).

⁶⁸ *See* A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370, 376 (1943) (explaining physiological needs supersede safety needs).

⁶⁹ *Id.* at 376.

⁷⁰ *See id.*

⁷¹ *Id.* at 373.

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).⁷² “When there’s a situation of the south side starving, homeless . . . there’s nothing about that environment that is safe.”⁷³

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.”⁷⁴ He did this while announcing that, to save money, Flint was disconnecting from Detroit’s water supply and turning to the Flint River.⁷⁵ Soon thereafter evidence emerged that Flint’s water was dangerous to drink.⁷⁶ 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.⁷⁷ There is no *safe* level of lead in drinking water.⁷⁸ Lead poses particular risks to children and their long-term development.⁷⁹ As a consequence, “the city’s lead crisis has migrated from its homes to its schools, where neurological and behavioral problems . . . are threatening to overwhelm the education system.”⁸⁰ 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.⁸¹ Admittedly, unlike food or water, one can live without housing. Plenty of people

⁷² Cainion, *supra* note 40.

⁷³ *Id.*

⁷⁴ Dominic Adams, *Closing the Valve on History: Flint Cuts Water Flow from Detroit After Nearly 50 Years*, MLIVE (Jan. 20, 2019, 8:48 AM), https://www.mlive.com/news/flint/2014/04/closing_the_valve_on_history_f.html [<https://perma.cc/PDN3-AT79>].

⁷⁵ See *Flint Water Crisis Fast Facts*, CNN (Jan. 14, 2021), <https://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html> [<https://perma.cc/9SR4-BQ6H>].

⁷⁶ *Id.*

⁷⁷ 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), 2016 WL 319206.

⁷⁸ See 40 C.F.R. § 141.51 (2022) (establishing that zero is the maximum contaminant level goal for lead).

⁷⁹ *Childhood Lead Poisoning Prevention: Populations at Higher Risk*, CDC, <https://www.cdc.gov/nceh/lead/prevention/populations.htm> [<https://perma.cc/N8UD-8DWD>] (last updated Oct. 29, 2021).

⁸⁰ Erica L. Green, *A Legacy of Poisoned Water: ‘Damaged Kids’ Fill Flint’s Schools*, N.Y. TIMES, Nov. 7, 2019, at A1.

⁸¹ See Barry Friedman, *supra* note 13 (manuscript at 27) (arguing for capacious understanding of public safety that “imposes an affirmative requirement on society to help the homeless”).

do. As we will see, in this country people living without housing number at least in the hundreds of thousands.⁸²

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.⁸³ The noun "shelter" refers to temporary protection from bad weather or danger; as a verb it means to protect or shield from something harmful.⁸⁴ People who live on the street are victimized more often, and become ill or die more frequently and quickly than others.⁸⁵

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.⁸⁶ 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 are no full-service grocery stores within a reasonable distance, resulting in less access to fruits, vegetables, and healthy food, but in

⁸² In 2019, this number was at least 567,715. OFF. OF CMTY. PLAN. & DEV., U.S. DEP'T HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 8 (2020); *see also* TRISTIA BAUMAN, JEREMY ROSEN, ERIC TARS, MARIA FOSCARINIS, JANELLE FERNANDEZ, CHRISTIAN ROBIN, EUGENE SOWA, MICHAEL MASKIN, CHERYL CORTEMEGLIA & HANNAH NICHOLES, NAT'L L. CTR. 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).

⁸³ Cainion, *supra* note 40 ("There's nothing safer than the black community having the ability to feed, clothe and house ourselves.").

⁸⁴ *See Shelter*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/shelter> [<https://perma.cc/EVD5-WJN2>] (last visited Feb. 11, 2022).

⁸⁵ *See, e.g.*, Lydie A. Lebrun-Harris, Travis P. Baggett, Darlene M. Jenkins, Alek Sripipatana, Ravi Sharma, A. Seiji Hayashi, Charles A. Daly & Quyen Ngo-Metzger, *Health Status and Health Care Experiences Among Homeless Patients in Federally Supported Health Centers: Findings from the 2009 Patient Survey*, 48 HEALTH SERVS. RSCH. 992, 1011 (2013) (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. SCIENTIST 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).

⁸⁶ *See* Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 971 (2013) (explaining rights to food are not enough and rights to nutrition are needed).

their place are purveyors of high-fat low-nutrition substitutes.⁸⁷ Unlike the past, when obesity was a marker of wealth, now obesity is the hallmark of poverty. With weight issues comes a host of health problems from type-2 diabetes and heart disease to infant mortality, all threatening individuals' lives and thus their basic safety.⁸⁸

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.⁸⁹ 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.⁹⁰ Similarly, during Thanksgiving weekend of 1966, ground-level smog in New York City caused an estimated 168 deaths and health problems for some 10% of city residents.⁹¹

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, makes many more people insecure on a daily basis than does a home invader or an attack on the street.⁹²

⁸⁷ *Id.* at 986. Emily Broad Leib and Margot Pollans argue that the panoply of food-related illnesses and problems requires 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 M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CALIF. L. REV. 1173, 1175 (2019).

⁸⁸ See Diller, *supra* note 86, at 981-82 (connecting obesity to malnutrition and greater likelihood for diseases and infant mortality). See generally Lauren M. Dinour, Dara Bergen & Ming-Chin Yeh, *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 relationship between food insecurity and obesity).

⁸⁹ On the contentiousness of the Clean Air Act, see Diane Katz, *Coming Clean on Regulatory Costs and Benefits*, HERITAGE FOUND. (Mar. 3, 2011), <https://www.heritage.org/government-regulation/report/coming-clean-regulatory-costs-and-benefits> [<https://perma.cc/2YVF-37BB>] (arguing that Clean Air Act's costs outweigh its benefits).

⁹⁰ *London Fog Tie-Up Lasts for 3D Day*, N.Y. TIMES, Dec. 8, 1952, at 17; Associated Press, *London Fog Is Bottled Up for Los Angeles Sampling*, N.Y. TIMES, July 21, 1952, at 4.

⁹¹ David Bird, *November Smog Killed 168 Here*, N.Y. TIMES, Oct. 27, 1967, at 56; *10% Here Suffered Effects of Smog, Private Study Finds*, N.Y. TIMES, Dec. 10, 1966, at 31.

⁹² See generally Jennifer Tolbert, Kendal Orgera & Anthony Damico, *Key Facts About the Uninsured Population*, KAISER FAM. FOUND. (Nov. 6 2020), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/> [<https://perma.cc/S2RU-SP9Y>] (“More 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”); Terri Williams, *Don't Have Health Insurance? What's the Worst That Could Happen?*, INVESTOPEDIA (Sept. 7, 2021), <https://www.investopedia.com/articles/personal-finance/120815/dont-have-health-insurance-whats-worst-could-happen.asp>

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.⁹³ Besides, without health 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.⁹⁴

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, even if they are not all recognized as such.

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 slipped away and people faced bleak economic futures.⁹⁵ 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 Institution, estimated (prior to the pandemic) that four out of ten people among the working-age group living below the poverty level were

[<https://perma.cc/QR23-58R4>] (“Without health insurance coverage, a serious accident . . . can result in poor credit or even bankruptcy.”).

⁹³ Einer Elhauge, *Allocating Health Care Morally*, 82 CALIF. L. REV. 1449, 1465-66 (1994) (noting “widespread (though not universal) consensus” on notion that everyone has right to some level of healthcare access); Matthew Sheffield, *Poll: Most Americans Want Universal Healthcare but Don't Want to Abolish Private Insurance*, HILL (Feb. 7, 2019), <https://thehill.com/hilltv/what-americas-thinking/428958-poll-voters-want-the-government-to-provide-healthcare-for> [<https://perma.cc/PT6M-5P6V>] (showing 32% of universal health care with private supplement, more than any other poll option).

⁹⁴ See Elhauge, *supra* note 93, at 1543 (noting “tradeoffs between health care and other social goods”).

⁹⁵ PAUL RYAN, *THE WAY FORWARD: RENEWING THE AMERICAN IDEA* 36 (2014).

employed, but still couldn't make enough to break out of poverty.⁹⁶ People who cannot afford the very basic necessities of life, such as food and housing, are not safe.

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.⁹⁷

5. Evolving Notions of Safety

When asked what safety entails, transportation might not appear on most peoples' lists. We tend to think of getting around as our own problem. Yet, in speaking to the collapse of municipal services in Detroit, Michigan, Mayor David Bing lumped together the classic aspects of the protection function—police, fire and emergency medical services, streetlights—with . . . buses.⁹⁸ “[Y]ou need a bus system that you can rely on to get to work, to school and to the doctor on time.”⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ People exposed to hate online do not feel safe.¹⁰² The ancestors spoke of physical threats to person and property, but what of emotional and dignitary harms?¹⁰³

⁹⁶ JAY SHAMBAUGH, LAUREN BAUER & AUDREY BREITWIESER, HAMILTON PROJECT, WHO IS POOR IN THE UNITED STATES? 8 fig.2 (2017), https://www.hamiltonproject.org/assets/files/who_poor_2017_annual_report.pdf [<https://perma.cc/LR5E-P5SC>].

⁹⁷ *Projected Poverty Impacts of COVID-19 (Coronavirus)*, WORLD BANK (June 8, 2020), <https://thdocs.worldbank.org/en/doc/461601591649316722-0090022020/original/ProjectedpovertyimpactsofCOVID19.pdf> [<https://perma.cc/M7G2-5SW7>].

⁹⁸ Bing, *supra* note 40.

⁹⁹ *Id.*

¹⁰⁰ See Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), <https://time.com/4779112/police-history-origins/> (noting first publicly funded, organized police force with officers on duty full-time officers was created in Boston in 1838).

¹⁰¹ See Robert L. Burgdorf, Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/> (noting how Act was written with eye toward improving education, public transportation, accessibility to public parks and streets, and medical treatment, among other reasons).

¹⁰² DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 3 (2014) (describing profound fear victims of cyber harassment and cyber stalking face).

¹⁰³ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-95 (1890) (describing evolution of common law to encompass harms beyond physical interference with life and property).

Discrimination threatens many people's safety.¹⁰⁴ Concerns about discrimination extend to people of color, to women, to the disabled, to LGBTQ+ individuals. People feel threatened if they are treated unequally because of their identity.¹⁰⁵ Are these elements 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 threat 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 is measuring damages from injuries and death recognize that an important element is “dread.”¹⁰⁶ 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 natural disaster relief often falls within the protection function.

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

¹⁰⁴ 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).

¹⁰⁵ CITRON, *supra* note 102, at 14 (“[B]eing a woman raises one's risk of cyber harassment, and for lesbian, transgender, or bisexual women and women of color, the risk may be higher.”).

¹⁰⁶ George Tolley, Donald Kenkel & Robert Fabian, *State-of-the-Art Health Values*, in VALUING HEALTH FOR POLICY: AN ECONOMIC APPROACH 323, 339-42 (George Tolley et al. eds., 1994) (describing how “the dread aspects of morbidity preceding mortality” are factored into mortality risk valuations); see Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 972-73 (1999) (arguing that dread in anticipating harm should be factored into valuations of damages for loss of life).

transportation. Why should we care if one of them—and only one—is thought to constitute “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 role of government in most, if not all, other dimensions. And this imbalance results in real harm to countless people, including from the protection function itself.

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 antiterrorism.¹⁰⁷ Municipal governments in many places devote 20% or more of their operating budgets to public safety, while other vital functions are cheated.¹⁰⁸ And even if something like education garners greater funding in any particular jurisdiction, there still is the question of right-sizing. We may spend far more than is necessary on protection, and far less on other things than they require.¹⁰⁹ Yet, cutting the policing budget can be a lot like touching a third rail.¹¹⁰

¹⁰⁷ See Noah Berlatsky, *Defund the Police, Then Defund the Military*, FOREIGN POL’Y (June 15, 2020, 12:13 PM), <https://foreignpolicy.com/2020/06/15/defund-the-police-military-spending-militarization-black-lives-matter/> [<https://perma.cc/S6YK-7A8U>] (“The United States spends about \$115 billion on policing a year”; this number does not include military spending); Barry Friedman & Elizabeth G. Janszky, *Policing’s Information Problem*, 99 TEX. L. REV. 1, 3 (2020) (noting that United States spends over \$100 billion on policing, which does not include counter-terrorism efforts).

¹⁰⁸ See Carl Sullivan & Carla Baranauckas, *Here’s How Much Money Goes to Police Departments in Largest Cities Across the U.S.*, USA TODAY (June 26, 2020, 7:00 AM), <https://www.usatoday.com/story/money/2020/06/26/how-much-money-goes-to-police-departments-in-americas-largest-cities/112004904/> (reporting that many cities allocate 20% or more of their total operating budget for policing).

¹⁰⁹ See, e.g., *Fiscal Year 2021*, CITY OF BOS., <https://www.boston.gov/finance/fiscal-year-2021> [<https://perma.cc/WZ4V-T94L>] (last updated Aug. 7, 2020) (noting that Boston will spend 41% of operating budget on education and 19% on public safety in fiscal year 2021).

¹¹⁰ 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); James Doubek, *D.C. Mayor Muriel Bowser: ‘Not At All’ Reconsidering Police Funding*, NPR (June 10, 2020, 12:08 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/10/873371574/d-c-mayor-muriel-bowser-not-at-all-reconsidering-police-funding> [<https://perma.cc/6GCT-5CKH>] (referencing Mayor Muriel Bowser’s statement that she was “not at all” reconsidering her proposed budget, which increased police spending); Tom Jackman, *Black Mayors Release Police Overhaul Plan That Doesn’t Support ‘Defunding,’* WASH. POST, July 28, 2020, at A3 (reporting that African American Mayors Association, a group of Black mayors in the United States, does not favor “defunding the police”).

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 me—the incredible men and women of law enforcement. I will always have your back”¹¹¹ 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 and a privilege to work with you.”¹¹² This reverence reaches almost religious fervor for some. Former 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.’”¹¹³

There’s nothing wrong with praise, of course, except when 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 nontransparency.¹¹⁴ And, as many have documented, we tend not to second-guess protection officials.¹¹⁵ The Supreme Court even has suggested a certain

¹¹¹ Donald J. Trump, President of the U.S., Remarks at a Listening Session with Leaders of the Fraternal Order of Police (Mar. 28, 2017) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-listening-session-with-leaders-the-fraternal-order-police> [<https://perma.cc/N3BB-XNTA>]).

¹¹² Janet Reno, U.S. Att’y Gen., Address to the First General Assembly of the International Association of Chiefs of Police Conference (Oct. 28, 1996) (transcript on file with *Boston University Law Review*).

¹¹³ Jeff Sessions, U.S. Att’y Gen., Remarks at the 63rd Biennial Conference of the National Fraternal Order of Police (Aug. 28, 2017) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-63rd-biennial-conference-national-fraternal> [<https://perma.cc/4RW7-84Z3>]).

¹¹⁴ See, e.g., Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 118-20 (discussing strategies police employ to keep their work under blanket of absolute secrecy); Pamela Seyffert, *Can Professional Civilian Oversight Improve Community-Police Relations?*, POLICE CHIEF (Sept. 13, 2017), <https://www.policechiefmagazine.org/can-professional-civilian-oversight-improve-community-police-relations/> [<https://perma.cc/8Y28-TXTM>] (reporting that “[t]he culture of policing is a guarded one” and explaining 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”).

¹¹⁵ See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 2067-68 (2017) (identifying how narratives of police expertise led to expansive judicial deference to opinion of police); Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 955-56 (2017) (“The American legal system, from the United States Supreme Court case law down to municipal ordinances, is tremendously deferential to police officers’ actions”); Erwin Chemerinsky, Opinion, *The Deck Is Stacked in Favor of the Police*, N.Y. TIMES: ROOM FOR DEBATE (May 18, 2016, 1:33 PM), <https://www.nytimes.com>

degree of deference is mandatory.¹¹⁶ Whether this is deserved is another question altogether. Police continue to engage in tactics that have been proven not to work and fail to follow basic protocols that do.¹¹⁷ They adopt tactics and technologies with little consideration of social costs.¹¹⁸

Still, there is virtually no supervision of protection agencies.¹¹⁹ They resist any sort of control; it took widespread protests in all fifty states to begin to achieve even basic reform.¹²⁰ 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.¹²¹ It is at best ironic

/roomfordebate/2014/11/25/does-ferguson-show-that-cops-who-kill-get-off-too-easily/the-deck-is-stacked-in-favor-of-the-police (“The problem is that the law gives too much deference to police conduct and does not do nearly enough to hold the police accountable.”).

¹¹⁶ See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (explaining that “the ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene” because police officers “are often forced to make split-second judgments—in circumstances that are tense”); *Ornelas v. United States*, 517 U.S. 690, 699 (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 wealth of experience in drawing inferences of probable cause).

¹¹⁷ See Friedman & Jánosky, *supra* note 107, at 9-10 (discussing how police maintain adherence to discredited random patrol while neglecting hot-spot policing); Cynthia Lum, *Ideas in American Policing: Translating Police Research into Practice*, POLICE FOUND., Aug. 2009, at 1, 3, http://www.policefoundation.org/wp-content/uploads/2015/06/Ideas_Lum_0.pdf [<https://perma.cc/39CU-Z37X>] (noting that despite 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”).

¹¹⁸ See Maria Ponomarenko & Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT COST ANALYSIS 305, 317 (2017) (describing how in deciding whether to adopt policing technology such as license plate readers, police chiefs are much less likely to consider downstream costs like incarceration than other factors such as budgetary restrictions and technology’s efficacy).

¹¹⁹ Many cities have “civilian review boards” but these are notoriously ineffective. See Tim Lynch, *How Mayors, Police Unions and Cops Rig Civilian Review Boards*, CATO INST. (Oct. 24, 2016), <https://www.cato.org/commentary/how-mayors-police-unions-cops-rig-civilian-review-boards> [<https://perma.cc/Z8EU-UNR9>] (outlining several issues with civilian review boards, including lack of funding and often politicized selection process).

¹²⁰ See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/6DKR-M2AZ>] (describing local and state policing reforms adopted after nationwide protests of George Floyd’s murder in 2020).

¹²¹ See, e.g., Maria Ponomarenko & Barry Friedman, *Democratic Accountability and Policing*, in 2 REFORMING CRIMINAL JUSTICE: POLICING 5, 9 (Erik Luna ed., 2017) (“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.”); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 134, 137-38 (2016) (remarking that law enforcement agencies should be treated like other

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.¹²² 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 homelessness, along with other social ills to which they are not suited.¹²³ This is one of the primary complaints of the movement to defund the police.¹²⁴

This tendency to turn all matter of social ills over to 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.¹²⁵

administrative agencies and that they should be subject to central features of the Administrative Procedural Act, such as rulemaking requirements).

¹²² See, e.g., Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017, 1024-25 (2020) (describing how police officers “are trained as generalists who deploy force to compel compliance when that skill set is not central to much of their daily jobs” which instead involves “‘social welfare’ functions”); Sarah Jones, *We Are Asking the Police to Do Too Much*, N.Y. MAG.: INTELLIGENCER (June 2, 2020), <https://nymag.com/intelligencer/2020/06/killing-of-george-floyd-shows-our-over-reliance-on-police.html> (“In the U.S., the police are the answer for everything. . . . for mediating domestic-violence disputes, for wellness checks, though they are not trained to soothe people in crisis.”); Seth W. Stoughton, Jeffrey J. Noble & Geoffrey P. Alpert, *How to Actually Fix America’s Police*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/> (arguing that because we use criminal law to confront 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”).

¹²³ See Friedman, *Disaggregating*, *supra* note 18, at 965-66 (explaining how police are constantly called to respond to situations involving domestic violence, substance abuse, mental illness, and homelessness despite not being trained to adequately address the core causes of these issues).

¹²⁴ 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> [<https://perma.cc/U5YQ-5S8Q>] (“Why is law enforcement the first responders for a mental health crisis? . . . [F]or domestic violence issues? . . . [And] for homelessness? . . . [T]hose are the first places we can look into.” (quoting Patrisse Cullors, cofounder of Black Lives Matter)).

¹²⁵ See, e.g., John Sullivan, Liz Weber, Julie Tate & Jennifer Jenkins, *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html (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 4% of those who were shot were unarmed); Tina Rosenberg, Opinion, *Have You Ever Been Arrested? Check*

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.¹²⁶ Yet, in the face of all these failings, what we do ultimately is immunize public safety agencies, so that neither they nor individual officers pay a price for the errors they make and misdeeds they commit.¹²⁷

In short, we 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

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); Christopher M. Sullivan & Zachary P. O’Keeffe, *Evidence That Curtailing Proactive Policing Can Reduce Major Crime*, 1 NATURE HUM. BEHAV. 730, 732 (2017) (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”).

¹²⁶ See, e.g., Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1723 (2006) (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 L. CTR. TO PREVENT GUN VIOLENCE, IN PURSUIT OF PEACE: BUILDING POLICE-COMMUNITY TRUST TO BREAK THE CYCLE OF VIOLENCE 5 (2020) (arguing that underprotection from police contributes to gun violence by making communities “less likely to report shootings, cooperate with the police, and serve as witnesses”).

¹²⁷ See, e.g., Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 956-57 (2014) (“[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 Statement on Supreme Court *Qualified Immunity Denial*, ACLU (June 15, 2020), <https://www.aclu.org/press-releases/aclu-statement-supreme-court-qualified-immunity-denial> [<https://perma.cc/9QDW-SWA2>] (characterizing qualified immunity as “loophole allowing government officials to escape accountability for violating constitutional rights”); *Qualified Immunity: The Supreme Court’s Unlawful Assault on Civil Rights and Police Accountability*, CATO INST. (Mar. 1, 2018), <https://www.cato.org/multimedia/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police> [<https://perma.cc/C2FE-KRMF>] (“The end result [of qualified immunity jurisprudence] is that police may get away with egregious unlawful conduct . . .”).

the dimensions identified in the previous Part.¹²⁸ This contest grew loud during the Populist and Progressive eras and reached full voice in the New Deal fights over the expansion of government.¹²⁹ There was a brief moment of relative consensus around Lyndon B. Johnson's War on Poverty, but that quickly collapsed.¹³⁰

Bill Clinton's presidency 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.¹³¹ The first was "welfare reform," in which the insistence was to force people off of welfare and require they work to retain benefits.¹³² This was built on a long-standing 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."¹³³ The second was a "crime bill" that addressed drug problems by putting some 100,000 police on the streets, contributing to the mass incarceration we face today.¹³⁴

¹²⁸ See, e.g., THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 312-21 (outlining evolution of American welfare state from the late 1800s to the 1990s and the political forces driving each step).

¹²⁹ See generally Lynn Dumenil, "The Insatiable Maw of Bureaucracy": Antistatistism and Education Reform in the 1920s, 77 J. AM. HIST. 499 (1990) (tracing battle waged over attempt to establish federal department of education in 1920s); TIMOTHY L. McDONNELL, THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS (1957) (documenting debate over passage of Housing Act of 1937, first major federal public housing legislation).

¹³⁰ See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 13-14 (exploring how President Johnson'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).

¹³¹ Bruce F. Nesmith & Paul J. Quirk, *Triangulation: Positioning and Leadership in Clinton's Domestic Policy*, in 42: INSIDE THE PRESIDENCY OF BILL CLINTON 46, 46 (Michael Nelson, Barbara A. Perry & Russell L. Riley eds., 2016) (describing President Clinton's triangulation strategy, in which he would "stand firm" on Democratic positions when they were popular but adopt centrist positions on issues where Republican positions were more popular).

¹³² See Martin Carcasson, *Ending Welfare as We Know It: President Clinton and the Rhetorical Transformation of the Anti-welfare Culture*, 9 RHETORIC & PUB. AFFS. 655, 655 (2006) (explaining how Personal Responsibility and Work Opportunity Reconciliation Act eliminated "a 61-year-old federal entitlement" and replaced it with "time limits, work requirements, and block grants").

¹³³ ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE 185 (2d ed. 2019) (citations omitted) (describing why welfare state idea is controversial in United States).

¹³⁴ Press Release, U.S. DOJ, President Clinton Announces New Crime Bill Grants to Put Police Officers on the Beat (Oct. 12, 1994) (available at https://www.justice.gov/archive/opa/pr/Pre_96/October94/590.txt.html [<https://perma.cc/MCT2-FJE4>]) (describing how crime bill facilitated "putting 100,000 police on America's streets"); Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM),

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.¹³⁵ 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.¹³⁶ 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.¹³⁷ Yet, evidence suggests that a well-funded safety net actually protects poor families.¹³⁸

This attitude of skepticism toward government's safety role in nonprotection 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.¹³⁹ (For all the hype, being a police officer is not nearly the most dangerous of jobs.)¹⁴⁰ Social workers often deal with the very same mentally ill or homeless persons as the police, people who can be volatile and violent at

<https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis> [<https://perma.cc/2HAZ-ADFR>] (“The federal crime bill . . . encouraged mass incarceration to grow even further.”).

¹³⁵ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 57 (rev. ed. 2012) (“The 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.” (footnote omitted)).

¹³⁶ STEPHANIE STULLICH, IVY MORGAN & OLIVER SCHAK, U.S. DEP’T EDUC., *STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION: A BRIEF FROM THE U.S. DEPARTMENT OF EDUCATION, POLICY AND PROGRAM STUDIES 1* (2016).

¹³⁷ See ALEXANDER, *supra* note 135, at 253 (“Obama’s budget for law enforcement is actually worse than the Bush administration’s in terms of the ratio of dollars devoted to prevention and drug treatment as opposed to law enforcement.”).

¹³⁸ See Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty*, *Studies Find*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html> (documenting that CARES Act, which was predicted to result in \$460 billion increase in spending on safety net in 2020 has “prevented the rise in poverty that experts predicted [due to COVID-19] . . . [and] done much to protect the needy”).

¹³⁹ See James P. Phillips, *Workplace Violence Against Health Care Workers in the United States*, 374 NEW ENG. J. MED. 1661, 1663 (2016) (“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.” (footnote omitted)).

¹⁴⁰ See Andy Kiersz & Madison Hoff, *The 34 Deadliest Jobs in America*, BUS. INSIDER (Dec. 16, 2021, 3:28 PM), <https://www.businessinsider.com/the-most-dangerous-jobs-in-america-2018-7> [<https://perma.cc/MVU4-GR7F>] (reporting that, according to Bureau of Labor Statistics, in 2019, police and sheriff’s patrol officers had 20th deadliest job in United States, behind jobs such as logging and fishing).

times.¹⁴¹ As has been so painfully obvious during the pandemic, doctors and other medical personnel rush into danger zones to render aid, including exposing themselves to illness and disease.¹⁴² 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, a city of 285,000 residents, where residents were exposed to elevated levels of lead in their water supply because of outdated infrastructure.¹⁴³ One study found that in 2015, nearly 21 million Americans were getting water from systems that violated the EPA's water quality standards.¹⁴⁴ 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.¹⁴⁵

Housing is a similar story. The U.S. 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.”¹⁴⁶ This doesn't count all the people couch surfing or “doubled up” with friends and family, or in hospitals,

¹⁴¹ See NAT'L ASS'N OF SOC. WORKERS, PROTECTING SOCIAL WORKERS AND HEALTH PROFESSIONALS FROM WORKPLACE VIOLENCE ACT OF 2019 (S. 2880/H.R. 5138) (2020), https://www.socialworkers.org/LinkClick.aspx?fileticket=_PaNxVmrZOG%3d&portalid=0 [<https://perma.cc/6EE6-QXLG>] (explaining that social workers, in providing essential mental health care services to individuals, are subject to increasing “[t]ragic incidences of violence”).

¹⁴² See Michael Schwartz, *Nurses Die, Doctors Fall Sick and Panic Rises on Virus Front Lines*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/03/30/nyregion/ny-coronavirus-doctors-sick.html> (“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 . . .”).

¹⁴³ Nick Corasaniti, Corey Kilgannon & John Schwartz, *Lead Crisis in Newark Grows, as Bottled Water Distribution Is Bungled*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/nyregion/newark-water-lead.html>.

¹⁴⁴ Maura Allaire, Haowei Wu & Upmanu Lall, *National Trends in Drinking Water Quality Violations*, 115 PNAS 2078, 2079 (2018).

¹⁴⁵ *Key Statistics & Graphics*, U.S. DEP'T AGRIC., ECON. RSCH. SERV. <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx> [<https://perma.cc/5Z4P-R6SF>] (last visited Feb. 11, 2022) (noting that 10.5% of U.S. households were food insecure at some time during 2020 and 38.3 million people lived in food-insecure households in 2020).

¹⁴⁶ OFF. OF CMTY. PLANNING & DEV., U.S. DEP'T HOUS. & URB. DEV., THE 2018 HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 10 exhibit 1.1 (2018).

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.¹⁴⁷

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.¹⁴⁸ Progress on climate change also is reversing, leading to higher temperatures and more wildfires, making the more conventional air pollution problems targeted by the Clean Air Act even more intractable.¹⁴⁹

A lack of health care similarly afflicts too many, particularly the poor.¹⁵⁰ Even after passage of the Affordable Care Act, more than 27 million people still lack coverage.¹⁵¹ Those without health insurance skip preventative health services like blood pressure checks or mammograms, don't get treatment or drugs medical personnel recommend, have a higher risk of being diagnosed with late-stage forms of diseases like cancer, and—unsurprisingly—have higher mortality rates.¹⁵²

The shortcomings of our system of public education are nothing short of appalling. According to the Programme for International Student Assessment, America now ranks thirty-seventh out of seventy-eight countries in math and

¹⁴⁷ See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 82, at 12 (detailing who is included in HUD's point-in-time homelessness count).

¹⁴⁸ AM. LUNG ASS'N, STATE OF THE AIR 2021, at 11-12, 21 (2021) (noting that more than 40% of Americans live in places with unhealthy levels of ozone or particle pollution and the health impacts of ozone exposure); 'State of the Air' Report Finds Continued Improvement in Air Quality, Yet Increase in Life-Threatening Spikes of Particle Pollution, AM. LUNG ASS'N (Apr. 19, 2017), <https://www.lung.org/media/press-releases/state-of-the-air-report-finds-continued-improvement> [<https://perma.cc/HV32-MBW5>] (noting that 38.9% of Americans lived in counties with unhealthy levels of ozone or particle pollution from 2013-2015); Katie Reilly, *More Than 141 Million Americans Are Breathing Unhealthy Air as Pollution Worsens*, TIME (Apr. 24, 2019, 10:35 AM), <https://time.com/5577203/state-of-the-air-pollution-report-2019/#> (describing increase of Americans living with bad air quality from 2014 to 2017).

¹⁴⁹ See Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html> (detailing policy initiatives from the Trump administrations to cut back on environmental protections); AM. LUNG ASS'N, *supra* note 148, at 11, 26 (reporting that climate change causes warmer weather, different rain patterns and major wildfires, contributing to continued challenges to long-term progress in reducing harmful air pollution under the Clean Air Act).

¹⁵⁰ See RACHEL GARFIELD & KENDAL ORGERA, KAISER FAM. FOUND.; ANTHONY DAMICO, THE UNINSURED AND THE ACA: A PRIMER 1 (2019) ("Those most at risk of being uninsured include low-income individuals . . .").

¹⁵¹ *Id.* (noting that in 2017 the number of uninsured rose to 27.4 million).

¹⁵² See *id.* at 13-15 (summarizing how lack of health insurance impacts health care access).

eighteenth in science.¹⁵³ 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% of eighth graders were deemed proficient in math.¹⁵⁴ The ongoing litigation in *Gary B. v. Whitmer*¹⁵⁵ 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 and as a result, in Detroit public schools “illiteracy is the norm” while “[p]roiciency rates . . . hover near zero percent in core curricular areas.”¹⁵⁶

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.¹⁵⁷ One quarter of Philadelphia’s residents (about 400,000 people) live in poverty.¹⁵⁸ 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.¹⁵⁹ The Hamilton Project estimates that four out of ten people living below the

¹⁵³ NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T EDUC., PISA 2018 U.S. RESULTS 21, 38 (2018), http://nces.ed.gov/surveys/pisa/pisa2018/index.asp# [<https://perma.cc/83X5-W6NC>].

¹⁵⁴ NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T EDUC., RESULTS FROM THE 2019 MATHEMATICS AND READING ASSESSMENTS 2 (2019), https://www.nationsreportcard.gov/mathematics/supportive_files/2019_infographic.pdf [perma.cc/2K3H-LRJY].

¹⁵⁵ 957 F.3d 616 (6th Cir. 2020).

¹⁵⁶ Brief of Appellants at 8-11, *Gary B.*, 957 F.3d 616 (Nos. 18-1855, 18-1871), 2018 WL 6044766, at *8-11.

¹⁵⁷ JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER & ABINASH MOHANTY, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018, at 1 (2019), <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf> [<https://perma.cc/AB4P-LSYB>]; CHILD’S DEF. FUND, ENDING CHILD POVERTY NOW 3 (2019), <https://www.childrensdefense.org/wp-content/uploads/2019/04/Ending-Child-Poverty-2019.pdf> [<https://perma.cc/9JKC-WWRT>] (noting that over 12.8 million children were poor in 2017).

¹⁵⁸ OCTAVIA HOWELL, PEW CHARITABLE TRS., PHILADELPHIA’S POOR: EXPERIENCES FROM BELOW THE POVERTY LINE 1 (2018), <https://www.pewtrusts.org/-/media/assets/2018/09/phillypovertyreport2018.pdf> [<https://perma.cc/JP3V-8WST>].

¹⁵⁹ See, e.g., Elisha Brown, *A Fare-Beating Fine Was the Last Straw*, N.Y. TIMES, Oct. 22, 2019, at A23 (describing Jasmin Perez’s horror story of jumping a turnstile); John Otis, *Easing Dental Woes with Grants and Grace*, N.Y. TIMES, Jan. 16, 2019, at A18 (“Access to dental service is our top need . . .” (quoting Community Health Advocates attorney)).

poverty level are employed, but still can't make enough to break out of poverty.¹⁶⁰

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.

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.¹⁶¹ Yet, as we have seen, the “protection” function garners that appellation but not much else that is vital to individual safety. 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.

¹⁶⁰ 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 [<https://perma.cc/G533-VK74>] (“Considering only those living in poverty who were of working age, about 40 percent were labor force participants . . .” (internal reference omitted)).

¹⁶¹ OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST* 152 (Cambridge Univ. Press 1996) (1899).

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.¹⁶² 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.¹⁶³ If the state can't do this, it can't do anything else.¹⁶⁴ So, this was indeed 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.”¹⁶⁵ 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.¹⁶⁶

¹⁶² See LOCKE, *supra* note 2, at 169 (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”); BLACKSTONE, *supra* note 31, at *125 (describing society's primary purpose as being the protection of individuals' ability to enjoy their natural rights).

¹⁶³ LOCKE, *supra* note 2, at 229.

¹⁶⁴ See THOMAS HOBBS, LEVIATHAN 236 (Cambridge Univ. Press 1914) (1651) (arguing that the sovereign must be exempt from civil laws because, otherwise, “he cannot performe the office [individuals] have put him into; which is, to defend them both from forraign enemies, and from the injuries of one another; and consequently there is no longer a Commonwealth”); LOCKE, *supra* note 2, at 229 (explaining that foreign force is usually the only way a society is dissolved, and “[w]henver the society is dissolved . . . the government of that society cannot remain”).

¹⁶⁵ U.S. CONST. art. I, § 9, cl. 2.

¹⁶⁶ See, e.g., Proclamation No. 104 (Sept. 15, 1863) (available at <https://www.presidency.ucsb.edu/documents/proclamation-104-suspending-the-writ-habeas-corpus-throughout-the-united-states> [<https://perma.cc/9CQ8-QAEC>]) (proclamation by Abraham Lincoln suspending the writ of habeas corpus throughout the United States); see also Proclamation No. 201 (Oct. 17, 1871) (available at <https://www.presidency.ucsb.edu/documents/proclamation-201-suspending-the-writ-habeas-corpus-certain-counties-south->

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 Americans who are happy to treat them basically as such (note how people use the word “civilian” in contrast to the police, just as we do to distinguish ordinary people from the military) 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.¹⁶⁷ 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.¹⁶⁸

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 depend 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 often are omnipresent—and were they not, the need for the police likely would be diminished.

carolina [<https://perma.cc/GA4H-SZ3f>] (proclamation by Ulysses S. Grant 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 Hawai‘i, which was not yet a state, after Pearl Harbor was attacked). I am writing this the day after former President Donald J. Trump stirred a mob to storm the United States Capitol.

¹⁶⁷ See, e.g., James Madison, *Ratification Without Conditional Amendments*, [24 June] 1788, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0110> [<https://perma.cc/N9XV-L4GV>] (last visited Feb. 11, 2022) (“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.”).

¹⁶⁸ See Posse Comitatus Act, ch. 263, § 15, 20 Stat. 152 (1878) (codified at 18 U.S.C. § 1385) (prohibiting domestic use of the Army or Air Force without authorization from Congress); Insurrection Act of 1807, ch. 39, 2 Stat. 443 (1807) (codified at 10 U.S.C. §§ 251-255) (providing exceptions to the Posse Comitatus Act during instances of insurrection, rebellion, or domestic violence).

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.”¹⁶⁹ With that power, government *may* do almost anything, and hardly is limited to protection. Blackstone explained that the power of “public police and economy” encompassed “the due regulation and domestic order of the kingdom” including such broad things as “the rules of propriety, good neighbourhood, and good manners.”¹⁷⁰ The Supreme Court, in one of its earlier statements on the subject, in *City of New York v. Miln*,¹⁷¹ 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] . . . [T]he authority of a state is complete, unqualified and exclusive.¹⁷²

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,” “Jews and their usury,” “flute players,” and on and on.¹⁷³ We did the same in the 18th century here, with regulations on “flax-seed,” “gaming,” “sole leather,” and “pot and pearl ashes.”¹⁷⁴ 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

¹⁶⁹ See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 483 (2004) (“The police power is the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts.”). Markus Dubber and Santiago Legarre have done wonderful jobs of tracing the roots of the police power back at least as far as the 16th century. See generally MARKUS DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007).

¹⁷⁰ 4 BLACKSTONE, *supra* note 31, at *162.

¹⁷¹ 36 U.S. 102 (1837).

¹⁷² *Id.* at 139.

¹⁷³ DUBBER, *supra* note 169, at 70.

¹⁷⁴ William Novak, *Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th-Century America*, 18 LAW & SOC. INQUIRY 1, 10 (1993) (detailing regulations in Massachusetts).

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.¹⁷⁵ 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 to be a real threat at one time.¹⁷⁶ 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.

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.¹⁷⁷

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 government has a responsibility to perform it at all. In *DeShaney v. Winnebago County Department of Social Services*,¹⁷⁸ the justices considered the case of Joshua DeShaney, a four-year-old boy battered into a senseless coma by his father.¹⁷⁹ The state had plenty of warning of the problem, and easily could anticipate the eventual outcome. Repeatedly family, doctors, and others told the Department of Social Services what was going on.¹⁸⁰ The Department investigated time and again and did nothing, despite clear evidence nothing was the wrong answer.¹⁸¹ As DeShaney’s caseworker said, too late to help, “I just knew the phone would ring some day and Joshua would be dead.”¹⁸²

¹⁷⁵ N.Y.C., N.Y., ADMIN. CODE §§ 10-114–10-166 (2022).

¹⁷⁶ See DUBBER, *supra* note 169, at 51 (describing prevalence of “idle unattached persons roaming the countryside” in 1500s as impetus for English statute criminalizing “wandering imposters and jugglers”).

¹⁷⁷ See U.S. CONST. art. I, § 8 (enumerating powers of the legislative branch); *id.* amend. X (delegating all powers not enumerated in the Constitution to state governments and the people); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers.”).

¹⁷⁸ 489 U.S. 189 (1989).

¹⁷⁹ *Id.* at 193.

¹⁸⁰ *Id.* at 208-09 (Brennan, J., dissenting).

¹⁸¹ *Id.* at 209.

¹⁸² *Id.*

DeShaney held, notoriously, that government has no affirmative obligation even to protect people.¹⁸³ *Our* Constitution, the Justices said, just keeps government from doing bad things.¹⁸⁴ The majority in *DeShaney*, led by Chief Justice Rehnquist, conceded that what happened to Joshua was “tragic.”¹⁸⁵ (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 do it, with ample time to stop you, but sitting idly by, is something else altogether.) The Court pointed to the Fourteenth Amendment itself: “No state shall . . . deprive any person of life, liberty, or property, without the due process of law.”¹⁸⁶ 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.”¹⁸⁷

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.¹⁸⁸ (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.¹⁸⁹ 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 government to set minimum wages and maximum hours for workers, one could go on and on and

¹⁸³ *Id.* at 195 (majority opinion).

¹⁸⁴ *Id.* (“[The Fourteenth Amendment] cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”).

¹⁸⁵ *Id.* at 191.

¹⁸⁶ *Id.* at 195 (quoting U.S. CONST. amend. XIV, § 14).

¹⁸⁷ *Id.*

¹⁸⁸ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (describing underenforced constitutional norms as constitutional claims which the federal judiciary is reluctant to uphold to their full extent).

¹⁸⁹ Cf. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 117-20 (2013) (describing how Supreme Court has rejected arguments that Equal Protection Clause obligates government to provide adequate education, but suggested that right to education may exist in cases involving Due Process Clause).

on about the Court's many missteps.¹⁹⁰ This surely seems one of them; as others have observed, our Constitution contains any number of positive rights.¹⁹¹

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 total or overall safety it can, while recognizing some people may have to give up their security so that others are made safe.¹⁹² Waldron emphatically rejected this aggregative approach: government cannot make some safer at the expense of others.¹⁹³

But Waldron's egalitarian notion of government's obligation to provide security turns out to be quite sparse.¹⁹⁴ Either, "a legitimate regime must bring each person's safety up to at least a certain level, 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."¹⁹⁵ 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

¹⁹⁰ *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that Constitution does not contain "a fundamental right to engage in homosexual sodomy"), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Lochner v. New York*, 198 U.S. 45, 58 (1905) (holding that workplace safety laws violate Due Process Clause); *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding Alabama's antimiscegenation statute as constitutional), *overruled by* *Loving v. Virginia*, 388 U.S. 1 (1967); *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 Black individuals, whether free or enslaved, could not be U.S. citizens), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁹¹ *See generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (arguing that even within negative rights, case law imposes positive duties on government in many areas).

¹⁹² Waldron, *supra* note 60, at 477-78.

¹⁹³ *See id.* at 478-80 (describing shortcomings of maximizing approach and advocating for egalitarian approach).

¹⁹⁴ Ultimately, it becomes clear that 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 communities in the United States—in an effort to keep the rest of us safe. *See id.* at 461.

¹⁹⁵ *Id.* at 492.

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 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."¹⁹⁶ 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 community*, by means of several statutes enacted for the relief of the poor¹⁹⁷

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.¹⁹⁸ 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.¹⁹⁹ There long has been in this country an appreciation of the need to help those who cannot help themselves.²⁰⁰ 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."²⁰¹

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 obligation to assure safety in other ways. And so, the question still remains whether there is some other source for according 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,

¹⁹⁶ BENTHAM, *supra* note 30, at 174.

¹⁹⁷ 1 BLACKSTONE, *supra* note 31, at *131-32 (emphasis added); *see also* LOCKE, *supra* note 2, at 133 ("[M]en . . . have a right to their preservation, and consequently to meat and drink and such other things as nature affords for their subsistence . . .").

¹⁹⁸ *See generally* 1 GEORGE NICHOLLS, A HISTORY OF THE ENGLISH POOR LAW 21-36 (1854) (discussing development of English Poor Laws and almshouses in the 1500s).

¹⁹⁹ *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 116-17, 156-59 (1997) (discussing how in late 1700s, towns cared for poor people when their families could not, and larger communities used almshouses to house their poor).

²⁰⁰ *See Historical Development*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/pdf/histdev.pdf> [<https://perma.cc/3GS3-M79B>] (last visited Feb. 11, 2022) (describing history of social welfare programs in America).

²⁰¹ RYAN, *supra* note 95, at 28.

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.”²⁰²

Were this the case, though, it would require some justification. Why should government have a monopoly on the provision of the protection 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, requiring government action.²⁰³ First, they are nonexcludable: if the good is made available, you can’t keep folks out, or force them to pay to take advantage.²⁰⁴ Second, they are nonrivalrous, meaning no matter how many folks take advantage, there’s still enough to keep going around.²⁰⁵ As a result, Charles Tiebout explains, “[a] public good is one which should be produced, but for which there is no feasible method of charging the consumers.”²⁰⁶

The classic example of a public good is a defense against ballistic missiles.²⁰⁷ It’s hard for market providers to charge for public goods, because folks will free

²⁰² HOBBS, *supra* note 2, at 110.

²⁰³ See RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 44 (1973) (defining public goods as those which require public production); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387, 388 (1954) (describing concept of “collective consumption goods” funded by public expenditures and enjoyed in common).

²⁰⁴ Tyler Cowen, *Public Goods Definitions and Their Institutional Context: A Critique of Public Goods Theory*, 43 *REV. SOC. ECON.* 53, 53 (1985) (defining public goods as nonexcludable).

²⁰⁵ See *id.* at 54 (describing nonrivalrous consumption and nonexcludability as the defining elements of public goods); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 *REV. AUSTRIAN ECON.* 88, 89 (same); Samuelson, *supra* note 203, at 387 (“[E]ach individual’s consumption of [a public good] leads to no subtraction from any other individual’s consumption of that good . . .”).

²⁰⁶ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 417 (1956).

²⁰⁷ See Christopher J. Coyne, *Lobotomizing the Defense Brain*, 28 *REV. AUSTRIAN ECON.* 371, 374 (2015) (“[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.”).

ride and still take advantage.²⁰⁸ The answer, economic theory says, is government stepping in, taxing everyone, and providing the good for everyone's benefit.²⁰⁹

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 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 . . .*²¹⁰

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.²¹¹ Even government seems quite plainly capable of protecting the residents of some communities but not others. Is public safety nonrivalrous? 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.²¹² Besides, Olson's just wrong on

²⁰⁸ Leah Brooks, *Volunteering to Be Taxed: Business Improvement Districts and the Extra-Governmental Provision of Public Safety*, 92 J. PUB. ECON. 388, 388 (2008) ("Because free riding prevails, large groups fail to provide even those public goods which each individual desires.").

²⁰⁹ *Id.* 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 205, 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.").

²¹⁰ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 14 (1971); see Hummel, *supra* note 205, at 111 (characterizing creation of government-run police and court system as a public good).

²¹¹ See Roger A. Fairfax, *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 273-75 (describing trend of private security firms performing services traditionally performed by public police); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1213-15 (1999) (describing the Pinkerton National Detective Agency's infamous specialization in antilabor assignments during the 1880s and 1890s).

²¹² Ed Gallek, *More Than 2,000 Cleveland Police 911 Calls Went Unanswered in June: I-Team*, FOX 8 (June 17, 2020, 7:10 PM), <https://fox8.com/news/i-team/i-team-more-than-2000-cleveland-police-911-calls-went-unanswered-in-june> [<https://perma.cc/KE64-X26X>] (describing how in June, over 2,000 of more than 20,000 calls went unanswered); Ted Booker, *10,000 911 Calls Go Unanswered in St. Joseph County Last Year*, S. BEND TRIB. (June 25, 2017, 6:05 AM), <https://www.southbendtribune.com/story/news/local/2017/06/25/10000-911-calls-go-unanswered-in-st-joseph-county-last-year/46314099/> [<https://perma.cc/99XC->

his insinuation—“if indeed it were possible”—that government lacks the ability to deny services to those who don’t pay. That may be true of ballistic missile defense, but we charge user fees for things around the protection function all the time.²¹³ Some jurisdictions even charge arrestees for the honor of being arrested.²¹⁴ 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.²¹⁵

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.²¹⁶

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.²¹⁷ Which is to say, even if we allow others to provide certain functions, private provision imposes costs on

MSJB] (“A dispatcher’s union says roughly 10,000 emergency calls went unanswered last year because of a staffing shortfall it says violates its contract with St. Joseph’s County.”).

²¹³ See *Court Fees and Getting Court Fees Paid*, LAWHELP.ORG, <https://www.lawhelp.org/resource/court-fees-and-getting-court-fees-paid> [<https://perma.cc/4GFH-NZ3X>] (last visited Feb. 11, 2022) (describing categories of common court costs).

²¹⁴ See *Markadonatos v. Village 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”).

²¹⁵ Cf. Erwin A. Blackstone, Andrew J. Buck & Simon Hakim, *Evaluation of Alternative Policies to Combat False Emergency Calls*, 28 EVALUATION & PROGRAM PLAN. 233, 240 (2005) (arguing that “consumers of false [burglar] 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 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. U.S. CONST. amend. XIV, § 1.

²¹⁶ 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).

²¹⁷ See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 7-8 (1986) (describing how issues with externalities can justify government intervention in provision of public goods).

the rest of us. So we are better off if government does the job, in order to avoid those externalities.²¹⁸

This is hardly a crazy argument. 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.²¹⁹ We can't very well have people running around shooting each other 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."²²⁰

This, however, would be radically inconsistent with our practice. People buy, possess, and use guns all the time for self-protection.²²¹ 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."²²² 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.²²³

²¹⁸ See, e.g., *id.* at 8 (describing how environmental policies are often implemented to cure or internalize negative externalities).

²¹⁹ See Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 390 (2006) (arguing that, due to increases in homicide and suicide rates, marginal social cost of household gun ownership ranges from \$100 to \$1,800).

²²⁰ Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (Hans H. Gerth & C. Wright Mills eds., 2d ed. 1965); 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.").

²²¹ 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, 27 (2015) (finding that self-defense gun use is very rare and "little evidence [exists] that self-defense gun use reduces the likelihood of victim injury during a crime").

²²² Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 50 (2004).

²²³ See Ian Loader & Neil Walker, *Policing as a Public Good: Reconstituting the Connections Between Policing and the State*, 5 THEORETICAL CRIMINOLOGY 9 (2001) ("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 60, at 502 ("[Security] may have communal aspects . . . but . . . security is a complex and structured function of individual safety, not an amiable communal alternative to it."). 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 Lee Anne Fennell, *Beyond Exit and Voice: User*

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.²²⁴ The Supreme Court’s interpretation of the Second Amendment as including a right to possess weapons for self-defense undercuts the monopoly argument altogether.²²⁵ 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 failure—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, but allow them in places that seem perfectly pacified. Yet, that’s not how the Supreme Court sees it, and popular opinion seems to support the Court.²²⁶

Not only is there a right to private protection, externalities notwithstanding, but 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.²²⁷

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

Participation in the Production of Local Public Goods, 80 TEX. L. REV. 1, 14-16 (2001) (arguing residents acting collectively are more likely to improve neighborhood safety than security systems or stricter law enforcement).

²²⁴ See, e.g., FLA. STAT. § 776.012 (2021) (excusing use of force by citizens acting in self-defense); MICH. COMP. LAWS § 780.972 (2022) (same); S.D. CODIFIED LAWS § 22-18-4 (2021) (same).

²²⁵ See *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010) (overturning handgun ban on grounds that the Second Amendment protects the right to bear arms in self-defense); *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008) (“[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.’” (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007))).

²²⁶ See *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> [<https://perma.cc/G9AQ-29HH>] (last visited Feb. 11, 2022) (finding that 73% of adults believe the Second Amendment guarantees the rights of Americans to own guns).

²²⁷ See Tracey L. Meares & Vesla M. Weaver, *Abolish the Police? Is Policing a Public Good Gone Bad?*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/podcast-law-justice/tracey-l-meares-vesla-m-weaver-abolish-police> [<https://perma.cc/72HZ-XXEW>] (discussing how communities impacted by crime and violence may still prefer less or no police presence, due to negative effects of policing); *Defund the Police*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/defund-the-police/> [<https://perma.cc/C9BS-GKNY>] (last visited Feb. 11, 2022) (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”).

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.²²⁸ 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.)²²⁹

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: education is positively correlated with voter turnout and income.²³⁰ 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.²³¹

There's every reason, therefore, to call into question whether economic arguments like public goods and externalities can justify 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

²²⁸ 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 legal regulation of behavior in public spaces).

²²⁹ See Friedman, *supra* note 81 (manuscript at 11-14) (describing harms of enforcing regulations against homeless people).

²³⁰ Rachel Milstein Sondheimer & Donald P. Green, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 AM. J. POL. SCI. 174, 185-87 (2010) (finding positive correlation between education and voter turnout is also causal relationship); *Education Pays*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm> [<https://perma.cc/X6N6-MKJ2>] (last updated Apr. 21, 2022) (showing positive correlation between education and income); see also 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." (internal references omitted)); Fennell, *supra* note 223, at 8 ("The composite 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.'").

²³¹ See, e.g., Michael Heise, *Preliminary Thoughts on the Virtue of Passive Dialogue*, 34 AKRON L. REV. 73, 93-105 (2000) (describing litigation efforts which seek to force state governments to fund public schools adequately).

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*.²³² 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.”²³³

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.²³⁴ 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.”²³⁵ The very point of civil society, he stressed, was “setting up a known authority to which everyone of that society may appeal upon any injury received or controversy that may arise, and which everyone of the society ought to obey.”²³⁶ 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.”²³⁷

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.²³⁸ On a victim’s say-so the accused even could be committed to jail pending trial, unless bailed.²³⁹ Private counsel was

²³² ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 11 (1974).

²³³ *Id.*

²³⁴ *E.g.*, BENTHAM, *supra* note 30, at 143 (describing law and legislation as only means through which humans have been able to create a durable form of security); HOBBS, *supra* note 2, at 108 (stating that men join in a body politic to make laws for their security); LOCKE, *supra* note 2, at 164 (stating that by joining in society, individuals authorize the collective to make laws applicable to them for the good and safety of all).

²³⁵ LOCKE, *supra* note 2, at 122.

²³⁶ *Id.* at 165.

²³⁷ HOBBS, *supra* note 2, at 112.

²³⁸ See Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1575-79 (2020) (describing how private prosecution was common from the colonial period through the Civil War); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 586 (1984) (describing commonality of private prosecution for misdemeanors in 1950s and influence of victims on charging process).

²³⁹ ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE* 38-39 (Thomas A. Green ed., 1989) (discussing role of alderman as “the point of initial contact between the citizenry and the criminal law” and their ability to hold the accused to bail or commit them to jail to await trial).

retained to prosecute a case should a defendant be bound over.²⁴⁰ As late as the 1950s, twenty-eight states depended on private prosecution of misdemeanors.²⁴¹ Today there are many varieties of private dispute resolution, such as mediation or arbitration. Governments delegate to homeowners associations the power to adopt enforceable rules, or defer to penalties imposed by a religious tribunal.²⁴² “Restorative justice,” often means putting in private hands the imposition of remedies to resolve even public crimes.²⁴³

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.”²⁴⁴

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 system of protection.

More fundamentally, once we reduce protection to the lawmaking and remedial 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 they injunctions, damages, fines, or imprisonment. This is just how government works. It does not set protection apart.

²⁴⁰ Steinberg, *supra* note 238, at 577 (discussing the minimal role of public prosecutors, stating “[f]or the majority of cases he could be, and perhaps was even expected to be, superseded by a private attorney”).

²⁴¹ *Id.* at 586.

²⁴² Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 840-46 (2013) (describing powers wielded by homeowners associations and 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, 177-81 (2007) (describing how courts enforce decisions made by Christian, Muslim, and Jewish tribunals on issues such as divorce, employment disputes, and contract claims).

²⁴³ See John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2272-75 (2018) (discussing retail companies’ use of restorative justice programs, involving retailer turning to a retail justice company rather than calling the police or turning to the legal system, instead of criminal prosecution, to address shoplifting); 34 C.F.R. § 106.45(b)(9) (2022) (permitting universities to use informal resolution processes, such as mediation, to resolve campus sexual assault complaints).

²⁴⁴ NOZICK, *supra* note 233, at 14.

E. *Capacity and Capability*

This does raise another way that protection possibly might 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 so that we accord primacy to protection over food, housing, or health care. But that's purely a function of aggregated preferences of the electorate, something I 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-à-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 "a Thousand Points of Light [in] all the community organizations that are spread like stars throughout the Nation, doing good."²⁴⁵ 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.²⁴⁶ 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

²⁴⁵ Inaugural Address, 1 PUB. PAPERS 2 (Jan. 20, 1989).

²⁴⁶ See Mike Konczal, *The Voluntarism Fantasy*, DEMOCRACY J. IDEAS, Spring 2014, <https://democracyjournal.org/magazine/32/the-voluntarism-fantasy> [<https://perma.cc/2J2E-DHKN>] (arguing for necessity of public social insurance programs, noting private sector has limits state does not in providing social insurance and documenting decreases in voluntary charity during economic crises).

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 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.²⁴⁷ 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.²⁴⁸ 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 its 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.”²⁴⁹

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 rely on the government doing its job to protect our person and property.

But if there is something to dependence, then surely 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 government has promised many people and failed them, as seen by the crisis in Flint, Michigan. Education is another obvious example: all fifty states not only

²⁴⁷ *DeShaney v. Winnebago Cnty. Dep’t Soc. Servs.*, 489 U.S. 189, 198-202 (1989) (discussing cases such as *Estelle v. Gamble*, *Youngberg v. Romero*, and *Revere v. Massachusetts General Hospital* in holding that government is obligated to provide medical care to incarcerated individuals).

²⁴⁸ *See id.* But see Roni Caryn Rabin, *Vulnerable Inmates Aren’t a Vaccine Priority*, N.Y. TIMES, Dec. 1, 2020, at A9 (explaining that federal guidelines do not list inmates as high-priority group for receiving COVID-19 immunizations, even though some of the largest outbreaks have occurred in prisons); *see also* *Barnes v. Ahlman*, 140 S. Ct. 2620, 2621-22 (2020) (Sotomayor, J., dissenting) (detailing conditions at jail during COVID-19 outbreak, including reports that inmates were denied COVID-19 tests despite being symptomatic).

²⁴⁹ *DeShaney*, 489 U.S. at 199-200.

promise to provide it, they mandate that students partake in it and again too often fail to provide it.

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 government must make good on its promise. Perhaps with warning from government we can take back that responsibility and once again become self-sufficient. In the face of a promise and reliance, though, 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.

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 were 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 although 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.²⁵⁰ It might be education, or meeting the most basic needs of the destitute, or health care.²⁵¹ Whether in South Africa or India or in those states of the United States that guarantee a public education, these provisions do exist.²⁵²

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.²⁵³

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.²⁵⁴ Some states' experience with public education provides

²⁵⁰ See Mila Versteed & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1681-82 (2014) (“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.”).

²⁵¹ *Id.* at 1681 (documenting most national constitutions “contain explicit socioeconomic rights, such as the right to education, health care, housing, social security, work, workplace safety, water, and food”).

²⁵² See *id.* at 1695-96 (stating that the U.S. Constitution's absence of positive rights distinguishes it from the constitutions of India, South Africa, and most U.S. states).

²⁵³ 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., 1996, ch. 2, § 29 (“Everyone has the right . . . to a basic education, including adult basic education; and . . . to further education, which the state, through reasonable measures, must make progressively available and accessible.”); THE WORLD BANK, OVERCOMING POVERTY AND INEQUALITY IN SOUTH AFRICA: AN ASSESSMENT OF DRIVERS, CONSTRAINTS AND OPPORTUNITIES, at xxii (2018) (noting poverty levels are highest among certain subgroups including those less educated and that “[l]iving in a household where the head has attained some tertiary education reduces the average risk of poverty by about 30 percent compared to those living in households where the head has no schooling”); *All India Rsr. v. Bank Empls. Ass'n v. Rsr. Bank India*, AIR 1966 SC 305 (1965) (India) (observing disconnect between India's constitutionally guaranteed living wage and the reality of meager and insufficient wages in the country).

²⁵⁴ See Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1529 (2010) (observing that judicial interaction with positive rights manifests as increased constitutional dialogue with legislature); see, e.g., Christine Bateup, *Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective*, 21 TEMP. INT'L & COMPAR. L.J. 1, 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).

just one example.²⁵⁵ 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 to human safety.²⁵⁶ 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.²⁵⁷

On these terms, our Constitution fails utterly.²⁵⁸ 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.²⁵⁹ And in truth (though "federalism" often remains the descriptor), much of the division includes local governments as well.²⁶⁰

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

²⁵⁵ See Michael Heise, *Political Economy of Education Federalism*, 56 EMORY L.J. 125, 153 (2006) (discussing school funding in states like Texas and Massachusetts).

²⁵⁶ See, e.g., George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 LOY. U. CHI. INT'L L. REV. 127, 183-84 (2011) (describing Argentinian Court of Appeals decision in *Menores Comunidad Paynemil*, having been interpreted as "strong judicial support" for independent right to water); Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, TUL. J. INT'L & COMPAR. L. 49, 110 (2007) (describing how India's Supreme Court imposed judicially enforceable obligation to provide emergency medical treatment absent explicit right to health care in Indian Constitution).

²⁵⁷ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1327 (2006) ("Constitutional culture preserves and perpetually destabilizes the distinction between politics and law by providing citizens and officials the resources to question and to defend the legitimacy of government, institutions of civil society, and the Constitution itself.").

²⁵⁸ See Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, J. CONST. L. 750, 752 (2001) (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").

²⁵⁹ See U.S. CONST. art. I, § 8 (enumerating powers of the legislative branch); *id.* amend. X (delegating to state governments all powers not enumerated in the Constitution).

²⁶⁰ See THE FEDERALIST NO. 39, *supra* note 2, at 211-14 (James Madison) (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 "state-local relationship" and "formal legal power local governments possess as well as all of their legally significant informal authority").

subsidizes it, enforces constitutional safeguards around it, and has ample power to do almost anything necessary to clean up policing's act.²⁶¹ So too could the states, as the raft of policing regulation now being adopted indicates.²⁶² And the national government engages in plenty of "protection" on its own—including in ways that are deeply deserving of criticism.²⁶³

Similar arguments could be made about many other aspects of safety. Education is a state and local responsibility, but the federal government does plenty here too and could do more.²⁶⁴ The national government deals with housing availability, but so too the states and localities.²⁶⁵ "Our Federalism" is a marble cake of mixed responsibilities, and to the extent the marbling is off, it simply could be adjusted.²⁶⁶

The problem, though, is that federalism is 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'

²⁶¹ 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. DOJ, <https://civilrights.justice.gov> [<https://perma.cc/LLP2-649F>] (last visited Feb. 11, 2022) (outlining ways the Civil Rights Division may help protect people from discrimination on various grounds); *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, BUREAU JUST. ASSISTANCE, <https://bja.ojp.gov/program/jag/overview> [<https://perma.cc/V8ME-BVT2>] (last visited Feb. 11, 2022) (providing overview of JAG program which is "leading source of federal justice funding to state and local jurisdictions"); Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Government's Role in Policing* (2021) (unpublished manuscript) (on file with *Boston University Law Review*) (arguing for increased federal role in reforming policing).

²⁶² See *supra* note 120 (describing recent legislative efforts).

²⁶³ See, e.g., Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 101, 88 Stat. 143, 143-44 (1974) (codified at 42 U.S.C. § 5121) (detailing scope of authority for the Federal Emergency Management Agency (FEMA) and ways 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 when they arrive for court").

²⁶⁴ See Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 965-66, 969-70 (2015) (describing federal government's role in establishing education standards and addressing achievement gaps, despite providing only 10.2% of education budgets).

²⁶⁵ See Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1215-18 (2019) (explaining how federal government and local agencies share responsibility for operating public housing).

²⁶⁶ See Morton Grodzins, *The Federal System*, in GOALS FOR AMERICANS: THE REPORT OF THE PRESIDENT'S COMMISSION ON NATIONAL GOALS 265, 265 (1960) ("As colors are mixed in the marble cake, so functions are mixed in the American federal system.").

responsibilities, and vice versa.²⁶⁷ Similarly, on the woes of the New York subway system.²⁶⁸ 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.²⁶⁹

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 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*²⁷⁰ exacerbated White flight by those determined to avoid busing or sending their children to desegregated schools.²⁷¹ 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.²⁷² The result is that those who can pay for their kids' fine educations get them.²⁷³ 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

²⁶⁷ See, e.g., Michael D. Shear, Noah Weiland, Eric Lipton, Maggie Haberman & David E. Sanger, *Passing Off Virus Burden, White House Fueled Crisis: Eager to Shed Blame for Failures, Trump's Team Embraced Rosiest Projections*, N.Y. TIMES, July 19, 2020, at A1, (describing how federal government and state governments clashed over who should be responsible for coordinating response to the COVID-19 pandemic).

²⁶⁸ See, e.g., Marc Santora & Emma G. Fitzsimmons, *Subway Fight Is as Much Political as It Is Fiscal*, N.Y. TIMES, July 22, 2017, at A1, A15 (describing disputes between city and state leadership over funding the subway system).

²⁶⁹ 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").

²⁷⁰ 347 U.S. 483 (1954).

²⁷¹ Donald C. Orlich, *Brown v. Board of Education: Time for a Reassessment*, 72 PHI DELTA KAPPAN 631, 631 (1991) (explaining that impacts of *Brown* included White flight from cities and busing policies); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 282 (1999) ("[D]esegregation plans themselves often added to existing patterns of white flight." (citing DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 199-201 (1995))).

²⁷² Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1605 (2003) (describing how White flight contributed to racial segregation and disparate funding of public schools).

²⁷³ See Ryan, *supra* note 271, at 272-75 (providing data demonstrating that suburban students have substantially better educational outcomes than urban students).

own personal safety.²⁷⁴ They drive to medical parks full of competent and available doctors, whose fees are covered by adequate if not ample insurance.²⁷⁵

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.²⁷⁶ But there's not much in our Constitution that's likely to allow us to limit private choices like these.²⁷⁷ 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.²⁷⁸ 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. City of Chicago*²⁷⁹: “Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence.”²⁸⁰ 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.²⁸¹ There's scarcity—be it

²⁷⁴ See John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1129 (1997) (explaining that many gated communities privatize “police protection and communal services such as schools, recreation, and entertainment”).

²⁷⁵ See generally Samuel L. Dickman, David U. Himmelstein & Steffie Woolhandler, *Inequality and the Health-Care System in the USA*, 389 LANCET 1431, 1431 (2017) (stating that wealthiest Americans have access to substantially better healthcare, living on average ten to fifteen years longer than the poorest Americans).

²⁷⁶ Loader & Walker, *supra* note 223, at 26 (arguing that “security . . . [is] an irreducibly social accomplishment, and insecurity . . . [is] an irreducibly social failure”).

²⁷⁷ See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that it is unconstitutional for state to prevent children from attending private religious schools); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that it is unconstitutional for state to criminalize foreign language instruction at parochial schools).

²⁷⁸ See 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 119 (Andrew Skinner ed., Penguin Books 1999) (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.”).

²⁷⁹ 561 U.S. 742 (2010).

²⁸⁰ *Id.* at 891 (Stevens, J., dissenting).

²⁸¹ Cf. Gwynne Hogan, “Please Get These Men Out”: Upper West Siders Campaign to Eject Homeless Residents, GOTHAMIST (Aug. 7, 2020, 4:21 PM), <https://gothamist.com/news/please-get-these-men-out-upper-west-siders-campaign-to-eject-homeless-residents> [<https://perma.cc/H67X-PQB8>] (reporting that Facebook group “Upper West Siders for Safer Streets” is attempting to rid its neighborhood of temporary homeless shelters).

education, dollars, or food, or police—and if someone else gets it, you don't. Or at least it feels that way. To the extent safety either is, or 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 perceived 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.²⁸² But if the data does not support the perception, we ought not to tolerate it.²⁸³ The same is true of constant calls to 911 about people doing nothing other than Living While Black.²⁸⁴ 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 versus safety; it's safety versus 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 queue up the lecture about dollars not being tantamount to educational outcomes, and how the United States spends more than other countries for worse performance, consider equalizing the resources that the country's richest school district spends to failing schools in Detroit, and see if there is progress.)²⁸⁵ 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.

²⁸² See *Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> [<https://perma.cc/8HJS-965U>] (last visited Feb. 11, 2022) (reporting that as of 2019, 42% of Americans believe that immigrants have made crime situation worse).

²⁸³ See ANTI-DEFAMATION LEAGUE, MYTHS AND FACTS ABOUT IMMIGRANTS AND IMMIGRATION 1 (2019), <https://www.adl.org/media/6950/download> [<https://perma.cc/7UX4-FG99>] (“[I]mmigrants . . . are less likely than native-born citizens to commit crimes . . .”).

²⁸⁴ See Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness As Nuisance*, 69 AM. U. L. REV. 863, 870 (2020) (examining incidents of #LivingWhileBlack, mundane activities by Black individuals, such as sitting at Starbucks and holding a BBQ, prompting White individuals to call the police and exploring callers' “casting of Blackness as a property harm—an interference with existing (white) property entitlements”).

²⁸⁵ See Brief of Appellants at 7-11, *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020) (Nos. 18-01855, 18-01871), 2018 WL 6044766, at *7-11 (describing abysmal conditions in some of Detroit's public schools); *supra* notes 155-56 and accompanying text (discussing *Gary B.*).

E. *Otherring, and the American Dilemma*

Self-interest is fueled further by a clan mentality that excludes caring about the “other,” exacerbated here by America’s long-standing blot: race. People at bottom are influenced by an understandable mixture of self-interest and altruism.²⁸⁶ 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.²⁸⁷ Voters, for example, are more supportive of welfare when the recipients are of their race, and less so if of another race.²⁸⁸ In particular, Whites are less apt to support welfare benefits if they perceive the recipients to be Black.²⁸⁹

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.²⁹⁰ 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 H.W. 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 spoke for an entire race.²⁹¹ The face of cutting welfare funds was the “welfare queens”—all too often portrayed as Black women—who supposedly took advantage of benefits programs to avoid work.²⁹² Today, immigrants, and Black

²⁸⁶ See KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM* 7 (1996) (defining normal human behavior as existing in 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 relative proportions varying across cultures).

²⁸⁷ See Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn’t the US Have a European-Style Welfare State?* 30 (Nat’l Bureau of Econ. Rsch., Working Paper No. 8254, 2001) (observing that people react hostilely to those of another race receiving welfare, but sympathetically when those of their own race receive welfare).

²⁸⁸ See *id.*

²⁸⁹ Allison Harell, Stuart Soroka & Shanto Iyengar, *Race, Prejudice, and Attitudes Toward Redistribution: A Comparative Experimental Approach*, 55 EUR. J. POL. RSCH. 723, 724 (2016) (“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.” (citations omitted)).

²⁹⁰ See generally ALEXANDER, *supra* note 135 (detailing how 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* (2016) (tracking racist ideology through colonial era, slavery, and Jim Crow to present day).

²⁹¹ See DOUG ROSSINOW, *THE REAGAN ERA: A HISTORY OF THE 1980s*, at 245 (2015) (describing Willie Horton controversy as “the burning core” of George H.W. Bush’s 1988 presidential campaign).

²⁹² Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_quee

and Brown folks, are targets of a renaissance of bigotry, racism, and White nationalism.²⁹³

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 what government's proper role ought to be in assuring individual safety.²⁹⁴ 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 is principle simply a justification for not doing what we don't want to do anyway?

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

n_ronald_reagan_made_her_a_notorious_american_villain.html [https://perma.cc/J2VC-UJN2] (discussing Ronald Reagan's use of "welfare queen" as dog whistle).

²⁹³ ANTI-DEFAMATION LEAGUE, MAINSTREAMING HATE: THE ANTI-IMMIGRANT MOVEMENT IN THE U.S. 4-5 (2018), available at <https://www.adl.org/media/12249/download> [https://perma.cc/U3NV-WKUQ] (noting the Trump Administration's use of violent anti-immigrant language and the increase in anti-immigrant language in mainstream American thought); Reverend Al Sharpton, Eulogy for George Floyd (June 9, 2020) (transcript available at <https://www.rev.com/blog/transcripts/reverend-al-sharpton-george-floyd-funeral-eulogy-transcript-june-9> [https://perma.cc/7YRA-547K]) (contextualizing murder of George Floyd with other violent attacks on Black Americans by police).

²⁹⁴ See BALLARD C. CAMPBELL, THE GROWTH OF AMERICAN GOVERNMENT 286-88 (2d ed. 2014) (stating that concerns about government's proper role and size have been obstacles to expansions of social services throughout American history); REBECCA E. KLATCH, WOMEN OF THE NEW RIGHT 104 (1987) (noting that some conservatives oppose welfare due to belief that "government has expanded dangerously beyond the limited role set forth in the Constitution").

bootstraps.²⁹⁵ (To which others respond: It's not a handout, it's a hand up. People need help getting on their feet.)²⁹⁶

There is a real strain of antipathy toward “big government.” Many people believe we are better off with a leaner state.²⁹⁷ Part of this belief is built from perceptions of state incompetence: money given to a bloated government is misused and wasted.²⁹⁸ Another part derives from the view that with a larger state comes infringement on our liberty and the fear of tyranny.²⁹⁹ Whichever,

²⁹⁵ 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 [1868], when Horatio Alger wrote novels about boys who worked hard and rose up the social ladder from poverty”); HORATIO ALGER, JR., RAGGED DICK 124, 126 (1868) (suggesting, through dialogue, “in this free country poverty in early life is no bar to a man’s advancement,” and “[s]ave your money, my lad, buy books, and determine to be somebody”); see also, e.g., Juan Williams, Opinion, *Reagan, the South and Civil Rights*, NPR (June 10, 2004, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=1953700> [<https://perma.cc/2LZU-7A2D>] (“Even when [Reagan] was characterizing poor women as welfare queens driving around in pink Cadillacs, he said it was [merely a] matter of encouraging people to pull themselves up by the bootstraps.”); Remarks Accepting the Presidential Nomination at the Democratic National Convention in Chicago, 2 PUB. PAPERS 1409-10 (Aug. 29, 1996) (positing that welfare-to-work requirements give Americans the chance to take personal responsibility for themselves).

²⁹⁶ See, e.g., Derek Thompson, *Busting the Myth of ‘Welfare Makes People Lazy,’* ATLANTIC (Mar. 8, 2018), <https://www.theatlantic.com/business/archive/2018/03/welfare-childhood/555119/> (arguing that cash assistance is a “critical investment in the health and future careers of low-income kids”); Randi Weingarten, *A Hand Up Is Not a Handout*, HUFFPOST (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).

²⁹⁷ 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 U.S. should have “smaller government with fewer services”); Jocelyn Kiley, *In Search of Libertarians*, PEW RSCH. CTR. (Aug. 25, 2014), <https://www.pewresearch.org/fact-tank/2014/08/25/in-search-of-libertarians/> [<https://perma.cc/53AB-AJV8>] (reporting that within all income ranges, at least 7% of individuals believe in “limiting the role of government”).

²⁹⁸ See AMY LERMAN, GOOD ENOUGH FOR GOVERNMENT WORK 4 (2019) (“[T]he tendency of Americans to associate ‘public’ with ineffective, inefficient, and low-quality services . . . is a central feature of our modern political culture.”).

²⁹⁹ See John Stuart Mill, *On Liberty*, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 65 (Everyman’s Library 1950) (1859) (arguing that 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 BUFF. L. REV. 819, 926 (2002) (explaining antigovernment 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.³⁰⁰

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 a minimal shop open.³⁰¹ 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 is simply 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.³⁰² 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.³⁰³

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.”³⁰⁴ And whenever we can't get a handle on something that feels threatening, we seem to pass laws simply cranking up the penalties for its

³⁰⁰ See *supra* text accompanying note 245 (recognizing President George H.W. Bush's view that community organizations constitute a “Thousand Points of Light”). See generally MARTIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* (1994) (arguing that social system relying on private charity organizations creates more social good than a welfare state).

³⁰¹ See NOZICK, *supra* note 233, at 22-28 (arguing for a minimal, night-watchman state responsible only for narrow and necessary protective functions).

³⁰² 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).

³⁰³ Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257 (2013) (“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* 16, 23-24 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing noncarceral harms of criminalization, including ineligibility for Supplemental Nutrition Assistance Program benefits and housing assistance).

³⁰⁴ See TED GEST, *CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 66 (2001) (noting Attorney General Edwin Meese's comment that Congress often passes “a law whether it's necessary or not, if it's politically salient”).

commission.³⁰⁵ 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.³⁰⁶

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 voters 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.³⁰⁷ People are to be punished because they have done wrong. There are plenty of laws that criminalize without requiring any bad intent.³⁰⁸ (Like sleeping, or asking for money, in public places.)³⁰⁹ But that's the problem. People who are unhoused, 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.³¹⁰ It's not clear that is making anyone safer. Eventually they come out, still without housing, and no better off.

³⁰⁵ See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 127 (2017) (showing criminal punishments have dramatically increased despite stagnant crime severity); Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 23, 24-25 (Joan Petersilia & Kevin R. Reitz eds., 2012) (describing practice of California governors “building and filling prisons as a generic and promising solution to the ubiquitous social problems facing California”).

³⁰⁶ 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. See generally Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019) (discussing court and legislative efforts to determine bounds of police power); Barnett, *supra* note 169, at 494-95 (“The decision in *Lawrence* implicitly rejects the view of the police power as unlimited and plenary and is entirely compatible with the analysis presented here. . . . By prohibiting the rightful exercise of liberty, the statute exceeds the proper scope of the police power.” (citing *Lawrence v. Texas*, 539 U.S. 558, 562-64 (2003))).

³⁰⁷ 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, 1547-48 (1997) (“Under the traditional, paradigmatic conception of the criminal law, the commission of a wrongful act must be accompanied by a culpable mental state . . .”).

³⁰⁸ See James R. Copland & Rafael A. Mangual, *Overcriminalizing America: An Overview and Model Legislation for States*, MANHATTAN INST. (Aug. 8, 2018), <https://www.manhattan-institute.org/html/overcriminalizing-america-overview-and-model-legislation-states-11399.html> [<https://perma.cc/B2QW-8TB2>] (arguing that to curb overcriminalization, criminal intent should be element of regulatory crimes).

³⁰⁹ See BAUMAN ET AL., *supra* note 82, at 7-8 (reporting that 27% of U.S. cities prohibit sleeping in particular public places, and 76% of cities criminalize begging in particular public places).

³¹⁰ See Friedman, *supra* note 81 (manuscript at 18) (describing widespread incarceration of the United States' homeless population).

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 jails and prosecutors and judges and prisons are tremendously expensive.³¹¹ 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.³¹²

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.³¹³ The criminal law both serves an expressive function—making clear that threatened harms to vulnerable groups matter—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.³¹⁴

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 meets the road.³¹⁵ Where funds are disbursed to a

³¹¹ 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.”); Nicole Lewis & Beatrix Lockwood, *Families Pay Prisons Hidden Costs, Even Holiday Phone Calls*, N.Y. TIMES, Dec. 18, 2019, at A16 (“The Bureau of Justice Statistics estimates that the United States spends more than \$80 billion each year to keep roughly 2.3 million people behind bars.”).

³¹² First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; see Barkow, *supra* note 311, at 1277 (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, 620-21 (2012) (observing that budgetary concerns have driven many reforms of criminal justice system).

³¹³ See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 229 (2011) (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 102 (describing cyberstalking, current laws that may hold perpetrators accountable, and suggesting legal reform).

³¹⁴ See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 931-34 (2009) (describing prison conditions as cruel, degrading, harmful, and inhumane).

³¹⁵ See generally KENNETH CULP DAVIS, *POLICE DISCRETION* (1975) (detailing discretion police exercise on the street and how it is used); KENNETH CULP DAVIS, *DISCRETIONARY*

particular claimant, or not. Where the decision is made to toss that unhoused 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 (or otherwise isn't) 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.³¹⁶

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 unhoused 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.³¹⁷

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 the need for bureaucratic employees to have discretion. It's just hard to get discretion right.³¹⁸ On the one hand, low-level workers need a certain amount of

JUSTICE: A PRELIMINARY INQUIRY 9 (1969) (showing that the administrative-heavy state has come to rely on billions of discretionary decisions).

³¹⁶ See Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1907 (2006) (noting that 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. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 740 (2013) (noting that greater specialization among different agencies at lower level of decision-making increases arbitrary overcriminalization).

³¹⁷ 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> [<https://perma.cc/CD8R-2GER>] (shooting of mentally ill homeless man camping outside "because city homeless shelters had 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> [<https://perma.cc/X8KZ-PBJJ>] (reporting police tasing and shooting mentally ill homeless man); Ian Lovett, *California: Police Charged in Killing*, N.Y. TIMES, Sept. 22, 2011, at A22 (reporting on death of Kelly Thomas, man who suffered from schizophrenia and, while homeless, was beaten to death by police in Orange County).

³¹⁸ 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 administrative discretion and delegation are necessary given scarcity of resources, excess of discretion generates arbitrariness and may have costs for systemic legitimacy); Frank

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 to 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 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.³¹⁹ 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 held responsible.

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.³²⁰ 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.

Anechiarico & Stephen L. Lockwood, *The Responsibility of the Police Command for Street-Level Actions*, 12 LAW & POL'Y 331, 340-42 (1990) (noting obstacles to formulating clearer standard of accountable discretion in street-level policing).

³¹⁹ Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (upholding qualified immunity for high government officials); see Ruth Marcus, *A Federal Judge Delivers a Blistering Lesson*, WASH. POST, Aug. 6, 2020, at A25 (highlighting the racialized impact of qualified immunity).

³²⁰ See Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1366 (2018) (noting that

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 neediest 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 multifaceted, 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, and without the use of

conclusions “usually are regurgitations of what came before,” and often “restat[e] in two paragraphs what [has been] said in thirty or more pages”).

force and law.³²¹ At the same time, these ambitious ideas are running hard into real world disagreement and complexity.³²²

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.

³²¹ See, e.g., Amy Forliti, *Proposal to Disband Minneapolis Police Blocked*, ASSOCIATED PRESS (Aug. 5, 2020), <https://apnews.com/article/police-us-news-minneapolis-racial-injustice-mn-state-wire-47cc373752ffab4c983077e6bc90ab13> (describing proposed amendment to disband Minneapolis Police Department and replace it with “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, Dakota Smith & Emily Alpert Reyes, *City Will Shrink the LAPD*, L.A. TIMES, July 1, 2020, at A1 (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/> [<https://perma.cc/K7H6-YHML>] (describing San Francisco’s pilot program, proposed following calls to defund SFPD, in which “behavioral health clinicians and peer specialists will respond to certain non-violent 911 calls in the city, instead of cops”).

³²² See, e.g., Jenny Gross & John Eligon, *Minneapolis Shifts \$8 Million from Police Budget After Turmoil*, N.Y. TIMES, Dec. 12, 2020, at A16 (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 police department, and noting that City Council voted to cut \$8 million from city police budget); Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 329 (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.’”).