Uncovering Police

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Introduction

My goal in this essay is to think through the concept of *Police*, which lies within in the American legal idea of the *police power*, at a moment in which many are working to transform the contemporary police service in this country. The work I will do in this essay sits somewhere between a meditation and a provocation. Some of the work is an excavation of an old idea – the notion of Police – in an attempt to demonstrate its relevance to the transformation project I just referenced. And some of the work is argumentative in that I will assert that lawyers have a particular role to play in helping others to appreciate the legal arguments underlying the idea of Police. I argue that state constitutions provide a source of the state's obligation to engage in nonharmful safety provision for citizens.

This essay has three primary parts. In part one I will explain (resuscitate?) the long history of Police in governance. This part is primarily historical and descriptive. While most people are used to thinking about police as individuals who carry out a fairly narrow governance role related to criminal law enforcement, the legal landscape underlying the concept of Police is much deeper and broader. Contemporary legal history demonstrates the extensive roots of the police power in the development of the modern American state. This history reveals that the breadth of topics traditionally classified as Police is quite capacious and includes governmental tasks and institutions far beyond those related to crime-fighting. It turns out, perhaps surprisingly to many, that the concept of Police is more than adequate to accommodate the transformation of the policing service that advocates today urge. History also suggests an answer to why this capacious term has not been readily leveraged in the contemporary policing transformation project, which I explore in part two through a review of

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some of the better-known problems of Police and the police power over time – especially projects of discrimination and morality enforcement. This part of the history demonstrates that the breadth and ambiguity of Police makes it difficult to contain. Moreover, the literal invisibility of Police has rendered it largely impervious to analysis or limitation. I believe (perhaps ironically) this ambiguity may be a strength for my analysis, because it makes clear there is no natural or obvious shape of Police. This means that there is no natural or obvious shape of the policing service itself despite current claims by some to the contrary. In part three I will offer a potential legal path to elucidation of and accountability for Police – state constitutional law. Many current projects of both criminal law scholars, who aim to restrict the contemporary policing service, and of police power scholars, who are typically state and local government experts who do not study the policing service, home in on the federal constitution as the primary mechanism for limitation. Instead of the federal constitution, I will suggest a focus on state constitutional law as a source of both limitation and, importantly, *obligation* to provide citizens with nonharmful safety provision.

What is Police

When I use the term Police,[1] the image that likely comes to mind for most readers is an individual, probably one who is uniformed, and almost certainly one who is carrying a firearm. You might imagine this person driving a car with flashing lights arriving at a location after having been directed there by a dispatcher, who was in turn contacted by a person professing some kind of problem denominated as such from their perspective (a theft from their home, a violent incident occurring two doors down from their residence, a loud party in their area, a Black man they observed watering his neighbor's flowers while the neighbor was on vacation[2]). When I use the term Police here, I am not referring to a person at all. Rather, I am referring to a concept underlying an essential role of the state which is its power to "prescribe regulations to

[1] Throughout this essay I will use the term "Police" to refer to governance of various topics related to general welfare as opposed to the officers or the agency more commonly known as police. When referring to those individuals I will use the terms "police," "policing," or "police service."

[2] See Eduardo Medina, *Alabama Pastor Is Arrested While Watering Neighbor's Flowers, Video Shows*, THE NEW YORK TIMES, Aug. 31, 2022, https://www.nytimes.com/2022/08/31/us/black-alabama-pastor-arrested-flowers.html (last visited Apr 30, 2023).

preserve and promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society."[3] Police is a term, legal scholar Ernst Freund noted in his seminal treatise on topic in 1904, "that has never been circumscribed."[4] Police is a basic building block of modern governance.[5]

In the United States, unlike Europe, we do not have a history or practice of using the term Police in this way. As several authors in a recent volume devoted to this topic note, there is a long history of Police discussed and explored as a cornerstone of political legal thought and practice in France, Germany, and Scotland going back to the 17th century at the very least.[6] In 18th Europe the study of "police science" was a requirement for those involved in governance. A key goal of many of these early administrators was to distinguish Police from the project of law and justice.[7] The United States has no similar scholarly tradition.[8] Police gained prominence here later at the turn of the 20th century through discussions of "the police power," which was developed as a legal basis for Police and which is a legal term that is distinctive to the U.S.[9]

The earliest mentions of the police power are found in court cases. The first court case to discuss the term extensively concerned an effort by the Massachusetts legislature to regulate the use of private property in the Boston Harbor.[10] The regulation established a wharf line beyond which property owners were prohibited from building to ensure that that no

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[3] See Lewis Hockheimer, *Police Power*, 44 Cent. L. J.158 (1897); Santiago Legarre, *The Historical Background of the Police Power*, 9 UNIV. PA. J. CONST. LAW 745 (2006). See also, Lindsay Farmer, *The Jurisprudence of Security: The Police Power and the Criminal Law*, *in* THE NEW POLICE SCIENCE (2006) at 145-46 (discussing lectures delivered by Adam Smith between 1762 and 1763 noting that Police comprises three topics: cleanliness, security (crime prevention), and plenty (availability of social wealth). Smith thought it obvious that control of crime depended on management of the economy and social wealth.

[4] ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 2 (College edition ed. 1904).

[5] See WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

[6] See THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE, (Markus Dirk Dubber & Mariana Valverde eds., 2006).

[7] See Markus Dirk Dubber & Mariana Valverde, *Policing the Rechtsstaat*, *in* POLICE AND THE LIBERAL STATE (2008). Markus Dirk Dubber, *The Power to Govern Men and Things: Patriarchal Origins of the Police Power in American Law*, 52 BUFFALO LAW REV. 1277 (2004).

[8] But see CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

[9] See Mariana Valverde, *"Peace, Order, and Good Government,": Policelike Powers in Postcolonial Perspective*, *in* THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE 73 (2006).

[10] Commonwealth v. Alger, 7 Cush. 53 (Mass. 1851). The first case in the United States to include the term "police power" was a case in the United States Supreme Court adjudicating the relative rights of the state and the federal government to regulate commerce under the Import-Export Clause of the federal constitution. (Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)).

obstructions impeded the harbor. Subject to prosecution for building a pier on his own property, Cyrus Alger argued the wharf line regulation was unconstitutional under Massachusetts's constitution. The Court, in an opinion by Justice Lemuel Shaw, disagreed. Justice Shaw stated that Massachusetts had the right to limit Alger's property rights as an exercise of its "police power."

> Rights of property, like all other social and conventional rights, are subject to reasonable limitations in their enjoyment . . .. This is very different from the right of eminent domain -- the right of a government to take and appropriate private property whenever the public exigency requires it -- which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the *police power*; the power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes, ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge for the good and welfare of the Commonwealth.[11]

Justice Shaw admitted that "marking the boundaries" of this power was a difficult enterprise. As use of the police power as a basis for regulation became more prominent in the 19th and early 20th century, scholars continued to grapple with theories of limitation. Those scholars as well as some today echoed Justice Shaw's concern calling the police power "vast"[12] and "inscrutable."[13] Perusing Ernst Freund's immense treatise on the topic, we see the police power includes safety regulation of mines and railroads, dangerous machinery, and fire codes.[14] Sanitary regulation of cemeteries, dead bodies, and food are also all the subjects of the police power.[15] Prohibitions against the cruelty to animals, controls of weights and measures (as a means of preventing fraud in business), regulation of hours of labor and rates of wages, and

[11] Commonwealth v. Alger, 7 Cush. 53, 84-85 (Mass. 1851) (emphasis added).
[12] FREUND, *supra* note 4 at ___.
[13] Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N. Y. UNIV. J. LAW LIB. 662 (2015).
[14] See FREUND, *supra* note 4.
[15] See ID.

regulation of banking all comprise Police.[16] The police power is the basis of compulsory education of children.[17]

We are not used to thinking about Police and the police power in this way. Because we have become accustomed to thinking about Police almost exclusively as people who work in an agency devoted to the detection of transgressors of laws (including transgressions of low-level order maintenance type ordinances, which are technically Police, as opposed to traditional criminal laws, which are the project of law and justice),[18] we forget or ignore a critical aspect of Police, which focuses on future-oriented risk management and social provision. Police is regulation through prohibition, to be sure. Police is also the basis of public utility and public health. Police is in large part what modern cities and states do for – and to – their citizens.

To illustrate the deep connection between Police and the growth of the modern administrative state, law professor and historian William Novak details in his most recent book, *The New Democracy,* the prolific and profound discussions of Police by Progressive Era scholars and policy makers attempting to solve the unruly problems of the state, law and economy across the United States. This group of people sought to establish a basis for legislative authority to govern for the public good free (as possible) from the constraints and peculiar particularities of common-law regulation because at the time, the justification for burgeoning regulatory projects was emergency self-defense.[19] These thinkers believed emergency self-defense, the basis of much early regulation often effected through exceptions to the common law, was inadequate justification for their work.[20] University of Chicago's Ernst Freund argued that modern legislation needed to be positivist, not merely confined to suppression of the

[16] See ID.
[17] See ID.
[18] A further complication is the fact that police enforce both criminal laws and laws passed to support Police low-level order maintenance type ordinances. Traditional criminal law is considered a project of law and justice where Police laws typically are not. Farmer, *supra* note 3. Historian and legal scholar Sarah Seo offers a compelling account of the interplay between criminal law and police and early understandings of the propriety of judicial regulation of the policing service. See Sarah A. Seo, *Democratic Policing before the Due Process Revolution Essay*, 128 YALE LAW J. 1246 (2018).
[19] See NOVAK, *supra* note 5 at 72 (explaining the doctrine of "overruling necessity" to justify early fire codes).
[20] See NOVAK, supra note 5.

offensive and unsanitary.[21] Quoting Justice McKenna in a case called *Bacon v. Walker*,[22] Novak writes that Freund's expanded understanding of Police was embraced by legislators and jurists alike: "The [police power] extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people."[23] Novak offers as an example of the power of this concept a description of Jane Addams's pioneering work on municipal administration in which she focused on Chicago's inability at the time to provide clean drinking water and regular garbage pick-up to the City's less well-off residents. Addams said, "A transition to a new type of democratic relation [is needed] to make clear to the voter that his needs are common needs, that is, public needs."[24]

A local(ish) example (at least to East Coasters) motivates the point. Broad concepts of Police at the turn of the century led to innovations in government structures for public social provision. In New York this innovation was represented by linking of health administration to the policing agency. Inspired by the London Police, the City of New York established one of the early urban policing agencies in 1845. This department was replaced by a state-based agency called the Metropolitan Police Department in 1857, which covered the counties of Kings, Westchester, Richmond, and New York.[25] Shortly after the Metropolitan Police Department was created, a campaign to pass a Metropolitan Health Bill began in 1860 against the backdrop of epidemic diseases (primarily cholera), destitute tenement conditions, and an effort to bypass the Democratic machine of Mayor Tweed.[26] A case involving a tenement building in the city identified as a major source of epidemic diseases was an organizing incident for reform work because there was no law or ordinance under which the city or the Metropolitan Police Department could force the owner to remedy the situation.[27] The Metropolitan Health Bill

[21] See e.g., JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOXTO COVID-19 (2020) (explaining the distinction between supression and more proactive approaches in the public health realm as the difference between "santitationism" and "quarantinism."

[22] 204 U.S. 311 (1907). The case concerned the constitutionality under the Fourteenth Amendment of the state of Idaho's regulations concerning where sheep and cattle were permitted to graze upon public lands.

[23] WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 98 (2022).

[24] ID. at 242.

[25] James Richardson, *The History of Police Protection In New York City*, 1800-1870 (1961) at 259.

[26] See STEPHEN SMITH, THE CITY THAT WAS (1911).

[27] Id. at 37.

became law in 1866. The prime mover of the legislation was noted surgeon and sanitarian, Stephen Smith.[28]

The Metropolitan Health Bill and the resulting Metropolitan Board of Health provide an early example of the way Police was institutionalized into municipal government in the City of New York. The structures created by Smith and others provide a model of municipal administration for which Addams argued.[29] The Boards of Metropolitan Police and Health were overlapping and intertwined. The 1866 Health Bill established a Board for New York and Brooklyn comprising four police commissioners, the health officer, and four other commissioners appointed by the governor.[30] The new act abolished all the existing health departments of the city, including the office of city inspector, and it authorized a new sanitary regional district, which included New York, Kings, Westchester, and Richmond counties, and the towns of Newton, Flushing, and Jamaica.[31] Importantly, the Health Bill declared that it "shall be the duty of said Metropolitan Police Board to advise the Board of Health of all threats to human life or health as well as to enforce and execute sanitary rules and regulations."[32] Consistent with the description of Police above, the Health Board's powers were very broad. One section of the Health Bill assigned to the Board of Health all powers "for the purpose of preserving or protecting life or health, or preventing disease." Moreover, and interestingly, the Bill authorized the Health Board to call up the Metropolitan Police to enforce its actions if the Board so decided.[33] A sanitary division composed of 34 individuals from the Metropolitan Police Department cooperated closely with the sanitary inspectors of the Board of Health to report nuisances and serve legal notices against offenders.[34] A bureau of street cleaning was shifted from the Health Department to the Police Department, and police officers (presumably because

[28] Smith wrote the book, THE CITY THAT WAS, cited in note 26, to recount how the legislation transformed city government and the city itself. He died at 99 in 1922, just ten years after the book was published.
[29] See Jane Addams, *Problems of Municipal Administration*, 10 AM. J. SOCIOL. 425 (1905).
[30] Laws of the State of New York, passed at the Eighty-Ninth Session of the Legislature,1866, (2 vols., Albany, 1866), I, chap. 74, pp. 114.
[31] The new district was conterminous with the Metropolitan Police District, created a few years earlier. First Annual Report of the Metropolitan Board of Health 1866 (Albany, 1867), 9.
[32] Laws of the State of New York, passed at the Eighty-Ninth Session of the Legislature, 1866, (2 vols., Albany, 1866), I, chap. 74, at 132.
[33] See JOHN DUFFY, HISTORY OF PUBLIC HEALTH IN NEW YORK CITY (1968).
[34] See Id. at 22.

they provided then, as now, a reliable pool of public workers) became responsible for all street cleaning after 1872.[35] Further examples of routine tasks the Health Board assigned to police officers to carry out included collecting blank burial permits, submitting weekly reports of all instances in which the streets, wharves, and piers had not been cleaned, making lists showing the locations of cesspools and cisterns still in use, and enforcing existing sanitary ordinances relating to public nuisances, privies, slaughterhouses, and other sources of danger.[36] Novak explains that even though the Board's work was challenged early on, New York courts repeatedly upheld the Board's powers.[37]

Through this history, we see an example of an agency familiar to us intermingling what we might consider to be modern policing tasks with those we may not typically consider to be policing according to the contemporary use of that term. Police roving about making notes of cesspools in use and formally noticing violations of sanitary ordinances might resemble (in a painfully familiar way) certain pages of the U.S. Department of Justice's Report on Ferguson Missouri.[38] Less familiar, however, might be the image of police officers engaged in street cleaning or providing inoculations. The historical point is that at the time, *all* these tasks were discussed in the parlance of Police, and those who promoted these strategies understood themselves to be engaged in Police to build a government structure to make the city *work* in a forward-looking way instead of being merely responsive to specific criminal incidents or emergencies.

Problems of Police Power

Once one is made aware of just how vast the police power can be, its problematic nature is immediately obvious. I have described the potential for nonharmful safety provision through Police, and it is indeed there. There is also great power for mischief. In his account of

[35] See Id. at 54.
[36] See Id. at 3.
[37] NOVAK, *supra* note 6. He adds this at 229, " The board was a fact-finding, law-making, and law-enforcing body—a legislature, court and administrative agency rolled into one. . . . It was [a] progenitor[] of a new administrative state."
[38] See UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION & THEODORE M. SHAW, THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

the early history of regulatory forms designed to promote the general welfare in the face of rapacious capitalism, Novak highlights a happier story of the deep ways Police and the police power were foundational to the development of the New Deal Era.[39] The success of that project was so complete, we now take for granted much of the administration that now structures our lives along with the attendant role that Police played to create our very every day. It is also true that the power that is the foundation of the common regulatory modes with which we regularly interact was often used to suppress, exclude, and discriminate. It is still so used, and thus is also part of our every day.

This duality is a function of the fact that during the building of the modern state, the capacious, ambiguous and undefined nature of the state's police power grew in relationship to very weak national power. During the earliest stages of this growth at the turn of the 20th century, the 14th Amendment did not exist, and neither was there a fully worked out jurisprudence of federal individual rights. There was, moreover, no robust national administrative state to counter state Police projects we consider obviously odious today. Before the 14th Amendment made national citizenship formally clear, states were entitled to choose who was and who was not a citizen and therefore who was or was not entitled to enjoy social provision. Laws defining citizenship were Police, too! Kate Masur shows her in her recent book, *Until Justice Be Done*, that states relentlessly utilized Police in the antebellum period to exclude free Black people from the burgeoning "welfare goods"[40] created by nascent positive notions of Police.[41] Novak similarly details a direct clash in Police between public provision of education and racial exclusion from it in his recounting of Prudence Crandall's efforts in Connecticut to school Black girls. Crandall's efforts ultimately were thwarted by the state's exercise of police

[39] See NOVAK, *supra* note 23. A key project of Novak's has been to demonstrate the long historical trajectory of this reality in order to undermine the historical myth of the laissez-faire state.

[40] Welfare goods is my term, not Masur's. It is not quite right. One might consider public goods to be a better term, but that is also not right given the very fact discussed in the sentence to which this footnote applies–free Black people were excluded from the "public good." *See* Benjamin Justice, *Schooling as a White Good*, 63 HIST. EDUC. Q. 154 (2023). Justice's ideas motivate me to use the term welfare goods.

[41] See KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (First edition ed. 2021).

power when she was prosecuted and jailed for establishing a "literary institution . . . for the instruction of colored persons belonging to other states."[42]

Even after the 14th Amendment was ratified and the national administrative state became more muscular, Police continued to be used in discriminatory ways. The list is long: consider laws concerning public morals, laws restricting marriage by race, eugenics regulation, laws regarding vice, and laws concerning vagrancy.[43] Police in these contexts often interacted and clashed with the state's general welfare Police projects concerning social provision. It took decades following the New Deal Era for a more robust federal constitutional schema to grow up to limit and quash these discriminatory practices. Vestiges of them yet remain. Dubber and Valverde put it this way, "Police powers are [] neither despotic nor democratic – they can be both, even at the same time."[44]

Given this complicated history, it might seem odd to look to Police as a potential project of progressive transformation in the 21st century. One need not deny the many problems associated with the realities of the ways in Police has been and is carried out to highlight its capacity for good. In fact, recognizing the breadth of Police might even be a welcome point for those who argue that policing today should take on a different, positive and preventive shape and character. There are at least two reasons why. First, history shows us that a version of the kind of policing some advocates argue for has already existed. In this way the history destabilizes contemporary expectations about the nature of law and policy projects.[45] Second, the very breadth and discretionary nature of potential Police projects makes clear that nothing about the contemporary policing service as we know it today is foreordained or required, as some have argued. Because we have lost the history of the connection between Police and municipal governance, we have come to identify the term with the particular armed agents who carry out particular emergency tasks. But I hope the brief history here shows, there is no

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[42] NOVAK, *supra* note 23 at 53-54.

[43] See, e.g., Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. LAW REV. 1637 (2021); Richard A. Epstein, *Race and the Police Power: 1890 to 1937 The Annual John Randolph Tucker Lecture*, 46 WASH. LEE LAW REV. 741 (1989). THOMAS C. LEONARD, ILLIBERAL REFORMERS : RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA (2016).[more citations]

[44] *Policing the Rechtsstaat*, *supra* note 7 at ___.

[45] Here I follow the methodological approach of historians such as William Novak cited above and Niko Bowie, see. e.g., Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE LAW J. 1652 (2020).

obvious or natural aspect to the ways cities and states carry out "public safety" except longstanding practice, habit, and expediency evolved through a series of informal arrangements. This last point leads to the next section. To chart a path to transformation of a small slice of Police – policing by armed agents of the state who enforce laws – lawyers should take advantage of more tools than we currently utilize. Policy is one important avenue, and many of us have made policy arguments and proposals for institutional arrangements to support them. Policy proposals are not, however, the same as articulation of a legal mandate for this work.

In pointing to a legal mandate, I deliberately deemphasize the role of federal constitutionalism. Contemporary scholars of the policing service devote a great deal of time and energy spelling out the shape and scope of federal limitations on policing agent excess in their law enforcement tasks.[46] That work is not concerned at all with the scope and articulation of broader safety projects of Police as I have described above. Scholars of the state's police power, on the other hand, pay no attention at all to the subject of the contemporary policing service. Their work, like that of scholars of the policing service, focuses on the federal constitutional limits of the state's power to regulate via police power, typically in the business regulation context. This focus, very probably, is the legacy of *Lochner*[47] which may be the most famous case on police power in American law.[48]

No legal scholar of which I am aware is attentive to exploring the shape and character of Police to advance public safety projects and how law might define as well as limit it, and I believe this is a project best suited to state, not federal, law. There are multiple paths in state

[46] Consider the numerous pieces and books on federal consent decrees: Samuel Walker, *The Justice Department's Pattern-or-Practice Police Reform Program, 1994–2017: Goals, Achievements, and Issues*, 5 ANNU. REV. CRIMINOL. 21 (2022); Rachel A. Harmon, *Evaluating and Improving Structural Reform in Police Departments Police Consent Decrees: Policy Essays*, 16 CRIMINOL. PUBLIC POLICY 617 (2017); Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOL. PUBLIC POLICY 575 (2017). Or, work in a related vein analyzing the federal doctrine of qualified immunity: Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME LAW REV. 1797 (2018); .Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUMBIA LAW REV. 309 (2020).

[47] Lochner v. New York, 198 U.S. 45 (1905).

[48] Novak explains that the *Lochner* era has come to be identified with so-called "laissez-faire constitutionalism" the idea that the historical period exalted private property rights and was not characterized by efforts by states to regulate business and property for the public interest. It turns out, Novak explains, that the Court's striking of labor regulation in the case was the exception and not the rule. NOVAK, *supra* note 23 at 102-107.

and local law for this approach. State legislation is, of course, one of them. We could, for example, imagine states enacting laws that required each policing agency in the state to be chartered with reference to specific tasks and guidance.[49] Similarly, legislation specifying public safety obligations and administered by a state agency could advance the project I describe here. There has been a recent flurry of state legislation directed at police reform in recent years, but I have not yet observed a state that has engaged in the kind of forward-looking regulation focused on non-harmful safety provision I am describing here. Instead, most recent legislation focuses more narrowly on restriction of specific contemporary policing service tactics, typically around use of force or narrow accountability measures.[50]

Drilling down to the municipal level, we could imagine articulating guidance for nonharmful public safety in a city's charter, a legal document that effectively functions as a city's constitution and where authorization for a policing agency and specification of the agency's tasks typically would be found. Such guidance is unlikely to exist today. As local government scholar Nestor Davidson explains, many municipalities choose not to adopt charters even when they are located in states that allow them to do so (five states – Alabama, Idaho, Illinois, Indiana, and Kentucky – do not permit city charters), and this means if there is no charter or no state law specifically authorizing the establishment and legal boundaries of a policing agency then that agency exists essentially outside of law![51] Even when agencies are specifically legally authorized, such authorization typically does not, importantly, extend to actual definitions of the policing service or important building blocks of the agency's power, focusing instead on more general issues like titles of supervisors and employment requirements to be the police chief.[52] I would be remiss to fail to note that a municipal-based strategy would be much more time consuming and complicated than an approach targeting fifty states.

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[49] Cite to relevant ALI Policing Principles chapter.

[50] For a comprehensive list of these kind of statutes see the National Council of State Legislatures Policing-State Tracking Database https://www.ncsl.org/civil-and-criminal-justice/legislative-responses-for-policing-state-bill-tracking-database.

[51] See Nestor M. Davidson, *Local Constitutions*, 99 TEX. LAW REV. 839 (2020). See also Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies Essay*, 121 COLUMBIA LAW REV. 1327 (2021).

[52] See Opinion contributor Jorge X. Camacho, *Defining Policing Is Essential to Reform It*, THE HILL (Jan. 26, 2021), https://thehill.com/blogs/congress-blog/politics/535813-defining-policing-is-essential-to-reform-it/ (last visited Oct 16, 2023). O'Rourke, Su, and Binder, *supra* note 49.

Against this background, I find state constitutional law, and more specifically the state constitutional amendment process, to be a potential mechanism for change. Unlike mere legislation, state constitutions are a critical site where a polity can make clear its obligations to its citizens. The extensive history of state constitutional amendment production demonstrates many instances of the ways in which states' constitutional amendment processes have been used to elevate important government topics such as education, labor, and the environment for public debate and legislative attention.[53] Because I believe there is a state obligation to provide safety products (goods?) for citizens in a nonharmful way, I think our longstanding practice of state constitutional amendment is a useful legal path to articulate a positive right of citizens to a more robust form of non-harmful Police.

The State's Obligation to Provide Nonharmful Safety

Police is at its essence discretionary – at least in terms of the distinct projects of Police that a state might pursue. This reality is reflected in the seeming hodgepodge nature of William Novak's lists of the types of regulation undertaken by state and local governments through the police power. Yet, the very nature of Police entails giving some projects priority. Public safety is one.[54] Of course, what one means when one says public safety is not self-evident given the capaciousness of Police. Physical safety of members of the public is a basic aspect of public safety. Ensuring that people are physically safe could (should?) include emergency intervention by the state if one human violently attacks another, which is distinct from a legal response to hold an individual to account upon completion of harm.[55] It also could (should?) include government intervention into the midst of pandemics such as cholera or COVID.[56] It could (should?) include public access to clean drinking water (especially during a pandemic when frequent handwashing is critical).[57] It could (should?) include access to housing because shelter

[53] See EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).
[54] Samuel Walker, *The Justice Department's Pattern-or-Practice Police Reform Program, 1994–2017: Goals, Achievements, and Issues*, 5 ANNU. REV. CRIMINOL. 21 (2022). ("Public Safety is the first job of government.")
[55] See BRANDON DEL DEL POZO, THE POLICE AND THE STATE : SECURITY, SOCIAL COOPERATION, AND THE PUBLIC GOOD (2023).
[56] See JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOXT O COVID-19 (2020).
[57] See Heather Tanana, Julie Combs & Aila Hoss, *Water Is Life: Law, Systemic Racism, and Water Security in Indian Country*, 19 HEALTH SECUR. S (2021). Benjamin J. Pauli, *The Flint Water Crisis*, 7 WIREs WATER e1420 (2020). Qingmin

is a cornerstone of physical safety.[58] There is a long history of the state and local governments engaging in Police to address each of these topics in some way even though today many people consider only the first on my list to be a typical task of the policing service.

Contemporary discussions of how we might transform the contemporary policing service increasingly include claims that the policing service should be doing less armed emergency response and more of some other activity to promote public safety.[59] Indeed, those who make abolition claims sometimes speak about eliminating entirely what we call the policing service in favor of some other state-supported services or what some call community safety initiatives.[60] My goal so far has been to demonstrate that the every project the state (as opposed to private individuals) would engage in to support what many commonly consider to be public safety writ large consists in what has historically been called Police because Police traditionally entails government intervention and provision (recall Adam Smith's concept of "plenty" or the availability of social wealth). To the extent certain Police projects such as the provision of armed emergency first responders are considered a government obligation while positive safety provision projects are seen as discretionary is a function of practice and habit as opposed to legal specification. A health board that requires the police to sweep the street is merely something the state *could* do. A policy the state *could* adopt. And in New York, that policy followed from legislation that created a state obligation. The reality is, however, that neither armed first responders nor a health board was originally an articulated state obligation as such. State constitutional law could change this landscape legally and, therefore, the public's expectation. By clearly specifying the obligation of states to provide public safety Police in state constitutions, we could move from the state's discretionary capacity to provide this kind of Police to an *obligation* to do so. This obligation could serve not only as a legal mandate but as a

Meng, *Urban Water Crisis Causes Significant Public Health Diseases in Jackson, Mississippi USA: An Initial Study of Geographic and Racial Health Inequities*, 14 SUSTAINABILITY 16325 (2022).

[58] See Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused Lecture*, 59 AM. CRIM. LAW REV. 1597 (2022).

[59] See, e.g., Opinion | Defund-the-police calls aren't going away. Here's what might come next., NBC NEWS, https://www.nbcnews.com/think/opinion/defund-police-calls-aren-t-going-away-what-do-they-ncna1231959 (last visited Sep 25, 2022).

[60] See, e.g., MARIAME KABA ET AL., NO MORE POLICE: A CASE FOR ABOLITION (2022).

critical signal to the polity – socialization of you will – of the state's positive commitments to its citizens.[61]

To make a case for and to explain how we might go about instantiating a state obligation to its citizens of nonharmful safety provision as opposed to a mere restriction on state excess in carrying out policing of crime, it is useful to consider and compare an alternative already mentioned – passing state legislation concerning these goals. Passing laws at the state level is much easier – and typically cheaper -- to achieve than amending the state's constitution. It is surely the case, moreover, that many of the goals of policing service transformation could be achieved through legislation. And as noted above, some advances in policing accountability and reforms have been achieved through legislation in the past few years as states have banned chokeholds, instituted civilian review, and imposed requirements to assess racial disparities in street policing. These reforms suggest that it is not necessary to rely upon state constitutional amendment to achieve changes in the policing service, so why this path? Political scientist Emily Zackin's work provides an answer. She shows that state constitutions place mandates on legislatures, overturn or pre-empt state supreme court decisions, and, perhaps most important, create energy and focus for social movements.[62] In this way creation of state obligations become an integrated process between state constitutionalism and the more ordinary process of state legislation. There is a practice in the United States of establishing state obligations to citizens with respect to public education, labor rights and protection of the environment through state constitutions. To my mind, public safety is a governance topic that is well-suited to this approach.

One way to think about a state's obligation to a member of the public is to couch that obligation in terms of a right. Indeed, national constitutions outside of the United States are explicit about guarantees to individual citizens of those nations regarding education, shelter, medical care, and the like.[63] The United States constitution, in contrast, has long been interpreted to provide individuals only rights to prohibit the government from interfering with

[61] See Benjamin Justice & Tracey Meares, *Does the Law Recognize Legal Socialization?*, 77 J. SOC. ISSUES 462 (2021).
[62] See ZACKIN, *supra* note 53.
[63] See Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. LAW 1043 (2014) (offering a textual count of such rights in more than two thirds of national constitutions across the globe).

basic liberties, which individuals typically enforce against the government through judicial action. Unlike many other national constitutions, the United States constitution contains no explicit provision of rights to welfare goods such as education, shelter work and basic subsistence.[64] Thus the federal constitution is typically described as embodying "negative rights." [65] But our national approach truly is exceptional, and not simply among national constitutions. Emily Zackin's work demonstrates that *within* the United States there is a longstanding constitutional tradition more consistent with constitutions across the globe – one representing a commitment to the kind of state obligation I argue for here. Zackin recounts the histories of three political movements aimed at amending state constitutions to include rights to education during the early republic, positive labor rights during the Gilded Age and the Progressive Era, and rights to environmental protection during the 1960s and 70s.[66] The details of each of these campaigns for "interventionist and protective" government supports her more general claim regarding the enduring role in the United States of state constitutions providing citizens with avenues to achieving social welfare goals in a way that is more sturdy and more robust than mere passage of legislation at the state level. Indeed, in many cases state constitutions themselves ensure the passage of relevant legislation.

Much of Zackin's work is a well-worked out defense of state constitutions embodying "positive rights." Regardless of whether one finds convincing her argument that there is an American positive rights tradition that is well-established and muscular–of equal importance to the more well-known constitutional theories of entrenchment--she nonetheless marshals a great deal of evidence that the popular movements driving the adoption of these constitutional amendments were critical aspects of "popular commitments to an active, interventionist and protective state."[67] This work is therefore important for my argument that state constitutions provide real and robust avenues for citizens to access welfare goods especially when citizens consider this process an as avenue for "frustrated outsiders" to bypass entrenched state

[64] See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 UNIV. CHIC. LAW REV. 1641 (2014).
[65] Isaiah Berlin, "Two Concepts of Liberty," in ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY ___ (1969).
[66] See ZACKIN, *supra* note 53.
[67] Id. at 48.

institutions that block progress and change. Of special note here is the fact that each of the instances of state constitutionalism she describes in her book can be characterized as Police.

Consider as examples of a state obligation for nonharmful safety provision the many provisions in the state constitutions providing for public education. Each of the fifty state constitutions contains at least one provision relevant to public education, and, as a structural matter, many of these provisions are directed toward the state's *obligation* to provide education to every child in contrast to the notion of guaranteeing individuals a right to education. The precursor to public school systems that we see today were free "common schools" that some colonies and later every state were required to establish by constitutional mandate.[68] Zackin explains that a critical goal of the common school activists was to create new government obligations rather than to entrench existing government forms by enabling and protecting funding streams and promoting efficient management of these funds for school systems.

One might think that the state's approach to constitutionalizing a state government obligation to provide education to its citizens is not very apt to contemporary contexts given that those amendments were adopted by the end of the 19th century. More recent efforts to adopt statement amendments promoting positive environmental rights advance the argument here, as many of those amendments were added to state constitutions during the 1960s and 1970s. The various movements supporting constitutional amendments advancing positive environmental rights also demonstrate important functions of unique to state constitutional amendments which are that they can (1) motivate state legislatures to pursue legislation on the targeted subject; (2) help advance political organizing; and (3) exclude hostile courts from particular policy battles – all critical aspects of the legal policy path to transforming the contemporary policing service.[69] The idea of using a constitutional right to exclude a court from a constitutional question might be troubling to some, but legal scholar Jonathan Marshfield explains with reference to an exhaustive assessment of state constitutional debates that a better way to think about constitutional rights in the state context is that they are mechanisms

[68] See, e.g., BENJAMIN JUSTICE, THE WAR THAT WASN'T : RELIGIOUS CONFLICT AND COMPROMISE IN THE COMMON SCHOOLS OF NEW YORK STATE, 1865-1900 (c2005).
[69] See ZACKIN, *supra* note 53.

to help democratic majorities better control wayward legislatures that the public believed was captured by special interests in contrast to the more commonly known idea developed with reference to the federal constitution that constitutional rights are designed to protect minorities from majorities.[70] Marshfield's intervention is useful in that it explains the value of the prevalence of state constitutional amendments as well as their detail and sometimes curiously long provisions pointing to particular problems of governance.

Practicalities

If you are with me to this point, you might begin to ask questions such as: How would the amendment process work? How much would it cost? How difficult would it be to carry out? And probably the most important question, what would it mean to enforce the constitutional amendment? If you are thinking about these questions I consider it a victory, but the devil is in the details no doubt. This part concludes with a few thoughts about the process and cost of state constitutional amendment, which will encompass some ideas about the relative ease (or difficulty) of amendment compared to state legislation. I will also offer some early thoughts about enforcement. Given the high-level nature of this essay none of what I offer here should be considered exhaustive, but, rather, evidence of proof of concept.

We can begin by noting that amending state constitutions is vastly easier than amending the federal counterpart. State constitutions are and have been amendment quite regularly since enactment. Indeed, many state constitutions expressly authorize replacement, which is a much more radical change than mere amendment. Several states have replaced their constitutions multiple times outside of federal demands after the Civil War.[71] The fact that there are multiple mechanisms to amend state constitutions including recommendation by commission, initiative, and conventions likely facilitates the production of state constitutional amendment we see.[72] Initiatives are a method that may seem familiar to readers as these have become much more popular in recent years even though they are not all directed at

[70] See Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 UNIV. PA. LAW REV. 853 (2021).
[71] See John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth and Twentieth Centuries*, 34 J. POLICY HIST. 297 (2022).
[72] See G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform Foreword*, 36 RUTGERS LAW J. 1075 (2004).

constitutional amendment. Initiatives can be targeted and specific and might seem especially suited to the project described in these pages, but initiatives can present potentially costly hurdles (signature and timing requirements, official review by state officials, approval thresholds), which could lessen the appeal of constitutional amendment compared with mere legislation.[73] There are, however, other mechanisms for amendment we might expect to be much less expensive than the initiative process if used creatively. One of these is the automatic convention call. Fourteen state constitutions mandate that the question of whether to hold a convention be submitted to voters on a periodic basis ranging between 10 and 20 years.[74] One could imagine enterprising organizers harnessing a mandatory convention to amend a state constitution adding a provision for nonharmful safety provision. I do not mean to suggest this approach is simple. One big logistical hurdle to be cleared in undertaking this endeavor is that should a constitutional convention be called under this mechanism, the entire state constitution potentially is up for grabs.[75] Again, the point here is that there are multiple unexplored mechanisms. It is time to consider trying them.

If these mechanisms are attempted and successfully passed then we will have a constitutional amendment that must be enforced. It is natural to ask what this enforcement would look like? A first step in thinking about an answer to that question is to move away conceptually from rights enforcement in the federal context where judicial enforcement of the right is the norm. A state constitutional amendment could be carried out through legislation as well as through administrative agencies. Legal scholar Helen Hershkoff also takes issue with the idea that state courts, typically comprised of elected judges with broad common law-making power, would be unlikely to enforce explicit positive rights found a state constitution.[76] For

[73] See Jessica Bulman-Pozen & Miriam Seifter, *The Right To Amend State Constitutions*, (2023), https://papers.ssrn.com/abstract=4555738 (last visited Oct 30, 2023) (explaining the ways in which primarily GOP legislatures have attempted to make amending state constitutions more difficult). I thank Udi Ofer for bringing to my attention the expense of mounting a statewide ballot campaign in this context.

[74] See Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context State Constitutional Commentary*, 65 ALBANY LAW REV. 1017 (2001) (most of these orovisions were added in the mid 20th century).

[75] See Tarr and Williams, *supra* note 70 (offering explanations for the limited use of these automatic provisions and explaining that one potential approach is to limit the constitutional convention).

[76] See Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions Fourteenth Annual Issue on State Constitutional Law: Foreword*, 33 RUTGERS LAW J. 799 (2001).

example, recently in Montana a state court ruled that the State of Montana violated its citizens' right to a "clean and healthful environment" when the state granted permits for new oil and gas projects without any assessment of whether and how the expansion the impact the environment.[77]

There are other useful models for enforcement. Comparative constitutional law and human rights law both offer helpful contexts for potential mechanisms of enforcement of a state constitutional right to nonharmful safety provision. Most national constitutions in the world contain provisions protecting the right to, or to put it differently obligating the particular state to provide, socioeconomic goods such as education, health care, workplace safety, housing, water, work, food and social security.[78] When interpreting these obligations under national constitutions, courts have devised ways of directing government to create bureaucracies and programs to address particular needs rather than granting individual plaintiffs specific relief, and one can imagine this approach in the state law context.[79] Declaring that the state has particular obligations does not necessarily require a court to specify how to fulfill those obligations, and if members of the public do not believe the state has fulfilled those obligations, they are entitled to come back and make that claim.[80] How might we know whether the state is fulfilling these obligations? Human rights law provides an interesting model. In the human rights context, a practice of using indicators has developed to promote accountability of human rights treat signatories.[81] Indicators not only demonstrate state failures to fulfill obligations, they also offer a mechanism for assessing progress and weaknesses in program implementation. There are advantages and disadvantages to this approach, of

[77] Montana Oil and Gas Violates Right to Safe Environment, GOVERNING (2023), https://www.governing.com/policy/montana-oil-and-gas-violates-right-to-safe-environment (last visited Oct 31, 2023).
[78] See Versteeg and Zackin, *supra* note 64.
[79] See Albie Sachs, *Enforcement of Social and Economic Rights Essay*, 22 AM. UNIV. INT. LAW REV. 673 (2006) (distinguishing between the idea of an individual right as opposed to a state-based program designed to provide resources to a group eligible for the good in question).
[80] See id.
[81] Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance: With CA Comment by John M. Conley*, 52 CURR. ANTHROPOL. S83 (2011). I thank Saira Mohammed and workshop participants at UC Berkeley Law School for bringing this idea to my attention.

course, but the point, again, is simply to demonstrate that there are existing and longstanding approaches to developing, assessing and measuring compliance in a "positive rights" context.

Conclusion

The conversation regarding the contemporary policing service is at a crossroads. As a participant in the conversation, I see the conversation often posited as a struggle between "the state" and "the community." This struggle, to my mind devolves quite easily into a debate over public versus private control. I think this is a mistake. Private control of violence in the United States will never be successful. To the extent it achieves success, that success is almost inevitably purchased by demoting the interests of the most vulnerable. I believe that safety, broadly defined, is a right of citizens and that Police provision is and has long been a key mechanism the state has used for safety provision. The reality is that Police is and must be public, and it is a topic that demands more, not less, law. It is my hope that the provocation I offer here is a productive start to a new conversation around the state's legal obligation to provide safety in a fulsome and nonharmful way.