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THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
OHIO STATE LAW JOURNAL

Volume 80, Number 5, 2019

Articles

Police Shootings: Is Accountability the Enemy of Prevention?
Barbara E. Armacost ........................................................................................................... 907

Part-Time Government
Kellen Zale ................................................................................................................................. 987

Note

Schools in Name Only: The Role of the Federal Judiciary in Remedying Our Nation’s Unconstitutional Schools
Kaela King ................................................................................................................................. 1055
Police Shootings: Is Accountability the Enemy of Prevention?

BARBARA E. ARMACOST

Police officers shoot an unarmed man or woman. The victim’s family and community cry out for someone to be held accountable. In minority communities, where a disproportionate number of officer-involved shootings occur, residents suspect that racial animus and stereotypical assumptions about “dangerous black men” played a part. Citizens seek accountability by filing lawsuits and demanding criminal prosecutions. They are usually disappointed: the majority of police-involved shootings are deemed “justified” by police investigators and courts, and no criminal charges are brought. If so, this is the end of the inquiry under current legal standards and there is no accountability. There is also no legal reason to ask why the shooting occurred and how it could have been prevented. This Article argues that the current accountability paradigm is hindering genuine progress in decreasing the number of police-involved shootings, including those motivated by racism. We need to look beyond the limited time frame embraced by the current legal standard and view police-involved shootings as organizational accidents. Borrowing lessons learned from the aviation and healthcare fields, this Article urges a prevention-first approach that applies systemic analysis to what are systems problems. In these sectors, investigations of tragic accidents employ Sentinel Event Review, a systems-oriented strategy that looks back to discover all the factors that contributed to the event and looks forward to identify systemic reforms that could mitigate the chance of recurrence. The goal is to create systemic barriers that make it more difficult for sharp-end actors to err or misbehave. I am not arguing that individual police officers should escape responsibility for their actions. But our current relentless focus on accountability—while an understandable human reaction—has become the enemy of prevention in the very communities that need it most.

* Professor of Law, University of Virginia School of Law. For helpful suggestions on early drafts, I thank participants of the 2018 Criminal Justice Roundtable at the University of Richmond Law School, and participants at a faculty workshop at the University of Virginia School of Law. I also thank students in my 2018 Advanced Issues in Criminal Justice seminar, my colleague and co-teacher, Anne Coughlin, and my colleague Rachel Harmon for crucial insights. I thank the stellar research librarians at UVA Law School and my editor, colleague, and friend Dr. Amy L. Sherman for her invaluable editorial contributions. Any remaining errors are mine.
I. INTRODUCTION ........................................................................................................... 908

II. POLICE VIOLENCE AS AN ORGANIZATIONAL PROBLEM ......................... 915
   A. Complexity and Organizational Accidents ......................................................... 917
   B. Policing as a Complex System ........................................................................... 918
   C. Accident Prevention in Complex Systems ....................................................... 922

III. PREVENTING ORGANIZATIONAL ACCIDENTS ............................................. 924
   A. Lessons from Aviation ......................................................................................... 926
   B. Sentinel Event Review in Medicine .................................................................... 931
   C. The Importance of Multi-incident Review .......................................................... 934
   D. Sentinel Event Review in Criminal Justice ......................................................... 935

IV. SYSTEMS-ORIENTED REVIEW OF POLICE SHOOTINGS ......................... 940
   A. What Is the Goal of Systems-Oriented Review of Police Shootings? ............... 940
   B. Why Accountability Review Does Not Prevent Police Shootings: A Case Study of the Tamir Rice Shooting .... 942
      1. The Inadequacy of Accountability Review ...................................................... 945
      2. Applying Systems-Oriented Review ................................................................. 948
         a. The Approach ................................................................................................. 953
         b. The Dispatcher’s Call .................................................................................... 962

V. THE PROMISE OF SENTINEL EVENT/SYSTEMS REVIEW IN POLICING ....... 966
   A. Beyond the Single Incident ............................................................................... 968
   B. Data-Informed Analysis: Looking for Patterns in Police Shootings ............... 973
   C. Challenges to Systems-Oriented Review: What Will It Take? ... 982

VI. CONCLUSION ........................................................................................................... 985

I. INTRODUCTION

Societal outrage over the death of civilians at the hands of police may be near an all-time high. The relentless litany of tragic deaths—Stephon Clark,1

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Eric Logan,2 Justine Ruszczyk Damond,3 Laquan McDonald,4 Eric Garner,5 Freddie Gray,6 Sandra Bland,7 Philando Castile,8 Tamir Rice,9 Alton Sterling,10 Michael Brown,11 Trayvon Martin,12 and others named and unnamed—has provoked street protests and recurring calls for prosecutorial intervention. Families, neighbors, and communities want police officers to explain why they found it necessary to use deadly force. Society looks to prosecutions and civil damages actions to provide accountability by unearthing the truth about the circumstances of the shooting, imposing sanctions for wrongdoing, and deterring any misconduct that may have led to the incident. People are dead and we thirst for justice. “ Officers must be held accountable,” we cry. “This must never be allowed to happen again.”


And yet it does happen again. Multiple factors contribute to this, perhaps predominant among them, ongoing structural racism.\textsuperscript{13} Unarmed African-American individuals are 3.5 times more likely to be shot by police than unarmed white persons.\textsuperscript{14} Efforts to hold individual officers directly accountable for their racially motivated actions, though, may be the enemy of prevention. Without in any way minimizing the reality of racism, we need to address police shootings from a different angle. This Article argues that the current accountability paradigm—targeting the officer who pulled the trigger—is actually hindering genuine progress in decreasing the numbers of these tragedies, including those motivated by racism.

We need to understand police shootings (and other acts of excessive force that result in the death of unarmed civilians) as tragic organizational accidents. We need a shift towards a prevention-first approach that applies systemic analysis to what are systems problems.

The current accountability paradigm is fundamentally flawed for three related reasons. First, the idea that successful prosecutions and lawsuits after a police-involved shooting will prevent future tragedies relies on several related, but fundamentally flawed assumptions: it assumes that police shootings result solely (or primarily) from individual misconduct by the person who pulled the trigger, that police reform should focus on changing the behavior of these officers, and that lawsuits against individual officers will result in the kinds of changes that will reduce the incidence of police violence.\textsuperscript{16}

In fact, the killing of unarmed civilians by police results from multiple causes, both human and systemic, that set the stage for the tragic moment when the shot was fired. Our current focus on only the immediate causer—and the narrow time frame that defines his actions—ignores this broader set of causal factors. This is not to say that the shooter is not blameworthy. But the single-


\textsuperscript{15} Many scholars, including myself, have argued that—even apart from the systemic arguments I am making in this Article—criminal prosecutions and civil damages actions are largely ineffective in regulating police misconduct. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 464–77 (2004); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 285–86 (1988) (arguing the deterrent effect of civil damage payments by municipalities on the conduct of individual officers remains highly questionable); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 18–19 (2003). These arguments have been thoroughly and exhaustively explored and are widely accepted by scholars. I do not rehash them here.

\textsuperscript{16} Walker, supra note 15, at 7.
A NEW PERSPECTIVE ON POLICE SHOOTING REVIEW

A NEW PERSPECTIVE ON POLICE SHOOTING REVIEW

minded focus on the officer who discharged his weapon leaves the officer’s colleagues embedded in the same organization that led to his mistakes. It misses the opportunity to address the systemic and organizational features that make it possible (or probable) that individual officers will continue to make mistakes or misbehave.

The second reason the accountability paradigm is flawed is that its tools—civil and criminal actions and internal police department investigations—ask the narrow question of whether the shooting was “justified” or “reasonable” at the precise moment the shot was taken.17 When a shooting is deemed justified, all other examination of the tragedy ceases. This adds to the tragedy, since further examination could illuminate its root causes and point us to systemic reforms that could reduce the incidence of future officer-involved shootings.

It is easy to miss the perverse implications of this analysis. The very word “justified” implicitly assumes that this shooting, and shootings like it, are unavoidable or even desirable. By applying a case-by-case inquiry, however, the analysis never squarely asks the question whether these kinds of shootings—shootings under these or similar circumstances—are reasonable or societally justified. In addition, the terms “reasonable” and “justified” deeply fail to express adequately the human values at stake: every loss of human life is regrettable and every police shooting a tragedy, even if—at the moment the shot was taken—the police officer reasonably believed it was necessary.

Third, the current accountability paradigm is inadequate because it applies a single-dimension analysis to an entity—a police department—which organizational management experts would define as a “complex” and “tightly coupled” organization.18 Such organizations by their nature are highly susceptible to systems failure.19 Yet present investigations do not apply systems-oriented analysis and review. This in turn prevents us from identifying the correspondingly wider range of potential preventative measures that could (or must) be taken to prevent similar tragic shootings in the future.

Many other actors may have contributed to the circumstances or increased the risks that led to the fatal moment; for example, the dispatcher who sent the officer to the scene, the supervisors who wrote the use-of-force policies, the managers who trained on those policies, the magistrate who signed an arrest warrant, or the legislature that set the terms of the officer’s arrest authority. Non-human factors, such as overtime or moon-lighting policies that promote overwork, unenforced discipline rules, patterns of repeated risk-taking behavior, pressure to effectuate quotas of arrests or stops, stop-and-frisk policies, laws that define crimes and regulate police powers, and cultural patterns that promote over-aggressive policing, may also have contributed to the officer’s actions.

18 See infra Part II.B for a discussion of police departments as complex systems.
If the goal is not only punishment and accountability for individual actions, but also prevention of future similar harm-causing incidents, then it is essential that these other causes be part of the analysis. We must move beyond the current strategy of looking backward to identify errors to a forward-looking approach that employs the kind of systems-oriented review that is currently not available as part of the adversarial process of criminal prosecution and civil litigation.

Sadly, accountability review fails even if it succeeds in holding the shooter responsible. Consider the recent prosecution of Officer Van Dyke, who was convicted of second-degree murder and sixteen counts of aggravated battery in the shooting death of Laquan McDonald. The prosecutor called the verdict “a satisfying victory” and McDonald’s family called it “justice.” The African-American community filled the streets to celebrate the first guilty verdict in fifty years in connection with a Chicago police-involved shooting. Officer Van Dyke will spend at least ten years in prison. But police leaders say the sixteen shots that killed Laquan McDonald were “absolutely justified,” that politicians “have used this case … to really kick around the Chicago Police Department.” Van Dyke’s attorney, Daniel Herbert, warned that the verdict will make police officers into “security guards” who will be unwilling to “get out of the car to confront somebody.”

The community is overjoyed with the verdict while the Fraternal Order of Police calls it a “sham trial,” and Herbert echoed it as a “sad day for law enforcement.” Will anything change as the parties talk past each other? No one seems to be asking why this happened.

To outsiders, there may seem to be a variety of responses giving voice to community outrage. But as I will argue, none of these as currently structured—internal investigations, civilian reviews, mayoral task forces—are sufficiently reliable, thorough, independent, or systemic. Moreover, because all focus on

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20 The Supreme Court has foreclosed forward-looking, equitable remedies that have been useful in other contexts, including school desegregation and prison reform. See City of L.A. v. Lyons, 461 U.S. 95, 112 (1982). Entity lawsuits, which are designed to hold the entity liable for the immediate causer’s actions, do not produce the kind of systems-oriented review I am advocating for here. Pattern or practice lawsuits against municipalities and 42 U.S.C. § 14141 lawsuits are also limited in addressing systemic issues involving additional actors and latent causes.

21 Swanson, supra note 4.
22 Id.
23 Id.
24 See id.
27 Blumberg, supra note 25; Swanson, supra note 4.
accountability, the queries that could raise reforms advancing prevention are absent.28

Given racial realities, it is tempting to say, “We know why this happened: a white police officer, motivated by racial animus and stereotypical assumptions about dangerous black men, shot a black man—again.” Even when this account is partially true, individual racism is not a sufficient causal story if the goal is to prevent the next shooting. We need to be asking a whole series of deeper “why” questions that go behind the racial explanation to uncover the systemic factors that enabled the officer’s actions, including factors that facilitated the officer’s race-motivated actions.

In short, what is needed instead is a paradigm focused primarily on prevention. For it, we can borrow from lessons learned in the aviation and healthcare fields. In these sectors, investigations of tragic accidents employ Sentinel Event Review (SER), a systems-oriented approach utilizing analytic tools, like root cause analysis, to both look back to understand all the factors contributing to the event and look forward towards the kinds of systemic

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reforms that could mitigate the chances of recurrence.29 In aviation, SER is
credited with dramatically increasing safety: there has been no major airline
accident involving an American commercial airplane since 2009.30 In the
healthcare field, systems-oriented review has led to a drastic reduction of certain
kinds of accidents and errors because of its focus on systems solutions rather
than on reducing human error.31

In Part II, drawing on the seminal work of Charles Perrow,32 I argue that we
must see police shootings not only as human-caused actions but as “systems
accidents,” meaning that they involve unanticipated interaction of multiple
failures in a complex system. I show how police departments are the kinds of
complex, “tightly bound” organizations that Perrow shows are especially
susceptible to system failures.

Perrow advanced our understanding of the kinds of organizations most
susceptible to system failure but did not offer strategies for how to implement
post-failure investigations in ways that could prevent future tragedies. This work
was pioneered by James Reason.33 He applied an early version of root cause
analysis (RCA), which has helped investigators understand the latent conditions
underlying such system failures. I discuss Reason’s work in Part III, exploring
its application to aviation accidents and medical mistakes. This Part ends with a
discussion of early applications of root cause analysis (systems review) to
wrongful convictions and other criminal justice errors.

In Part IV, in an effort to make the concept of RCA more three-dimensional,
I apply this analytical tool to the tragic shooting of twelve-year-old Tamir Rice

29 See Sentinel Events Initiative, NAT’L INST. JUST. (Nov. 1, 2017),
https://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx [https://perma
.cc/AZ8V-XZ9J].
30 Leslie Josephs, The Last Fatal U.S. Airline Crash Was a Decade Ago. Here’s Why
/cogl-air-crash-10-years-ago-reshaped-aviation-safety.html [https://perma.cc/
T7GU-CMe6G].
31 See, e.g., Peter Pronovost & Eric Vohr, Safe Patients, Smart Hospitals 24–
51 (2010) (describing how checklists reduced the risk of central line infections to “nearly
zero”); see also Atul Gawande, The Checklist Manifesto—How to Get Things Right
7–8 (2009) (discussing how a simple checklist can reduce surgery deaths and complications).
32 See generally Perrow, supra note 19.
33 James Reason was a Professor of Psychology at the University of Manchester starting
in 1977, where he continues as Professor Emeritus. Reason has published multiple important
articles and books on human error and organizational processes, including most importantly,
Human Error (1990) [hereinafter Reason, Human Error], Managing the Risks of
Organizational Accidents (1997) [hereinafter Reason, Managing the Risks of
Organizational Accidents], and Organizational Accidents Revisited (2016). For a
general description of Reason’s work, see James T. Reason, SafetyLeaders,
http://safetyleaders.org/superpanel/superpanel_james_reason.html [https://perma.cc/
35FM-JLCX] [hereinafter Reason, SafetyLeaders].
by an officer of the Cleveland Division of Police in November 2014. Here I
demonstrate how the insights from this kind of structured analysis can lead to
systems solutions. Full success, though, rests on applying RCA not only to
individual incidents but also to large-scale data records that can help us find
patterns of mistakes across multiple, similar incidents.

In Part V, I supply an overview of the promise of systems-oriented review
in policing, including the use of data-informed analysis to look for repeated
causal patterns in police shootings.

Finally, Part VI briefly concludes.

II. POLICE VIOLENCE AS AN ORGANIZATIONAL PROBLEM

Police-involved shootings almost always give rise to investigations or
litigation targeting the individual officer who fired the shots. This seems like an
obvious result. It was, after all, this officer who decided to approach or confront
the suspect. It was he who determined that deadly force was necessary. He is
the one who raised his gun and pulled the trigger. This way of thinking reflects
the way we generally think about issues of causation: we tend to look at the most
proximate causer.

Lawsuits and prosecutions against the person who did the shooting also
express a legitimate demand that justice be done. Police officers’ power to take
a human life is an awesome and terrible power. When that power is applied
against an unarmed person or against someone who arguably posed no risk to
police, there is understandable grief, sorrow, and moral outrage. Beyond the
tragedy of a lost life, the suspect’s family and community may believe that
police acted carelessly or even maliciously. In many communities there is a
history of police violence or illegality by police officers, particularly against
racial or cultural minorities. There is suspicion that police, investigators, and
governmental officials will not tell the truth about what really happened.
Communities rely on legal actions to get the real story out, to make sure that
someone is held accountable, to make sure that justice is done for the victim and
his family, to get bad or dangerous cops off the streets—all in hopes that
lawsuits will keep police from taking other innocent lives in the future.

Enforcing individual culpability reflects Western culture’s deep
commitment to the idea that human beings have agency and act voluntarily. Our
entire criminal justice system is premised on the belief that human beings can
justifiably be held accountable for their bad behavior. Even though we know

34 See Heisig, supra note 9.
35 See, e.g., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE
BALTIMORE CITY POLICE DEPARTMENT 16 (2016), https://assets.documentcloud.org/
documents/3009376/BPD-Findings-Report-FINAL.pdf [https://perma.cc/2NXZ-F3TT]
(outlining, among other incidents, a history of racially motivated civil rights
violations by the Baltimore Police).
36 See generally SIDNEY DEKKER, JUST CULTURE 90–91 (2d ed. 2012) (describing the
role of lawsuits).
that criminal conduct is not entirely “voluntary” in a deeper sense—poverty, past abuse, mental illness and other factors contribute to the likelihood of criminal conduct—criminal sanctions fall on the voluntary acts of the final human actor, the last “cause” in the chain. This way of thinking also reflects a deep human need to find someone to blame for harmful or tragic circumstances. The need to identify causes is fundamental to human nature; not being able to find a cause is deeply disturbing because it signals a loss of control:

Without a cause, there is nothing to fix. And, with nothing to fix, things could go terribly, randomly wrong again—with us on the receiving end this time. Having a criminal justice system deliver us stories that clearly carve out the disordered from order, that excise evil from good, deviant from normal, is about creating some of the order that was lost in the disruption of the bad event.

Ironically, the sense of order we get from blaming individual bad performance—the belief that blaming will bring change—is an illusion when it comes to harms involving complex organizations. Several decades of research on “organizational accidents” demonstrates that so-called “active causes” by “sharp end” actors—pilots, airline mechanics, surgeons, equipment operators—are only a small part of the causal story. Sharp end actors inherit situations and circumstances with latent failures and errors inherent in them. It is the combination of active errors and latent weaknesses that predominantly explains harmful results in complex systems. Sadly, addressing only active causes, through lawsuits and prosecutions against individual actors, does not ultimately result in a reduction in harmful accidents. If, as I argue below, policing involves a complex system within the meaning of the organizational accident literature, the current reliance on lawsuits and prosecutions in police-involved shootings is at best inadequate, and at worst counterproductive.

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38 DEKKER, supra note 36, at 151 (citing FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS: OR HOW TO PHILOSOPHIZE WITH A HAMMER (1889)).

39 Id. at 152.


41 Id. at 83.

42 Id. at 84.
A. Complexity and Organizational Accidents

In 1979, reactor No. 2 of the Three Mile Island Nuclear Generating Station near Harrisburg, Pennsylvania partially melted down, causing the most serious radiation leak in the history of the U.S. commercial power plant industry. The accident resulted in multiple investigations, commissions, books, articles, and lawsuits all seeking to understand what went wrong. The accident and the desire to identify its causes inspired Charles Perrow’s seminal book with the counterintuitive title “Normal Accidents.” Perrow argued that where high-risk technologies are involved, some accidents are “inevitable,” no matter how effective are conventional safety devices. This has to do with the way failures in the system can interact and the way systems are tied together. Importantly, he argues, this “interactive complexity” is a characteristic of the system, not the operator.

The key to safety in complex systems is to focus on the “properties of systems themselves, rather than on the errors that owners, designers, and operators make in running them.” Perrow faulted conventional accident explanations for focusing solely on such causes as “operator error; faulty design or equipment; lack of attention to safety features; lack of operating experience; inadequately trained persons; failure to use advanced technology; [or] systems that are too big, underfinanced, or poorly run.” He argued that this myopic attention to individual failures or weaknesses misses important insights about the way risks interact and the way complex, nonlinear systems function. As I explain more fully below, systems that are “complex” and “tightly coupled” rather than “linear” and “loosely coupled” are the most susceptible to systems accidents of the sort that occurred at Three Mile Island.

Additional catastrophes in the 1980s involving complex, technological operations brought increased attention to Perrow’s work on systems accidents, including a focus on human failures in such systems. Whereas fifty years ago

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43 PERROW, supra note 19, at 15.
44 Id. at 16.
45 See generally id.
46 Id. at 3.
47 Id. at 4.
48 Id.
49 PERROW, supra note 19, at 63.
50 Id.
51 Id.
52 Incidents included the Bhopal methyl isocyanate tragedy of 1984, the Challenger and Chernobyl disasters of 1986, the capsizes of the Herald of the Free Enterprise, the King’s Cross tube station fire in 1987, and the Piper Alpha oil platform explosion in 1988. Detailed analyses of these and other catastrophic accidents led to an increasing awareness that “latent errors” as opposed to active human errors “pose the greatest threat to the safety of a complex system.” See REASON, HUMAN ERROR, supra note 33, at 173.
53 Theoretical and methodological developments in cognitive psychology also spurred interest in the study of human error. See id. at 50.
investigations of a major tragedy, such as a plane crash, would have ended by identifying the “proximal cause” at the “sharp end” of the causal chain, i.e., pilot error, today neither investigations nor organizational leaders would end there. Today it is understood that rather than being the “main instigators” of a harmful incident, operators (even those contributing their own mistakes) inherit system defects resulting from preexisting conditions such as poor design, faulty installation or maintenance, inadequate supervision, or bad management decisions.\textsuperscript{54} Thus even culpable operators add “the final garnish to a lethal brew whose ingredients have already been long in the cooking.”\textsuperscript{55} Moreover, the category of “human factors” encompasses much more than those associated with the “front-line operation of a system.”\textsuperscript{56} Increasingly, experts agree that attempts to discover and neutralize system defects may have a greater beneficial effect upon system safety than will localized efforts to minimize active errors.\textsuperscript{57}

The implications of this organizational literature for safety in policing are profound. The point is not that safety cannot be improved at the operator level, but that improving safety at that level will never solve the problem if latent defects and failures plague the entire system. While individual prosecutions and lawsuits are important for accomplishing other goals, they may be the wrong avenue for achieving what we all want the most: fewer police shootings.

B. Policing as a Complex System

According to Perrow, the kind of system that is most likely to have a systems accident is one that is complex (as opposed to linear) and tightly (as opposed to loosely) coupled.\textsuperscript{58} The first variable captures the relative interactiveness of the system: do its parts interact in a simple, linear fashion or do the parts serve multiple functions, interacting in a more complex way?\textsuperscript{59} Linear interactions overwhelmingly predominate in all systems; even the most complex systems comprise mostly linear, planned, visible interactions.\textsuperscript{60} Conversely, while all organizations have many parts that interact with each other, the key determinant of a complex system is whether these interactions are expected and obvious, or unexpected and hidden.\textsuperscript{61}

The consummulate example of a linear system is manufacturing, specifically ordinary assembly-line production.\textsuperscript{62} The equipment in the production line is

\textsuperscript{54} Id. at 173. \\
\textsuperscript{55} Id. \\
\textsuperscript{56} Id. at 174. \\
\textsuperscript{57} Id. at 173. \\
\textsuperscript{58} See PERROW, supra note 19, at 4. \\
\textsuperscript{59} Id. at 78. \\
\textsuperscript{60} Id. at 75. \\
\textsuperscript{61} Id. Even the most linear systems will have at least one source of complex interactions: the environment in which the system operates. Id. \\
\textsuperscript{62} See id. at 86–87.
spread out and the steps are discrete and sequential.63 A failed component can easily be segregated.64 There are few unintended or unknown feedback loops in the process.65 Sources of information about the functioning of the system tend to be direct and straightforward.66 Personnel on a simple production line are usually generalists who can rotate, bid on various jobs, or fill in for other people.67 Another example of a linear system is a trade school, where classes are taken in sequence.68

By contrast, complex systems tend to have unexpected connections and interactions that were not intended or built into the system, and that operators could not fully anticipate or guard against.69 A nuclear power plant is a good example of a complex system.70 Unlike assembly line manufacturing, equipment in a complex system is tightly spaced and not linear.71 Components are not in a production sequence and they often have multiple modes of connection with other components.72 There are unfamiliar, sometimes “unintended feedback loops.”73 Information sources about how the system is functioning are often “indirect and inferential.”74 Operators and other personnel tend to be specialists, and there is very little substitutability among jobs.75

Another, somewhat different example of a complex system, and one more like a police department, is a university. Universities have multiple functions: classroom teaching, vocational training, research, public service, etc. These interact in unexpected, synergistic, creative, or disruptive ways. Consider, for example, what might happen if university administrators deny tenure to a popular teacher allegedly because her research did not measure up. The tenure denial might spark protests by students who highly value her classroom teaching. It might also engender insecurity among other untenured faculty, who worry that their research will be found wanting. In addition, imagine the teacher runs a public service program that is well-known and valued in the community. The mayor and other community leaders are up in arms that the program might be terminated. The local paper covers the story and some private donors threaten to withdraw their financial support for the university if the case is not

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63 See id.
64 See PERROW, supra note 19, at 86–87.
65 See id.
66 See id.
67 Id.
68 Id. at 93–94.
69 See id. at 78.
70 For a detailed description of the complex, nonlinear way in which the accident at Three Mile Island occurred, see PERROW, supra note 19, at 15–31.
71 See id. at 83.
72 Id. at 82–83.
73 Id. at 82.
74 Id. at 83.
75 Id. at 87.
reconsidered. The failure to tenure one teacher has produced a whole set of unexpected results and problems for university administrators.\textsuperscript{76} Despite being complex, however, a university is “loosely” rather than “tightly” coupled. This is the second determining variable for the likelihood of systems accidents. “Tight coupling” is a mechanical term used by engineers, which means that there is no “slack or buffer or give between two items.”\textsuperscript{77} In other words, whatever happens in one automatically and directly affects what happens in the other.\textsuperscript{78}

Tightly coupled systems have certain characteristics that make them more susceptible to systems accidents.\textsuperscript{79} Because complex systems do not tolerate delay and must proceed in particular and invariant sequences, they are unable to handle failures and errors without serious consequences.\textsuperscript{80} Tightly coupled systems have very little flexibility.\textsuperscript{81} Their overall design permits only one way to reach the production goal. “Quantities must be precise; resources cannot be substituted for one another; wasted supplies may overload the process; failed equipment entails a shutdown because the temporary substitution of other equipment is not possible.”\textsuperscript{82} One of the most important differences between tightly and loosely coupled systems is the inability of the former to recover from failures.\textsuperscript{83} In loosely coupled systems there is a better chance that spur-of-the-moment fixes and substitutions can be found even if not planned ahead of time.\textsuperscript{84} By contrast, in complex systems buffers, redundancies and substitutions cannot be improvised but must be created in advance.\textsuperscript{85}

Returning to the university example, Perrow argues that while universities are complex, they are loosely rather than tightly coupled.\textsuperscript{86} In the case of the fired teacher, he says, there is ample slack (and time) to limit the impact of the negative tenure decision.\textsuperscript{87} For example, administrators can meet with students to hear their complaints and explain the reasons for the tenure decision. Students can be invited into the process of interviewing a new scholar for the department. Faculty can be given clear guidelines about future research requirements. Community members can be reassured that someone will take over the running of the public service program. Funders can be educated about the careful process

\textsuperscript{76} This example is drawn, with some adaptations, from Perrow, supra note 19, at 98–99.
\textsuperscript{77} Id. at 90.
\textsuperscript{78} Sociologists and psychologists adopted the term in the mid-1970s to describe whether a particular remedial program was tightly (or only loosely) correlated with intended changes in the behavior of students. See id.
\textsuperscript{79} See id. at 94.
\textsuperscript{80} Id.
\textsuperscript{81} See id.
\textsuperscript{82} Perrow, supra note 19, at 94.
\textsuperscript{83} See id. at 95.
\textsuperscript{84} See id.
\textsuperscript{85} Id. at 94–95.
\textsuperscript{86} Id. at 98.
\textsuperscript{87} See id. at 99.
followed in the tenure decision. These actions have the potential to prevent harmful fallout from a controversial tenure decision.

Applying these insights to law enforcement, it seems clear that policing is more like a university than it is like a linear manufacturing line. The policing context has a high level of interactive complexity. Police organizations have many goals and tasks; for example, investigating crimes, preventing crimes, promoting public safety, enforcing traffic laws, responding to citizen reports and complaints, conducting public welfare checks, leading educational programs in schools and other institutions, and taking mentally ill people into protective custody. In addition, policing priorities may be affected by city officials seeking to use law enforcement to raise money through increased ticket writing or by penalties or promotion metrics that reward aggressive policing.

These goals, actions and priorities intersect in complicated ways. Moreover, complexity arises whenever police officers face circumstances, citizen responses, or reactions by fellow officers that are unexpected or unanticipated. When a police officer stops a driver with a broken tail light, or knocks on a door to execute a search warrant, or answers a public welfare call, the officer cannot be certain of the circumstances that await him. A welfare check can lead to an investigation or arrest for illegal activity. An automobile stop for a minor offense can result in threatened or perceived force by a suspect, a fatal shooting, and riots in the surrounding community. Police responding to a call regarding a mentally ill person face unique uncertainties requiring unique skills. Multiple officers responding to an emergency may have difficulty communicating their intentions, coordinating their actions, or anticipating their interactions. That police have multiple, intersecting and sometimes conflicting goals and function in an uncertain, rapidly changing environment means that failures and mistakes take uncertain paths that are difficult to anticipate and often impossible to manage or control.

While policing is like a university in its complexity, it is unlike a university in that policing is a much more tightly coupled system, meaning that there is very little slack for correcting mistakes before they result in harm. Recall our

88 On the other hand, consider the series of events that followed the forced resignation of a popular university president by a subgroup of the board of visitors of that institution. See Richard Pérez-Peña, Ousted Head of University Is Reinstated in Virginia, N.Y. TIMES (June 26, 2012), https://www.nytimes.com/2012/06/27/education/university-of-virginia-reinstates-ousted-president.html [https://perma.cc/RTS9-2MU5]. The resignation resulted in student and faculty protests and marches, a statement by the faculty senate decrying the actions and demanding the president’s reinstatement, a meeting of the full board of visitors, reactions by the state legislature that partially funds the school, weigh-in by the governor, eventual reinstatement of the president, and investigation of the governance of the university by the higher education accrediting body. Id. No one could have predicted this series of events! In certain circumstances, it seems, even relatively loosely coupled systems can sometimes suffer systems accidents. (I do not mean to suggest that the reinstatement of the University of Virginia’s president was itself a mistake.)

example of the teacher not granted tenure. While tight coupling occurs on a continuum, as a general matter, university administrators can anticipate fallout from a potentially unpopular decision, and they have time and opportunity to intervene against harmful consequences. By contrast, circumstances in the policing context tend to be fast-moving, uncertain, and unpredictable, making it very difficult to intervene once potentially hazardous events have been set in motion. Officers have little time to think and limited options to act in the heat of the moment. Whatever constructive actions police are able to take in such circumstances will depend upon reflex actions, training, and discipline rather than reasoned intervention to address the particular system breakdown at hand. These distinctions become vitally important when designing preventative measures to address harm-causing incidents in policing.\textsuperscript{90}

Police face at least two “production pressures” that contribute to the tight coupling that characterizes law enforcement.\textsuperscript{91} The first is the pressure to “move on”; to finish each policing task quickly and proceed to the next. Police officers experience a constant pressure to triage their time, always wondering whether they should be answering another call or helping out their colleagues at another location, and worrying that they will be judged by their peers for taking too much time with any particular task. According to police scholar Lawrence Sherman, this results in a “dominant occupational culture” best described as “urgency,” the perceived need to finish each task quickly and resume “readiness to provide immediate assistance elsewhere to those who need it most.”\textsuperscript{92} The second production pressure is the necessity to “contain risk.”\textsuperscript{93} This pressure is created by the tight coupling between the behavior of non-compliant citizens and the potential risks such behavior poses to the officer and others.\textsuperscript{94} Both production pressures create incentives to move in quickly and to move in close.\textsuperscript{95} In turn, both of these actions increase the tightness of coupling in the social system by escalating the situation and reducing the possibilities for preventing harm.\textsuperscript{96}

C. Accident Prevention in Complex Systems

That policing is a relatively complex and tightly coupled system means that it is especially susceptible to organizational or systems accidents.\textsuperscript{97} A systems

\textsuperscript{90} See infra Part II.C.
\textsuperscript{91} Sherman, supra note 89, at 436. By production pressure, I mean the pressure to complete the job of producing the product at issue. In policing the “product” is public safety—or more narrowly, responding to all challenges to public safety—rather than widgets.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} See Sherman, supra note 89, at 434.
accident “involve[s] the unanticipated interaction of multiple failures” in a complex system.\textsuperscript{98} While such an accident may have one active proximal cause—such as a pilot or air traffic controller whose error resulted in a plane crash—it has many other, latent causes that interacted in complex and unanticipated ways with the errors of the operator.\textsuperscript{99} In this way of thinking, the erring operator is usually best thought of not as an instigator of the accident but as an inheritor of preexisting system defects, such as faulty design, installation, maintenance, and management.\textsuperscript{100}

Some latent defects are traceable to human error, but others are more difficult to attribute.\textsuperscript{101} Latent defects contribute to the potential of accidents by increasing the likelihood of active failures, for example, by increasing the potential for errors or violations, or by aggravating the consequences of unsafe acts.\textsuperscript{102} Importantly, these system defects were in place before the accident sequence began.\textsuperscript{103} They are weak spots whose accident-causing potential is generally kept in check.\textsuperscript{104} But these preexisting weaknesses can combine with external circumstances to bring about a catastrophic incident.\textsuperscript{105}

The organizational accident literature leads to some important insights that should frame our thinking about solutions to accidents in complex systems, including policing. First, the tendency to identify as the sole or primary causer of an accident the proximal, active causer—usually a front-line operator—is woefully inadequate if the purpose is to prevent future accidents.\textsuperscript{106} Ironically, to the extent an accident resulted from the confluence of multiple factors that are unlikely to recur, a single-minded effort to prevent repetition of the same specific, active errors will do little to improve the safety of the system as a whole.\textsuperscript{107} Second, while it seems intuitive that it is easier to change human

\textsuperscript{98} PERROW, supra note 19, at 70.
\textsuperscript{99} REASON, HUMAN ERROR, supra note 33, at 173.
\textsuperscript{100} Id. at 173–74.
\textsuperscript{101} See id. at 173.
\textsuperscript{102} REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS, supra note 33, at 11.
\textsuperscript{103} Id. at 12.
\textsuperscript{104} See id. at 11.
\textsuperscript{105} See id. at 9. James Reason dubbed this the “Swiss cheese” theory of accident. Id. Imagine that you have a package of ten slices of Swiss cheese in an even stack. Although each of the pieces of cheese has multiple holes in it, you cannot put your eye to any one of the holes in the first slice and see through to the other side. The holes in each slice are in different places. Now imagine that each slice is a subpart or component of a complex system that would need to fail for an accident to occur. The holes are weak spots that predispose that particular component to fail in some way. The only way that the accident will occur is if all the holes are lined up so that all of the potential failures occur at the same time. In other words, the accident likely resulted from the unique confluence of multiple necessary, but singly insufficient factors. See id.
\textsuperscript{106} See REASON, HUMAN ERROR, supra note 33, at 216.
\textsuperscript{107} Id. at 174.
beings than systems, scientific research suggests the opposite.\textsuperscript{108} While human error can be reduced to some extent by retraining, discipline, etc., it is inevitable that even the best-trained and most well-intentioned human beings will continue to make mistakes from time to time.\textsuperscript{109} Many sources of human error result from psychological factors such as inattention, mismanagement, forgetfulness, preoccupation, and anxiety, which are hard to control or eliminate.\textsuperscript{110} While we cannot completely eliminate human error, we can change the circumstances in which fallible human beings work, particularly the circumstances that increase the likelihood of operator error or aggravate the consequences of unsafe acts.

### III. Preventing Organizational Accidents

As noted in Part II, accident investigations in the past tended to focus almost entirely on human operator errors and equipment failures. A series of catastrophic accidents, however, led investigators to recognize that many of the underlying causes of these incidents were latent within the system long before the active errors occurred.\textsuperscript{111} This led to the growing realization that “attempts to discover and neutralise these latent failures [could] have a greater beneficial effect upon system safety than . . . localised efforts to minimise active errors.”\textsuperscript{112} In particular, investigators realized that attempting to weed out or remove so-called “accident prone” human actors or “bad apples” was not the most effective strategy for preventing accidents.\textsuperscript{113}

James Reason is one of the pioneers of this theory of human error and organizational processes. His error classification and models of systems breakdown laid the groundwork for putting these ideas into practice across multiple domains, including commercial aviation, nuclear power generation, process plants, railways, marine operations, financial services, and healthcare organizations.\textsuperscript{114} His insights provided the scholarly architecture for the

\textsuperscript{108} REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS, supra note 33, at 129.
\textsuperscript{109} Id. at 129.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} REASON, HUMAN ERROR, supra note 33, at 173. For a brief history of modern research on accidents and causation from the early 20th century into the 21st, demonstrating the move from single causes to multiple causes and from human causes to systems causes and nonblaming review, see generally THOMAS G.C. GRIFFIN ET AL., HUMAN FACTORS MODELS FOR AVIATION ACCIDENT ANALYSIS AND PREVENTION 26–56 (2015).
\textsuperscript{113} See SIDNEY DEKKER, THE FIELD GUIDE TO UNDERSTANDING ‘HUMAN ERROR’ 11–13 (3d ed. 2014).
\textsuperscript{114} See generally Armacost, supra note 15 (criticizing the “bad apple” explanation for police misconduct); REASON, HUMAN ERROR, supra note 33 (examining human errors and the field of human error study); REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS, supra note 33 (discussing organizational accidents and how to manage the risks associated with them); REASON, ORGANIZATIONAL ACCIDENTS REVISITED, supra note 33
development of systemic accident reviews known as “sentinel event review” (SER) and “root cause analysis” (RCA).\textsuperscript{115} A “sentinel event” is a “significant negative outcome that: [s]ignals underlying weaknesses in the system or process[;] [i]s likely the result of compound errors[;] and [m]ay provide, if properly analyzed and addressed, important keys to strengthening the system and preventing future adverse events or outcomes.”\textsuperscript{116} Sentinel event review often employs the tool of “root cause analysis” to identify what, how and why something happened, with the goal of preventing its recurrence.\textsuperscript{117}

RCA is designed to investigate and categorize the “root causes of events with safety, health, environmental, quality, reliability and production impacts.”\textsuperscript{118} The goal of RCA is to determine not only what and how an event happened, but also why it happened.\textsuperscript{119} Only by knowing the “why” can investigators identify “workable corrective measures that prevent future events of the type observed.”\textsuperscript{120} Identifying root causes requires the analyst to go behind the visible problem—usually the last causer—to identify first-level and second-level and third-level causes, i.e., causes that came before the most proximal, human causer.\textsuperscript{121} The overall goal of SER is to investigate significant, unexpected harm-causing events and to use the knowledge gained from the review to create barriers against future harm-causing errors.\textsuperscript{122}

\textsuperscript{115}As will be explained in more detail below, “root cause analysis,” which applies a linear investigative strategy in pursuit of just one cause, has been criticized as ineffective as a systems analysis tool. To the extent that RCA is applied in this narrow way, I agree with these criticisms; however, it can and often is employed much more broadly as one tool toward pursuit of systemic causes. In this Article, I assume the broader use of RCA. Risk management scholars and practitioners have created numerous frameworks for systems-oriented accident review, but most seem to trace their origins to some version of Reason’s framework.

\textsuperscript{116}Sentinel Events Initiative, supra note 29.

\textsuperscript{117}See James J. Rooney & Lee N. Vanden Heuvel, Root Cause Analysis for Beginners, 37 QUALITY BASICS 45, 45 (2004). American Society for Quality (ASQ) is a global, professional association that promotes the use of techniques to improve organizational quality. About ASQ, AM. SOC’Y FOR QUALITY (Sept. 4, 2019), https://asq.org/about-asq [https://perma.cc/4CMZ-4ZN3]. It has over 80,000 members in 150 countries. Id. ASQ provides its members with certification, training, publications, conferences, and other services. Id.

\textsuperscript{118}Rooney & Vanden Heuvel, supra note 117, at 45.

\textsuperscript{119}Id.

\textsuperscript{120}Id. Note that a root cause is one over which management has control and for which there is a workable solution. Id. at 46.

\textsuperscript{121}See generally id.

Traditional RCA was sometimes understood to involve a purely linear investigative strategy designed to find a single root cause that was local enough to be mitigated by the investigating institution or organization. As these assumptions about the nature of RCA have led to vigorous criticism by organizational management scholars and practitioners, as applied by systems-oriented risk managers, RCA must not be so limited. It is understood and expected that investigation of an accident involving a complex system will reveal multiple, nonlinear chains that lead to multiple “root causes.” In addition, while incident-specific RCA continues to define a root cause as one over which management has control—to ensure that the resulting action plan can actually be implemented—organizational management scholars embrace a broader causal analysis. Systems-oriented review is designed to identify not only incident-specific and institution-specific causes, but also systems-wide causes that may involve broader patterns that transcend organizational and institutional boundaries.

A. Lessons from Aviation

This kind of systems-oriented review has been adopted and perfected in various industries, including in commercial aviation, nuclear energy, and medicine. Commercial aviation, which has enjoyed a dramatic increase in safety over the past few decades, is the poster child for the success of proactive, forward-looking, systems-oriented review of harm-causing incidents. Airline safety has improved in every decade since the 1950s. In 1959 an individual would have faced a chance of being in a fatal accident in one out of every 25,000 departures. Today the odds of dying in an airline crash in the U.S. or European Union are calculated to be only 1 in 29 million. Even though the number of worldwide flight hours has doubled over the past 20 years—from approximately 25 million in 1993 to 54 million in 2013—in the same period the

123 See Rooney & Vanden Heuvel, supra note 117, at 48.
125 As root cause analysis has long been associated with the kind of systems review advocated by organizational management scholar James Reason and investigators who follow his insights, it was never intended to describe a linear, single root cause strategy. While the term continues to be used, some scholars and practitioners have urged the alternative term “systems analysis” to avoid misunderstanding. In this Article, I use the term “root cause analysis” in this broader sense, to connote a structured, systems-oriented approach.
126 ALLIANZ, GLOBAL AVIATION SAFETY STUDY 4 (2014).
127 Id.
128 Id.
129 Id.
number of airflight-caused fatalities fell from approximately 450 to 250 per year.130

This enormous increase in airline safety has resulted from a combination of factors, including dramatic improvements in aircraft engines and design as well as the advent of electronics, most notably the introduction of digital instruments.131 Higher standards of training for flight crews, improved air traffic technology, and better collision avoidance systems have also had an impact.132

One of the most important factors generating the dramatic improvement in airline safety is that commercial aviation has a sophisticated program of systematic investigations of airline accidents, which is viewed as a model for other industries.133 Investigations come from two sources: under National Transportation Safety Board (NTSB) regulations, all “accidents” and certain “incidents” must be reported to the NTSB,134 which was established in 1967 to conduct independent investigations of all civil aviation accidents in the United States.135 The NTSB immediately sends a “go team” of investigators and specialists to the accident site to collect and analyze information.136 The team ultimately drafts a report for the Board, including safety recommendations based on the findings of the investigation.137 The issuance of safety recommendations is the most important part of the NTSB’s mandate, and may address deficiencies discovered during the investigation, even if they did not contribute to the accident.138 The Board is required to address safety issues immediately, often issuing safety recommendations before the investigation is complete.139 The final report, which contains details about the accident, analysis of the factual

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132 Id.
133 Id.
136 Id. The NTSB “go team” consists of from three to four to as many as twelve or more specialists from the Board’s headquarters in Washington, D.C. who serve on a rotating basis. Id. Each of the “go team” investigators has a working group composed of experts in eight different areas of expertise—operations, structures, powerplants, systems, air traffic control, weather, human performance, and survival factors—and includes representatives from various stakeholder groups, including the Federal Aviation Administration (FAA), the pilots and flight attendant’s unions, airframe and engine manufacturers, etc. Id. The team begins its investigation at the crash site (remaining for days or even weeks), continues its analysis at NTSB headquarters in Washington, D.C., and drafts a report that goes to the NTSB with safety recommendations. Id.
137 Id.
138 Id.
139 Id.
record, conclusions and the probable cause of the accident, and the related safety guidance, is posted on the NTSB website.\footnote{140}{Id.; see also Accident Reports, NAT’L TRANSP. SAFETY BOARD, https://www.ntsb.gov/investigations/AccidentReports/Pages/AccidentReports.aspx [https://perma.cc/7JJU-L25M] (containing a dynamic list of accident reports, updated daily).}

Since its creation, the NTSB has investigated more than 140,500 aviation accidents and issued thousands of safety recommendations, more than 73 percent of which have been adopted in whole or in part by the entities to which they were directed.\footnote{141}{NAT’L TRANSP. SAFETY Bd., ANNUAL REPORT TO CONGRESS 2014 3 (Dec. 2015), https://www.ntsb.gov/about/reports/Documents/2014_Annual_Report.pdf [https://perma.cc/6XVW-PXPE]. Despite its contributions, the NTSB has been the subject of various criticisms over the years. See, e.g., CYNTHIA C. LEBOW ET AL., RAND INST. FOR CIVIL JUSTICE, SAFETY IN THE SKIES: PERSONNEL AND PARTIES IN NTSB AVIATION ACCIDENT INVESTIGATIONS 23 (2000), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1122.pdf [https://perma.cc/7KAF-XR28].} Although most NTSB reports focus on one accident, the NTSB also publishes reports that address deficiencies that are common to a set of similar accidents.\footnote{142}{NAT’L TRANSP. SAFETY Bd., supra note 141, at 3.} As I explain in more detail below, this kind of pattern-oriented analysis is essential to successful risk management.

While investigation of airline accidents is crucial and can lead to forward-looking safety recommendations, this learning comes only in the face of catastrophe. In addition, absent centralization and communication of findings, one-by-one accident investigation can obscure patterns of errors leading to repeated, similar accidents.\footnote{143}{In addition, as aviation safety has continued to improve, there are fewer serious accidents to provide opportunities for continuous and significant improvements, making reporting of near misses and other incidents crucial.} This lesson was brought home to the airline industry in December 1974, when the flight crew of TWA Flight 514, inbound to Dulles Airport in a cloudy sky, misunderstood the clearance from traffic control and crashed into the Virginia mountains, killing everyone on the plane.\footnote{144}{This incident is described in STEPHEN K. CUSICK ET AL., COMMERCIAL AVIATION SAFETY 252 (6th ed. 2017).} Upon investigation, it was discovered that six weeks earlier, a United Airlines flight crew had experienced the same clearance misunderstanding and had only narrowly missed a similar crash during a nighttime approach.\footnote{145}{Id.} A warning notice had gone out to all United Airlines pilots, but there was no mechanism for communicating this information more widely.\footnote{146}{Id.} The creation of the Aviation Safety Reporting System (ASRS) was the first step in establishing a national incident-reporting system, which proved crucial to continued advances in airline safety.\footnote{147}{Id.}

ASRS was designed by the FAA to analyze voluntarily submitted incident reports from pilots, air traffic controllers, dispatchers, cabin crew maintenance

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\footnote{140}{Id.; see also Accident Reports, NAT’L TRANSP. SAFETY BOARD, https://www.ntsb.gov/investigations/AccidentReports/Pages/AccidentReports.aspx [https://perma.cc/7JJU-L25M] (containing a dynamic list of accident reports, updated daily).}
\footnote{142}{NAT’L TRANSP. SAFETY Bd., supra note 141, at 3.}
\footnote{143}{In addition, as aviation safety has continued to improve, there are fewer serious accidents to provide opportunities for continuous and significant improvements, making reporting of near misses and other incidents crucial.}
\footnote{144}{This incident is described in STEPHEN K. CUSICK ET AL., COMMERCIAL AVIATION SAFETY 252 (6th ed. 2017).}
\footnote{145}{Id.}
\footnote{146}{Id.}
\footnote{147}{Id.}
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crew, maintenance technicians and others.\textsuperscript{148} These reports identify hazardous or dangerous conditions recognized by ground-level practitioners and experts as posing risks to safety.\textsuperscript{149} In order to encourage voluntary reporting, reports sent to ASRS are held in strict confidence and may not be used by the FAA in enforcement actions against reporters.\textsuperscript{150}

From its inception in 1975, ASRS reporting has been robust, with an average intake of over 8,000 reports every month, and over 1.5 million reports in its forty-three-year history.\textsuperscript{151} Each incident report is read and analyzed by at least two of ASRS’s corps of aviation safety experts, composed of experienced pilots, air traffic controllers, and mechanics.\textsuperscript{152} Their first priority is to flag any aviation hazards identified, and send an alerting message to the appropriate FAA office or aviation authority.\textsuperscript{153} The analysts then classify each report and uncover the causes underlying the reported incident.\textsuperscript{154} The original report and the expert’s observations are incorporated into the ASRS database.\textsuperscript{155} ASRS has also conducted over sixty research studies that seek to effect incremental improvement in aviation safety on a system-wide level.\textsuperscript{156} ASRS incident reports are viewed as one of the world’s largest sources of information on aviation safety and human factors.\textsuperscript{157}

The history of safety investigations in commercial aviation illustrates two moves that have become central features of risk management in industries as diverse as health care, nuclear power and banking. The first is the move from the reactive strategy that investigates only full-fledged accidents—the “fly-
crash-fix-fly” approach to investigating close calls and near miss incidents as well. Historically, only the costliest and most harm-causing events were subjected to detailed investigation to determine causes and contributory factors. In current risk management practice, the whole range of procedural errors, human mistakes, and systems defects are routinely analyzed and investigated. “Incidents, or ‘near misses,’” can include instances in which only “partial penetration of defences” occurred or where “all the available safeguards were defeated but no actual losses were sustained.” The proactive approach includes actively looking for potential safety problems by analyzing trends, investigating hazards, and using other methods of scientific inquiry.

There are two potential benefits to looking at near misses, dangerous mistakes and close calls as well as accidents: First, it provides insight into why some sequences of events result in accidents while other sequences do not. Second, this kind of investigation can uncover circumstances that pose dormant or hidden risks before those risks result in an accident.

The second important move in aviation safety management that has served as a model for other disciplines is the move from looking at accidents or incidents one by one, to looking for recurring patterns or risk factors. Aviation investigators constantly work to find “connections and interrelations between individual events” that suggest there is some “common, underlying risk.”

The TWA incident described above

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Stolzer, Halford, and Goglia describe three levels of safety risk management: Reactive safety management involves forensic analysis of harm-causing accidents or incidents in order to determine causative or contributory factors that led to the events. Id. at 215. Proactive safety management uses “trend analysis, hazard analysis, and other methods of scientific inquiry” to look for potential safety problems before they result in an accident. Id. The Aviation Safety Reporting System (ASRS), which promotes active reporting of potential safety hazards, is an example of a proactive program. Id. at 53. It is by far the most successful voluntary reporting system, and is widely accepted by virtually all stakeholders in the airline industry, including flight crews, dispatchers, maintenance technicians, and flight attendants. Id. For examples of other proactive airline safety programs, see id. at 51–53. The third level of safety management goes even farther, for example, using models such as probabilistic risk assessment and data mining to determine where and when the system is likely to fail. Id. at 217. See generally CUSICK ET AL., supra note 144, at 205–64 (describing reactive versus proactive safety management).

159 MACRAE, supra note 157, at 1.
160 Id.
161 Id.
162 GRIFIN ET AL., supra note 112, at 46.
163 STOLZER ET AL., supra note 158, at 215.
165 Id.
166 MACRAE, supra note 157, at 150.
167 Id.
is one example of this strategy, which linked the TWA crash to an almost identical near miss that had occurred just six weeks prior.\textsuperscript{168} In addition, proactive investigations of similar incidents or near misses can lead to discovery of dangerous conditions, safety hazards or jeopardous human conduct before a catastrophic accident occurs.\textsuperscript{169}

B. Sentinel Event Review in Medicine

Systems-oriented, root cause analysis has also been applied with good results in medicine, although its use in this context is still evolving. Modern risk management in medicine looks to aviation as its precursor, but prior to applying the aviation model the medical profession employed an earlier version of multidisciplinary accident review.\textsuperscript{170} Hospitals have a long tradition of conducting “morbidity and mortality conferences” to review negative patient outcomes and medical errors to better understand how they occurred and how they could have been prevented.\textsuperscript{171} In early versions, however, these reviews were limited by their backward-looking, “blaming” approach.\textsuperscript{172} More recently safety management experts have looked to commercial aviation as a model for more forward-looking, systems-oriented review.\textsuperscript{173}

Salient parallels between aviation and medicine make the commercial airline model a good one.\textsuperscript{174} Physicians, like pilots, are highly educated for work in “high-risk environments,” they are often forced to make decisions under pressure, and they are “constantly reminded that their mistakes may cost human life.”\textsuperscript{175} Both function in complex settings where teams of experts interact with technology, and in both settings, threats to safety can come from a wide range of environmental sources.\textsuperscript{176} Also, in medicine as in aviation, safety is critical but financial concerns can affect the commitment of safety resources.\textsuperscript{177} Scholars have also identified particular risk-management strategies used in aviation that are deemed transferable to the medical context, for example, aviation teamwork is suitable for adaptation to hospital operation rooms and

\textsuperscript{168} CUSICK ET AL., supra note 144, at 252.
\textsuperscript{169} See, e.g., id. at 490.
\textsuperscript{170} See, e.g., Kapur et al., supra note 130, at 1, 6.
\textsuperscript{171} See POPE & DELANY-BRUMSEY, supra note 122, at 2.
\textsuperscript{173} See, e.g., Kapur et al., supra note 130, at 1.
\textsuperscript{174} For a detailed chart comparing aviation to medicine, see id. at 2. Some authors have expressed reservations about the analogies between aviation and medicine. See id. at nn.5–9 (listing references).
\textsuperscript{177} Id.
emergency departments, and the aviation safety reporting has served as a model for voluntary reporting of medical incidents. In addition, the use of checklists and redundancies, which have transformed aviation safety, have been employed to good effect in addressing particular recurrent errors in medicine.

An important event that led medicine out of old-school blaming review toward more forward-looking review was the 1999 U.S. Institute of Medicine (IOM) consensus report *To Err is Human: Building a Safer Health System.* It reported the alarming statistic that 44,000 people died every year from preventable errors. The key insight of the report was that the majority of medical errors result not from mistakes by individuals but from “faulty systems, processes, and conditions that lead people to make mistakes or fail to prevent them;” in other words, from “bad systems rather than bad people.” This was a transformative concept for medical review of errors. It led the IOM to conclude that mistakes can best be prevented by designing the medical system to “make it harder for people to do something wrong and easier for them to do it right.” The IOM reasoned that “when an error occurs, blaming an individual does little to make the system safer and prevent someone else from committing the same error.” Its recommendations were designed to adopt a more “institutionalized approach that identifies root causes and underlying system failures,” with the goal of reducing medical errors by a minimum of 50% over the succeeding 5 years.

The Joint Commission, the oldest and largest standard-setting and accrediting body for healthcare organizations in the world, has since institutionalized a strategy for identifying and analyzing harm-causing medical

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178 Id. at 782, 784.
179 See INST. OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 158, 162, 171–72, 194 (Linda T. Kohn et al. eds., 2000) [hereinafter IOM REPORT]; Kapur et al., supra note 130, at 4–5 (reviewing the literature on use of checklists in preventing medical errors).
180 See generally IOM REPORT, supra note 179.
181 Id. at 1. For a summary version of the full report by its authors, see id. at 1–5. The report defines medical error as “the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim.” Id. at 4. The report lists as common errors: “adverse drug events and improper transfusions, misdiagnosis, under and over treatment, surgical injuries and wrong-site surgeries, suicides, restraint-related injuries or deaths, falls, burns, pressure ulcers, and mistaken patient identities.” NIKI CARVER & JOHN E. HIPSKind, MEDICAL ERROR 1 (2019).
182 CARVER & HIPSKind, supra note 181, at 1.
184 Id.
185 CARVER & HIPSKind, supra note 181, at 1.
186 IOM REPORT, supra note 179, at 5.
187 POPE & DELANY-BRUMSEY, supra note 122, at 2.
188 IOM REPORT, supra note 179, at 4.
errors and formulating action plans to prevent such harms from recurring.\footnote{190} Since 1996, the Commission has had in place a Sentinel Event Policy, which requires accredited organizations to conduct a systemic review of all sentinel events to determine causal and contributing causes and to formulate an action plan to promote greater safety going forward.\footnote{191} A sentinel event is defined as a patient safety event (not primarily related to the natural course of the patient’s illness or underlying condition) that reaches a patient and results in death, permanent harm, or severe temporary harm.\footnote{192} Such events are deemed “sentinel” because they signal that immediate investigation and response is needed.\footnote{193} The goal of sentinel event review, using a revised version of root cause analysis called Root Cause Analysis and Action (RCA\textsuperscript{2}), is to identify and implement “sustainable systems-based improvements” that improve patient safety.\footnote{194} As virtually all U.S. hospitals and medical organizations are accredited by the Joint Commission, sentinel event review using RCA\textsuperscript{2} has become the standard of safety for medical providers in this country.\footnote{195}

RCA\textsuperscript{2} seeks to improve traditional root cause analysis in two ways, first by emphasizing that investigation and analysis must be followed by a concrete action plan, and second by prescribing that analysis and implementation must focus on systems-oriented change.\footnote{196} Specifically, RCA\textsuperscript{2} is designed to identify and mitigate “system vulnerabilities” rather than individual errors, on the theory that individual performance is a “symptom” of broader, systems-based problems.\footnote{197} Human error simpliciter is never an acceptable root cause because disciplining or retraining a human causer may reduce the risk that the errant actor will repeat his mistake, but it will not reduce the probability that the event

\footnote{190}{See Sentinel Event Policy and Procedures, JOINT COMMISSION, https://www.jointcommission.org/sentinel_event_policy_and_procedures/ [https://perma.cc/ER2R-MF3M]. Accredited organizations are “strongly encouraged” but not required to report sentinel events to the Joint Commission, which enables “lessons learned” from the event to be added to the Joint Commission’s Sentinel Event databases. Id. This contributes to widespread knowledge about harm-causing events and to enhanced opportunities for risk reduction. Id.}

\footnote{191}{Id.}

\footnote{192}{Id.}

\footnote{193}{Id.}

\footnote{194}{NAT’L PATIENT SAFETY FOUND., RCA\textsuperscript{2} IMPROVING ROOT CAUSE ANALYSES AND ACTIONS TO PREVENT HARM i, vii (June 2015), https://www.ashp.org/-/media/assets/policy-guidelines/docs/endorsed-documents/endorsed-documents-improving-root-cause-analyses-actions-prevent-harm.ashx [https://perma.cc/67R4-PES6]. The overall goal of robust investigations of harm-causing events is a “culture of safety.” U.S. DEP’T OF JUSTICE, supra note 172, at 4. The Agency for Healthcare Quality and Research at the Department of Health and Human Services has formulated indicators that measure the culture of safety at health institutions, such as whether staff members feel free to speak up if they see others making an error. Id. The goal is to “shine a spotlight on errors and create a culture where people are comfortable sharing information on mistakes.” Id.}

\footnote{195}{See NAT’L PATIENT SAFETY FOUND., supra note 194, at vi (listing organizations that endorse the use of RCA).}

\footnote{196}{Id. at 1–3.}

\footnote{197}{Id. at vii.}
will recur with other operators in similar circumstances.\textsuperscript{198} Thus the strongest, most effective actions are systems-wide interventions that reduce the inevitable risk that well-trained and well-intentioned human operators will make mistakes. Strong, systems-oriented actions include architectural/physical plant changes, engineering control, simplification of processes, and standardization of equipment.\textsuperscript{199} The weakest actions are those directed at directly changing human behavior, such as double checks, warnings, new procedures and retraining.\textsuperscript{200}

Sentinel event, systems-oriented review in medicine has not yet reached the high level of success it has reached in aviation. The reasons for some of its failures in medicine hold important lessons for systems-oriented review in the criminal justice context. One determinative difference between aviation and medicine has to do with the organizational culture of the two contexts with regard to safety: over the past twenty years, aviation has developed a “non-blaming” culture in which incident reporting has become more routine and less threatening.\textsuperscript{201} In addition, aviation is less hierarchical than medicine, which makes joint-responsibility for safety less threatening and more likely.\textsuperscript{202}

Commitment to safety permeates all levels of the business of airlines, whereas safety in medicine continues to be regarded as a specialized priority for some but not the obligation of all.\textsuperscript{203} Finally, organizational culture in some medical institutions continues to be a culture of “low expectations,” in which medical personnel fail to correct discrepancies, mistakes and inconsistencies.\textsuperscript{204} If medical personnel come to expect that they will receive faulty or incomplete information, it may lead them to conclude that “red flags” are not unusual or worrisome.\textsuperscript{205} They may come to regard them as only repetitions of the poor communication to which they have become accustomed.\textsuperscript{206}

C. The Importance of Multi-Incident Review

Sentinel event review of particular, harm-causing events has been an essential feature of systems review in commercial aviation and in medicine. As

\textsuperscript{198} Id. at 18. Retraining that is focused on the harm-causing event is also inadequate because there is always turnover and a high-profile event is eventually forgotten. Id.

\textsuperscript{199} Id. at 17 (laying out an “action hierarchy” from stronger actions to weaker actions that was developed by the U.S. Department of Veterans Affairs National Center for Patient Safety, which has been “used for decades in many other industries to improve worker safety”); id. at 16 (internal citation omitted).

\textsuperscript{200} Id. at 17.

\textsuperscript{201} Kapur et al., supra note 130, at 2.

\textsuperscript{202} Id. at 5.

\textsuperscript{203} Id. at 2.

\textsuperscript{204} Mark R. Chassin & Elise C. Becher, The Wrong Patient, 136 ANNALS INTERNAL MED. 826, 830 (2002).

\textsuperscript{205} Id.

\textsuperscript{206} Id.
described above, the NTSB requires the investigation of all airline accidents and near misses and the Joint Commission requires that hospitals review all “sentinel events.”

The dramatic success of systems-oriented analysis in these contexts, however, lies in accident investigation that goes beyond single incident review. Commercial aviation and medical investigators have increasingly used the information gleaned from individual reviews to identify patterns of repeated, similar errors that were found to have caused repeated, similar accidents. In turn, pattern identification has led the way for systems-oriented interventions that have had enormous success in changing the circumstances that lead to predictable, repeated human errors in these contexts.

Single incident analysis is essential for identifying the lines of causation that uncover the root causes of a particular accident. Employed alone, however, single incident analysis has limited value. Focusing solely on individual events may frustrate an institution’s ability to appreciate its vulnerability to reoccurring harmful errors, some of which may result from easy-to-identify systems causes. Failing to see these easy fixes is to miss the lowest hanging fruit. By contrast, identifying patterns of errors and sharing information among similarly situated institutions or agencies promotes the most efficient and effective investigation of harm-causing events. In addition, prioritizing the investigation of reoccurring errors avoids the risk of investing inordinate resources to prevent a rare event, which may be unlikely to recur. In short, investigating and addressing reoccurring errors—by looking at both harmful events and near misses—has huge payoffs for accident reduction.

D. Sentinel Event Review in Criminal Justice

    In 2004, twenty-one-year-old Michael Bell was shot in the head by officers of the Kenosha (Wisconsin) Police Department. Michael had driven home from an evening out and pulled up to the curb at his home when police pulled up behind him. There is no dispute that Michael was unarmed, but the events that led to the shooting were outside the range of the officers’ dashcam and

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207 See How Aviation Safety Has Improved, supra note 131; Sentinel Event Policy and Procedures, supra note 190.
208 See, e.g., Kapur et al., supra note 130, at 7.
209 Id.
211 Id. Police claimed that because Michael “failed to make a complete stop,” they followed him to his house and parked behind him. Id. Toxicology screens later demonstrated that Michael had been drinking that night. Id. Michael had tangled with one of the three officers sometime before, and was scheduled to appear in court the next day in connection with charges from that incident. Appendix to the Affidavit of Russell Beckman Regarding the Circumstances Surrounding the Possession of the Handgun of Officer Eric Strausbaugh During the Encounter with Michael E. Bell at 38 [on file with Ohio State Law Journal].
details were disputed. What is now clear, however, is that while three officers were trying to subdue Michael against a police vehicle, one yelled, “He’s got my gun,” and moments later a fellow officer shot Michael point blank in the head.

After the incident, Michael’s father, Michael Bell, Sr., who is a retired lieutenant colonel in the U.S. Air Force and familiar with NTSB investigations of airline accidents, assumed that there would be a similar, detailed, independent investigation of his son’s death. Instead, the Kenosha police department’s internal affairs unit spent only 48 hours investigating the incident before concluding that the shooting was justified. The investigation was apparently conducted without interviewing witnesses or waiting for the forensic evidence to come back from the crime lab.

When the forensic reports came back, and Michael’s fingerprints and DNA were not found on the officer’s gun, Mr. Bell, Sr. hired his own investigators, including a retired police detective from the Kenosha Police Department. In the course of this investigation, the detective discovered evidence suggesting that the officer’s holstered handgun may have gotten caught in the driver’s side mirror—found to be broken at the base—which caused the tugging the officer interpreted as an effort to disarm him.

In comparing the vigorous investigations of airline accidents to the less independent and comparatively anemic investigations of many police shootings by their departments, Mr. Bell, Sr. was raising an important question: Does aviation have something to teach the criminal justice system about how to investigate harm-causing accidents with an eye toward preventing such events in the future? Significantly, Mr. Bell, Sr. did not blame the officer who fired the shot, concluding that he made an “honest mistake” in thinking that Michael had

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213 Id.
214 Kennedy, supra note 210.
215 In Wisconsin, a Decade-Old Police Shooting Leads to New Law, supra note 212.
216 Id.
217 Id. For a record of this investigation, see generally Evidence & Investigation, PLEA FOR CHANGE, https://michaelbell.info/Evidence.html [https://perma.cc/57TC-7ABD] (describing the evidence and investigation of the Michael E. Bell shooting).
218 See Affidavit of Russell Beckman Regarding the Circumstances Surrounding the Possession of the Handgun of Officer Erich Strausbaugh during the Encounter with Michael E. Bell at 2, https://docs.google.com/file/d/0B6SnSBw-2I60ME9iH4SdBN1k/edit [https://perma.cc/R5SZ-Y2DX]. In 2010, the City of Kenosha agreed to pay $1.75 million dollars to settle a wrongful-death lawsuit by Michael’s family. Kennedy, supra note 210. The family used the settlement money to fund a grassroots campaign to pass legislation to mandate that police incidents involving civilian deaths be investigated by outside, independent investigators. In Wisconsin, A Decade-Old Police Shooting Leads to New Law, supra note 212. The statute is admirable for requiring an independent investigation, but, unfortunately, it does not mandate the systems-oriented review that Mr. Bell, Sr. envisioned from his aviation experience. See Wis. STAT. § 175.47 (2014); Kennedy, supra note 210.
What Mr. Bell objected to was the fact that the department failed to conduct a thorough investigation that took seriously all available evidence. Instead it stopped with the conclusion that the shot was “justified.”

A rigorous, systems-oriented sentinel event review of these circumstances would have gone behind the officer’s mistake to determine why that mistake occurred. If the gun got caught on the side mirror, did that suggest an equipment design failure? Did it implicate an addressable vulnerability in the way the officer positioned himself so that his gun holster got caught? Was the initial stop justified? Could de-escalation techniques been used to diffuse the situation? Could Michael have been ticketed rather than arrested, in order to avoid the escalation that occurred? These kinds of questions could uncover systems vulnerabilities that could be addressed to make a similar shooting less likely to occur in the future. In other words, that the shooting may have been reasonable (lawful) at the moment the shot was fired does not preclude a finding that there were ways it could have been prevented. The list of questions I have outlined suggest there may have been systems vulnerabilities that contributed to the shooting. This is the great benefit of independent, nonblaming, systems-oriented review.

Criminal justice scholars have begun to recognize the promise of systems-oriented review. Initial interest was spurred by the U.S. Justice Department’s landmark 1998 study of the first twenty-eight wrongful convictions exposed by DNA testing and the growing number of such cases that were catalogued by the first Innocence Project.

More recently, the National Institute of Justice has launched the Sentinel Events Initiative (SEI) to explore whether the same forward looking, all-stakeholders, multi-disciplinary, nonblaming review employed in medicine, aviation and other contexts could be used to address sentinel events in the criminal justice system. NIJ defines a sentinel event as an “unexpected negative outcome” that signals a possible weakness in the system and is likely caused by “compound errors.” Such an event may provide, “if properly

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219 Kennedy, supra note 210.
220 Id.
221 Id.
222 I take no position on the question of whether the shooting was lawful at the moment it occurred.
223 See, e.g., Hollway et al., supra note 28, at 884.
224 See generally EDWARD CONNORS ET AL., NAT’L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).
225 For a discussion of this history, see generally James M. Doyle, Learning from Error in American Criminal Justice, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010).
226 The National Institute of Justice is part of the Office of Justice Programs at the Department of Justice.
228 Id. at 1.
analyzed and addressed—important keys to strengthening the [criminal justice system] and preventing future adverse events or outcomes.” The purpose of the NIJ Sentinel Events Initiative is to “develop a template for how state and local stakeholders could learn from criminal justice errors” and to “provide a platform where stakeholders can disseminate information, accessing each other’s experiences and allowing access by other jurisdictions, including researchers, to knowledge gained from a sentinel review.”

In 2013, after two years of preliminary research by NIJ fellow James Doyle, the NIJ convened a roundtable of criminal justice experts to consider the applicability of sentinel event review for such negative outcomes as wrongful convictions, erroneous release of dangerous inmates, and cold cases that remain unsolved for too long. Doyle urged his colleagues to consider making multidisciplinary, nonblaming review of errors a regular part of criminal justice practice; to make the errors themselves the mechanism for learning and change. The 2013 roundtable participants concurred with Doyle’s assessment and urged the NIJ to begin the process of testing the viability of sentinel event review in the criminal justice context.

In 2014, NIJ invited jurisdictions around the country to volunteer to review a sentinel event that had occurred in their area of authority. Through a competitive process, three sites were selected: Milwaukee, Philadelphia, and Baltimore. Teams in each of these sites designated and conducted a review of a “justice error”—a sentinel event—that had occurred in their jurisdiction. All three sites successfully completed their reviews, providing the first empirical evidence of the feasibility of adopting SER in the criminal justice context. While retaining promised anonymity about the details of the sentinel event each

229 Id.
231 James M. Doyle was a former defense attorney from Boston.
232 See U.S. DEP’T OF JUSTICE, supra note 172, at 1, 5, 24. Doyle reflected that the recent wave of DNA exonerations had focused attention on system-wide errors in criminal justice and undermined public confidence in the American public justice system. Id. at 2. He noted that some progress had been made in addressing these issues, but that efforts to that point had created best practices for individual actors, while ignoring the complex interactions and system features that together lead to adverse events. See id. at 2–3. He deemed this “linear” approach inadequate to address errors in complex systems, including the criminal justice system. Id. at 2.
233 See id. at 3.
234 Doyle, supra note 227, at 1.
236 Id.
237 Id.
238 Id. at 3.
site chose to review, the NIJ published a detailed report of “lessons learned” across the three SERs.  

More recently, police scholars John Hollway, Calvin Lee, and Sean Smoot have urged the application of root cause analysis, as it has been applied in aviation, medicine, and other industries, to police shootings. They argue, as I do here, that our existing systems for evaluation of past officer-involved shootings by administrative investigations, civilian oversight, and civil and criminal investigation are inadequate for learning how to prevent similar shootings in the future. They agree that unlike these existing strategies, which are backward-looking and individual-focused, root cause analysis could uncover nonhuman, systemic causes and corresponding systemic remedies that would be more effective in preventing officer-involved shootings.

What is missing to this point is a more robust description of what root cause analysis might look like in the context of police-involved shootings, and precisely what kinds of systemic causes—and systemic solutions—root cause analysis might uncover. In what follows, I begin to fill that gap.

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239 *Id.* at 2. The report covered the following topics: Where does a jurisdiction start when thinking about performing a sentinel event review? *Id.* at 3. What kind of event should be reviewed, including some of the benefits and challenges of selecting an older event? *Id.* at 3–4. Who should be on the sentinel event team—and who should lead or facilitate the review process? *Id.* at 5–6. How can the important “non-blaming” component of sentinel event review be achieved? *Id.* at 11. In 2014 and 2015, the NIJ made four research grants as part of its effort to bring sentinel event reviews into the criminal justice system. Nancy Ritter, *Testing a Concept and Beyond: Can the Criminal Justice System Adopt a Nonblaming Practice?*, 276 NIJ J. 38, 39–40 (2015). Grants were awarded to Texas State University to study wrongful convictions; the Vera Institute to implement and evaluate a protocol for reviewing cases of self-harm in New York City jail; Michigan State University to study the use of sentinel event review in aviation and medicine; and the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania to work with the Philadelphia Police Department, District Attorney’s Office, Defender Association, and Court of Common Pleas to evaluate the effectiveness of multidisciplinary sentinel event teams. *Id.* This project will create a database of errors and near misses similar to the Aviation Safety and Reporting System to provide a mechanism for prioritizing negative outcomes that are suitable for sentinel event review. *Id.* The goal is to develop rules and standards for the creation and maintaining of multi-stakeholder teams that will embrace a culture of learning from error. *Id.*


241 See *id.* at 891–92.

242 See *id.* at 898–99.

243 A notable exception is Schwartz, who suggests some possible systemic solutions. See Joanna C. Schwartz, *System Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 561–62 (2018). Her discussion, however, is quite general and does not combine individual incident root cause analysis with the kind of pattern analysis that has been so successful in aviation and medicine.
IV. SYSTEMS-ORIENTED REVIEW OF POLICE SHOOTINGS

Current methods of investigating police-involved shootings differ from the forward-looking, systems-oriented investigations of accidents that occur in aviation and medicine in three critical ways. First, unlike investigations by the NTSB and the Joint Commission, almost none of the traditional police investigatory mechanisms are fully independent from the employing police organization. Second, police reviews are designed solely to determine whether the proximal, human actor—the officer who pulled the trigger—was legally culpable, i.e., whether he acted reasonably at the moment of the shot. Once it is determined that the officer’s conduct was legally justified, the investigation is over. There is no interrogation of the broader circumstances surrounding the shooting, no search for systems vulnerabilities, and no analysis of how the shooting could have been prevented. (I examine this difference in more detail below.) Third, existing structures for police review have no mechanism for sharing analyses of individual police shootings to discover recurring errors or recurring systems breakdowns that could help identify forward-looking solutions.

In the following pages, I illustrate what systems-oriented review might look like in the policing context by examining as a case study the 2014 shooting by a police officer of twelve-year-old Tamir Rice. First, though, I address the question of what the goal of systems-oriented review is—because that is more complicated in the police context than in aviation and medicine since lethal force is sometimes necessary to protect police and public safety.

A. What Is the Goal of Systems-Oriented Review of Police Shootings?

Effective systems-oriented review requires clearly defined goals. In aviation and medicine, the task of setting goals is relatively easy. In aviation the aim is to prevent airline crashes. In medicine the objective is to prevent harm or injury to patients that is not related to the natural course of the patient’s illness. While finding the right level of safety in these contexts includes financial

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244 See id. at 558.
245 See Chuck Wexler, Why We Need to Challenge Conventional Thinking on Police Use of Force, in POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 6 (2016).
246 I will contrast the extant accountability reviews with what I call a “modified” systems-oriented review. I use the term “modified” because I am not a trained expert in RCA and my analysis is limited to the information contained in the existing record. Full-blown sentinel event review leading to systems-oriented review would require additional data gathering, participation by individuals involved in the event being reviewed, and third-party experts from the context in which the events occurred.
considerations, there is little else to “balance” against airline safety and patient safety.247

Setting a goal for systems-oriented review of police shootings is more complicated because there are important values (aside from cost) on the other side of the balance. Decreasing police-involved shootings of citizens might increase the risk that police officers or third parties could be shot or injured. Putting more pressure on police not to use their firearms might increase the incidence of crime or threaten public safety. In addition, the balancing is even more fraught because the costs and benefits on the two sides of the balance are not evenly distributed across demographic and socially defined communities: for example, police-involved shootings fall disproportionately on inner city, African-American communities, while many of the benefits of aggressive police intervention may inure to richer, whiter communities.248

That the goal is more complicated, however, does not preclude systems-oriented review of police shootings. It simply means that prevention measures must take account of conflicting values and distributional effects. The question for a systems-oriented investigator is whether a particular shooting (or pattern of shootings) could have been prevented without compromising police and public safety across all communities.249

Reviews that apply current legal standards never ask this question. Legality of lethal force depends upon whether the officer reasonably believed the force he or she applied was necessary under the specific circumstances at the moment the shot was fired. This inquiry is ultimately about accountability, not prevention: it tells us whether the officer was culpable for pulling the trigger given what he reasonably perceived at the time. That a particular killing was “justified” in this legal sense, however, tells us nothing about “what kinds of attacks really require lethal counterforce or how often police use of deadly force—whether fatal or not—saves the lives of police or crime victims.”250

Moreover, to call police-involved shootings “justifiable killings”251 is to implicitly deny the social costs to victims, families, and the broader community.

247 I say “little else” because it is possible that some efforts to create fewer accidents or incidents in aviation and medicine could have other, less easily monetized costs. For example, institution of a checklist before a surgery could increase the length of that procedure, which could lead to fewer surgeries and longer wait times for patients to get necessary treatments. Some human costs like these are not wholly monetizable. But, in general, the primary value on the other side of the equation is financial cost.


249 FRANKLIN E. ZIMRING, WHEN POLICE KILL 91 (2017).

250 Id. at 124 (emphasis added).

251 The FBI’s Supplementary Homicide Reports (SHR) designates officer-involved, fatal shootings as “justifiable killings by police officers of felons.” Id. at 122. The SHR is part of the Uniform Crime Reporting (UCR) Program administered by the FBI. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, NATION’S TWO MEASURES OF HOMICIDE 1 (2014), https://www.bjs.gov/content/pub/pdf/ntmh.pdf [https://perma.cc/9264-R5UF]. “The UCR provides aggregate annual counts of the number of homicides occurring in the United
of legally justified shootings, especially those that were factually unnecessary because neither the officer nor the public was ultimately at risk.\textsuperscript{252} While some officer-involved shootings might be unavoidable, every police shooting that takes a human life is regrettable and tragic.\textsuperscript{253} This point gets obscured by an investigative regime that ends by calling a shooting “justified.” Whether or not justified, every officer-involved shooting is undesirable and worthy of review to understand how and why it occurred and how it can be prevented in the future.

That the legal standard governing review of police shootings is focused on placing (or eliminating) blame rather than on decreasing unnecessary shootings underlines the need for additional, systems-oriented investigations. In the next section I illustrate the difference between accountability review and systems-oriented review by contrasting the extant reviews of the Tamir Rice shooting with a more systems-oriented inquiry.

\section*{B. Why Accountability Review Does Not Prevent Police Shootings: A Case Study of the Tamir Rice Shooting}

On November 22, 2014, Tamir Rice was shot in a city park by Officer Timothy Loehmann from the Cleveland (Ohio) Division of Police.\textsuperscript{254} Loehmann and his partner, Officer Garmback, entered the park in their vehicle in response to a police dispatch call reporting a black male who allegedly kept “pulling a gun out of his pants and pointing it at people.”\textsuperscript{255} The officers drove across the park in their vehicle.

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\textsuperscript{252}The social cost to victims and their communities is obvious. What might be less obvious is that there are also grave personal and professional costs for an officer who is involved in a lethal police-involved shooting. See generally DAVID KLINGER, INTO THE KILL ZONE 7, 203–71 (2004) (describing the dramatic, negative effects that police-involved shootings can have on the officer who pulled the trigger, effects that have been called “post-shooting trauma”—a form of traumatic stress syndrome—in law enforcement circles).\textsuperscript{253} See Hollway et al., \textit{supra} note 28, at 887–88 (“[O]ur system of criminal justice defines any [officer-involved shooting]—even one in which all protocols were followed by the officer—as an undesirable outcome, and one worthy of review to understand how and why it occurred with the goal being its prevention in the future.”).\textsuperscript{254} KIMBERLY A. CRAWFORD, FED. BUREAU OF INVESTIGATION, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE 1, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir-2014Investigation/Crawford-Review-2014Deadly%20Force-Tamir-2014.pdf [https://perma.cc/Z74Q-5JTS].\textsuperscript{255} TIMOTHY J. MCINTYRE, OFFICE OF THE PROSECUTING ATTORNEY, CUYAHOGA COUNTY PROSECUTOR’S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE 3–4, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice-2014Case%20Report%20FINAL%20FINAL%202012-28a.pdf [https://perma.cc/QM96-3NRA] [hereinafter CCPO REPORT].
\end{flushleft}
ground close to the suspect and braked on the snow-covered grass. The vehicle then slid over forty feet to a point adjacent to where Tamir was standing. Officer Loehmann disembarked and fired his weapon within two seconds after the vehicle came to a stop. Tamir Rice was transported to a nearby hospital, but died several hours later from his injuries.

It turned out that Tamir was only 12 and that the gun was an “airsoft” gun, which shoots small plastic pellets and is not designed to kill or wound. Officer Loehmann later reported that Tamir looked like he was reaching for a gun in his waistband.

In the aftermath of the shooting, the Cleveland Division of Police and the Cuyahoga County Prosecutor’s Office launched investigations into the shooting. Tamir Rice’s family and community called for criminal prosecutions of the officers and filed a wrongful death suit against the officers, the police department and the City of Cleveland, alleging claims under the Fourth Amendment, the Due Process Clause, and state tort law. The lawsuit and demands for prosecution reflect the strong causal intuitions and moral commitments that underlie calls for accountability review: the officers drove their police car into the park and shot and killed a young boy holding a pellet gun. Surely someone must be held accountable for Tamir’s tragic death.

256 Id. at 4.
257 Id.
258 Id.
259 Id. at 5.
261 Kilpatrick, supra note 260.
264 See generally First Amended Complaint, Winston v. Loehmann, No. 1:14-CV-02670 (N.D. Ohio Jan. 30, 2015) (detailing the various claims brought by the administrator of the estate of Tamir Rice).
There were three layers of accountability review of the shooting. The first was an administrative review by the Internal Affairs Unit (IAU) of the Cleveland Police Department to determine whether police employees—the two officers and the police dispatcher—had violated any police rules or policies. The second, an administrative inquiry by the Critical Incident Review Committee (CIRC), was tasked to investigate the officers’ actions and make recommendations to police management for changes to training, rules, policies, or equipment in light of the reviewed incident. The third review was conducted by the Cuyahoga County Prosecutor’s Office (CCPO) to determine whether there was a basis to bring criminal charges against the two officers involved in the shooting.

All three investigations concluded that Officer Loehmann had acted lawfully because he reasonably believed, based on the facts and circumstances known to him at the time, that Tamir Rice was reaching into his waistband to pull out a real gun. The only sanctions that were brought against either officer were administrative sanctions: Officer Garmback was suspended for ten work days and ordered to attend remedial tactical training for failing to stop his police vehicle more quickly and declining to coordinate his approach with other police vehicles. Officer Loehmann was fired for failing to disclose a negative employment history on his application, but not for shooting Tamir Rice.

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265 See Internal Affairs Unit, Investigative Report from Timothy A. Stacho, Sergeant, Cleveland Division of Police, to Monroe B. Goins, Lieutenant, Cleveland Division of Police 3 (Feb. 2015), https://www.dropbox.com/sh/z5g1kd9qzjggdw4/AABPS1s8y5g_pptRyUYI0g1oa?dl=0&preview=IA+Report.pdf [https://perma.cc/YA56-8Z28] (hereinafter IAU Report).

266 Critical Incident Review Comm., Tamir Rice Incident 1 (Apr. 2017), https://www.dropbox.com/sh/z5g1kd9qzjggdw4/AABPS1s8y5g_pptRyUYI0g1oa?dl=0&preview=CIRC_Report.pdf [https://perma.cc/VT5B-DUMK] (hereinafter CIRC Report). The CIRC was empaneled by Police Chief Calvin Williams in February 2016. Id. The Committee was chaired by the Deputy Chief of Field Operations, Cleveland Police Department, and consisted of eight members, five from the Cleveland Police Department and three administrators of the City of Cleveland. Id. It met from February 22, 2016 through October 6, 2016 and issued a report and an addendum. Id. at 3.

267 CCPO Report, supra note 255, at 1.

268 See id. at 70; CIRC Report, supra note 266, at 17; IAU Report, supra note 265, at 9.


city ultimately settled the wrongful death lawsuit with the plaintiffs for $6 million.\textsuperscript{271}

1. The Inadequacy of Accountability Review

The legal question being interrogated by the three investigations was whether the shooting of Tamir Rice was a justified use of deadly force.\textsuperscript{272} Each of the three applied the Fourth Amendment standard to conclude that Officer Loehmann had acted lawfully.\textsuperscript{273} Under \textit{Graham v. Connor},\textsuperscript{274} police use of force is lawful if the officer’s actions were “objectively reasonable” in light of the facts and circumstances as the officer knew or reasonably perceived them to be when he took the shot.\textsuperscript{275} The reasonableness analysis requires “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”\textsuperscript{276} The \textit{Graham} Court cautioned that legality of force must not be judged with the “20/20 vision of hindsight,” but must take into account that police officers are required to make “split-second judgments” under “tense, uncertain, and rapidly evolving” circumstances.\textsuperscript{277}


\textsuperscript{272} \textit{See CCPO REPORT, supra note 255}, at 1; \textit{CIRC REPORT, supra note 266}, at 1; \textit{IAU REPORT, supra note 265}, at 3.

\textsuperscript{273} \textit{See CCPO REPORT, supra note 255}, at 35; \textit{CIRC REPORT, supra note 266}, at 17; \textit{IAU REPORT, supra note 265}, at 5.

\textsuperscript{274} 490 U.S. 386, 397 (1989).

\textsuperscript{275} Although there is a circuit split on this question, compare \textit{Young v. City of Providence}, 404 F.3d 4, 22 (1st Cir. 2005) (providing that the conduct of officials leading up to the use of force should be considered), with \textit{Livermore v. Lubelan}, 476 F.3d 397, 407 (6th Cir. 2007) (providing that everything leading up to the use of force should be disregarded), the Supreme Court has signaled that the timeframe for determining the propriety of allegedly excessive force is extremely narrow. \textit{See Graham v. Connor}, 490 U.S. 386, 396–97 (1989). With very limited exceptions, the broader context that led up to the need for force is not reliant to the \textit{Graham} inquiry.

\textsuperscript{276} \textit{Graham}, 490 U.S. at 396.

\textsuperscript{277} \textit{Id.} at 396–97. Although the Supreme Court has opined in \textit{Scott v. Harris}, 550 U.S. 372, 383 (2007), that the \textit{Graham} standard applies to both deadly and non-deadly force, many jurisdictions, including Cleveland, continue to apply the more specialized rules of \textit{Tennessee v. Garner} to deadly force cases. \textit{See CCPO REPORT, supra note 255}, at 35. As the CCPO framed it: “Law enforcement officers can only use deadly force in making an arrest where the police have probable cause to believe that the suspect poses a threat of death or serious bodily harm to the police or to public,” for example, “if the suspect threatens the officer with a weapon.” \textit{Id.} (quoting \textit{Tennessee v. Garner}, 471 U.S. 1, 11–12 (1985)).
Applying the Graham standard to the shooting of Tamir Rice, all three reports concluded that Office Loehmann acted reasonably when he pulled the trigger.\textsuperscript{278} For example, according to the IAU investigator:

As [the officers] arrived on scene, Officer Loehmann saw a male, who fit the given description, stand up from a picnic table and place a gun in his pants . . . The male walked toward the path of the [patrol] car and, as the [patrol] car came to a stop in front of him, raised his shirt with one hand and began drawing the gun from his pants with the other. Officer Loehmann exited the vehicle and, fearing for his and Officer Garmback’s lives, shot the male two times in the abdomen and immediately sought cover behind the [patrol] car.\textsuperscript{279}

The investigator concluded that “the use of deadly force by Officer Loehmann was reasonable and within the guidelines set forth in GPO 2.1.01 [Use of Force],” which mirrors the Graham standard.\textsuperscript{280}

The CIRC investigator\textsuperscript{281} and the Cuyahoga County Prosecutor’s Office also agreed that Officer Loehmann had acted lawfully under Graham.\textsuperscript{282} The CCPO report began with the troubling and revealing concession that Officer Garmback’s “approach—skidding to a halt directly in front of where Tamir was standing—had left [Officer Loehmann] dangerously exposed to what [Loehmann] believed was a suspect drawing a gun.”\textsuperscript{283} But this observation was irrelevant to its analysis of the legality of the shooting:

[T]he two responding officers [were led] to believe a real man with a real gun was threatening innocent people’s lives at a recreation center . . . . The officers, who had no idea that the gun was fake or that Tamir was only [twelve], thought he was going to pull the gun out at them.\textsuperscript{284}

\begin{itemize}
  \item \textsuperscript{278} See CCPO REPORT, supra note 255, at 70; CIRC REPORT, supra note 266, at 17; IAU REPORT, supra note 265, at 9.
  \item \textsuperscript{279} IAU REPORT, supra note 265, at 8–9.
  \item \textsuperscript{280} See id. at 9 (quoting CLEVELAND DIVISION OF POLICE, GENERAL POLICE ORDERS ch. 2, § 2.1.01 (2014)).
  \item \textsuperscript{281} For example, the CIRC Report reported:
    \begin{quote}
      The CIRC examined the tactics used by PPO Loehmann and P.O. Garmback and determined they were reasonable and were based on their response to [Tamir’s] actions of standing up and retrieving the gun from the picnic table, placing then [sic] gun in his waistband then initially turning away from officers, and then finally turning back towards the officers and taking the gun out of his waistband.”
    \end{quote}
  \item \textsuperscript{282} CCPO REPORT, supra note 255, at 66, 70.
  \item \textsuperscript{283} Id. at 66 (emphasis added).
  \item \textsuperscript{284} Id. at 69.
\end{itemize}
The evidence does not show that Loehmann’s decision to shoot was unreasonable, or that it was feasible to give more commands than he did. Loehmann was facing a suspect pulling an object from his waist. The law does not require an officer to wait until being fired upon to confirm whether the gun is real or to give the suspect additional time to open fire to draw and fire upon the officer.

The legal analysis applied in each of these reviews demonstrates four crucial limitations that make accountability review of the shooting inadequate for the purpose of preventing the next shooting. First, the reviews focused almost entirely on the actions of Officer Loehmann, the proximal human causer who pulled the trigger. Investigation of other officials was for the limited purpose of ascertaining whether they had violated police rules, not to interrogate whether their errors were causally linked to the mistaken shooting. In addition, none of the investigations considered whether broader systems failures contributed to the errors, misjudgments, or misunderstandings made by police officials.

Second, the applicable legal standard limited the analysis to the narrow question of whether Officer Loehmann reasonably believed that his life was in imminent danger at the moment he discharged his weapon. As a result of this narrow timeframe, the lawfulness inquiry did not consider whether the officers’ approach—coming within four to seven feet of an allegedly armed suspect—unreasonably increased the risk that lethal force would be required. For example, it did not invite investigators to consider whether the officer failed to use de-escalation techniques or provoked the confrontation in some way. Nothing that occurred before the shooting mattered to the investigation.

Third, the ultimate question to be answered was whether Officer Loehmann was culpable for what he did. The purpose of the exercise was to assign blame, i.e., to determine whether the officer should be punished, reprimanded, or fined for what happened. Once each of the reviews had determined that the shooting by Officer Loehmann was lawful, the investigation was over and no additional causal inquiry was required or indeed permitted.

Fourth, the investigations were almost entirely backward-looking. The goal was to determine what policies, rules, or laws were broken and to hand down sanctions for past behavior. By contrast, prevention requires investigators to ask not “what happened and who is to blame?” but, rather, “why did this happen

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285 Id. at 66.
286 See, e.g., CIRC REPORT, supra note 266, at 20.
287 The Supreme Court has signaled that the timeframe for determining the propriety of allegedly excessive force is relatively limited. See Graham v. Connor, 490 U.S. 386, 396–97 (1989). Courts of appeals are divided on the question of how narrowly the timeframe should be defined, with some courts permitting a more liberal analysis. See supra note 275 and accompanying citations.
288 Only the CIRC analysis had anything to say about forward-looking policies, and its recommendations were vanishingly thin (one page out of twenty-one) and embarrassingly superficial. See CIRC REPORT, supra note 266, at 21.
and how can we make sure it doesn’t happen again?” At the end of the day, “accountability review” of the sort described above is not well adapted to asking the “why” question.

Accountability questions are very important, and administrative reviews and lawsuits that ask them play an important role. These legal actions uncover important information, vindicate important society goals, and—at least sometimes—identify and punish culpable actors. But to focus exclusively on individual blame by the last actor for actions in the past is to miss something vital. This kind of analysis will almost never prevent the shooting of another Tamir Rice tomorrow, or next week, or next year: once the shooting is “justified” the investigator’s job is done. In the complex, tightly coupled world of policing, with its susceptibility to systems accidents, we need a systems-oriented approach that goes beyond the search for accountability.

2. Applying Systems-Oriented Review

My goal in this part is to apply a more systems-oriented, forward-looking analysis to the events that led to the shooting of Tamir Rice. I do not purport to be doing actual “sentinel event review (SER)” as it is practiced in aviation and medicine. Formal SER would require additional data gathering, participation by individuals involved in the event being reviewed, and third-party experts, such as police and forensic specialists. By contrast, I am limited to the information that was gathered in the accountability investigations, and I can only gesture at possible systemic causes and preventative solutions. To the extent possible, however, I use the materials, analysis, and conclusions contained in the investigative record of the Tamir Rice shooting to highlight some of the additional questions that systemic, sentinel event review would be trying to ask (and answer).

Recall that SER is designed to investigate a harmful outcome—here a police shooting—that may signal underlying weaknesses in a system or process. If properly analyzed and addressed, a sentinel event can provide important insights for preventing future, similar adverse outcomes. SER generally employs root

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289 See Hollway et al., supra note 28, at 904 (describing the difference between “accountability review” and “root cause analysis”).
290 Id. at 890.
291 This Part relies on the reviews by IAU, CIRC, and CCPO and their supporting documents, including witness statements, reports by independent police expert, an Ohio Highway Patrol Accident Reconstruction Report, and an enhanced video of the moments before, during and after the shooting. The enhanced video was solicited by the Cuyahoga Prosecutor’s Office from Grant Fredericks, an accredited video analyst with Forensic Video Solutions in Spokane Washington. See GRANT FREDERICKS, FORENSIC VIDEO SOLUTIONS, https://assets.documentcloud.org/documents/2623185/2015-11-28-tr-video-enhancement-forensic-video.pdf [https://perma.cc/M22J-RYLV].
292 See supra Part III.
293 U.S. DEP’T OF JUSTICE, supra note 172, at 1.
cause analysis as a problem-solving tool to determine not only what and how the harm-causing event occurred, but also why it happened.\textsuperscript{294}

One effective method to begin the process of identifying root causes is the “Five Whys” analysis. It involves identifying a problem and then asking a series of “whys” to try to get to successive underlying causes.\textsuperscript{295} The idea is that it takes at least five “Why?” questions—but sometimes more—to uncover a “root” or systems-oriented cause.\textsuperscript{296}

To take a very simple example, suppose the problem is that your car won’t start. Here is how the “Five Whys” analysis might play out:

\textbf{PROBLEM:} The vehicle won’t start.
Why? Because the battery is dead.
Why? Because the alternator is not working.
Why? Because the alternator belt is broken.
Why? Because the alternator belt was worn past its useful lifespan and not replaced.
Why? Because the vehicle was not regularly maintained.

\textbf{SOLUTION:} Schedule regular maintenance checks.\textsuperscript{297}

The immediate cause of the problem was a dead battery. If the owner gets a new battery, it will fix that problem and the car will run. Of course, the battery will quickly run down if she doesn’t also get the alternator working. But, even if she gets both a new battery and a new alternator belt, the problem will eventually reoccur unless the car has routine maintenance checks. The only way to keep the same series of events from happening again is to attend to the root problem, the cause, that lies at the beginning of a whole chain of causes.

Sentinel event review of individual harm-causing events is a first step toward identifying systems-oriented solutions.\textsuperscript{298} It may be that nonhuman causes such as organizational factors (management, policies, organizational pressures, or occupational culture) and/or workplace factors (supervision, training, or working conditions) have created a flammable brew just waiting to be ignited by human error.\textsuperscript{299} Solutions, then, should aim not to change people directly, but to change the conditions that lead them to make mistakes by adopting barriers and safeguards that constrain human conduct.\textsuperscript{300}

Sentinel event review of the Tamir Rice shooting begins by identifying the harmful event or problem to be investigated: the shooting of an unarmed twelve-year-old boy.

\textsuperscript{294} See Hollway et al., supra note 28, at 906.
\textsuperscript{295} Id. at 904.
\textsuperscript{296} Id. at 905.
\textsuperscript{297} This example appears in id. at 904.
\textsuperscript{298} Id. at 905. Tools like the “Five Whys” analysis press investigators to work backward in the causal chain behind the human causers identified by accountability review.
\textsuperscript{299} REASON, HUMAN ERROR, supra note 33, at 173. Systemic factors can act as “error traps” that predispose to repeated, similar mistakes.
\textsuperscript{300} Hollway et al., supra note 28, at 905.
PROBLEM: Police Officer Loehmann exited his patrol car in a city park and shot an unarmed boy.

The first “why” question asks why the officer would have fired his gun at an unarmed person. It is the only question that was addressed by each of the three investigations of the Tamir Rice shooting. The answer they gave went something like this:

Why? Because when Officer Loehmann fired the shot he was standing four to seven feet from an individual who fit a police dispatcher’s description of a male in the park who had been “pointing a gun at people.” The officer fired because he thought the male was reaching toward his waistband to pull out a gun.

This answer essentially ended the legal inquiry because it supported a finding that the officer acted reasonably, even if mistakenly: Officer Loehmann reasonably believed that the male he faced when he alighted from the vehicle was the same person who had been threatening people with a gun and he reasonably believed the person was reaching into his waistband for that gun. Based on these facts, all three reviews concluded that the shooting was lawful. The investigations ended there.

Given the narrowness of this analysis, the question of prevention never came up. Indeed, the lawfulness judgment comes with an implicit assumption that the shooting need not—or could not—have been prevented: if the shooting was reasonably necessary to protect the officers’ safety, then it was—by definition—unavoidable. But this assumption is unfounded. That a shooting is justified addresses the momentary culpability of the officer at the moment he pulled the trigger. It tells us nothing about whether this is the kind of circumstance that requires lethal counterforce in order to save the lives of police or third parties or to prevent crime. Specifically, the legality of the shooting does not tell us whether this shooting—and others like it—could be prevented without compromising police or public safety. For that we need an investigation that employs a broader timeframe and goes beyond the first why question to interrogate deeper, systems-oriented causes.

James Reason’s typology of errors for assessing organizational accidents is helpful for expanding the causal horizon beyond the first “why” question addressed by accountability review. Reason makes a distinction between

301 See CCPO REPORT, supra note 255, at 1; CIRC REPORT, supra note 266, at 17; IAU Report, supra note 265, at 3.
302 See CCPO REPORT, supra note 255, at 69.
303 See supra note 278 and accompanying text.
304 Reason’s work is widely cited by virtually all institutions that routinely conduct root cause analysis. See, e.g., NAT’L INST. OF JUSTICE, supra note 230, at 6 (citing REASON, supra note 33). His most cited books were published in the 1990s, but his work goes back to the early 1970s. See JAMES REASON, HUMAN ERROR (1990); JAMES REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS (1997).
“active failures” and “latent conditions,” both of which contribute to organizational accidents.\footnote{Reason, Human Error, supra note 33, at 173.}  
Active failures are unsafe acts on the part of those who are in direct contact with the system, including, but not limited to, the proximal causer.\footnote{Id. at 14.} They can result from: inattention or forgetfulness (“skill-based slips or lapses”); failing to apply good rules and policies or applying bad rules and policies (“rule-based mistakes”); or misapplication of rules or policies to new or novel situations (“knowledge-based mistakes”).\footnote{Id. at 2–3.} Active failures can also involve violations (as opposed to merely errors). Violations arise from motivational factors and may result from intentionally cutting corners, thrill seeking, habitual rule breaking, or willful violations not condoned by management.\footnote{Id. at 3.}

Reason’s discussion of latent, harm-causing conditions is especially enlightening in the policing context, given accountability review’s failure to look beyond immediate, human causes. Unlike active failures and violations, latent conditions may (but need not) involve mistakes by human actors.\footnote{Id. at 9.} Rather, they are preexisting, causal factors (culpable or not) that are necessary to the harmful event, like oxygen is a necessary condition for fire.\footnote{Id.} Organizational accidents in complex systems “arise from the insidious accumulation of delayed-action failures lying mainly in the managerial and organizational spheres.”\footnote{Id. at 9.} “Such latent conditions (or latent failures) are like resident pathogens within the system,”\footnote{Reason, Organizational Accidents Revisited, supra note 307, at 9.} “Organizational accidents can result when these latent conditions combine with active failures (errors or violations at the ‘sharp end’) . . . to breach or bypass the system defenses.”\footnote{Reason, Organizational Accidents Revisited, supra note 307, at 10.}

In Reason’s parlance, an organizational accident involves much more than the conduct, culpable or not, of the proximate causer.\footnote{Id. at 10.} The “accident sequence” begins with the organization, where management decisions, organizational processes, and corporate culture create conditions in the workplace that promote errors and violations.\footnote{Id. at 10.} These conditions then combine with human propensities for errors and violations which can result in risk-creating acts.\footnote{Id.} In order for an accident to occur, the organizational and

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\footnote{Reason, Human Error, supra note 33, at 173.}
\footnote{Id. at 14.}
\footnote{Id. at 2–3.}
\footnote{Id. at 3.}
\footnote{Id. at 9.}
\footnote{Id.}
\footnote{Reason, Organizational Accidents Revisited, supra note 307, at 9.}
\footnote{Id. at 10.}
\footnote{Id. at 10.}
\footnote{Id.}
workplace conditions must combine with human errors or violations and penetrate the system’s ordinary defenses.\(^{317}\)

Reason’s typology of accident review highlights the grave limitations of the accountability analysis applied in the Tamir Rice investigations. Stopping with the conclusion that Officer Loehmann acted reasonably at the moment of the shooting leaves multiple potential causes unexplored. By contrast, a systems analysis requires investigators to reach back in time before the moment of the shooting by asking a descending series of questions. Applying a “Five Whys (or more)” framework, one line of analysis could look like this:\(^{318}\)

PROBLEM: Police Officer Loehmann exited his patrol car and shot an unarmed boy in a city park.

Why? (1) Because when Officer Loehmann fired the shot he was standing four to seven feet from an individual who fit a police dispatcher’s description of a male in the park who had been “pointing a gun at people.”\(^{319}\) The officer fired because he thought the male was reaching toward his waistband to pull out a gun.\(^{320}\)

Why? (2) Because Officer Garmback drove the police vehicle right up to the suspect instead of stopping farther back and seeking cover.\(^{321}\)

Why? (3) Because Office Garmback wanted to stop the vehicle close enough so the officers could pursue the suspect on foot.\(^{322}\) The grass was wet and snowy, causing the vehicle to slide even closer than he intended.\(^{323}\)

Why? (4) Because the officers (mistakenly) thought there was an “active shooter” in the park, which may have influenced their decision to come in quickly and not wait for backup.\(^{324}\)

Why? (5) Because the officers were responding to a dispatcher’s inaccurate report that there was an adult male in the park who was threatening people with a gun.\(^{325}\)

Why? (6) Because the dispatcher failed to tell police that the 911-caller had actually said that the gun was “probably fake” and that the alleged shooter was “probably a juvenile.”\(^{326}\)

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\(^{317}\) In the language of Reason’s famous “Swiss Cheese” model of accident causation, the accident only occurs if the holes in the cheese are lined up so that the hazard finds its way through all the potential layers—organizational, workplace and individual—that would otherwise arrest its progress. Id. at 2.

\(^{318}\) Recall again that the idea behind “Five Whys” is that it takes at least five why questions to get to a root cause. As will become clear, this line of analysis is only one series of questions that would be posed as part of a multi-linear, systems review.

\(^{319}\) CCPO REPORT, supra note 255, at 3.

\(^{320}\) Id. at 6.

\(^{321}\) Id. at 49.

\(^{322}\) Id. at 7.

\(^{323}\) Id. at 49.

\(^{324}\) Id. at 47.

\(^{325}\) CCPO REPORT, supra note 255, at 69.

\(^{326}\) Id. at 3.
a. The Approach

The questions numbered (2) through (4) above, interrogate the question why Officer Loehmann came to be standing so close to an active shooter. Why would Officer Loehmann have disembarked from the passenger seat of the patrol car within four to seven feet of an individual who was reportedly threatening people with a gun? The instant investigations considered these questions, but only in connection with possible violations of discrete police rules or policies. By contrast, sentinel review seeks to determine why the officers used the close approach and whether their decision was a causal factor in the mistaken shooting.

The investigators concluded that the police officers entered the park in response to a “Code-1,” which was the highest priority call. They drove their vehicle past a dead-end street and over wet, snowy grass, allegedly to get good access to the location of the alleged shooter. According to a forensic analysis by the Ohio State Highway Patrol, which was accepted by the CCPO, the police vehicle was traveling at about 19 mph when the officer braked to a stop. The police car came to rest only four to seven feet from where pre-teen Tamir Rice was then standing.

In defense of their close approach, the officers claimed that they purposely drove right up to the suspect because they had seen him pick up an object, place it in his waistband, and begin walking toward a nearby recreation building. Officer Garmback stated that his approach was intended to keep the suspect from entering the recreation building where he might pose a danger to people

327 CIRC REPORT, supra note 266, at 20.
328 A Code-1 designation indicated that the incident posed a significant public risk. CCPO REPORT, supra note 255, at 41.
329 Id. at 7.
330 Officer Garmback said in his written statement that he was traveling at 10–12 mph, id., but the Ohio State Highway Patrol Report put the speed at 19 mph. Id. at 30. The latter speed was accepted by the CCPO REPORT. Id.
331 CRAWFORD, supra note 254, at 1. The investigations and witness statements, including statements by the officers themselves, assert that people on the scene before and after the shooting thought 12-year-old Tamir was much older, perhaps as old as 18 or 19. See, e.g., CCPO REPORT, supra note 255, at 6. That he was mistaken for an adult rather than a child is consistent with social science studies identifying structural racism in age estimations of black male children. See Phillip Atiha Goff et al., The Essence of Innocence: Consequences of Dehumanizing Black Children, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 532 (2014) (explaining that minority children are consistently estimated to be older than they actually are, while Caucasian children are not).
332 CCPO REPORT, supra note 255, at 6. The officers invoked the Fifth Amendment and gave only written statements to the Internal Affairs Committee and to the CCPO. Id. at 5–6. It appears that they were interviewed by the CIRC investigator. See CIRC REPORT, supra note 266, at 14.
inside. On this explanation, the officers intentionally chose their close approach to allow them to disembark and pursue the suspect on foot.

It bears emphasis that not one of the police experts or investigators involved in the official review of these events accepted this defense of the officers’ approach. All agreed that no reasonable officer would have tried to engage an active shooter from such close range, but, rather, would have stopped their vehicle, taken cover and called for backup. For example, the Internal Affairs Unit concluded that Officer Garmback “did not employ proper tactics when he operated the [patrol] car up to what was reported to be an armed suspect, thereby violating [police policy].” The investigator concluded that Garmback had recklessly approached a suspect who was allegedly threatening to shoot people “without [waiting for] backup” even though another squad car had primary responsibility for the area. This action “placed himself and his partner in a position where either or both of them could have been injured by the suspect.”

The officer’s tactically flawed approach called for administrative sanctions against him.

Police expert Jeffrey Noble, who reviewed the video of the circumstances surrounding the shooting for the Cuyahoga County Prosecutor’s Office, also strongly disputed the officers’ defense of their close approach:

Reasonable police officers responding to a man with a gun call would have stopped their vehicle prior to entering the park to visually survey the area to

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333 CCP REPORT, supra note 255, at 7 (“As we moved in to the park, I saw the male in the gazebo. He matched the description given over the radio . . . . I believed at first the male was going to run. I think I told my partner, ‘watch him he’s going to run.’ However, he stopped and turned towards our cruiser . . . . Part of my intentions was [sic] to keep him away from entering the Recreation Center Building.”).

334 See CIRC REPORT, supra note 266, at 14–15 (“[Garmback] states he thought the suspect might run and slammed on the brakes in order to stop the car and ‘bail out.’ He stated he did this so that they could run after the subject. P.O. Garmback indicated he believed the subject might shoot at them because he did not run away as other subjects usually have in the past.”).

335 See, e.g., IAU REPORT, supra note 265, at 5. Commander Brian Hefferman who, in reviewing the IAU’s recommendations, acknowledged Garmback’s alleged rationale (that he was worried the suspect would flee), but concluded that Garmback should have adopted a “safer approach” when working as a Field Training Officer with a rookie probationary partner. Id.

336 Id. at 6.

337 McGrath Letter, supra note 269, at 3. The letter advises Garmback of the results of the administrative pre-disciplinary hearing held on March 13, 2017, in which Garmback was charged with a series of rule violations. Id. at 1.

338 IAU REPORT, supra note 265, at 6.

339 As his reprimand letter framed it, Garmback approached a suspect who was allegedly threatening to shoot people “without [waiting for] backup” even though another squad car had primary responsibility for the area. McGrath Letter, supra note 269, at 3. He was sentenced to a ten-workday suspension for employing improper tactics in approaching an active shooter, failing to wait for backup, and failing to coordinate his actions with the police team that had primary responsibility for that area. Id. at 2–4.
avoid driving upon a subject who may be armed. This serves not only to protect the officers, but also serves to protect others who may be in the area and it provides both time and distance for the officers to evaluate the situation and develop a plan. It also allows time for other officers to arrive to provide assistance.

... The officers’ grossly reckless tactics placed Officer Loehmann in a position where he was within a few feet of Tamir... [This was] counter to virtually all police training that counsels officers to develop a plan prior to confronting a subject, to take their time and proceed cautiously and slowly in attempting to resolve a situation, to remain calm, to remain at a safe distance from a subject, to wait for backup when possible, and to employ tactics focused on de-escalation.340

Noble described the alternatives in some detail:

[P]olice officers are trained how to evaluate and manage potentially violent field situations and how to apply tactics to minimize the danger of risk to themselves and others... Reasonable officers understand the value of cover and concealment, contact and cover strategies, and calm and effective negotiation skills. They are well-versed in containing scenes, setting perimeters, isolating suspects, and evacuating those in harm’s way. Modern police officers are also provided a wide range of tools (including less lethal options like pepper spray, Tasers, and impact projectiles) to minimize the necessity of using serious or deadly force.341

As an alternative defense for his close approach, Garmback claimed that he meant to stop further from the suspect, but the brakes locked and the vehicle slid closer than he had intended.342 It is undisputed that the squad car slid somewhere between 40 and 75 feet after the officer applied the brakes.343 This second

340 JEFFREY J. NOBLE, PRELIMINARY EXPERT REPORT OF JEFFREY J. NOBLE 8–9 (Nov. 2015), https://www.chandralaw.com/files/blog/Jeff-Noble-Preliminary-Report.pdf [https://perma.cc/K2T6-ELFM] (emphasis added); see also ROGER CLARK, EXPERT REPORT ON THE SHOOTING DEATH OF TAMIR RICE 10, https://www.ecbalaw.com/wp-content/uploads/2015/11/00234247.pdf [https://perma.cc/U8BC-S5B5] (“Officers are trained to approach similar situations carefully, to assess it, and try to de-escalate it. Here, Officers Loehmann and Garmback did the opposite. Officer Garmback jumped the curb, drove through the park at a reckless speed, stopped right beside Tamir, and Officer Loehmann jumped out shooting...[T]hey had plenty of time to stop their car sooner and assess the situation from a position of cover and safety.”).

341 NOBLE, supra note 340, at 7.

342 CCPO REPORT, supra note 255, at 7 (“The cruiser did slide as I applied my brakes. I am not sure how far. The car did not stop where I intended.”) On the day the shooting occurred, the ground was wet with snow and covered with wet leaves. Id. at 4.

343 See id. at 30 (stating that, based on the speed of the vehicle, the frictional value of the surface at the time, and video evidence, Ohio State Highway Patrol Sergeant John Thorne determined that the vehicle slid to a stop at a minimum of 40.3 feet in 3.5 seconds, or a maximum of 73.3 feet in 4.5 seconds).
explanation for Garmback’s close approach, however, begs two important questions: First, was the officer driving at a safe rate of speed when he applied the brakes, given the need for caution in confronting a possible active shooter? Second, was his intended stopping point far enough back to afford safety and cover in a dangerous situation, given that the grass was wet and snowy? If the answer to either of these questions is “no,” then we are back to saying that Garmback violated best police practices by coming in too close to an active shooter.344

Although police experts universally condemned the officer’s close approach as violating police best practices—and the IAU recommended discipline of Officer Garmback for these actions345—none considered whether the close approach was a causal factor in the shooting. The CCPO report stated that Officer Garmback’s “approach—skidding to a halt directly in front of where Tamir was standing—had left [Officer Loehmann] dangerously exposed to what he believed was a suspect drawing a gun.”346 The IAU investigation concurred that Garmback violated “cover and concealment training” and “high risk traffic stop training” when he drove his police car “up to what was reported to be an armed suspect” thereby “placing himself and his partner in a position where either or both of them could have been injured by the suspect.”347

But when considering the lawfulness (reasonableness) of the shooting itself, both investigations treated Officer Loehmann’s dangerous location as a “given” and

344 The answers to these questions depend on factual reconstructions of the accident and conclusions based on these reconstructions, upon which investigators and police experts disagreed. Compare NOBLE, supra note 340, at 5 (finding that the officers engaged in reckless tactical decision making that created the danger and the deadly force was excessive, unreasonable, and inconsistent with generally accepted police practices), with CIRC REPORT, supra note 266, at 17 (finding that the tactics used by the officers were reasonable). For example, there is a factual dispute among investigators and experts as to when exactly Officer Garmback applied the brakes in an attempt to stop the vehicle: when the officers saw Tamir sitting still in the gazebo with no gun visible or when Tamir allegedly picked up an object, put it in his waistband, and began walking out of the gazebo and toward the vehicle. This distinction matters for Garmback’s claim that he drove close because he thought the suspect would enter the recreation center and harm people inside. The CIRC investigator concluded that Garmback braked when he saw Tamir with a gun, that the vehicle was traveling about 19 mph when Garmback braked, that the officer was in control of the vehicle, and that he could not have anticipated his vehicle would slide on the wet grass. CIRC REPORT, supra note 266, at 15–17 (stating that “it was possible to clearly see a person picking up a weapon from the picnic table located in the gazebo”).

345 See IAU REPORT, supra note 265, at 6 (concluding that “Office Frank Garmback did not employ proper tactics when he operated the zone car up to what was reported to be an armed suspect, thereby violating General Police Order 2.1.01 [Use of Force]” and recommending that he be “disciplined”).

346 CCPO REPORT, supra note 255, at 66 (emphasis added). CCPO investigators did not fault Garmback only because they concluded that he had intended to stop “much earlier than he did.” Id. at 49; see also CIRC REPORT, supra note 266, at 15–16 (concluding that Garmback intended to stop the vehicle sooner, but it slid on the wet grass).

347 IAU REPORT, supra note 265, at 6 (emphasis added).
neither considered whether the bad positioning contributed to the shooting.\footnote{See id. at 9; CIRC REPORT, supra note 266, at 17; see also CCPO REPORT, supra note 255, at 37–41.} That Garmback’s action may have increased the risk that deadly force would be necessary was deemed irrelevant.\footnote{See IAU REPORT, supra note 265, at 9; CIRC REPORT, supra note 266, at 17; see also CCPO REPORT, supra note 255, at 37–41 (arguing that “the tactics used by the police officers prior to the use of deadly force cannot be the basis for finding the use of deadly force itself unreasonable”).}

Police expert Kimberly Crawford made this explicit in her analysis, concluding that whether or not “the officers enhanced [the] risk by entering the park and stopping their vehicle so close to a potentially armed suspect” was not germane to the lawfulness analysis: “Whether the officers’ actions were courageous or foolhardy [in driving within a few feet of the suspect] is not relevant to a constitutional review of the subsequent use of force.”\footnote{CRAWFORD, supra note 254, at 6.}

Legal consultant S. Lamar Sims’s analysis was similar, concluding that:

[Officer Garmback] approached and stopped in such a way that Officer Loehmann was in a position of great peril—he was within feet of a gunman who had stood up, was approaching the police car and reaching toward his waistband. The officers did not create the violent situation—they were responding to a situation fraught with the potential for violence to citizens . . . . To suggest that Officer Garmback should have stopped the car at another location is to engage in exactly the kind of “Monday morning quarterbacking” the case law exhorts us to avoid.\footnote{Sims, supra note 260, at 12–14 (referring to City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1777 (2015)) (emphasis added). Sims’s reference to “Monday morning quarterbacking” reflects the Supreme Court’s warning not to judge the reasonableness of excessive force with the benefit of 20-20 hindsight. See Graham v. Connor, 490 U.S. 386, 387 (1989); Sheehan, 135 S. Ct. at 1777.}

The admonition to avoid “Monday morning quarterbacking” is an ironic one under these circumstances. While fans could be faulted for second guessing coaching decisions after a sports event, teams and their coaches spend hours doing precisely that kind of review to figure out what went wrong. My point here is not to fault the instant investigations for focusing their constitutional analysis on the moment of the shooting, as required by the current constitutional standard. It is to make clear that accountability review, which under current doctrine stops at “why” question (1), has foreclosed an entire line of inquiry that is crucial for preventing the next police shooting, namely, “Did the officers’ ‘reckless approach’ which left them ‘dangerously exposed’ and put them in ‘great peril’ significantly (and unreasonably) increase the risk that deadly force would be needed to protect them?” In prevention (or systemic) terms, could a different approach—for example, waiting for backup before engaging the
shooter or employing de-escalation techniques—have prevented the shooting
without compromising police and public safety?\textsuperscript{352}

On the first point, recall that the officers argued they drove in quickly and
close to engage Tamir Rice on foot and block him from entering the recreation
center.\textsuperscript{353} This claim implicitly invoked the CPD’s “active shooter” policy,
which permits officers to move in rapidly without backup to engage a person
who is actively threatening others with a firearm.\textsuperscript{354}

Like virtually all police agencies, Cleveland adopted its active shooter
policy in the wake of the Columbine school shooting.\textsuperscript{355} Before Columbine, the
universal best practice was for patrol officers to “contain” and “control” a
dangerous situation or person and call in a specialized SWAT team to engage
with the shooter.\textsuperscript{356} In the Columbine incident, police from various Denver-area
agencies responded and secured the perimeter of the school but did not enter to
stop the shooter.\textsuperscript{357} Although police were doing exactly what they were trained
to do, this strategy was deemed inadequate for circumstances requiring
immediate action to halt a shooter.\textsuperscript{358} The active shooter policies adopted post-
Columbine give patrol officers the authority to approach at close range without
backup in order to stop an individual who is actively engaged in killing people
or attempting to kill people in a populated area.\textsuperscript{359}

The Cleveland Police Department’s policy defines an active shooter as an
individual whose “activity and use of a firearm (or any other deadly instrument,
device, machine, dangerous ordnance, or deadly hazard) is causing or
attempting to cause immediate death and/or serious physical harm in a well
populated area (target rich environment), such as a school, church, business, or
any other public place.”\textsuperscript{360} When these circumstances occur, Cleveland police

\textsuperscript{352} See infra notes 365–71 and accompanying text.
\textsuperscript{353} See CCPO REPORT, supra note 255, at 47.
\textsuperscript{354} See id. at 46–47.
\textsuperscript{355} Id. at 46.
\textsuperscript{356} Id. Law enforcement agencies call this the 4Cs: Contain, Control, Communicate and
Call SWAT. See Amaury Murgado, Movement to Contact, POLICE MAG. (Nov. 14, 2013),
http://www.policemag.com/channel/careers-training/articles/2013/11/movement-to-
contact.aspx [https://perma.cc/99KL-54NS].
\textsuperscript{357} POLICE EXEC. RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: THE POLICE
RESPONSE TO ACTIVE SHOOTER INCIDENTS 1 (2014).
\textsuperscript{358} See id. at 2 ("'Contain and negotiate' may be appropriate for hostage incidents or
situations where a person is barricaded in a room and unable to harm victims. But it is not
appropriate for active shooter incidents.").
\textsuperscript{359} CCPO REPORT, supra note 255, at 46–47.
\textsuperscript{360} See id. at 46 (quoting Cleveland Police Department Active Shooter Policy). The CPD
definition is somewhat broader than the definition that has been adopted across multiple law
enforcement agencies, including the FBI and the Department of Homeland Security, which
defines an active shooter as “an individual actively engaged in killing or attempting to kill
people in a populated area,” such as a school, workplace, house of worship, transportation
center, or other public gathering site. Active Shooter Resources, FED. BUREAU
“have the authority to and shall attempt to make immediate contact with and stop the active shooter.” The prosecutor who investigated the Tamir Rice shooting concluded that the officers’ actions fit within this policy because they faced a “potential active shooter” who was “attempting to cause death and/or serious physical harm” at the nearby recreation center, which was 200 feet away.

Let’s just pause here. Upon arrival at the park, the officers did not see terrified people running away or wounded bodies on the ground. They did not hear gunshots or screaming. The park was virtually empty except for the lone figure of Tamir Rice sitting or standing with no visible firearm. Nothing they witnessed would have confirmed their interpretation of the dispatcher’s message: that they were facing an active shooter.

Thus, the prosecutor’s reading of the CPD was certainly a very broad one. By it, the policy would apply not only to actual shooters but also to potential shooters (which could be anyone with a gun!). Under the prosecutor’s reading, the officers were justified in the belief that Tamir Rice was “causing or attempting to cause immediate death and/or serious physical harm” at the moment they entered the park without backup, even though they had no confirmation that shots had been fired, that anyone actually had a gun, or that anyone had been hurt or was in danger.

By contrast, police expert Jeffrey Noble concluded that the active shooter policy had not been triggered, observing that “there were no claims that a single shot had been fired [or that] anyone was injured in any way, and the officers could see as they arrived that there was no one else in the area.” Invoking the active shooter policy under these circumstances was broadly inconsistent with the purpose of such policies; namely, to authorize police action when the suspect is actively shooting people and “even a one-minute delay in responding may result in multiple additional fatalities.”

It bears emphasis that after all the facts and expert testimony had been considered, the Cleveland Police Department agreed that Tamir Rice was not an active shooter within the meaning of the Department’s policy: it concluded that

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361 CCPO REPORT, supra note 255, at 47.
362 Id. Around the time of the incident the recreation center’s security video system recorded a few people near the entrance to the recreation center. Id. at 48. In addition, the prosecutor reasoned that “as an experienced First District officer, Garmback would have known that during business hours, the Recreation Center would be crowded with children and adults.” Id. at 49.
363 Id. at 47 (emphasis added).
Garmback’s claim that he “had to take these actions because it was an active shooter situation [was] not supported by the facts.”

That Officers Garmback and Loehmann apparently believed they were following CPD’s active shooter policy under these circumstances raises broader, systemic questions. For example, did the active shooter policy encourage the officers to make a precipitous approach that increased the likelihood that deadly force would be required without improving officer safety or public safety? Police expert Jeffrey Noble answers in the affirmative. He concludes that “Officer Loehmann’s inaccurate assessment of the situation may [have been] a factor in his unreasonable use of deadly force.”

Or, to ask the question more broadly, are active shooter policies generally being applied in the appropriate circumstances? Do they conflict with de-escalation goals? Has the more precipitous approach that is permitted by these policies increased the incidence of police-involved shootings in some circumstances where such shootings might have been avoided? Virtually no attention has been paid to this important, systemic question by police scholars.

Relatedly, the invocation of the active shooter policy against a potential shooter foreclosed the skillful use of de-escalation techniques that might have diffused the threat without endangering the lives of the officers. In the language of Perrow’s theory of systems accidents, de-escalation creates slack in the social system by loosening the otherwise tight coupling that often characterizes fast-moving, uncertain police/citizen interactions. It gives police more time and creates more space for diffusing the situation without triggering a rapid sequence of circumstances that is hard to arrest or constrain.

While most large police agencies have adopted de-escalation polices, either voluntarily or under Department of Justice consent decrees, the meaning and

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366 McGrath Letter, supra note 269, at 4.
367 NOBLE, supra note 364, at 5.
368 Id.
369 For a discussion of active shooter events and policies, see generally J. PETE BLAIR ET AL., ACTIVE SHOOTER: EVENTS AND RESPONSE (2013).
370 None of the investigations discussed whether de-escalation policies could have been used. See generally CCPO REPORT, supra note 255; IAU REPORT, supra note 265; CIRC REPORT, supra note 266 (all failing to discuss de-escalation techniques that could have been utilized). I am not aware of whether the CCPD had such a policy in place at the time of the Tamir Rice shooting and, if so, whether the officers had attended de-escalation training.
371 See PERROW, supra note 19, at 90; see also Sherman, supra note 89, at 436–37 (describing the dangers of tight coupling in the policing context).
373 Id.
application of de-escalation techniques continues to be debated by police leaders. Police departments that have instituted de-escalation training have reported drops in use-of-force incidents, but there is a need for systematic empirical studies to document the benefits (and costs) of such training. More robust use of de-escalation strategies may be a systems-oriented strategy that would reduce the risk of police-involved shooting in some contexts.

To summarize: unlike accountability review, sentinel event review gets us to questions (2)–(4), forcing us to ask what features of police rules, policies, management and culture might have contributed to the officers’ decision to approach an active shooter, driving at 19 mph over wet and snowy grass, without backup and without adequate cover. In addition, the line of analysis I have constructed from the instant reports is only the beginning of a systems-oriented analysis. The potential causes that I have identified—along with other possible causes—could, in turn, implicate defects in supervision, management, training, or organizational culture. The goal of systems review is to identify actionable steps that will address not only the proximate cause, but second and third order causes—both human (active) and organizational (latent)—that combined with the proximate human cause to result in a catastrophic event. Recommendations emphasize verbal de-escalation techniques as part of an agreement to resolve the DOJ’s investigation of the BPD pursuant to 42 U.S.C. § 14141).

375 In 2016, the Police Executive Research Forum, a prominent, policing think tank, published its Guiding Principles on Use of Force, which urged police agencies to “[a]dopt de-escalation as formal agency policy.” See POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 40 (Mar. 2016). There was immediate pushback from the International Association of Chiefs of Police (IACP), a large professional association for law enforcement worldwide. See Tom Jackman, National Police Groups Add ‘De-Escalation’ to New Model Policy on Use of Force, WASH. POST (Jan. 17, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/01/17/national-police-groups-add-de-escalation-to-new-model-policy-on-use-of-force/?noredirect=on [https://perma.cc/T5VX-UYNY]. In 2017, however, a group of eleven national police organizations, including IACP, adopted a model policy that incorporated the concept of de-escalation. See NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 2–3 (Oct. 2017), https://www.theiACP.org/sites/default/files/all/no/National_Consensus_Policy_On_Use_Of_Force.pdf [https://perma.cc/6NNH-N77P]. Several large police groups, including two national sheriffs’ associations and the Major Cities Chiefs Association, and PERF, declined to sign on to this document because it included other policies, for example, the use of warning shots, with which they disagreed. Jackman, supra note 375. Most states (thirty-four total) do not mandate de-escalation training, leaving the decision whether to train up to local chiefs and sheriffs. Many departments do not provide such training, citing reasons such as cost, lack of staff, and belief that the training is unnecessary or is a rebuke to traditional policing. Curtis Gilbert, Not Trained to Kill, AM. PUB. MEDIA REP. (May 5, 2017), https://www.apmreports.org/story/2017/05/05/police-de-escalation-training [https://perma.cc/45RQ-MHA3].

are designed not only, or primarily, to change the behavior of human causers, but to make it harder for them to make mistakes.

b. The Dispatcher’s Call

Returning to our list of “why” questions, we are ready to tackle (5)–(6), which interrogate the response to “why” question (4); namely, why did the officers mistakenly think they were facing an active shooter?

Why (5)? Because the officers were responding to a dispatcher’s inaccurate report that there was an adult male in the park who was threatening people with a gun.

Why (6)? Because the dispatcher failed to tell police that the 911-caller had actually said that the gun was “probably fake and the alleged shooter was “probably a juvenile.”

To get at these questions, I need to fill in the beginning of the story of what happened on November 22, 2014, the day that Tamir Rice was shot. At approximately 3:24 pm, a Cleveland Police dispatcher received a 911 call in which the caller’s initial words were, “I’m sitting here in the park . . . by the West Boulevard Rapid Transit Station. There’s a guy with a pistol. It’s probably fake, but he’s like pointing it at everybody.” Two more times in the course of a very short conversation, the caller expressed uncertainty about whether the gun was real, saying “It’s probably fake” and “I don’t know if it’s real or not.” The caller also said the guy was “probably a juvenile.”

Despite the fact that the caller expressed multiple qualifications, the call-taker did not convey these qualifications to the police dispatcher who told police: “Hey we have a Code-1 at Cudell. Everybody is tied up on priorities. Supposed to be a guy sitting on the swings pointing a gun at people.” And again,

Alright, it’s at Cudell Rec Center; 19, 10 West Boulevard; 1, 9, 1, 0 West Boulevard. [911 caller] calling. He said in the park by the Youth Center, there’s a black male sitting on the swing. He’s wearing a camouflage hat, a gray jacket with black sleeves. He keeps pulling a gun out of his pants and pointing it at people.

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377 CCPO REPORT, supra note 255, at 2.
378 Id.
379 Id. at 3.
380 Id. For text of the entire 911 call, see id. at 2–3.
381 A Code-1 is the highest priority call and it “designated the incident as [posing] a significant public risk.” Id. at 3, 41.
382 Id. at 3.
383 CCPO REPORT, supra note 255, at 4.
As a result of this message, Officers Loehmann and Garmback volunteered to respond to what was deemed the highest priority police call.\textsuperscript{384} They later testified that they believed they were responding to an “active shooter” situation, which under police protocols might have given them justification to approach the suspect without waiting for backup.\textsuperscript{385} Their expectation that the person they were about to encounter was an adult threatening people with a real gun shaped their expectations and tactical decisions as they drove into the park and confronted the suspect.\textsuperscript{386} When Officer Loehmann disembarked with his gun drawn and saw the suspect reach toward his waistband, he believed the suspect was now threatening him with a real gun.\textsuperscript{387} He did not know that the suspect was a child and the gun he was allegedly reaching for was a nonlethal “airsoft” gun.\textsuperscript{388}

The call-taker’s errors were prior workplace mistakes, holes in an earlier layer of Swiss cheese, weaknesses in the layers of protection that might have reduced the risk of (or prevented) the accident. The IAU investigation concluded that the call-taker had “failed to include [certain pertinent] information in the incident or to update the incident with the applicable [information],” in violation of Bureau of Communications and Property Control, Communications Control Section, Policy and Procedure Number 2012-04(VII).\textsuperscript{389} According to police experts, procedures requiring additional questioning and updating reflect the necessity for call-takers to be sufficiently skeptical of the accuracy and veracity of the 911 caller. While information given from a citizen-informant who gives his or her name and phone number is considered the most accurate form of informant information,\textsuperscript{390} dispatchers are also trained to be skeptical: many 911 calls are outright false and/or contain incorrect or inaccurate information.\textsuperscript{391} The uncertainty conveyed in the call in this case

\textsuperscript{384} Id. at 3.
\textsuperscript{385} Id. at 6, 45. It is not clear that even based on the erroneous dispatch the situation qualified as an “active shooting” as the suspect had not shot anyone or actively threatened to shoot. See supra notes 362–65 and accompanying text.
\textsuperscript{386} CCPO REPORT, supra note 255, at 6–7.
\textsuperscript{387} Id. at 6.
\textsuperscript{388} Id. at 2.
\textsuperscript{389} IAU REPORT, supra note 265, at 9–10. This policy requires the call-taker to “obtain the basic information and immediately send the information to the dispatcher” informing the caller that the call-taker “must ask a few more questions, advising [the caller] that this will not delay the information being sent to the dispatcher or the responding zone car.” Id. at 9. The call-taker is to “gather pertinent information on the critical call and update the incident as needed.” Id. at 9–10.
\textsuperscript{390} CCPO REPORT, supra note 255, at 42 (citing LEWIS R. KATZ, OHIO ARREST, SEARCH AND SEIZURE 93 § 2:22 (2015 ed.) (concluding that the officers had probable cause that the suspect had violated Ohio’s felonious assault statute by taking a gun out and pointing it at people)).
\textsuperscript{391} See, e.g., CLARK, supra note 340, at 9. Officer Clark, who was retained by the Rice family in their § 1983 suit against the City of Cleveland, see CCPO REPORT, supra note 255, at 31, had 40 years of experience in law enforcement. CLARK, supra note 340, at 2, 9. As a former supervisor in the Los Angeles County Sheriff’s Department communications center,
would have required, at a minimum, a means for the informant to make contact with the dispatched units to vet the information the dispatcher had received.\footnote{Id. at 9.} This was especially important given that Tamir was dressed in fairly ordinary clothing,\footnote{See CCPO REPORT, supra note 255, at 3. The caller said the black male had on “a gray coat with black sleeves,” “gray pants,” and a “camouflage hat.” Id.} which would have made it more difficult to identify him quickly and increased the risk of misidentification. The dispatcher should have instructed the informant to move to a safe place and remain on the line to provide accurate information or point out the target to police officers.\footnote{See CLARK, supra note 340, at 8.}

The call-taker also failed to convey to the dispatcher and thus to police officers converging on the scene the specific uncertainties the 911 caller had expressed when calling in the alleged threat, namely that the person he had observed might be a kid (“juvenile”) playing around with a toy (“fake”) gun.\footnote{See CCPO REPORT, supra note 255, at 69.} According to Assistant County Prosecutor Matthew Meyer who reviewed the entire episode for the Cuyahoga County Prosecutor’s Office, if the officers had received this “critical information,” they “would not have considered this incident to have been so serious and almost certainly would have used different tactics.”\footnote{See News 5 Cleveland, Full Press Conference: Grand Jury Declines to Indict Officer who Shot 12-year-old Tamir Rice in Clev, YOUTUBE (Dec. 28, 2015), https://www.youtube.com/watch?v=N7GZFbEm2eo [https://perma.cc/4XZZ-UGSK] (reporting by Assistant County Prosecutor Matthew Meyer with quoted material at 39:00–39:23). The IAU investigator recommended that the call-taker be disciplined for her failure to “include the information [that the suspect might be a juvenile and the gun might be fake] in the incident or to update the incident with the applicable [information].” IAU REPORT, supra note 265, at 10. This failure violated police policy concerning how incidents are to be reported and updated. See id. The CIRC also concluded that the call-taker “may have violated” police policy. See CIRC REPORT, supra note 266, at 19. In discussing the effect of the erroneous dispatch message, CIRC investigators noted: “From [the officers’] perspective they were preparing to respond to the call for a male with a gun pointing it at people.” Id. at 17.} The information the officers received from the dispatcher “led the two responding officers to believe that a [grown] man with a real gun was threatening innocent people’s lives at a recreation center.”\footnote{News 5 Cleveland, supra note 396, at 53:08–53:24.} Their mistaken beliefs distorted their assessment of the risks posed, shaped their tactical choices, and negatively impacted their response to Tamir’s actions. When Tamir “unexpectedly moved in their direction and began pulling the gun from his waistband, the officers had no idea that it was fake or that Tamir was only twelve.”\footnote{Id. at 53:24–53:38.}
Neither the IAU investigation nor the CIRC investigation (nor most of the police experts who reviewed the case) adequately discussed the possible causal link between the erroneous dispatch information the officers received and their use of deadly force in the park.\textsuperscript{399} This is a crucial omission if the goal is to avoid the next tragic shooting. It again points out the limitations of accountability review.

Two police experts did consider a possible link—concluding there was none—but for conflicting reasons. Police expert Ken Katsaris concluded that the omitted information was “irrelevant to the deadly force decision” because at the precise point when Tamir Rice appeared to be reaching for his waistband “the only objectively reasonable decision to be made by Loehmann was to utilize deadly force and deploy his firearm.”\textsuperscript{400} Police expert Roger Clark agreed that the dispatch was irrelevant but for a different reason. He reasoned that even based upon what Officer Loehmann did know “it was unreasonable for him (Loehmann) to jump out with his gun drawn and immediately open fire within 1.7 seconds at a person he could not be sure was the subject of the dispatch.”\textsuperscript{401} Crucially, both experts applied a very narrow timeframe—the exact moment of the shooting—in finding the erroneous dispatch causally irrelevant.

One last piece of the puzzle is that the erroneous dispatch was the first step in the causal chain that led Officers Garmback and Loehmann to apply the department’s “active shooter” policy.\textsuperscript{402} As noted earlier, this was a crucial judgment: the police officers believed it permitted, indeed compelled them to act more aggressively, more quickly, and without waiting for backup. Approaching an armed and dangerous individual at close range without backup would obviously have increased the risk that the officers would find it necessary

\textsuperscript{399} The IAU REPORT recommended punishment for the call-taker’s failure accurately to convey all relevant information to the officers, but did not connect it to the shooting. IAU REPORT, supra note 265, at 10. The CIRC Report noted in passing that the erroneous transmission led the officers to believe “they were preparing to respond to the call for a male with a gun pointing it at people,” but did not pursue this connection further. CIRC REPORT, supra note 266, at 17 (recommending follow-up training for dispatchers involved, including training on following correct procedures for documenting incoming information, but not how to handle unclear reporting from a 911 caller). The CCPO Report came the closest to connecting the erroneous dispatch with the shooting, noting that the reasonableness of the officers’ actions must be judged based on their “tragedically mistaken [view] about the key facts of the case.” CCPO REPORT, supra note 255, at 69. The conclusion that the officers had acted lawfully, however, marked the end of the legal inquiry with no further need to interrogate the causal connections for purpose of prevention. See id. at 69–70.


\textsuperscript{401} Clark, supra note 340, at 10.

\textsuperscript{402} Police expert Jeffrey Noble disagreed that the circumstances triggered the CPD’s active shooter police. See supra notes 362–65 and accompanying text.
to use deadly force against the suspect. It should be clear that a contain-and-wait-for-backup strategy might have produced a different result than a strategy designed to neutralize a potentially dangerous gunman: if the officers had received the correct information about the suspect, sought backup to secure the recreation center, taken more time to consider their approach, and kept in touch with the dispatcher, the situation might have resolved without a shooting. If so, the dispatcher’s error that led to the designation “active shooter” may have played a decisive role in the shooting of Tamir Rice.

In a true systems review, my linear analysis of questions (5)–(6) would have been supplemented by an exploration of additional possible causes for the dispatcher’s actions: was there a policy in place that led the dispatcher to decline to pass on information she was unsure of? Was the dispatcher operating without clear guidance on how to handle transmission of disputed or unclear information? Was there a policy in place, but the dispatcher was inadequately trained on that policy? Did the dispatcher fail to disclose out of fear that if she cast doubt on whether the gun was real, police might place themselves in danger? Was the dispatcher distracted, inattentive or careless as a result of personal circumstances (e.g., fatigue) or workplace conditions (e.g., low morale)? Any of these causes could, in turn, lead to additional “why” questions and ultimately to additional human or systems causes that could be addressed by remedial recommendations.

V. THE PROMISE OF SENTINEL EVENT/SYSTEMS REVIEW IN POLICING

The purpose of my discussion in the prior section was to identify and answer some of the “why” questions that sentinel event review might tackle. While my analysis relied on the information contained in the instant investigations, it differed from the administrative and legal investigations of the Tamir Rice shooting in at least three important ways: First, my analysis expanded the causal timeframe. It went behind the proximal human causer to ferret out second and third level causes outside the narrow time frame of the immediate causer’s actions. In addition, rather than asking whether each human causer was blameworthy for violating a law or policy applicable to their specific area of

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403 As noted earlier, where activity poses a serious risk to public safety, most police departments have shifted from a “contain-and-wait-for-backup strategy” towards a policy that authorizes the first police responders to “quickly engage and attempt to neutralize active shooters.” CCPO REPORT, supra note 255, at 46 (citing Anderson Cooper, Responding to an Active Shooter, 60 MINUTES (Nov. 22, 2015), https://www.cbsnews.com/news/responding-to-an-active-shooter-60-minutes-anderson-cooper/ [https://perma.cc/J3BW-SB62]). The CPD defined an active shooter as one whose “activity and use of a firearm (or any other deadly instrument, device, machine, dangerous ordnance [sic], or deadly hazard) is causing or attempting to cause immediate death and/or serious bodily harm in a well populated area (target rich environment), such as a school, church, business, or any other public place.” Id.
responsibility, I asked how their conduct ultimately contributed to the end result: the tragic shooting of an unarmed boy.

Second, the analysis went behind individual human errors to ask what kinds of latent systemic causes might lie behind them, including error-producing conditions in the workplace—such as low morale, fatigue, poor police training, or inadequate equipment—and organizational factors—such as management decisions, organizational processes, and corporate culture.\(^404\)

Finally, the ultimate purpose of my inquiry was not primarily to identify errors made by individual actors in order to sanction them. Its purpose, rather, was to identify systems-oriented barriers and defenses that could reduce the risk of the kinds of human errors that may have occurred.

Detailed investigation of particular, harm-causing events of this sort has been an essential feature of systems review in commercial aviation and medicine.\(^405\) Recall, however, that the dramatic advances in safety in these contexts depends upon additional analysis that goes beyond single incident review. Risk management experts have learned to use the insights gleaned from particular, sentinel event reviews to uncover patterns of repeated, similar errors that were found to have caused repeated, similar accidents.\(^406\) This pattern evidence has then been employed by risk managers to formulate systems-oriented solutions to address the repeated errors.\(^407\) It is this pattern-identifying analysis that is responsible for the dramatic advances in safety in commercial aviation and medicine.\(^408\)

In Part A, below, I next identify some features of the Tamir Rice shooting that have recurred in other police shootings, and thus may call for systems-oriented solutions. I can only gesture in this direction, however. It would ultimately fall to policing experts to identify errors and corresponding points of systems vulnerability, and then formulate and implement solutions designed to address these failures. Then, in Part B, I broaden the discussion beyond the Tamir Rice shooting. I discuss systems-oriented solutions suggested by data-informed analysis of demographic and circumstantial features of police shootings writ large.

\(^{404}\) This is why broadening the timeframe in Fourth Amendment analysis would be helpful, but not sufficient. As noted above, some circuits have permitted claimants to include, in their excessive force claim, circumstances that preceded the actual moment of the shooting. See supra note 275 and accompanying text. This could permit a court to consider whether reckless or unreasonable tactical decisions prior to the shooting unreasonably increased the risk that deadly force would be necessary. For example, in an excessive force claim against Officer Loehmann, it might have permitted a court to consider Loehmann’s role in the decision to drive the patrol car so close to Tamir that it put the officers in danger. For obvious reasons, however, even the broader timeframe would not yield the same benefits as root cause analysis, which not only broadens the timeframe, but includes consideration of second and third level causes not directly related to Officer Loehmann’s actions.

\(^{405}\) See supra Parts III.A–B.

\(^{406}\) See supra Part III.C.

\(^{407}\) See, e.g., Kapur et al., supra note 130, at 7.

\(^{408}\) See id.
A. Beyond the Single Incident

Comparing the Tamir Rice case with other incidents of police-involved shootings suggests some repeated circumstances that may increase the risk of police shootings. I have already discussed two such circumstances: namely, circumstances involving active shooters and circumstances that might call for de-escalation strategies. Comparing police responses in multiple contexts involving the invocation of active shooter policies could lead to systemic lessons for safer, more effective use of police force. Similarly, comparing the use of de-escalation strategies in multiple contexts could enhance police learning about best practices in diffusing potentially dangerous confrontations.

A third systemic factor that contributed to the shooting of Tamir Rice was a breakdown in communication at several points. The first was the transfer of erroneous information between the dispatcher and the police officers, which led them to think they were facing an adult, active shooter with an actual gun.409 The second communication breakdown was Officer Garmback’s failure to coordinate his approach with another police vehicle that was in the area and was formally assigned to the jurisdiction in which the park was located.410 Garmback failed to report his arrival time to the dispatcher and neglected to make radio contact at any time prior to the shooting.411 As Garmback’s disciplinary letter framed it:

No one knew where you were or what you were doing, and you did not know where anyone else was or what they were doing, until after the shooting occurred.... You never requested instructions from the primary car or otherwise coordinated your efforts with the primary car. You never gave the primary car the opportunity to decide on the best strategy.412

Had Garmback communicated his location, the other officers—who arrived at the park only a few minutes later—could have provided backup, which might have changed the chosen approach and created space for de-escalation strategies.

Significantly, communication breakdown among team members is one of the most significant systemic causes of accidents that has been identified by risk management experts in commercial aviation and medicine.413 Airlines have

409 CCPO REPORT, supra note 255, at 69.
410 McGrath Letter, supra note 269, at 2.
411 Id.
412 Id. at 3.
413 See, e.g., Helmreich, supra note 176, at 781 (arguing that pilots and doctors have “common interpersonal problem areas and similarities in professional culture” including the breakdown of communication); MACRAE, supra note 157, at 96 (concluding that “[c]ommunication problems are regularly found to be key contributors to adverse events and accidents”); A.J. Starmer et al., Changes in Medical Errors After Implementation of a Handoff Program, 371 NEW ENG. J. MED. 1803, 1803 (2014) (identifying “miscommunications” as a “leading cause of serious medical errors”).
sought to address the risks of miscommunication in the cockpit or between pilots and other airline personnel by requiring airline employees to undergo Crew Resource Management (CRM) training.\textsuperscript{414} CRM training can be traced back to National Aeronautics and Space Administration research, which identified human error resulting from failures of interpersonal communications, decision making and leadership as a major cause of air crashes.\textsuperscript{415} CRM is a set of instructional strategies aimed at reducing human error and increasing the effectiveness of flight crews by improving teamwork in the cockpit.\textsuperscript{416} While it is difficult to establish a clear causal link between CRM training and airline crashes, studies demonstrate a positive effect on attitudes, knowledge, and safety-enhancing behavior.\textsuperscript{417}

Medical experts have sought to replicate the CRM program in the medical context, particularly among personnel in the operating room.\textsuperscript{418} Hospitals have also sought to improve communication by standardizing what is communicated when patients are “handed off” from one medical person to another, with dramatic reduction of medical errors.\textsuperscript{419}

Police officers, like commercial aviation personnel and medical personnel, work in teams, which include other officers, administrative personnel, dispatchers, etc. Miscommunication and misunderstanding among members of the policing team and uncertainty about who is in charge have contributed to many tragic scenarios in the policing context.\textsuperscript{420}

\begin{footnotes}
\item[415] Id.
\item[418] See, e.g., Kapur et al., \textit{ supra} note 130, at 5 (arguing that communication failures may be more likely to occur in healthcare than in aviation cockpit settings and suggesting that some healthcare settings may benefit from implementation of aviation procedures); Leonie Seager et al., \textit{Applying Aviation Factors to Oral and Maxillofacial Surgery—The Human Element}, 51 BRITISH J. ORAL MAXILLOFACIAL SURGERY 8, 8 (2013) (identifying features of crew resource management training that could readily be applied to healthcare settings).
\item[419] \textit{See generally} Starmer et al., \textit{ supra} note 413 (describing multicenter study assessing programs designed to improve handoff of information about patient care).
Finally, the Tamir Rice shooting raises the broader question of mistakes caused by realistic-looking, nonlethal guns. In 2016, the Washington Post did an analysis of police shootings involving “ultra-real-looking pellet guns, toy weapons and non-functioning replicas.” According to the Washington Post’s database of fatal police shootings, over the two years prior to the article’s publication, police had shot and killed eighty-six people in such encounters. Half of these shootings occurred at night. Police report that in sixty cases the suspect pointed the gun at them, and in virtually all of the cases the suspect failed to comply with their instructions. Significantly, in a large percentage of these cases—thirty-eight out of eighty-six—the suspect had a history of mental illness. Ten of the shootings began as robberies and fourteen resulted from calls of domestic disturbances. Over the years, however, a significant number of police shootings involving imitation firearms have involved individuals who were not committing crimes, some of whom were young children.

In 1988, Congress passed legislation that required a bright orange barrel on some imitation firearms, including water guns, many replicas and Airsoft guns that fire nonmetallic projectile, but it exempted BB guns, pellet guns, and replicas of antique firearms. Subsequent studies mandated by federal law to study whether the mandated orange barrels would prevent shootings found that the markings did not help police distinguish between toy guns and real guns.


422 Id.
423 Id.
424 Id.
425 Id.
426 Id. According to a 1990 study of shootings involving toy or immigration firearms, a nontrivial number involved suspects who were using them to commit crimes such as robbery and assault. See POLICE EXEC. RESEARCH FORUM, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, TOY GUNS: INVOLVEMENT IN CRIME AND ENCOUNTERS WITH POLICE viii (June 1990) [hereinafter TOY GUNS]. This study found that fifteen percent of all robberies are perpetrated with fake firearms. Id.

427 Sullivan et al., supra note 421.
428 See id. For example, five-year-old Patrick Andrew Mason was shot by a police officer who came to do a welfare check and mistook a child with a red gun for a burglar. Id.
429 Id.
430 See TOY GUNS, supra note 426, at viii–ix; KENNETH CARLSON & PETER FINN, ABT ASSOCIATES INC., TEST OF THE VISIBILITY OF TOY AND REPLICA HANDGUN MARKINGS x
Police confirm that it is “virtually impossible” to train officers to distinguish between actual guns and imitations from a distance.431 They are trained to treat anything that looks like a gun as a potential lethal threat, regardless of what the suspect may try to claim.432

The risk created by imitation firearms cries out for a systemic, legislative solution. One possibility would be to mandate that the entire surface of all toy guns and BB guns be painted a bright color, as California state law requires.433 Of course, it remains to be seen whether police officers are able to distinguish the bright colors at a distance or at night. Eleven states, the District of Columbia and Puerto Rico have banned imitation firearms or imposed restrictions on their use.434 The cities of Washington, D.C., Baltimore, Maryland, and Boston, Massachusetts have outlawed imitation firearms in public.435 The risk posed by the ubiquity of imitation firearms, some made by manufacturers who advertise their imitation guns as “carbon copies” of their most popular lethal firearms, cannot be addressed at the level of the individual police agency.436 It requires a systemic, legislative solution.

A final, intractable, systemic issue raised by the shooting of Tamir Rice is the fact that the twelve-year-old was assumed by most everyone on the scene to have been an adult.437 This mistake traces back to the initial 911 caller who was...

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431 Sullivan et al., supra note 421.
432 See TOY GUNS, supra note 426, at ix. During site visits by PERF investigators conducting the study referenced in note 426, police officers described a “Shoot/Don’t Shoot” training video in which the suspect appears with a gun and says something like “Don’t shoot, it’s a toy.” When the officer stands down, the suspect shoots the officer. This training illustrates why police are taught to assume that any object that looks like a firearm is a real weapon. Id.
433 Sullivan et al., supra note 421. In 2015, Sen. Barbara Boxer (D. Cal.) introduced a bill that would have mandated the California solution as a matter of federal law, but the bill stalled in committee. Id.
434 See Kevin Frazzini, Fracas over Fakes, 42 ST. LEGISLATURES 8, 8 (2016).
437 CCPO REPORT, supra note 255, at 3. Both Officers Loehmann and Garnback thought twelve-year-old Tamir was over eighteen years old. Id. at 6–7. Detective Lentz, who arrived on the scene immediately after Tamir was shot, thought the boy was seventeen or eighteen. Id. at 8. Patrol Officer Ken Zverina and Patrol Officer Ricardo Roman, who were in the area and arrived on the scene six minutes after the shooting described Tamir as “18–20 years old” and “early twenties” respectively. Id. at 10–11. Two other officers who responded to the report of shots fired, Louis Kitko and Chuck Judd, stated that Tamir looked to be somewhere between eighteen and twenty years old. Id. at 11–12.
unsure whether Tamir was a “juvenile.”\textsuperscript{438} The systemic nature of the error is reflected in social science studies showing that black boys are routinely misperceived as older than they actually are, including by police.\textsuperscript{439} For example, in one study black thirteen-year-old boys were routinely mischaracterized as adults by police officer participants from a large urban police department.\textsuperscript{440} The average age error for thirteen-year-old black boys was 4.59 years.\textsuperscript{441} The overestimation of age was correlated with police assumptions that the black, juvenile suspects were more culpable than white boys of the same age.\textsuperscript{442} Significantly, it was also correlated with a higher level of use of force by police against black male children, controlling for how much the suspects resisted arrest or were located in high-crime areas.\textsuperscript{443}

Devising systemic solutions for racial disparities of this sort is a huge challenge. Some police departments have initiated programs to address implicit racial bias through educational training, with mixed success for lasting change.\textsuperscript{444} Police departments in many cities have also sought to create more racially mixed departments to better reflect the demographics of their communities.\textsuperscript{445} Community oriented policing—where officers walk the neighborhood on foot or otherwise become involved with neighborhood youth—means that police are more likely to know or recognize the juveniles in the areas they patrol. This strategy could mitigate the kind of mistakes that contributed to Tamir’s death. At the end of the day, though, structural racism is one of our nation’s biggest challenges in contexts that go well beyond policing. A more detailed account is beyond the scope of this Article.

\textsuperscript{438} Id. at 3.
\textsuperscript{439} Goff et al., supra note 331, at 530–35.
\textsuperscript{440} See id. at 535.
\textsuperscript{441} See id. at 534–35. The study focused on black boys rather black than girls on the ground that black boys were more likely to become involved in criminal activity. Id. at 528.
\textsuperscript{442} See id. at 534.
\textsuperscript{443} See id. at 535. Significantly, these racial disparities were predicted by measures of dehumanization but not by traditional measures of explicit or implicit bias. Id. Dehumanization is “the denial of full humanness to others,” meaning that social protections from violence can be removed. Id. at 527 (quoting Nick Haslam, \textit{Dehumanization: An Integrative View}, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 252 (2006)). The general association between a group and “animals” is one form of dehumanization. Id. at 528. For example, the association of African-Americans with great apes. Id.
\textsuperscript{444} For an optimistic assessment by a former police officer turned lawyer that “sophisticated training could lead to more accurate threat identifications, correcting for racial bias that officers may not even be aware of,” see Seth Stoughton, \textit{How Police Training Contributes to Avoidable Deaths}, ATLANTIC (Dec. 12, 2014), https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/ [https://perma.cc/HQW5-U7U9].
B. Data-Informed Analysis: Looking for Patterns in Police Shootings

The identification of system vulnerabilities in the circumstances leading up to the shooting of Tamir Rice and the effort to identify similar vulnerabilities in other police shootings illustrates the way a single incident can be mined for potential pan-incident vulnerabilities and corresponding pan-incident solutions. But analyzing specific incidents is only one strategy for this.

A second strategy is to analyze the wide range of accessible statistical data that is currently available on police shootings for patterns that suggest potential systemic changes. This kind of research and analysis, focusing specifically on systems-oriented interventions, are still in their infancy. One of the most thorough recent studies along these lines is Franklin Zimring’s 2017 book, When Police Kill, made possible by newly accessible statistical data from two websites, both launched in 2015 to keep detailed data on police shootings.446

For many years the FBI and the Centers for Disease Prevention were the only available sources of data on the incidence and circumstances of police-involved fatal shootings. Government officials have admitted that these data, which depend on voluntary reporting,447 were and are woefully inadequate and incomplete.448 In 2015, the Washington Post and the Guardian (a British daily newspaper) each launched databases designed to keep better records of police-involved shootings.449

446 See ZIMRING, supra note 249, at 43.


The Washington Post began compiling a database of every fatal shooting in the United States by a police officer in the line of duty. The Post tracks more than a dozen details about each killing, including the race of the victim, the circumstances of the shooting, and whether the person was armed or experiencing a mental health crisis. It obtains the information for the database from local news reports, law enforcement websites, social media, and by monitoring independent databases such as Killed by Police and Fatal Encounters.

The Guardian’s website—“The Counted”—is an interactive database that uses a “verified crowdsourcing model to record fatal encounters through sixteen data points.” The Guardian has also published a series of long form investigations into recurring police use of force issues identified by analysis of the data.

Police scholars urging systems-oriented review in policing have begun to rely on these databases to identify trends and patterns associated with increased


Tate et al., supra note 449.  
Id. In 2016, the Post began gathering additional information by filing open records requests with police departments. “More than a dozen additional details are being collected about officers in each shooting,” and the “[o]fficers’ names are being included in the database after The Post contacts the departments to request comment.” Id.  
Laughland & Lartey, supra note 449; see also The Counted: About the Project, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted [https://perma.cc/84LY-3MJV] (“The Counted is a project by The Guardian—and you—working to count the number of people killed by police and other law enforcement agencies in the United States throughout 2015 and 2016, to monitor their demographics and to tell the stories of how they died.”).  
risk of police shootings.455 Perhaps the most comprehensive is Franklin Zimring’s book-length analysis of police-shooting data.456 One of the most important goals of Zimring’s analysis is to find systems-oriented strategies that reduce police shootings of civilians—even legally justified ones—without compromising police safety.457 So, for example, his recommendations for empirical research call for studies that encompass both investigations on the character and causes of police use of fatal force and research on minimizing threats to police from life-threatening incidents while on duty: “Testing the current assumptions about what threatens police and searching for tactics and limitations on police force that can reduce civilian death rates at no cost to police safety are the central tasks of policy research on police use of deadly force.”458

For Zimring, the most important strategy for decreasing the use of deadly force by armed police officers is clear restrictions on the circumstances in which and the extent to which police are permitted to use force.459 In getting at what such restrictions should look like, a key question is what kinds of police/citizen interactions result in the highest incidence of police shootings. One systemic strategy would be to reduce, when possible, the kinds of police/citizen interactions that increase this risk.460

Zimring used 2015 data from the Guardian website to answer the police/citizen interaction question posed above.461 His analysis revealed that while most of the categories of citizen activity resulting in police-involved shootings involved relatively serious, criminal activities (criminal investigation, crime in progress, arrest in progress, serving warrants, armed and dangerous, shots fired), fully nine percent of shootings—approximately 100 deaths per

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456 See generally ZIMRING, supra note 249.
457 See id. at 162.
458 Id.
459 Id. at 227, 231.
461 ZIMRING, supra note 249, at 43.
year—occurred after a traffic stop.462 This was despite the fact that individuals who are shot during a traffic stop are disproportionately unlikely to be armed.463

While police officers are relatively unlikely to be injured or killed during routine traffic stops, the “dominant narrative” in policing is that traffic stops are fraught with hidden, unpredictable danger.464 Jordan Blair Woods describes how police academies “show officer trainees videos of the most extreme cases of violence against officers during routine traffic stops in order to stress that mundane police work can quickly turn into a deadly situation if they become complacent on the scene or hesitate to use force.” According to police magazines and websites, traffic stops figure prominently in law enforcement training videos because “the traffic stop remains one of the most dangerous aspects of police work.” Given their training, it is not surprising that traffic stops create stress and anxiety and police approach them ready for action. Joanna Schwartz frames it this way: “As an officer is walking up to the car window, he is likely to be primed for the possibility that the person he has stopped is armed and dangerous, and that he may need to make a split-second decision about whether to use force.” This creates precisely the kind of “cognitive strain that heightens implicit biases and makes error more likely.”

Given these realities, Zimring’s observation is important: while many of the risk-creating police/citizen interactions he identified are impossible to avoid because they involve serious criminal activity, it would be possible to reduce the incidence of traffic stops. For example, police could use cameras more widely, i.e. to identify and ticket not only speeders and red-light violators, but also individuals with minor violations such as broken taillights. One creative solution for minor traffic offenses is for police to pull up behind an automobile, photograph the license plate and log a ticket to that license plate by computer.

The key point here is that it makes sense to reduce the incidence of routine traffic

462 Id. at 52–53.
465 *Id.* at 638 (internal footnotes omitted).
467 Schwartz, *supra* note 243, at 547.
468 *Id.* at 548.
469 See Friedersdorf, *supra* note 460.
stops if they greatly increase the risk of police-involved shootings and pose risks to officer safety, without significantly enhancing road safety.\textsuperscript{470}

It is worth noting that quite a number of the most notorious police-involved shootings that have occurred over the past fifteen years involved traffic stops for relatively trivial violations that ultimately escalated out of control, resulting in the deaths of Samuel DuBose,\textsuperscript{471} Sandra Bland,\textsuperscript{472} Walter Scott,\textsuperscript{473} Philando Castile,\textsuperscript{474} Michael Bell,\textsuperscript{475} and others.\textsuperscript{476} Reducing the incidence of traffic stops is a systems-oriented strategy that could save the lives of approximately one hundred civilians\textsuperscript{477} and ten police officers per year.\textsuperscript{478}

\textsuperscript{470} Unfortunately, police departments might resist any effort to reduce traffic stops because officers routinely use such stops—and accompanying searches incident to arrest, automobile searches, or inventory searches—to investigate non-traffic related crimes. See, e.g., Devallis Rutledge, \textit{Investigative Traffic Stops}, POLICE MAG. (Sept. 1, 2005), https://www.policemag.com/339426/investigative-traffic-stops [https://perma.cc/N4JK-Q84P]. Recent Supreme Court cases have curtailed their power to do so, but not entirely eliminated it. See generally Barbara E. Armacost, Arizona v. Gant: \textit{Does It Matter?}, 2009 SUP. CT. REV. 275, 276 (arguing that Arizona v. Gant curtailed, but did not eliminate, traffic stops). In addition, police agencies would have to give up the notorious “Ferguson strategy” of using traffic stops to load citizens with tickets and fines in order to raise money for the city. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (Mar. 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Q84Z-AGZ6]; see also Beth A. Colgan, \textit{The Excessive Fines Clause: Challenging the Modern Debtors’ Prison}, 65 UCLA L. REV. 2, 22 (2018) (discussing the revenue generated from economic sanctions and Ferguson County’s use of fines and fees as a major component of their municipal budget). That fewer traffic stops would curtail these two strategies would be an important win in my view.


\textsuperscript{472} Laughland, supra note 7.


\textsuperscript{474} Nelson, supra note 8.

\textsuperscript{475} Kennedy, supra note 210.

\textsuperscript{476} See supra notes 462–63 and accompanying text.

\textsuperscript{477} In the first six months of 2015, approximately 500 police officers were killed during policing activities, and nine percent of these deaths occurred during traffic stops, for a total of approximately 100 per year. See ZIMRING, supra note 249, at 51–53. For this data, Zimring relies on media reports linked to the Guardian’s descriptions of police killings reviewed and coded by researcher Colin Christensen. See id. app. at 259–85; see also \textit{The Counted}, supra note 454 (discussing findings on the use of deadly force by police).

\textsuperscript{478} Between 2005 and 2014, 18.4% of the 505 felonious deaths of police officers resulted from traffic pursuits or stops, an average of nine per year. Michelle Ye Hee Lee, \textit{Are Most Job-Related Deaths of Police Caused by Traffic Accidents?}, WASH. POST (July 12, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/07/12/are-most-job-related-deaths-of-police-caused-by-traffic-incidents/?utm_term=.766ad0a9c857 [on
A second important observation about the circumstances of deadly force is that the kind of threat that provoked deadly force was very different when the officer was alone.479 Single officers were more likely to use deadly force against the same threat than multiple officers.480 In addition, single officers who kill were at least nine times as likely to kill an assailant who had no weapon than officers in pairs or more.481 Zimring’s explanation is that “[a]s a matter of strategy as well as psychology, police officers who confront what they regard as danger are much more vulnerable when operating without the assistance and counsel of another officer.”482 This vulnerability might lead officers to take more precipitous and aggressive actions, as it causes stress that can increase the incidence of miscalculations, misjudgments, and errors.

An obvious systems-oriented strategy is to make sure, as much as possible, that police officers act in pairs rather than alone. In addition, “a good tactical response to potential danger when it is operationally possible is to call for more police.”483 Zimring recommends a clear rule: “When police are in constant communication with dispatchers and their departments, a rule that prohibits shootings in favor of calling for assistance makes sense unless the absence of gunfire produces a true emergency where the officer or an innocent citizen will be in mortal danger.”484 This recommendation could call into question the broad scope and specific terms of active shooter policies.485

A third observation that bears notice is that in approximately thirty-three percent of the police shootings—over 150 deaths per year—the person who was killed by gunfire had or was threatening to use only a knife, club, or other weapon that may have had little or no potential to kill the police officer.486 Virtually all of the attacks that kill police officers—97.5%—are with firearms.487 FBI data shows that less than one percent of police deaths result

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479 ZIMRING, supra note 249, at 59–61.
480 Id. at 60–61.
481 Id. at 61.
482 Id. at 60.
483 Id.
484 Id. at 229.
485 See supra notes 356–61 and accompanying text.
486 See ZIMRING, supra note 249, at 57. This is an empirical claim, which Zimring supports with statistical evidence from websites and studies that track on-duty police officer fatalities from various causes. Id. For example, only two police officers were killed with knives or other cutting instruments in the United States between 2008–2013. Id. at 97. Significantly these deaths resulted at close range by assailants who had hidden knives. Id.
487 Id. at 96.
from knife wounds.\footnote{Id. at 95, 229. In order to have complete information about the risk to police officers, however, we need additional data on the incidence and seriousness of nonfatal knife attacks, and the types of weapons and types of attacks that produce serious injuries. Id. at 163–64.} In addition, British and German case studies show that protocols that use other than deadly force against knives and blunt instruments did not increase the risk to the lives of police in those countries.\footnote{See id. at 80, 83–84, 90.} Zimring argues that the so-called “21-foot rule”—which advises deadly force against a knife-wielding attacker who comes within twenty-one feet—lacks empirical support.\footnote{Id. at 100–01. The “21-foot rule” was apparently formulated by Lt. John Tueller, a firearms instructor with the Salt Lake City Police Department, who was said to have written that “it [is] entirely possible for a suspect armed with an edged weapon to fatally engage an officer armed with a handgun within a distance of 21 feet.” Id. at 100. The rule, which encourages officers to start shooting when knife-wielding adversaries are within twenty-one feet, has spread throughout the law enforcement community. Id.} In light of existing data, Zimring proposes a blanket rule prohibiting deadly force in response to knives and blunt instruments with very few exceptions.\footnote{Id. at 229.}

A fourth observation about the circumstances of deadly force is that about ten percent of all fatal shootings by police officers in the United States—or about 100 per year—take place where the potential assailant had no weapon at all.\footnote{ZIMRING, supra note 249, at 57. (This excludes situations where police saw something that turned out not to be a gun or weapon). Id.} The question in these cases is whether police safety would be compromised by holding their fire in cases in which no weapon is observed. In its \textit{Guiding Principles On Use of Deadly Force}, the Police Executive Research Forum concluded, based on international police studies, that non-shooting responses to no-weapon situations do not threaten police lives and safety: “Unless there is credible and specific intelligence that a suspect is armed with a deadly weapon, a ‘shoot first’ policy seems premature and should be prohibited.”\footnote{Id. at 228 (citing Wexler, supra note 245, at 5–8).}

A fifth observation concerns the extent to which a deadly attack was ongoing and the total amount of deadly force used. A major factor contributing to civilian fatalities is the total number of gunshot wounds inflicted by police.\footnote{Id. at 64.} As neither official governmental reports nor the \textit{Guardian} or \textit{Washington Post} websites have kept comprehensive data on this issue, Zimring looked to a study of fatal and nonfatal shootings by the Chicago Police Department from 2007–2013.\footnote{Id. at 65.} He found that the death rate for multiple-wound shootings (fifty-one percent) was more than twice the death rate for single-wound shootings (twenty-one percent), and that three-quarters of the civilian fatalities involved more than
one police-inflicted wound. The study demonstrates that police infliction of multiple wounds is a major risk in civilian deaths. According to Zimring, however, few if any departments have done research on the question of whether multiple shots are necessary to make police safer or made serious efforts to control multiple-shot continuations of shootings that were initially justified. In light of the paucity of data to elucidate the possible effects of restrictions on continued shots, Zimring recommends restrictions in only three limited scenarios. But he calls the lack of reliable and detailed information on this and other issues concerning how weapons have been used in confrontation between civilians and police officers a “mind-boggling feature of the status quo in American police killings.” This absence of information “risks the lives not only of the victims of police shootings but also of police.”

In addition to Zimring, other police scholars have identified additional specific patterns in police shootings that call out for systems-oriented considerations. For example, Lawrence Sherman, who analyzed data from the Washington Post’s website, “Fatal Force,” in 2015, noticed that a majority of the shootings (fifty-one percent) in his seven-month sample occurred in communities of fewer than 50,000 people, and almost seventy percent occurred outside of major cities of 250,000 or more. In addition, the rate of police-involved shootings per one-hundred homicides was six times greater in the smallest of communities, those with less than 10,000 people, as compared to the largest cities. Sherman argues that studies identifying different rates of shootings in different geographical and social contexts foregrounds “organizational and environmental differences in the potential causal mechanisms or their policy applications for reducing shootings.”

Joanna Schwartz has pointed to evidence suggesting that police overtime and “moonlighting” likely contribute to violence and error resulting from officer

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496 See id. at 67–69. More than seventy-four percent of individuals who are wounded five or more times by police shootings die of their wounds. Id. at 69.
497 ZIMRING, supra note 249, at 231.
498 Zimring describes three settings where he believes available data justifies restrictions on continued shots: first, when an adversary may have a gun but has already been wounded by police fire; second, where the adversary has not fired shots and is now on the ground; and third, where the adversary is fleeing from a confrontation with police. In the first two scenarios, Zimring doubts there is a realistic danger that a non-shooting suspect will begin shooting if the officers stop their shots. In the third category, Zimring posits that the firing may be “motivated by apprehending the suspect or avoiding the frustration of defeat by escape” rather than reasonable risk of police being shot. Id. at 231–32.
499 Id. at 232.
500 Id.
501 Sherman, supra note 89, at 429 (citing Lawrence W. Sherman, Small is Dangerous: Community Size and Police Shooting Deaths, Presented at The American Society of Criminology 71st Annual Meeting (Nov. 18, 2015)).
502 Id. at 429–30.
503 Id. at 430.
fatigue. She cites studies demonstrating “that fatigued officers ‘were significantly more likely to associate African-Americans with weapons,’ received more complaints, were more likely to be involved in use of force incidents, and were more likely to commit ethics violations.” A systems-oriented fix for this problem would be to limit the amount of time officers could work overtime, and limit their freedom to take on additional work.

Schwartz has also identified contexts in which police agencies might adopt the use of “checklists,” a systems-oriented strategy that has been used with great success in commercial aviation and medicine. Checklists can be effective for educating or reminding actors of important steps that promote safety. Perhaps counterintuitively, carefully formulated checklists can improve safety even in recurring emergency or stressful circumstances by focusing the actor’s attention and laying out a logical sequence of considerations and actions where time is of the essence. In the policing context, checklists are being used in an attempt to reduce the disproportionately high incidence of shootings that occur during police interaction with individuals who have a history of mental illness. Two police agencies have begun field-testing a checklist (“screening form”) for identifying people with severe mental illness who may pose a danger to themselves or others. An important goal of the program is to collect data that can be analyzed and used to “establish a connection between a particular


505 Id. at 550–51.

506 See generally Gawande, supra note 31 (discussing the use and effectiveness of checklists in complicated, complex, and emergency situations in medical, aviation, and other high-risk scenarios).


combination of observable characteristics and a high risk of potentially dangerous behavior.\footnote{Id.; see also Mason et al., supra note 508 (recommended that law enforcement agencies adopt a checklist similar to the brief-jail-mental-health-screening (BJMHS) checklist that many local jails have adopted to screen arriving inmates along with Crisis Intervention Team (CIT) training).} The final step would be to incorporate these insights into police training to enhance the safety of police officers as well as mentally ill individuals.

C. Challenges to Systems-Oriented Review: What Will It Take?

In thinking about the application of sentinel event/systems-oriented review in the policing context it is useful to consider four circumstances that have been essential to the success of such review in aviation and medicine.

First, in both contexts sentinel event review of certain kinds of incidents is mandatory, required by the NTSB in aviation and strongly encouraged by the Joint Commission in medicine.\footnote{See Report an Aircraft Accident to the NTSB, NAT’L TRANSP. SAFETY BOARD, https://www.ntsb.gov/Pages/Report.aspx. See jointly note 511, at 6 (Jan. 2016), https://www.jointcommission.org/assets/1/6/CAMH_24_SE_all_CURRENT.pdf. See generally ALEXANDER T. WELLS & CLARENCE C. RODRIGUES, COMMERCIAL AVIATION SAFETY 87–88 (4th ed. 2003) (describing the Aviation Safety Reporting System, a voluntary, confidential reporting system designed to gather the maximum amount of information without discouraging the reporter).} Second, in both contexts sentinel event review investigations enjoy some degree of protection from discovery in civil (and criminal) cases.\footnote{Second, see joint note 511, at 12; WELLS & RODRIGUES, supra note 512, at 52–68 (describing the role of the National Transportation and Safety Board in investigating airline accidents, creating accident reports, making safety recommendations, and publicizing reports and safety information); Program Briefing, AVIATION SAFETY REPORTING SYS., https://asrs.arc.nasa.gov/overview/summary.html (-describing role of ASRS in “collect[ing], analyze[ing] and respond[ing] to voluntarily submitted aviation safety incident reports in order to lessen the likelihood of aviation accidents”).} Third, both contexts have organizations that can receive information from individual investigations, aggregate that information with investigative information from other similar events, and identify common causes.\footnote{Third, see joint note 511, at 12; WELLS & RODRIGUES, supra note 512, at 87 (explaining that the Aviation Safety Reporting System analyzes data and publicizes reports of its findings); Program Outputs, AVIATION SAFETY REPORTING SYS., https://asrs.arc.nasa.gov/overview/outputs.html (ASRS} Fourth, both contexts have an official, institutional mechanism for conveying the results of sentinel event investigations of single events, or the safety recommendations they identify, back to their members, which promotes best practices across institutions.\footnote{Fourth, see joint note 511, at 13; Confidentiality and Incentives to Report, AVIATION SAFETY REPORTING SYS., https://asrs.arc.nasa.gov/overview/confidentiality.html. See generally ALEXANDER T. WELLS & CLARENCE C. RODRIGUES, COMMERCIAL AVIATION SAFETY 87–88 (4th ed. 2003) (describing the Aviation Safety Reporting System, a voluntary, confidential reporting system designed to gather the maximum amount of information without discouraging the reporter).}
These features pose notable—but not insurmountable—challenges for the potential success of systems-oriented review and prevention in policing. Unlike aviation and medicine, policing is highly decentralized. Police agencies lack an authoritative, institutional mechanism for mandating investigations and for prescribing the kind of review designed to uncover systems-oriented solutions. Instead, police departments have their own localized mechanisms such as internal affairs review and civilian oversight board review for reviewing incidents that occur in their own jurisdiction.\textsuperscript{515} Unlike airlines and hospitals, police departments are not required to collect the kind of data necessary for identifying patterns and systems vulnerabilities.\textsuperscript{516} Without such data, police agencies cannot make evidence-based decisions designed to reduce the risks of harm-causing conduct by police.\textsuperscript{517}

In addition, policing has no widely accepted, centralized mechanism for collecting, receiving, and analyzing crucial information derived from sentinel event/systems-oriented reviews.\textsuperscript{518} This lack of centralization severely limits the

\textsuperscript{515} See Hollway et al., supra note 28, at 892–95 (describing mechanisms for review by a department’s homicide investigators, internal affairs department or civilian review board).

The U.S. Department of Justice has created a certain level of centralization by mandating specific police reforms pursuant to consent decrees with some troubled police agencies under 42 U.S.C. § 14141. See Rachel Harmon, Promoting Civil Rights through Proactive Policing Reform, 62 STAN. L. REV. 1, 3 (2009); see also 32 U.S.C. § 12601 (2017) (formerly cited as 42 U.S.C. § 14141). Many of these reforms have been mandated in multiple departments and some have become accepted as best practices. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 3 (Jan. 2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/XMJ5-TWZY]. But this mechanism is seriously limited by resource constraints on the DOJ’s ability to bring suit. See Harmon, supra note 515, at 3. Professor Harmon has recommended ways that DOJ could use § 14141 proactively to induce police reform. See id. at 22.

\textsuperscript{516} See Schwartz, supra note 243, at 558.

\textsuperscript{517} See id. at 559.

\textsuperscript{518} See id. at 558. The Police Executive Research Forum (PERF), an independent research organization, conducts important research resulting in widely-read recommendations on best practices. See POLICE EXEC. RESEARCH FORUM, supra note 375, at 121. These recommendations are often debated and sometimes rejected, but many of PERF’s recommendations end up influencing policies adopted by police agencies around the country. See generally id. at 33–73 (“The policies, training, tactics, and recommendations for equipment and information exchange that are detailed in this chapter amount to significant changes in a police agency’s operations and culture.”). Unlike the Joint Commission in medicine, however, PERF is not an accrediting agency that can mandate best practices, and unlike the NTSB in aviation, PERF cannot require review of shooting or other harm-causing incidents by police. See Facts About Hospital Accreditation, JOINT COMMISSION (Sept. 12,
ability to identify repeated errors and patterns across harm-causing incidents like police shootings. It also limits the potential for disseminating crucial information from lessons learned. Evidence from other fields has shown that in order for learning to result from sentinel event review, there must be an intentional plan to disseminate the findings of the investigation and to ensure that the recommendations are “salient and actionable.”

Centralization of sentinel event review in aviation also means that reviews are done by an on-call, multidisciplinary team that includes not only subject matter experts (pilots, flight attendants, mechanics) but also experts in risk management. Just as NTSB investigation enables a kind of review that would be impossible for individual airlines, police agencies would benefit from the availability of centralized, multidisciplinary resources for expert investigation and data gathering. Importantly, these external reviews would be designed not to blame individual officers, but to identify system vulnerabilities and systems-oriented solutions.

Sentinel event review by a team that includes risk management experts also ensures that recommendations will be systems-oriented and effective. Recommendations by local teams without such expertise are often what systems analysts would call “weak,” meaning solutions such as reminders, additional training, or policy rewrites. These kinds of fixes may simply result in risk migration, where the mitigation of one risk simply results in a new risk. In addition, they do not address latent causes, such as poorly designed technology or defective operational systems, systems problems that predispose to human error. Involving human factor experts increases the likelihood of stronger, more effective solutions.

The challenges to sentinel event review in policing are real but by no means unsurmountable, and the rewards of such review are enormous. First and foremost, systems review holds the potential to reduce the number of police shootings and begin to chip away at the layers of police-citizen animosity repeatedly stoked by civilian deaths at the hands of police. This would be infinitely good, not only for civilians but for police officers, many of whom labor faithfully in difficult circumstances and bear the brunt of public anger and
suspicion. In addition, focusing on prevention has great potential to increase police officer safety. According to Professor Zimring, there have been no rigorous, scientific, systems-oriented evaluations of the strategies and tactics that are designed to protect police.\textsuperscript{524} These benefits make systems-oriented review worth fighting for.

VI. CONCLUSION

Despite its significant promise, systems-oriented review will likely face resistance. Some of the strongest resistance may come from police departments themselves and from the communities that are most affected by police shootings.

Police departments are notoriously defensive toward outside investigations of police shootings and other incidents.\textsuperscript{525} Systems solutions may be suspect, especially if they are viewed as being imposed by authorities outside of the police department without taking account of the realities on the ground.\textsuperscript{526} Police leaders might be slow to let go of deeply held, but unsupported assumptions about risks to their safety, for example the belief that ordinary traffic stops pose a very high risk of officers being shot.\textsuperscript{527} They are also likely to resist bright-line rules against vigorously defended practices—such as the use of lethal force against suspects in fleeing vehicles or suspects within twenty-one feet brandishing a knife—which increase the risk of unnecessary shootings, i.e., shootings not required to protect police or public safety.\textsuperscript{528} Police may also resist other systems-oriented reforms that threaten police practices offering collateral benefits aside from safety. For example, a move to reduce traffic stops would undermine policing’s widespread practice of using such pretextual stops to investigate unrelated crimes.\textsuperscript{529} Getting police departments on board for systemic changes will pose significant challenges.

In a surprising way, though, systems review actually holds promise for responding to some of law enforcement’s own most vehement criticisms of civil actions and criminal prosecutions against police officers. The law enforcement community complains that legal actions make the officer who pulled the trigger a “scapegoat” for merely doing his job. In addition, they assert that such actions are never about one shooting; rather, legal actions blame one officer for what communities deem a long history of police transgressions. It turns out that systems review may actually address these criticisms in important ways.

The goal of systems review is precisely to get beyond the single-minded focus on blaming the shooter in order to identify workplace and organizational causes that lie behind the last human causer. By focusing on systemic causes,

\textsuperscript{524} ZIMRING, supra note 249, at 97–98.
\textsuperscript{525} See Schwartz, supra note 243, at 559–60.
\textsuperscript{526} Id.
\textsuperscript{527} See supra notes 463–70 and accompanying text.
\textsuperscript{528} See supra notes 454, 486–91 and accompanying text.
\textsuperscript{529} See supra note 470 and accompanying text.
systems-oriented review has the effect of spreading the blame so that individual officers are not the only ones held responsible for harm-causing incidents and are not left to bear alone the professional and personal consequences of having taken a human life. By reducing the likelihood that sharp end actors will make mistakes—including reasonable mistakes—systems solutions should ultimately reduce the likelihood that officers will be blamed for just “doing their job.” Moreover, data-driven improvements in police use of firearms will ultimately increase officer safety. In short, if articulated clearly and done right, systems review should prove appealing to the policing community.

Another source of resistance to systems review will likely come from the communities that have experienced the most harm from police shootings. Public resistance takes us back to where we started: when there is a police shooting, families and communities understandably look for someone—a human being—to blame. The need to hold someone accountable is deeply embedded in human nature. For this purpose, systems review seems inadequate. After all, it looks for causes that lie behind the immediate human causer to identify underlying systems vulnerabilities that contributed to the harm-causing action. Solutions are forward-looking and preventative, rather than backward-looking and blaming. While systems analysis need not (and should not) replace some form of accountability review, loosening the grip on blaming is likely to go down hard in communities plagued by police-involved shootings.

The best response to the anticipated public reaction against systems-oriented review is this: the vast majority of police-involved shootings are ultimately deemed “justified” or “reasonable” by police investigators and courts, and that is the end of the investigation. Most police-involved shootings do not result in criminal charges and even fewer in convictions. This is true even in the many cases in which the shooting was factually unnecessary under the circumstances (i.e., the suspect was unarmed or the officer’s safety was not actually at risk). As much as we might want to think otherwise, under our current system there is almost no “accountability” of the sort communities are crying out for. By adopting systems-oriented review, virtually nothing will be lost, and much will be gained.

I am not arguing that police officers should escape responsibility when they do misbehave. But our current relentless focus on accountability—while an understandable human reaction—has become the enemy of prevention in the very communities that need it most.
Part-Time Government

KELLEN ZALE

Part-time government is the rule, not the exception, for cities in the United States. The vast majority of the 20,000 cities in the U.S.—eleven out of every twelve—are governed by part-time local legislatures. From small towns to major urban metropolises, the fate of cities collectively responsible for billions of dollars in public revenues and expenditures is determined by city council members who often volunteer their time for minimal pay and juggle public service with full-time outside employment.

This Article contends that the part-time model has systematic implications for city power that have gone unrecognized. All things being equal, a part-time city council has less power, in terms of capacity, resources, and political capital, than a full-time city council. Where does that power go? On one hand, the diminished power of part-time city councils may mean that power goes unexercised: ordinances that are never passed, city services that are never funded, intergovernmental agreements that are never entered into. On the other hand, the diminished power of part-time city councils may mean that power gets redistributed to other institutions, such as states, other city officials, other units of local government, and private actors, which exercise power in ways that may diverge from how that power would have been exercised by city councils.

Recognizing these power dynamics leads to a further normative question: Is part-time government in American cities a problem? In mid-size and larger cities in particular, the question of whether city council should remain part-time is a recurring and often highly contentious issue. Drawing on political science and public administration scholarship, this Article offers a systematic assessment of the power dynamics of part-time city councils and develops a set of normative guideposts that can inform the often highly politicized debates about part-time government. By thinking more deeply about factors that lend legitimacy to city councils as decision-makers, such as the representation of a diversity of interests, democratic accountability, and local autonomy, as well as factors that may cut in the other

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direction, such as concerns about efficiency, expertise, and metropolitan fragmentation, this Article makes a novel contribution to the local government literature and offers a framework to clarify and refine our intuitions about the connections between institutional design and city power.

I. INTRODUCTION ................................................................. 988

II. CITY COUNCILS AND THE PART-TIME MODEL ...................... 995
   A. A Primer on City Councils ............................................ 996
   B. Part-Time Versus Full-Time ........................................ 1009
      1. Defining Part-Time ............................................... 1009
      2. The Prevalence of the Part-Time Model ....................... 1016

III. THE POWER DYNAMICS OF PART-TIME CITY COUNCILS .......... 1023
   A. The Diminished Power of Part-Time Local Legislatures ........ 1024
   B. Where Does Power Go? .............................................. 1030
      1. Power Unexercised ................................................ 1031
      2. Power Redistributed ............................................. 1034

IV. INSTITUTIONAL DESIGN AND CITY POWER .......................... 1041
   A. Assessing City Councils as Decision-Makers ..................... 1041
      1. Legitimacy-Enhancing Features of City Councils ............. 1042
      2. Legitimacy-Diminishing Features of City Councils ........... 1044
   B. Implications of the Analysis ..................................... 1047

V. CONCLUSION ...................................................................... 1053

Part-time government is the rule, not the exception, for cities in the United States.1 The vast majority of the 20,000 cities in the United States—eleven out of every twelve—are governed by part-time city councils.2 From small towns of a few hundred residents to major urban metropolises like Dallas and Phoenix,

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1This Article uses the term “cities” to refer generally to incorporated municipalities that are general purpose local governments. However, depending on state law, other designations may be used, such as village, borough, and town. Throughout this Article, I use the phrases “local legislature” and “city council” interchangeably as generic terms referring to the local legislative body in an incorporated place. Other labels may also be used to refer to this entity, such as “Board of Supervisors” or “City Commission.”

2See, e.g., James H. Svara & Jennifer Claire Auer, Perspectives on Changes in City Government Structures, in 80 THE MUNICIPAL YEARBOOK 2013, at 17, 29 (2013) (“The vast majority of city councils have part-time members. Only 260 cities (8%) reported having full-time members and another 45 have a combination of full- and part-time members. . . . This proportion of 1 in 12 cities with full-time members is fairly consistent across city population sizes . . . ”); H. GEORGE FREDERICKSON ET AL., THE ADAPTED CITY: INSTITUTIONAL DYNAMICS AND STRUCTURAL CHANGE 125 (Richard D. Bingham & Larry C. Ledeber eds., 2004) (“The norm in American cities is to have part-time councils.”).
the fate of cities collectively responsible for billions of dollars in public revenues and expenditures is determined by city councils whose members typically volunteer their time for minimal pay and juggle public service with full-time outside employment.3

The part-time model represents a remarkably persistent pattern across cities, despite vastly different populations, demographics, public needs, and resources.4 Furthermore, the part-time model has a remarkably sticky institutional design outcome: even as cities grow in size and diversity, and are faced with more numerous and complex policy problems, departures from the part-time model remain relatively rare.5 A number of arguments can be made in favor of or against the part-time model as an institutional design choice. These range from concerns about its potential to limit elected office to only those who can afford to serve and potential impacts on the diversity of elected leaders;6 to questions about the representativeness of an institution whose members may need to regularly recuse themselves because of conflicts related to their outside employment;7 to


5 Cf. Kellen Zale, Compensating City Councils, 70 STAN. L. REV. 839, 871 n.152 (discussing one recent example of an anomalous change in San Antonio, Texas).

6 See, e.g., Katie McKellar, Despite Political ‘Awkwardness,’ Salt Lake City Council Considering Giving Themselves a Pay Raise, DESERET NEWS (Nov. 27, 2018), https://www.deseretnews.com/article/900044102/despite-political-awkwardness-salt-lake-city-council-considering-giving-themselves-a-pay-raise.html [https://perma.cc/R3R2-PFPF] (“[T]he council’s work has evolved over the years and the argument could be made the current pay rate hasn’t kept pace with the demands of the job, and perhaps could block regular Joes from serving on the council if they can’t afford to take time away from their day jobs.”); Morgan Smith, Part-Time Legislature Can Create Financial Hardship, TEX. TRIB. (Feb. 14, 2013), https://www.texastribune.org/2013/02/14/part-time-legislature-can-create-financial-hardshi/ [https://perma.cc/64MQ-RGCU] (“The state’s founders envisioned the part-time Legislature as a place where there would be no room for full-time politicians. Tying lawmakers to their districts for all but five months every two years would keep them connected to the constituents they had been elected to serve. But in the modern Legislature, the paltry pay that goes along with being expected to earn a living elsewhere can have the opposite effect—narrowing the ranks of potential office-holders to only those who can afford to do it full time.”).

7 See ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE 11 (2000) (discussing various remedies to address conflicts of interest and noting that recusal is “a relatively appropriate remedy for officeholders performing quasi-judicial functions, since in most cases one judge can easily replace another. But it remains ill-suited for those executing quasi-legislative responsibilities. As the legal scholar Peter Strauss puts it, recusal ‘may, by changing [a] commission’s balance, disturb an intended and legitimate political judgment . . . .’” (alteration in original)); Patricia E. Salkin, Crime Doesn’t Pay and Neither
the challenge of developing ethics rules that provide adequate disclosure and transparency about part-time lawmakers’ outside interests without imposing requirements that are so onerous that they become a deterrent to public service. Conditions in growing mid-sized and larger cities, where there is a greater diversity of competing interests and more numerous and complex governance needs, further heighten concerns about the welfare consequences of a part-time local legislature, as evidenced by recurring and often highly contentious debates about the part-time status of city councils in these cities.

While political science and public administration literature has explored some aspects of the part-time model of governance, most prominently in the context of state legislatures, scholars have largely overlooked the question of whether the part-time model might have distributional consequences for city power. This Article is an attempt to remedy this oversight. I contend that the part-time model affects power dynamics in cities in ways that existing scholarship has not adequately grappled with.
All things being equal, a part-time city council has less power—in terms of capacity, resources, and political capital—than a full-time city council. Where does that power go? On one hand, the diminished power of part-time city councils may mean that power goes unexercised: ordinances that are never passed, city services that are never funded, intergovernmental agreements that are never entered into. On the other hand, the diminished power of part-time city councils may mean that power is redistributed to other institutions, such as states, other city officials, other units of local government, or private actors, each of which exercising power in ways that may diverge from how that power would have been exercised by city council.

The recognition that the part-time model produces power vacuums and redistributes power away from city councils invites a further normative question: How much power should city councils have? In part, the answer depends on one’s view of the role of city councils: Are they more likely to be sites of small-scale civic engagement and valuable laboratories of democracy, or sources of unnecessary layers of regulation, prone to policymaking that imposes spillovers and undercuts statewide uniformity concerns? Judgments about council members are also relevant: Are local legislators uniquely well-positioned to act on matters of local import, or do they pose a risk of being well-intentioned but underqualified, drawn from a limited pool of candidates, many of whom may have personal interests at stake due to their outside employment?

Answering these questions is no simple task: they form the basis of much of the foundational literature of local government law. While much more could be written about each of these issues, a comprehensive reckoning of all of the policy and legal implications of the part-time model is beyond the scope of this project. The more modest goal of this Article is to hone in on how the part-time model impacts the power of city council vis-à-vis other institutional actors, and why those power dynamics matter. Drawing on political science and public administration scholarship, this Article develops a set of normative guideposts that can inform the often highly politicized debates about part-time government. I suggest that by focusing on factors that lend legitimacy to local legislatures as decision-making entities, such as the representation of a diversity of interests, democratic accountability, and local autonomy, as well as factors that may cut in the other direction, such as concerns about efficiency, expertise, and metropolitan fragmentation, we can develop a set of normative criteria by which to judge the part-time model. If we want to prioritize efficiency and expertise, and to provide a check against metropolitan fragmentation and electoral disinterest, then a part-time city council would seem to be a rational institutional design choice: the fact that power may be unexercised by a part-time council or redistributed to other institutional actors who better serve these values is a

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11 Power in this sense means something different than formal legal authority. See infra Part II.A.
12 See infra Part II.A.
13 See infra Part II.B.
normatively desirable outcome. Conversely, if we are more concerned with local decision-making reflecting values of democratic accountability, representing a diversity of interests, and enhancing local autonomy, then a part-time city council is more problematic, since it may result in a power vacuum and redistribution of power away from the very institution that can effectuate those values.

While a core concern of local government law is the distribution of power—between cities and states, among local governments, and between local governments and private interests—and the public administration literature on the internal structures of local governments is voluminous, scholars have given less attention to how these two doctrinal domains interact. This Article aims to fill this gap in the literature by providing both a comprehensive, descriptive account of how part-time city councils can create power vacuums and redistribute power, as well as advancing a set of normative claims about how to respond to these power dynamics. In doing so, the Article makes a novel contribution to the growing body of legal scholarship that grapples in important ways with how internal structures of local government shape legal and policy outcomes.

The literature on these issues is vast. Two of the foundational pieces of literature examining local government power are Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUM. L. REV. 1, 8 (1990), and Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057, 1105–09 (1980).


This Article’s focus on the power dynamics of the part-time model is also valuable because it moves the debate away from the often-ideological rhetoric over citizen legislators versus professional politicians to the more pragmatic context of distribution of power in governance systems. When the debate over part-time government is viewed through the former lens, as it so often is, the focus is often on individuals, not institutions. While there will certainly still be differences of opinion about how much power institutions should have vis-à-vis each other, evaluating the part-time model through the lens of institutional power not only provides a more doctrinally sound foundation for policy debates among scholars, but may also foster more civically productive dialogues among community members and their elected officials.

A few preliminary remarks about the scope of this project are warranted. First, a baseline assumption of this Article is that city councils, as the policymaking bodies for cities, have power that can be exercised in ways that matter. Although various background principles of state law, such as narrow conceptions of home rule authority, state preemption doctrines, and tax and expenditure limitations directly or indirectly limit the legal authority of cities, city councils still have extensive regulatory and policymaking authority over issues that matter, from infrastructure to economic development to social welfare.

Relatedly, it might be asked why focus on part-time city councils, when there are other sites of governance, from state legislatures to county commissions to mayors and judicial officers, whose part-time statuses also implicate institutional power dynamics. In part, this Article’s focus on city councils responds to a gap in the literature. Although a nascent resurgence of scholarship in local government law provides valuable insights into the local


\[18\] See Johhny Kauffman, Low Pay in State Legislatures Means Some Can’t Afford the Job, NPR (Jan. 9, 2017), https://www.npr.org/2017/01/09/508237086/low-pay-in-state-legislatures-means-some-can’t-afford-the-job [https://perma.cc/K8A3-DXN9] (quoting Neil Malhotra, professor of political science at Stanford University) (“There’s very, very few working class people in legislatures. This might have something to do with why a lot of legislation does not seem very friendly towards working class people.”).

\[19\] See infra Part II.A.
executive,\textsuperscript{20} local administrative agencies,\textsuperscript{21} and local judicial officials\textsuperscript{22} (and there is a significant body of legal and political science scholarship on state legislatures, some of which grapples with the part-time nature of those institutions),\textsuperscript{23} city councils remain a particularly understudied institutional actor.

Furthermore, focusing on the implications of the part-time model in the context of city councils offers a relatively standardized measure of comparison. A significant percentage of U.S. cities do not have an independently elected executive,\textsuperscript{24} but almost ninety percent have democratically elected city councils, which have broad governing authority and a set of foundational, baseline responsibilities that are fairly standardized across cities, such as budgeting, overseeing public employees, and responding to infrastructure needs.\textsuperscript{25} And while there is significant variation in the full-time versus part-time status of county commissions, both across states and within individual states, as noted at the outset, the vast majority of cities in the United States utilize part-time city councils.\textsuperscript{26}

Finally, in focusing on the connection between institutional design and city power, I am mindful that numerous other factors determine the power of city councils, from differences in the scope of home rule authority to the fiscal health of a city to the individual personalities of council members,\textsuperscript{27} and that city


\textsuperscript{21}See Davidson, supra note 16, at 569–70.


\textsuperscript{23}A majority of state legislatures are considered part-time. See Full- and Part-Time Legislatures, NAT’L CONF. ST. LEGISLATURES (June 14, 2017), http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/N8P2-2NZQ] (indicating that ten states have full-time state legislatures; twenty-six states have hybrid state legislatures (defined as two-thirds of a full-time job); and fourteen states have part-time state legislatures (defined as one-half of a full-time job)).

\textsuperscript{24}See infra note 51 (discussing the council-manager form of government).


\textsuperscript{26}See infra Part II.A.2.

\textsuperscript{27}See DOUGLAS YATES, THE UNGOVERNABLE CITY: THE POLITICS OF URBAN PROBLEMS AND POLICY MAKING 10 (1977) (“[T]o say that x holds y amount of power is not to give an adequate account of how he uses or fails to use that power to influence or control a particular decision.”); see also James H. Svara, The Embattled Mayors and Local Executives, in AMERICAN STATE AND LOCAL POLITICS: DIRECTIONS FOR THE 21ST CENTURY 139, 140 (Ronald E. Weber & Paul Brace eds., 1999) (noting that constraints on local officials include “the weakness of cities in the federal system, disparity of resources in
councils are but one part of any calculus regarding city power. But this makes it even more important to understand how different factors impact city power. Analyzing how the internal structures of local government institutions affect power relationships not only contributes to a more analytically complete understanding of local governments, but can also help us adopt substantive policies that align with the capacities of our institutions—or change those institutions so that they have the necessary capacity to effectuate substantive policies.

Especially as cities increasingly become sites of policy innovations and act as “laboratories of democracy” with regard to issues ranging from campaign finance to public health to environmental protection, it is important to examine the structural dynamics that operate on the institutions that enact these policies.

This Article proceeds in five Parts. Part II provides an overview of part-time city councils, beginning with a primer on the positive features of city councils as an institution and their roles in local governance. This Part then turns to unpacking what is meant by the label “part-time” as applied to city councils and analyzing why the part-time model is such a prevalent one in cities. Part III first develops a descriptive framework of the power dynamics of the part-time model, beginning with an analysis of the tradeoffs the part-time model makes in terms of legislative capacity, institutional resources, and political capital, and then develops a taxonomy of how the diminished power of part-time city councils can produce power vacuums and redistribute power to other institutions. Part IV explores the normative implications of these power dynamics. A brief conclusion follows in Part V.

II. CITY COUNCILS AND THE PART-TIME MODEL

Part II.A begins with a descriptive account of city councils, highlighting their organizational features and role in local governance. Part II.B turns to unpacking the meanings of “part-time” versus “full-time,” and analyzing why

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28 See B. Guy Peters, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE NEW INSTITUTIONALISM 184 (3rd ed. 2012) (“[I]nstitutions are the variables that explain political life in the most direct and parsimonious manner, and they are also the factors that themselves require explanation.”); Ronald D. Hedlund, Organizational Attributes of Legislatures: Structure, Rules, Norms, Resources, 9 Legis. Stud. Q. 51, 87 (1984) (“[O]rganizational characteristics are important features of a legislature because they define the situation in which legislative activity takes place, structure legislative behavior and activity, and establish the ways in which legislatures operate. . . . The impact of such organizational factors has been seen in both direct and indirect ways . . . .”).

29 See Vivien Lowndes, New Institutionalism and Urban Politics, in THEORIES OF URBAN POLITICS 91, 92 (Jonathan S. Davies & David L. Imbroscio eds., 2009) (discussing the “new institutionalism” school of political science, which “does not take political institutions at face value [and] instead . . . takes a critical look at the way in which they embody values and power relationships”).
the part-time model is such a prevalent institutional design choice for city councils.

A. A Primer on City Councils

Types of Local Governments. At the broadest level, local governments fall into two categories: general purpose governments and special purpose governments. The former consists of cities and counties, while the latter covers a vast range of entities, ranging from school districts to river authorities to hospital management districts. The two main types of general purpose local governments, cities and counties, are formally distinguished by the incorporated status of the former and the unincorporated status of the latter. Formally referred to as “municipal corporations,” cities are created by an act of incorporation initiated by residents. Counties are directly created by the state as administrative units.

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31 See Definitions: Local General Purpose Governments, supra note 30. Other general purpose local governments include towns, townships, boroughs, and parishes; these forms of government are only found in some states. Id.
33 McQuillin, supra note 32, § 2:07:10.
34 Id. In addition to cities, the U.S. Census includes villages, boroughs (except in New York and Alaska), and towns (except in New England and the upper Midwest) as types of municipal corporations in the total count of incorporated places. DARRYL T. COHEN ET AL., U.S. CENSUS BUREAU, POPULATION TRENDS IN INCORPORATED PLACES: 2000 TO 2013, at 5–6, 13 (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1142.pdf [https://perma.cc/G3S4-M6RF]. For purposes of brevity, this Article uses the generic term “city” to refer to all types of municipal corporations.
35 Counties are considered to be more direct agents and political subdivisions of the state and thus are more constrained in both their legal powers and their institutional design arrangements than cities. See, e.g., Curtis v. Eide, 244 N.Y.S. 2d 330, 332 (N.Y. App. Div. 1963) (“[C]ounties are involuntary subdivisions of the state created for the most part for convenience and for more expeditious state administration.”). However, some states have granted home rule powers to counties somewhat analogous to those granted to cities, and some counties have embarked on innovative policymaking outside the scope of their traditional duties. See Michelle Wilde Anderson, Mapped Out of Local Democracy, 62 STAN. L. REV. 931, 994 (2010). In some ways, counties are more complicated institutional entities than incorporated municipalities and are worthy of further study. See id. (“[W]e know very little about the political economy of county government. . . . [C]ounty governments wear several distinct hats. They serve as the only general purpose local government for unincorporated areas, the second level of general purpose local government for incorporated
There are over 19,000 municipal corporations in the United States, the majority of which are small places with fewer than 5000 residents.\textsuperscript{36} Thus, despite the common connotation of a city as a dense, highly populated, urban place, most places with the legal designation of a city look more like what most people would refer to as a suburb or small town. However, even though most cities are small cities, the majority of the U.S. population lives in larger cities: 75\% of Americans live in cities of 10,000 or more residents,\textsuperscript{37} and roughly 60\% of Americans in incorporated places live in cities with more than 50,000 residents.\textsuperscript{38}

\textit{The State-Local Relationship.} All local governments, whether counties, cities, or special purpose districts, are considered creatures of the state.\textsuperscript{39} There is no equivalent to the Tenth Amendment for local governments: local governments are considered political subdivisions of the state, and the state has broad power to shape, control, and even eliminate them.\textsuperscript{40} This top-down view of local government has meant that local power has traditionally been viewed narrowly: unless explicitly authorized by the state, local governments have been presumed not to have the power to act.\textsuperscript{41}

However, the value of local autonomy has long been recognized, and most states grant significant autonomy to local governments, both through specific grants of power to local governments and through the broader principle of home rule. Home rule refers to local self-government that results from the delegation of power from the state to local governments to regulate municipal affairs without requiring a specific grant of authority from the state for each act of local regulation.\textsuperscript{42} Home rule is not automatic: if state law provides for home rule, for a city to take advantage of it, that city typically must meet a minimum


\textsuperscript{37}FREDERICKSON ET AL., supra note 2, at 3.

\textsuperscript{38}See COHEN ET AL., supra note 34, at 3.

\textsuperscript{39}See Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.”).

\textsuperscript{40}Id. at 178–79.

\textsuperscript{41}This view of limited local autonomy is also reflected in Dillon’s Rule, which provides that municipal corporations possess and can exercise only the following powers: those expressly granted, those necessarily implied by the powers expressly granted, and those essential to accomplish the purposes of the corporations. See RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 327 (8th ed. 2016). Under Dillon’s Rule, doubts about existence of power are resolved against the municipality. See id.

\textsuperscript{42}Id. at 330.
population requirement as well as adopt a city charter through a majority vote of its residents.43

The parameters of home rule vary, depending both on the type of home rule authority granted under state law and on how courts interpret the scope of the authority. Under legislative home rule, local governments are delegated broad authority to act unless the state specifically prohibits local action.44 While local governments have a broad presumption of autonomy under this type of home rule, the state can choose to preempt local action on any matter.45 In these states, the legal question in home rule cases is typically whether the state has implicitly preempted local action.46

Another type of home rule is known as imperio home rule. In an imperio home rule system, local governments retain the authority to act on “municipal affairs” only.47 As a result, cities in imperio home rule states have authority over a narrower range of affairs than cities in legislative home rule states.48 However, if a matter is determined to be exclusively municipal in an imperio home rule state, then the normal rules of preemption are inverted: the local government action cannot be preempted by conflicting state law.49 In these states, the legal question in home rule cases typically centers on whether the state has made the definition of “local” as narrowly as possible.46

Structures of City Government. In addition to being distinguished by whether they have home rule authority, cities also differ in their internal organizational structures. Forms of local government vary both in how power is distributed internally between elected and appointed officials, as well as in how power is distributed among elected officials. The vast majority of cities use one of two organizational structures: the mayor-council system or the council-manager system.51

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43 Id.
45 See BRIFFAULT & REYNOLDS, supra note 41, at 348.
46 See BRIFFAULT & REYNOLDS, supra note 41, at 347.
47 See BRIFFAULT & REYNOLDS, supra note 41, at 348.
48 See id. at 347.
49 Id. at 350.
50 Id. at 350.
51 See DeSoto et al., supra note 20, at 158 (“Ninety-two percent of municipal governments in the United States today have one of [these] two forms of governments . . . .”); Nelson & Svara, supra note 15, at 259. Other forms of government that are more infrequently used are the commission form, town meeting, and representative town
In the mayor-council form of government, used in approximately one-third of all cities, there is a separation of powers between the city council, which has legislative authority, and the mayor, who is separately elected and vested with executive and administrative powers. The council-manager system, in contrast, vests all governmental authority—legislative, executive, and administrative—in the city council. The council in this system delegates its administrative authority to an appointed city manager who is tasked with the day-to-day administration of city government and implementation of policies enacted by the council.

Council-manager systems emerged as part of the early twentieth century Progressive reform movement, in an attempt to depoliticize local government and professionalize public administration. Because the council-manager meeting. See Forms of Municipal Government, supra note 25 (describing these forms of government). In a commission form of government, the city is governed by an elected commission, which holds all legislative and executive authority and has no elected executive or appointed professional manager. Id. Each member of the commission is responsible for a specific aspect of city governance (such as fire, police, or public works). Id. In a town meeting form of government, all eligible voters make decisions about policy directly, and in a representative town meeting form of government, residents elect a large number of their fellow residents to serve as selectmen who vote at town meetings. Id. Although the council-manager and mayor-councils are distinguished formally as described herein, some public administration scholars have suggested that, in practice, many cities use elements of both systems, such as mayor-council cities that appoint chief administrative officers who serve in a role much like a city manager. See, e.g., FREDERICKSON ET AL., supra note 2, at 18 (analyzing the changes in forms of municipal governments and suggesting that fewer cities fit the traditional mold of council-manager or mayor-council and “[m]ost American cities are now best described as adapted”); DeSoto et al., supra note 20, at 158 (summarizing recent research suggesting the “traditionally clear distinction between mayor-council and council-manager systems is eroding”).

The mayor-council system is used most frequently in small cities and large cities, and less frequently in mid-sized cities, which tend to use the council-manager system. See MORE THAN MAYOR OR MANAGER, supra note 15, at 8–10 (providing tables showing the distribution of governmental forms across municipalities of various populations).

See id. at 7–8 (“In contrast to the council-manager form in which the council has authority over the manager, the mayor in the mayor-council form is a separate and independent executive.”).

Id. at 4.

Id. at 7; see also LEAGUE OF ARIZ. CITIES & TOWNS, WHAT ALL NEWLY-ELECTED LOCAL OFFICIALS NEED TO KNOW 34 (June 2018), https://www.azleague.org/Archive Center/ViewFile/Item/185 [https://perma.cc/R583-Z4GQ] (describing the role of the city manager in a council-manager system: “The manager is generally given the power to appoint and remove all employees, to draft the annual budget for submission to the council, to supervise and coordinate the day-to-day operations of the various departments and to present policy alternatives to the council.”).

Another legacy of the progressive reform movement in cities is non-partisan elections; in both council-manager and mayor-council forms of government, elections often are non-partisan: almost seventy percent of cities have non-partisan elections. See Elmendorf & Schleicher, supra note 16, at 385 (discussing problematic aspects of non-partisan elections).
system is intentionally designed to remove politics from governance, it trades accountability for efficiency: decisions about policy implementation are made by a professional city manager, who may bring efficiency to that decision-making process but who is not directly accountable to voters.57

In cities with mayors, the mayor may be characterized as either the strong mayor or weak mayor variety. These labels are not judgments about mayoral effectiveness but simply refer to the level of “political power and administrative authority” the mayor has been granted pursuant to the city charter.58 Strong mayors tend to be associated with the mayor-council form of city government and weak mayors with the council-manager form, but there is no necessary correlation.59 In a strong mayor system, the mayor is an independently elected official who typically has authority to supervise city agencies and oversee personnel, as well as a significant amount of discretion over budgetary decisions and veto power over council legislation.60 In cities with a strong mayor, separation of powers most closely mirrors that of federal or state government:61 while the city council may disagree with how the mayor is administering (or failing to administer) policies enacted by the council, council has limited authority to interfere with the mayor’s decisions over personnel or the day-to-day administration of city departments.62

In the weak mayor system, the mayor may be independently elected or may be chosen from among city council members and largely serves a ceremonial role as the head of the city.63 The mayor may have full voting rights on city council or may only have power to break a tie;64 and the council, not the mayor, appoints department heads and has primary control over the city budget.65

57 See Alan Ehrenhalt, The Mayor-Manager Conundrum, GOVERNING STATES & LOCALITIES (Oct. 2004), http://www.governing.com/topics/mgmt/Mayor-Manager-Conundrum.html [https://perma.cc/YXL2-GR3Q] (pointing out the challenges a city faces in trying to design a system that promotes efficiency and accountability equally: “It can hire a manager to replace wasteful political patronage with non-partisan administration, but in doing that it gives up the benefits of having highly visible political leadership. Or it can choose a strong mayor, and get the leader it is looking for. But as often as not, that brings in an element of managerial cronism and politically tainted policy decisions.”).


60 Mayoral Powers, supra note 58.

61 See id.

62 Id.

63 See Forms of Municipal Government, supra note 25.

64 See, e.g., Functions of City Council, CITY OF CENTER, TEX., https://www.center.texas.org/city-council/functions-city-council [https://perma.cc/6MHL-CY4A] (“The mayor is recognized as the head of the city government for ceremonial and emergency purposes but is not a voting member of the Council except to break a tie.”).

65 See COLO. MUN. LEAGUE, supra note 59, at 13.
Furthermore, in a weak mayor system, which is often correlated with a council-manager system, there is no traditional separation of powers: the mayor typically has minimal executive powers and may simply share legislative power with the council (if she is a voting member).66 And while the council delegates administrative authority to the city manager, the city council retains the ability to overrule that authority, and thus may be potentially more involved in the day-to-day administration than would be permitted in a mayor-council system.67

Role of City Councils. As noted above, unlike at the state and federal levels of government, there is no constitutionally mandated separation of powers at the local level: city councils perform both legislative and non-legislative functions.68 For example, city councils in both council-manager and mayor-council forms of government commonly act as quasi-judicial decision-making bodies on land use matters, such as rezonings, special use permits, and subdivision applications.69

As the elected legislative body of cities, city councils have primary responsibility for setting city policy through the enactment of local legislation.70 Traditionally, this has meant enacting laws related to the allocation of public

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66 See Forms of Municipal Government, supra note 25.
67 See COLO. MUN. LEAGUE, supra note 59, at 13.
68 The structure of council-manager cities underscores this point: as noted above, in such cities, all governmental power is held by the city council. See 1 John Martinez, Local Government Law § 9:7 (West 2017) (noting that under its plenary legislative authority, state legislatures may, but need not, create separate branches of local government by statute). The exact contours of separation of powers at the local level vary from state to state. See Zale, supra note 5, at 852–53 (discussing how states vary in their approach to separation of powers at the local level).
69 See Zale, supra note 5, at 852–53.
70 See, e.g., City Council, CITY OF LEXINGTON, VA., http://lexingtonva.gov/gov/city_council.htm [https://perma.cc/GUV9-TKJV] (“The City Council is the legislative and policy-making body of the city.”); COLO. SPRINGS, COLO., CHARTER art. III, § 3–10(a)–(b) (2010), http://d3n8a8pro7vhmx.cloudfront.net/coloradospringsforward/mailings/57/attachments/original/CityOfColoradoSpringsCharter.pdf?1417735165 [https://perma.cc/4N32-UVUK] (“All legislative powers of the City shall be vested in the Council, except as otherwise provided by law or this Charter. . . Except as otherwise set forth herein, whenever an executive or administrative function or duty shall be required to be performed by ordinance, the same shall be performed by the executive branch and not by the legislative branch.”). Although policymaking authority is vested in city councils, and the local executive (the mayor in a mayor-council system or the city manager in a council-manager system) is tasked with implementing policies, the line between policymaking and administration can be porous. See, e.g., Roles and Responsibilities of Local Government Leaders, MUN. RES. SERVS. CTR., http://mrsc.org/Home/Explore-Topics/Governance/Offices-and-Officers/Roles-and-Responsibilities.aspx [https://perma.cc/3MBU-NUZN] (“Mayors, county executives, city managers, and staff do not make policy decisions. However, they have strong influence on the policy-making process and its resultant decisions. For example, they propose budgets, oversee staff-led studies and analyses related to proposed policies, and make policy recommendations to councils.”).
goods, such as education, land use, and infrastructure. But city councils, particularly in home rule cities, have broad authority to enact a wide range of public health, safety, and welfare measures. In response to the needs and demands of residents—and in response to inaction by state and federal lawmakers—councils in cities large and small have enacted policies on a wide range of issues that go beyond the traditional municipal focus on roads and schools, and encompass issues ranging from environmental regulation to consumer protection to election law reforms.

In addition to setting policy—which council accomplishes not only by passing ordinances but also through a range of other policy-related actions, such as adopting the annual budget (which sets fiscal priorities), making decisions about city contracting and entering into intergovernmental agreements, and appointing members of administrative commissions—city councils also perform other duties. Some of these responsibilities are mandated by state or federal law, such as ensuring the city’s compliance with election rules. Other duties are political, rather than legal: for example, a significant part of a council member’s role is providing constituent services. Constituent services refer to the expectation that council members or their staff will be available to address the individualized needs and concerns of constituents, with respect to everything from responding to complaints about trash pickup times to assisting residents with permit applications. Empirical surveys indicate that constituent services are a significant and time-consuming part of a council member’s job, occupying as much as one-third to one-half of the total time members spend on council-related work.

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71 See KAREN M. KAUFMANN, THE URBAN VOTER 19 (2004) (describing the decisions of local lawmakers as primarily allocational in nature: “who will receive how much and at the expense of whom”).

72 See infra Part II.B.2 (discussing home rule cities’ broad powers).


74 See, e.g., Elections, CITY OF WATAUGA, TEX., https://www.cowtx.org/826/Elections [https://perma.cc/B5DF-PFXK] (“The City of Watauga is a Home Rule municipal government and operates under a Council-Manager form of government. . . . City elections are conducted in accordance with the Texas Election Code . . . each year.”).

75 See United States v. Brewster, 408 U.S. 501, 512 (1972) (stating that constituent services “are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative. . . .”).

76 See Joshua Bone, Stop Ignoring Pork and Potholes: Election Law and Constituent Service, 123 YALE L.J. 1406, 1411 (2014) (“The term ‘constituent service’ involves a set of relationships between individuals and their representatives that are often personal, idiosyncratic, and hidden from public view.”).

77 See SVARA, TWO DECADES, supra note 15, at 11–12 (presenting survey results on how much time council members reported spending on constituent services in proportion to overall time spent on council-related activities and noting that constituent services take up
To provide a more complete picture of the legal powers and duties of city councils, Table 1 below provides an overview of the various functions performed by city councils, as well as the role (if any) of other institutional actors with regard to specific functions. How much of the council’s overall agenda each of these functions occupies necessarily varies by city, depending not only on the scope of the city’s legal authority (in particular, whether it is a home rule city), but also on the size of the city, the staff support, the level of involvement of the mayor and other government officials, as well as idiosyncratic differences among council members. However, the first three functions listed in Table 1—adoption of an annual budget, enacting ordinances, and constituent services—are the core functions of any local legislature.

It is also important to recognize that some functions described below have additional layers of granularity not captured in this tabular summary. For example, the category of “enacting local ordinances” includes a vast range of possibilities. Many local ordinances can be described as “nuts and bolts” ordinances which simply keep the city operational, such as ordinances setting fees for use of city recreational facilities, establishing rules for city procurement processes, clarifying vesting requirements for public employee pension benefits, or updating address numbering for the street grid. Other local ordinances look more like administrative decisions and may affect only a few individuals or even just a single resident or property owner; this is particularly true in the land use context, such as with rezoning decisions. Other ordinances may have broader ramifications, not only for the city adopting them, but also in terms of shaping the public policy debate in other cities, as well as at the state and federal levels, such as the adoption of anti-smoking ordinances in cities in the 1990s, or the living wage ordinances being adopted in cities today.

While acknowledging that there is more complexity to city council powers than can be captured in a tabular summary, the following table nonetheless offers a snapshot of the typical responsibilities of city councils, as well as a comparative summary of other institutional actors with whom particular

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79 See INST. OF MED., SECONDHAND SMOKE EXPOSURE AND CARDIOVASCULAR EFFECTS: MAKING SENSE OF THE EVIDENCE 113 (2010) (“[D]uring the 1990s state and local governments across the country enacted an increasing number of more restrictive bans, including bans on smoking in most workplaces in some states.”).

responsibilities may be shared or alternatively held by. I will return to this table in Part III, as it will be helpful in thinking through instances when the diminished power of a part-time city council might result in particular city council powers being unexercised versus being redistributed to other actors.

Table 1: Powers and Duties of City Councils

<table>
<thead>
<tr>
<th>Powers and Duties of City Councils</th>
<th>Roles of Other Institutional Actors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption of annual budget(^{81})</td>
<td>In mayor-council cities, the mayor typically submits an initial budget draft and may have veto over the council vote.(^{82}) In council-manager cities, the manager typically submits an initial budget draft.(^{83})</td>
</tr>
<tr>
<td>Enactment of local ordinances, resolutions, and/or motions in furtherance of public health, safety, welfare (i.e., legislative exercise of police powers)(^{84})</td>
<td>Ordinances may be proposed by the council itself, or by the mayor, city staff, residents, interest groups, etc.(^{85})</td>
</tr>
<tr>
<td>Constituent services(^{86})</td>
<td>Other elected executives (for example, mayors) are also typically expected to perform constituent services.(^{87})</td>
</tr>
</tbody>
</table>

\(^{81}\) Adoption of an annual budget is often the major responsibility of a city council: in developing and adopting an annual budget, the city council makes a wide range of policy decisions, such as determining which city-provided services will be maintained, increased, diminished, or eliminated; how much funding various city departments and the public employees working in them will receive; and setting the rates for sales, property, and other taxes (if authorized under state law). See COLO. MUN. LEAGUE, supra note 59, at 41.


\(^{83}\) See COLO. MUN. LEAGUE, supra note 59, at 11.

\(^{84}\) The scope of local legislative authority to enact ordinances varies, depending on whether the city has home rule authority or not. In home rule cities (sometimes referred to as charter cities), local legislative authority is generally fairly broad, subject only to the limitations of the state’s home rule; in non-home rule cities (sometimes referred to as non-charter cities) where Dillon’s Rule applies, local legislative authority is typically limited to only those powers that have been specifically authorized by the state. See BRIFFAULT & REYNOLDS, supra note 41, at 327.

\(^{85}\) See, e.g., Functions of City Council, supra note 64.

\(^{86}\) City Councils, NAT’L LEAGUE CITIES, https://www.nlc.org/city-councils [https://perma.cc/6VCG-EM22] (noting constituent services as one of several possible responsibilities of local government).

\(^{87}\) See, e.g., Rick Rojas, His Home Flooded, the Port Arthur Mayor Puts His City First, N.Y. TIMES (Sept. 17, 2017), https://www.nytimes.com/2017/09/17/us/harvey-port-arthur-mayor.html?&_r=0 [https://perma.cc/QR2H-NRSV] In the weeks after Hurricane Harvey, the role of the Port Arthur, Texas mayor greatly expanded.
Powers and Duties of City Councils | Roles of Other Institutional Actors
--- | ---
Appointment, termination, and general supervision of city manager\(^8^8\) | While mayor-council cities typically do not have a city manager, some cities have adopted a hybrid form of government (mayor-council with a city manager, often called an administrator). In these cities, appointment and supervisory authority over the administrator may be shared between council and mayor.\(^8^9\)

Decisions about land use, planning, and/or zoning\(^9^0\) | Certain types of land use decisions (variances, conditional uses, subdivisions, etc.) may be delegated to administrative bodies, such as planning and zoning boards. Final decisions may or may not require city council approval.\(^9^1\)

Holding of regular meetings and public hearings\(^9^2\) | Not applicable.

Normally the job of mayor is part-time, requiring only one white button-down shirt embroidered with his name and the city logo. Lately, his mother has been washing that shirt every morning. Mr. Freeman has spent his days racing around the city, lobbying a visiting senator for federal aid one moment, sitting next to a woman sobbing onto his shoulder the next. He has focused on practical matters like restoring trash pickup, reopening schools and finding homes for displaced families.

\(^8^8\) See, e.g., *City Manager, City of Saratoga, Cal.*, https://www.saratoga.ca.us/DocumentCenter/View/1381/City-Manager [https://perma.cc/GEP3-PCXA] (explaining that the Saratoga City Council has the power to appoint, oversee, and remove city manager); *City Manager, City of Buda, Tex.*, https://www.ci.buda.tx.us/104/City-Manager [https://perma.cc/D2L6-BZGL] (specifying that city manager is appointed by Buda City Council for an indefinite term and is removable by city council).

\(^8^9\) See COLO. MUN. LEAGUE, supra note 59, at 10 (discussing this hybrid dynamic).

\(^9^0\) As noted above, some land use decisions, such as rezonings, may be considered legislative actions and are enacted through the adoption of an ordinance (and thus technically are a sub-category of the broader “enactment of ordinances” category above). Other land use decisions, such as variances, are considered quasi-judicial or administrative actions. *See 8A EUGENE McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:249 (3d ed., rev. 2019).*


\(^9^2\) See, e.g., COLO. SPRINGS, COLO., supra note 70, § 3–60(a)–(b) (“The Council shall meet at least once a month in legislative session, and the Council shall prescribe the time and place of its legislative sessions and the manner in which special meetings thereof may be called.”).
<table>
<thead>
<tr>
<th>Powers and Duties of City Councils</th>
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</thead>
<tbody>
<tr>
<td>Approval of city contracting(^{93})</td>
<td>May be subject to review and/or approval by other governmental authorities or elected officials (for example, state or local auditors, subject-specific state agencies, labor relations boards, etc.).(^{94})</td>
</tr>
<tr>
<td>Authority over decisions regarding real and personal city property, including acquisition, disposition, and the exercise of eminent domain(^{95})</td>
<td>Not applicable.</td>
</tr>
<tr>
<td>Establishment of property tax rate and proprietary public utility rates(^{96})</td>
<td>State law may establish limitations on property tax rates;(^{97}) state law or interlocal agreements may establish other requirements with regard to public utility rates.(^{98})</td>
</tr>
<tr>
<td>Issuance of municipal bonds(^{99})</td>
<td>State law or the city charter may require voter approval for the issuance of municipal bonds.(^{100})</td>
</tr>
</tbody>
</table>

\(^{95}\) See, e.g., City Councils, supra note 86.  
\(^{96}\) See, e.g., Utilities, City of Livingston, Tex., https://www.cityoflivingston-tx.com/154/Utilities [https://perma.cc/GE93-JPW] (“Rates for all [municipal utility] services are established by municipal ordinances which are adopted and approved by the City Council.”).  
\(^{97}\) See, e.g., N.Y. St. Off. Comptroller, Understanding the Constitutional Tax Limit 2, https://www.osc.state.ny.us/localgov/finreporting/cities.pdf [https://perma.cc/3E2Y-C32X] (“The New York State Constitution places a legal limit on the authority of cities, as well as counties and villages, to impose property taxes. Statutes intended to enforce these constitutional provisions require the Comptroller to withhold certain local assistance payments if taxes are levied in excess of a municipality’s tax limit.”).  
### Powers and Duties of City Councils

<table>
<thead>
<tr>
<th>Service on local, regional and/or inter-jurisdictional entities[^101]</th>
<th>Not applicable.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption of legislative agenda identifying policy goals and interests to be lobbied for at the state and/or federal level</td>
<td>May be formal or informal; often a cooperative effort with mayor; may involve cooperation with other local governments[^102]</td>
</tr>
<tr>
<td>Appointment and/or approval of appointments for designated city positions[^103]</td>
<td>Council itself may appoint certain designated positions (typically high-level city employees, such as the city attorney or members of city boards and commissions), or it may confirm candidates for such positions appointed by the mayor or manager[^104]</td>
</tr>
</tbody>
</table>


[^102]: See, e.g., *Frequently Asked Questions (FAQ) About City Government*, CITY OF TUCSON, https://www.tucsonaz.gov/gov/frequently-asked-questions-faq-about-city-government [https://perma.cc/5RKE-K3ML] (“There are some issues with which Mayor and Council must approach a higher form of government, such as the Arizona State Legislature or Congress, to get resolved. Consequently, Mayor and Council form a Legislative Agenda to advocate solutions for local problems.”).


[^104]: Compare About Houston, CITY OF HOUSTON, TEX., https://www.houstontx.gov/abouthouston/citygovernment.html [https://perma.cc/DBG7-VNJN] (describing one of Houston’s city council’s roles as “confirming the mayor’s appointments”), with COLO. SPRINGS, COLO., *supra* note 70, § 3–10(e) (describing the requirement that the Colorado Spring’s city council “appoint by the concurring vote of a majority of its members a City Auditor”).
<table>
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<th><strong>Powers and Duties of City Councils</strong></th>
<th><strong>Roles of Other Institutional Actors</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Creation and/or abolishment of local administrative commissions and boards&lt;sup&gt;105&lt;/sup&gt;</td>
<td>Council and/or mayor may have authority to create and/or abolish administrative commissions&lt;sup&gt;106&lt;/sup&gt;</td>
</tr>
<tr>
<td>Approval of intergovernmental agreements&lt;sup&gt;107&lt;/sup&gt;</td>
<td>Subject to state law requirements;&lt;sup&gt;108&lt;/sup&gt; the other unit(s) of local government (i.e., the city, the county, and/or special districts) entering into the interlocal agreement typically also must approve any interlocal agreement&lt;sup&gt;109&lt;/sup&gt;</td>
</tr>
<tr>
<td>Authority over boundary change and/or local government formation&lt;sup&gt;110&lt;/sup&gt;</td>
<td>Annexations, deannexations, dissolutions, formation of special districts, and other boundary changes may be subject to approval by city council.&lt;sup&gt;111&lt;/sup&gt; State law may impose additional requirements.&lt;sup&gt;112&lt;/sup&gt;</td>
</tr>
<tr>
<td>Election-related duties</td>
<td>Subject to requirements of state law; typically includes the duty to set election</td>
</tr>
</tbody>
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<sup>107</sup> See, e.g., *Atlanta City Council Approves Intergovernmental Agreement Allowing for the Transformation of Philips Arena, ATLANTA CITY COUNCIL* (June 20, 2017), http://citycouncil.atlantaga.gov/Home/Components/News/News/162/175 [https://perma.cc/3LW4-BGY5].

<sup>108</sup> See, e.g., *COLO. REV. STAT. ANN. § 29-20-105(1) (West 2019)* (“Local governments are authorized and encouraged to cooperate or contract with other units of government...for the purposes of planning or regulating the development of land including, but not limited to, the joint exercise of planning, zoning, subdivision, building, and related regulations.”).


<sup>112</sup> See, e.g., *OHIO REV. CODE ANN. § 709.02(A) (West 2019)* (“The owners of real estate contiguous to a municipal corporation may petition for annexation to a municipal corporation...”).
<table>
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<th>Roles of Other Institutional Actors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigative powers(^{114})</td>
<td>Not applicable.</td>
</tr>
<tr>
<td>Fulfill other duties pursuant to local, state, and/or federal law</td>
<td>Local, state, and/or federal law may impose other duties on city councils, to perform alone or in conjunction with other institutional actors.</td>
</tr>
</tbody>
</table>

### B. Part-Time Versus Full-Time

Part II.B begins by unpacking the meanings of “part-time” versus “full-time” in the context of city councils, and then turns to a brief discussion of why the part-time model is such a prevalent institutional design choice for city councils.

#### 1. Defining Part-Time

In addition to the structural features discussed above, cities can also be characterized by their use of a part-time or full-time city council.\(^{115}\) These labels may appear to be self-explanatory, but precisely defining the terms in this context is less than straightforward.\(^{116}\) Most cities do not officially designate council members as full-time or part-time; and in those that do, the label is rarely defined.\(^{117}\) Elected officials are typically not considered government

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\(^{113}\) See, e.g., HOUSTON, TEX., supra note 100, at art. V, § 3 (“It shall be the duty of the City Council to establish the boundaries of districts covering the entire City for the purpose of electing District Council Members. Such boundaries shall be established by ordinance . . . .”).

\(^{114}\) See COMM. OF SEVENTY, supra note 82, at 13 (“[Philadelphia] City Council has the power to conduct special hearings, called inquiries or investigations, to gather information to aid its legislative work. A resolution authorizing an investigation must first be passed by a majority vote . . . .”).

\(^{115}\) Applying these labels to an institution serves as shorthand for the status of the elected officials serving in that institution: a part-time city council is part-time because the position of city council member is part-time.

\(^{116}\) See Full- and Part-Time Legislatures, supra note 23 (“It seems like an easy question: Which legislatures are full-time and which ones are part-time? But with 50 different formulas for designing a state legislature, it’s difficult to paint this issue in black and white.”).

\(^{117}\) Unlike other structural features of city government, which are typically clearly delineated in a city charter—such as the form of government as council-manager or mayor-council or the designation of council elections as at-large or by district—the part-time or full-time status of city council members only rarely is officially designated by city charter or local ordinance. See, e.g., J. Edward Johnson, Dir. of Legislative Affairs for Columbus City Council, Employment Status of City Council Members, Presentation Before the City of Columbus Charter Review Committee Charter Review Commission 2 (2016), https://www.columbus.gov/uploadedFiles/Columbus/Elected_Officials/City_Council/Charter_Review_Commission/2016_Committee/2016-1215%20Full%20time%20v.%20part%20time%20remarks.pdf [https://perma.cc/Y63Z-2XAB] (“Often times, when
employees, so importing definitions of the term from the employment law context does not neatly map onto the positions of city council members. There is also no automatic correlation between the two structural forms of local government discussed above—the mayor-council form and the council-manager form—and the part-time or full-time status of elected officials. Furthermore, because individual cities differ in terms of population and demographics, there is no standardized prototype of a part-time council, but rather a continuum of institutional design arrangements that fall under the banner of “part-time.”

However, by surveying empirical data about the institutional design arrangements of different types of city councils, as well drawing on political looking at the cities where council members are part-time, the language is not informative as to the necessary time and attention required to be an effective local elected official.”). For example, of the ten most populous U.S. cities, only three have charter provisions defining the part-time or full-time status of the city council or council members. See Houston, Tex., supra note 100, at art. VII, § 1 (“The Councilmen shall not be required to devote their full time to the duties of their offices.”); San Diego, Cal., Charter, art. III, § 12(f) (2018), https://docs.sandiego.gov/citychart/Article%20III.pdf [https://perma.cc/7SQU-88BM] (“Council members shall devote full time to the duties of their office and not engage in any outside employment, trade, business or profession which interferes or conflicts with those duties.”); San Jose, Cal., Charter art. III, § 407 (2018), http://sanjose.ca.gov/documentcenter/view/85489 [https://perma.cc/M89F-E86W] (“The base salary shall be in an amount which takes into account the full time nature of the office and which is commensurate with salaries then being paid for other public or private positions having similar full time duties, responsibilities and obligations.”).

See, e.g., Ill., Ill. Mun. Code §§ 2-152-140(b)-(c) (defining “[e]mployees” as “individuals employed by the City of Chicago, either full-time or part-time,” and separately defining “[e]lected officials” as “the mayor, city clerk, city treasurer, and aldermen of the City of Chicago”); Karen Murphy, County Commissioners: Full- or Part-Time?, Tallahassee Rep. (Apr. 25, 2017), http://tallahasseeereports.com/2017/04/25/county-commissioners-full-or-part-time/ [https://perma.cc/63S7-ZWD7] (noting that Florida county “commission positions are not specified as full- or part-time in any . . . county charter, ordinance or Florida statute because the commissioners are not employees, they are elected officials”).

Furthermore, the part-time label does not have a consistent meaning in the employment law context. See, e.g., Part-Time/Full-Time Status, Tex. Workforce Comm., https://twc.texas.gov/news/efte/part_time_full_time.html [https://perma.cc/4WQE-GKPB] (“Texas and federal laws leave it up to an employer to define what constitutes full-time and part-time status within a company and to determine the specific schedule of hours.”).

See DeSoto et al., supra note 20, at 161.

In part because there is no single, absolute definition of “part-time,” there can be confusion about what the term means even among elected officials themselves. What one person believes is a part-time position, another may believe is full-time (or vice-versa), even when those people are members of the same city council. See Zale, supra note 5, at 856–57 n.82 (describing conversations with Chicago aldermen concerning whether their positions were full- or part-time, in which “three indicated that the position was full-time; two indicated it was part-time; and one indicated it was part-time but with full-time hours”).
science literature about professionalism in state legislatures, it is possible to identify a set of four criteria that can be used to distinguish part-time positions from full-time ones: (1) compensation; (2) permissibility of outside employment; (3) formal time commitments; and (4) institutional resources.

Compensation. Pay is often the clearest objective indicator of whether an elected office is considered full-time or part-time. In studies of state legislative professionalism, higher pay is one of the signifiers of professional state legislatures, and the more professional a state legislature is, the more likely it is to be considered a full-time legislative body. While pay for public sector employment is not necessarily comparable to private sector employment, relatively higher pay signals that the position is a “career” position, whereas lower pay provides a signal that legislators are expected to keep their outside employment (or have independent means to support themselves). While the salary amounts for council positions that are considered full-time vary

122 See Full- and Part-Time Legislatures, supra note 23 (using the indicia of professionalism to categorize state legislatures into full-time, hybrid, and part-time bodies). Professionalism is a proxy for full-time status used by political scientists studying state legislatures. See John R. Hibbing, Legislative Careers: Why and How We Should Study Them, in LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES 37 (Gerhard Loewenberg et al. eds., 2002) (noting that factors indicating legislative professionalism include “session length, member compensation, number of staff, other perquisites, general legislative resources, and committee structures”); Gary F. Moncrief, Recruitment and Retention in U.S. Legislatures, in LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES 59 (Gerhard Loewenberg et al. eds., 2002) (“[T]he concept of legislative professionalization remains a somewhat difficult one to measure precisely. For one thing . . . [there is a] distinction between the components that are directly related to the institution [such as session length] and those that are more related to the incentive structure of the individual [such as compensation].” (internal citations omitted)); Rodriguez, supra note 16, at 649 (“[P]rofessionalism may be difficult to define precisely, but one key operational definition concerns whether state legislatures are made up of professional politicians charged with the responsibility to meet regularly and to conduct legislative business as their principal avocation.”).

123 Lawmakers’ total compensation includes not only salary, but also non-salary benefits, such as per diem payments, expense accounts, and pension benefits. Because of the difficulty in gathering data on these non-salary forms of compensation and the enormous variation across municipalities in the availability of different types of compensation, compensation as used here refers to salary, with the recognition that salary does not necessarily reflect overall compensation. See Zale, supra note 5, at 860–61 (discussing non-salary, as well as non-monetary, components of city council compensation, and the challenges in measurement and comparison created by such non-salary forms of compensation).

124 See id. at 855–56.

125 Id. at 856.

126 See Full- and Part-Time Legislatures, supra note 23 (noting that states in which legislators are well-paid and afforded large staffs usually require they spend eighty percent or more of the hours usually required for a full-time job).
considerably across cities. A nonscientific rule of thumb is that city council salaries at or above the city’s median income are more likely to be considered full-time positions, while those below that level are more likely to be considered part-time.

Permissibility of Outside Employment. Part-time city council positions typically permit council members to have outside employment, subject to conflict of interest rules and other limitations. In contrast, members of full-time city councils are less likely to engage in outside employment, although outright bans on outside employment are rare. The permissibility of outside employment for part-time city council members reflects both expectations about the time and attention that they devote to their positions on city council, as well as the recognition that if outside employment were not permitted, only a limited pool of candidates could afford to serve in a part-time position with relatively low pay.

For example, in San Antonio, which recently adopted a full-time model for its city council, the annual salary for the position is approximately $45,000, while in New York City, full-time city council member’s salary is almost $150,000 annually. See Zale, supra note 5, at 858–60, 869 n.142, 900 n.285 (discussing the reasons for salary disparities between city councils among the 100 most populous cities in the United States).

See id. at 859–60 (noting that a city’s median income is among the factors affecting city council compensation).

For example, some part-time city councils allow outside employment in the private sector, but do not permit outside employment in the public sector, known as dual office holding. See Patricia E. Salkin, Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers, 14 BYU J. PUB. L. 209, 219 (2000) (“The issues surrounding dual office holding regularly arise in small, more rural municipalities where it can be difficult to recruit willing volunteers into public service. It can also arise where one person simultaneously holds two public sector jobs in an effort to earn a full-time salary.”). The permissibility of outside employment for council members may be governed by specific local ordinances or policies, or addressed through general conflict-of-interest rules. Conflict-of-interest rules, when they even exist at the local level, which is not as frequently as one might hope, are often developed and adopted as part of good government and public ethics reforms that are neither temporally nor substantively linked to the variety of other considerations that can give content to the part-time or full-time status of elected officials (i.e., compensation, staff support, etc.). See Vincent R. Johnson, Ethics in Government at the Local Level, 36 SETON HALL L. REV. 715, 725–26 (2006) (“Few municipalities have enacted a code of ethics that provides a simple and comprehensive list of do’s and don’ts for their officers and employees, let alone a more precise document stating obligations susceptible to legal enforcement.”).

See Johnson, supra note 129, at 725–26 (discussing how municipal codes of ethics rarely provide a bright-line test for whether conduct is permissible); Zale, supra note 5, at 856–57 (discussing how Chicago aldermen are technically allowed to maintain outside employment, despite the position requiring full-time hours).


It may not be in local government’s best interest to exclude all individuals with relevant expertise from public service merely because that expertise may give rise to conflict of interest. In smaller towns, a municipality would have a particularly difficult time trying
Formal Time Commitments. In the state legislative context, the length of the legislative session is used as a proxy for the formal time commitments of state legislators; longer and more frequent sessions are correlated with full-time state legislatures, while shorter and less frequent sessions are correlated with part-time ones. Unlike state legislatures, which may meet for only a few months of the year, but for full daily sessions during those months, city councils meet year-round, but typically for only a few meetings per month. A proxy for the formal time commitments of city council members therefore might be the average number and length of regular, special, and committee meetings attended per member per month. Councils that meet more frequently and impose greater committee obligations on their members are more likely to be characterized as full-time, while councils that meet less frequently and use committees to a lesser extent are more likely to be characterized as part-time.

However, it is important to recognize that formal time commitments, as measured by meeting and committee schedules, only represent part of the overall amount of time council members spend on council-related work. Council members typically must spend additional time in preparation for formal meetings by reviewing materials, meeting with staff, and holding informal to find volunteers for its boards if service required volunteers to sever all employment and business connections with the municipality. The goal of local government must be to strike a balance between encouraging broad participation by respecting the legitimate personal interests of public officeholders and preventing conflicts of interest and biases which could adversely influence the objective functions of government.


133 See Ginsberg et al., supra note 3, at 15 (finding, in a survey of fifteen city councils, the median number of weeks during the summer with no official business scheduled was only six); MacManus, supra note 15, at 175 (observing city councils for larger municipalities typically meet weekly, whereas councils for smaller municipalities may meet only monthly or bi-monthly).

134 Committees are regularly used by councils in cities of all sizes and forms of government, though committee use is somewhat higher in larger cities and in those that use the mayor-council form of government. See Svara, Two Decades, supra note 15, at 26–27 (citing statistics on committee use by city size and form of government and indicating that 91% of large cities, 76% of medium cities, and 71% of small cities use committees).

135 See MacManus, supra note 15, at 175 (noting that larger cities, which are more likely to utilize full-time city councils, typically hold weekly meetings, while cities under 10,000 residents in size, which are likely to almost uniformly use part-time city councils, hold bimonthly or monthly meetings, and that council meetings are also “longer in larger cities. The typical council meeting lasts two to four hours in over half of all cities, but four to eight hours in nearly one-fourth of the cities, mostly the larger ones”).
gatherings with the public and interest groups. In addition, as discussed in the previous Part, council members typically provide ongoing constituent services to residents. The amount of time spent on constituent services necessarily varies by individual council member and the particular needs of their constituents, but empirical data from surveys of council members, as well as abundant anecdotal evidence, indicate that constituent services are a significant and time-consuming part of a council member’s job, ranging from one-third to one-half of the total time council members spend on council-related work.

Institutional Resources. A final indicator of the part-time or full-time status of city councils is the extent of institutional resources provided to council members. These resources include the number of staff per council member, the budget given to council members to run their offices, and whether an office is even provided. While there is no set amount of institutional resources that delineate a part-time council from a full-time one, the greater the resources provided to the legislative body to support its operation, the more likely it is to

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136 There may be temporary expansions in the role of local elected officials, such as after a disaster, during which a part-time position in city government becomes a de facto full-time one. See Rojas, supra note 87.

137 See SVARA, TWO DECADES, supra note 15, at 11 (presenting survey results on how much time council members reported spending on constituent services in proportion to overall time spent on council-related activities).

138 See id. Many members of part-time state and local legislative bodies would contend that when constituent services and other ongoing responsibilities are taken into account, their role is actually a full-time one. See, e.g., Getting Paid: Debating the Council’s Outside Income and Salaries, GOTHAM GAZETTE (Dec. 10, 2007), https://www.gothamgazette.com/economy/3738-getting-paid-debating-the-councils-outside-income-and-salaries [https://perma.cc/9GMA-D5VJ] (quoting a city council member who reported, “We don’t work five days a week . . . . You go to church and you still deal with constituent service [sic.]”); Liz Shepard, Counties Differ in How They Pay Board Members, TIMES HERALD (Dec. 6, 2014), http://www.thetimes herald.com/story/news/local/2014/12/06/counties-differ-pay-board-members/20014979/ [https://perma.cc/QF4G-ZR83] (quoting a part-time county commissioner: “I spend more time doing this job than I do my real job.”); see also SQUIRE & MONCRIEF, supra note 10, at 218 (“It is almost certainly the case that the general public overestimates the amount legislators are paid and underestimates the amount of work involved.”); John Aguilar, Aurora Voters Choose Whether to Give Elected Leaders a Pay Hike, DENVER POST (Apr. 17, 2017), https://www.denverpost.com/2017/04/17/aurora-voters-choose-elected-leaders-payhike/ [https://perma.cc/SV5W-YGGS] (“Aurora Councilwoman Marsha Berzins said that although she and her council member colleagues are not classified as full-time employees, she still works 50 hours or so a week on city business. She said she had to give up her job working for an airline at Denver International Airport during her first year on council because she didn’t have time to do both jobs, even though the city’s charter stipulates that council members shouldn’t put more than 20 hours a week into the job. ‘I realized I couldn’t do justice to the citizens of Aurora and have another job . . . .’”); Smith, supra note 6 (“[F]or most members, the demands of [the Texas state legislature] aren’t quite limited to January through May in odd-numbered years [as the state officially dictates]. The needs of their constituents and the issues they must follow to make public policy don’t go away during the interim, nor do the campaigns they must orchestrate to stay in office.”).
be considered full-time. Conversely, the more limited the resources, the more likely the body is considered part-time.

The factors laid out above provide a set of criteria that can be used to designate a city council as either full-time or part-time. Theses labels are not meant to be talismanic; certain criteria, such as low levels of compensation and few institutional resources, may indicate that a particular council position is designed to be part-time, but these criteria may fail to reflect the actual full-time governing responsibilities and time commitments required of the position. The criteria may also point in conflicting directions as to what the status of a particular city council is: for example, a council position with a salary at or near the city’s median income that still allows for outside employment might be categorized as full-time in some cities, but part-time in others. Furthermore, context is important: the same factors that might demarcate a council position as a part-time one in a major urban center—for example, a salary of $40,000 and a single staffer for each member—might qualify it as a full-time position in a smaller municipality. But despite the lack of a bright-line demarcation between a full-time council and a part-time council, the criteria laid out above offer a way to give content to these labels. With this definitional framework in place, the next Part turns to the question of why so many cities utilize the part-time model for their city councils.

139 See supra note 138.
140 Staff support for councils is typically lower in council-manager cities (across all sizes) than mayor-council cities because of the assumption that council can rely on the city manager and her staff for necessary support. See Svara, Two Decades, supra note 15, at 27–28. In contrast, in mayor-council cities, because of the separation of legislative and executive power between the council and mayor, councils in cities of all sizes are more likely to have staff support. See id. (presenting empirical data from a 2001 study of city councils indicating that 97% of city councils in large cities with the mayor-council form of government had council staff versus 80% of city councils in large cities with the council-manager form of government; 61% of city councils in medium cities with the mayor-council form of government had council staff versus 42% of city councils in medium cities with the council-manager form of government; and 36% of city councils in small cities with the mayor-council form of government had council staff versus 23% of city councils in small cities with the council-manager form of government).
141 See Ginsberg et al., supra note 3, at 10 (“In many of the cities, the official designations of ‘full-time’ and ‘part-time’ have become irrelevant for council members.”); MacManus, supra note 15, at 175 (citing statistics on the amount of time council members spend on council matters and noting that “in spite of the fact that a council position technically may be ‘part-time,’ it is closer to a full-time job for many”).
142 For example, in Philadelphia, the city council is paid a six-figure salary; however, because the city’s conflict of interest rules permit council members to retain outside employment (with some caveats), several council members maintain their private-sector, full-time jobs, resulting in ethical concerns and perception problems. See Chris Brennan, Despite Six-Figure Salary, City Council Still a Part-Time Job for Some, Phila. Enquirer (Aug. 8, 2016), http://www.philly.com/philly/news/politics/20160809_Despite_six-figure_salary_city_council_is_still_a_part-time_job_for_some.html [https://perma.cc/S4NN-7YLD] (reporting about the “perception problem” that outside employment creates in Philadelphia).
2. The Prevalence of the Part-Time Model

As noted in the Introduction, the overwhelming majority of cities—eleven out of every twelve of the nearly 20,000 municipalities in the U.S.—utilize the part-time model for their city councils.143 And although the very largest of U.S. cities are more likely to have a full-time city council, the part-time model is otherwise the prevailing institutional design outcome across cities of all sizes, including growing mid-size and larger cities where it might not be expected.144

This Part explores why the part-time model of city councils is so prevalent. Drawing on both public administration literature about local governance structures and political science research on legislative professionalism, this Part identifies several factors related to the objective characteristics of cities, subjective preferences of residents, and background settings of state law, which operate as drivers of the part-time model for city councils. Given the differences between individual cities and background principles of state law in different states, the relative weight of the factors discussed herein as an explanation for a particular city’s choice of the part-time model will necessarily vary. But taken together, they provide a cohesive, descriptive account of why the part-time model is the prevailing institutional design choice for city councils.

Population and Demographics. The first explanation for the prevalence of part-time city councils is simply that the governance responsibilities of most city councils are limited due to the small size and homogeneous populations of most cities. As noted in Part II.A, although the term “city” may instinctively connote a major urban metropolis, in fact, the vast majority of cities are small incorporated places.145 According to the most recent available census data, of the 19,519 incorporated municipalities, almost half—9205—are cities with less than 1000 residents.146 Most of the remaining cities—7339—have less than 10,000 residents,147 meaning nearly 85% of all municipalities are places with less than 10,000 residents.148 Of the nearly 20,000 cities in the United States, only a few hundred exceed 50,000 residents, and only 61 cities have populations over 300,000.149

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143 Svara & Auer, supra note 2, at 29.
144 See id. (“Only 260 cities (8%) reported having full-time members and another 45 have a combination of full and part-time members . . . .”).
145 See U.S. CENSUS BUREAU, supra note 36.
146 Id.
147 This total is based on the most recently available census data (2012), which indicates that 3584 municipalities have 1000–2499 residents; 2088 municipalities have 2500–4999 residents; and 1667 municipalities have 5000–9999 residents. Id.
149 It is worth noting the distinction between the fact that the majority of cities are small incorporated places, but the majority of the U.S. population lives in larger incorporated places. See U.S. CENSUS BUREAU, supra note 36 (indicating that approximately 3.65 million
Not only is the population of most U.S. cities relatively low, but the residents of many cities are also often fairly homogeneous in terms of socioeconomic characteristics such as race, ethnicity, average income, and education levels. As a result, there is unlikely to be the diversity of interest groups vying for the time and attention of local lawmakers that would be seen in a major urban area. While there still may be issues that spark intense disagreements about local government decision-making even under these conditions—land use being a common example—the extent of conflict in many cities is limited by the relative homogeneity of residents. Furthermore, as a practical matter, in smaller cities, there is a proportionally smaller pool of individuals to run as candidates for city council. Thus, there may simply be not enough people who would be willing or able to serve in a full-time body.

Scope of Governance Authority. The governance responsibilities of local lawmakers are also limited by state law. How much authority cities have varies by state, as well as within states, depending on whether the city is a home rule

people in the United States live in 9205 cities with populations of under 1000 residents, while 51.1 million people live in 61 cities with populations greater than 300,000).

See J. ERIC OLIVER, DEMOCRACY IN SUBURBIA 71–72 (2009) (“Although the economic differentiation between central cities and suburbs is well known, what is not often recognized is how internally homogeneous many of these communities are . . . . American cities in general are highly stratified by income . . . . Middle income cities hold a wide range of income groups, but richer cities tend to have only rich people and the poorest cities tend to have mostly poor people.”); Schragger, Strong Mayors, supra note 16, at 2576 (noting that “smaller, more homogeneous communities” often are able to use “technocratic” governance forms, such as part-time councils and professional city managers, in part because “those communities have found ways to insulate themselves from larger economic and demographic dislocations. As economic and demographic circumstances change, however, suburban municipalities will increasingly need political—not just technocratic—governance.”).

See MORE THAN MAYOR OR MANAGER, supra note 15, at 6 (discussing how the council-manager form of government tends to align with the needs of “small, harmonious communities” because in smaller cities, the population is less likely to be “a collection of competing interests” and more likely to be a “community with shared interests”); Robert Cropf et al., St. Louis: Déjà Vu All over Again—Charter Reform Fails, in MORE THAN MAYOR OR MANAGER, supra note 15, at 266 (“[T]he larger the city, the more public services it provides. In other words, the scope and substance of the functional responsibilities of larger cities tends [sic] to be on the whole greater and more diverse than those of smaller ones.”).

See OLIVER, supra note 150, at 71 (discussing the lack of conflict in many small, homogeneous cities).

See Markowitz, supra note 131, at 603 (“In smaller towns, a municipality would have a particularly difficult time trying to find volunteers for its boards if service required volunteers to sever all employment and business connections with the municipality.”); How To: Reduce the Size of Council; Section 818 of the Borough Code, PA. ST. ASS’N BOROUGHS, http://boroughs.org/collection/userfiles/files/How%20to%20Reduce%20Number%20of%20Council.pdf [https://perma.cc/CE62-T55P] (describing a Pennsylvania law that allows municipalities that are unable to fill all the seats on their local legislative body to formally reduce the size of body).

Id.
city. While home rule cities have a relatively broad lawmaking authority, non-
home rule cities have only those powers that state law expressly gives them.\textsuperscript{155} To gain home rule status, a city typically must have a certain minimum population and adopt a charter;\textsuperscript{156} smaller cities may fail to meet one or both of these qualifications. Thus, to the extent that a city is a non-home rule city whose legal authority is limited under state law, there simply may not be a need for a full-time city council, since state law limits the set of governing duties to be accomplished.

\textit{Fiscal Constraints.} Cities, arguably to a greater extent than other levels of government, operate in a severely fiscally constrained environment. Not only are they limited in their revenue-raising ability by numerous tax and expenditure limitations imposed under state law, but they also face competitive incentives to provide tax incentives to mobile capital.\textsuperscript{157} For small cities—and as noted above, most cities are small cities—fiscal constraints may loom especially large: annual budgets in such cities experience greater variances and are subject to more limitations on revenue raising under state law.\textsuperscript{158} While the salaries of a handful of city council members may not be a particularly large percentage of a city’s overall budget, for these types of smaller cities, the cost of full-time salaries and other benefits for elected officials may be a significant cost.\textsuperscript{159} The part-time model may also be perceived as offering cost savings not only because council members are paid less than full-time council members,\textsuperscript{160} but also because the part-time nature of the job is seen as cabining the ability of the city council to engage in activities that would expand government programs or services and thereby increase the overall tax burden of residents.

\textit{Subjective Preferences of Residents.} The underlying values associated with the part-time model—such as those associated with civic volunteerism, limited government, and fiscal restraint—also reflect the subjective preferences of

\textsuperscript{155} See \textsc{Brieffault \& Reynolds}, \textit{supra} note 41, at 327 (describing how Dillon’s Rule constrains the authority of non-home rule cities to those powers that are expressly granted or necessarily implied).

\textsuperscript{156} See \textit{id.} at 330 (‘‘[I]n many states, home rule extends only to some cities (usually the more populous ones) and counties (usually the most urbanized ones), not to all.’’); \textsc{Zale, supra} note 5, at 863 n.105 (‘‘[T]o assert home rule powers, typically a local government must enact a charter . . . .’’).

\textsuperscript{157} See \textit{generally} \textsc{Richard Schragger, City Power: Urban Governance in a Global Age} (2016) (discussing the constraints imposed on cities) [hereinafter \textsc{Schragger, City Power}].

\textsuperscript{158} John Rogard Tabori et al., Town of Univ. Park, Md., Presentation at the Annual Conference of the Mississippi Municipal League: Budget Planning and Economic Forecasting, A Small Town Perspective (June 29, 2011), \textsc{http://www.md municipal.org/DocumentCenter/View/31/Budget-Planning-and-Economic-Forecasting-FINAL?bidId=} [\textit{https://perma.cc/74AF-QPEC}] (noting that small towns often have limited taxation authority, which can lead to greater revenue instability).

\textsuperscript{159} See \textit{id.} (describing labor as “the primary cost driver” of small town budgets).

\textsuperscript{160} There is wide variation, however, in pay across full- and part-time local legislative bodies, both by type (city council, county commission, etc.) and by size of the locality. See \textsc{Zale, supra} note 5, at 857.
many Americans. Polls consistently show that a majority of Americans believe “big government” is the greatest threat to the country.161 A central premise of the Republican platform is that smaller government is better government.162 Even Democrats, who have been traditionally more supportive of an expansive role for the government, have joined the calls for less government.163 By its very design, the part-time model reflects these sentiments: by imposing fewer formal time commitments, providing low compensation, and maintaining an expectation that members will retain outside employment, the part-time model limits the amount of governing a city council will likely engage in.164

Furthermore, governance in the form of a nonprofessional citizen legislature reflects longstanding sociopolitical concerns about government power in the

161 Noam Fishman & Alyssa Davis, Americans Still See Big Government as Top Threat, GALLUP (Jan. 5, 2017), http://www.gallup.com/poll/201629/americans-big-government-top-threat.aspx [https://perma.cc/VT6E-YQ56] (discussing a 2017 Gallup poll in which 67% of those polled thought that “Big Government” was the country’s greatest threat; 26% of respondents indicated “Big Business” was the greatest threat; 5% indicated “Big Labor” was the greatest threat).


164 In this sense, the part-time model can also serve as an anti-entrenchment device, since its limited power and limited pay may reduce the appeal of the position to those who would focus more on getting reelected than on lawmaking. See Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 YALE L.J. 400, 402 (2015); David L. Sollars, Institutional Rules and State Legislator Compensations: Success for the Reform Movement?, 19 LEGIS. STUD. Q. 507, 517 (1994) (“If a legislator views the job as a career rather than a temporary interlude, keeping the job becomes a paramount concern and many incentive problems arise for the members . . . [and] a vast amount of time and effort is spent in pursuit of reelection.” (citation omitted)).
United States. While full-time, professional legislatures may have advantages over citizen legislatures in terms of resources, expertise, and experience, full-time legislatures can raise concerns about a “separate class” of career politicians. The part-time legislative model arguably can serve as a bulwark against such a separate class developing, by attracting “regular” citizens who are expected to maintain their prior careers, as opposed to those interested in government service as a full-time career. Part-time, nonprofessional, citizen governance, the argument goes, can serve “as a democratic check on government and [ensure] that government is responsive to the interests of the public.” The part-time model also appeals to norms in favor of public service, with many of those who hold part-time office at the local level conceding that the position may objectively impose time demands rising to a full-time commitment, but also viewing it as a way of giving back to the community.

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165 See, e.g., Bobby Jindal, \textit{Congress Should Be a Part-Time Job}, HILL (Dec. 1, 2010), http://thehill.com/blogs/congress-blog/politics/131361-congress-should-be-a-part-time-job [https://perma.cc/599C-RZ6P] (arguing that the “Founding Fathers envisioned that being a member of Congress would be a part-time job” and noting that at one time, “Pennsylvania’s state constitution even had a provision calling for members of the Legislature to ‘have some profession, calling, trade, or farm, whereby he may honestly subsist.’ Otherwise, they feared legislators would come to rely on politics as a career, and they would be unable to ‘preserve [their] independence.’”).

166 Studies of state legislatures have found that “the more professional the legislature, the less people approve of it . . . even though . . . contact between representatives and the represented increases with professionalization, as does policy responsiveness.” See SQUIRE & MONCRIEF, supra note 10, at 208.

167 See, e.g., Salvatori & Allen, supra note 9 (voicing the concerns of two former city council members over a proposed pay raise for the current council, who believed that “citizens want their council members to have real jobs, because it is one thing to pass legislation, but quite another to have to comply with it”); Linton Weeks, \textit{Hey Congress: Keep Your Day Jobs}, NPR (Dec. 28, 2010), http://www.npr.org/2010/12/28/132294306/hey-congress-dont-keep-your-day-jobs [https://perma.cc/8B9B-S5C5] (quoting a part-time Nevada state legislator, who said that, “unlike certain places that have full-time legislatures . . . in Nevada we have people in our legislature who are teachers, who run nonprofits, who are small-business people, are ranchers, all of whom give a diverse perspective on setting public policy for the state”); Peter Crispino, \textit{For Part-Time Elected Officials, Public Office Is a Juggling Act}, PASADENA VOICE (Mar. 24, 2015), http://www.pasadenavoice.com/stories/for-part-time-elected-officials-public-office-is-a-juggling-act,16427 [https://perma.cc/XK7E-N54Z] (“‘In some ways, I think [a part-time position] keeps you grounded,’ [Maryland County Commissioner] Trumbauer continued. ‘Every day, I face the same struggles that many of my constituents face with family life or budget decisions and the day-to-day grind of a job . . . as opposed to a full-time politician, which by its very definition makes you different than everybody else.’”).

168 See Beth Nolan, \textit{Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials}, 87 NW. U. L. REV. 57, 84 (1992) (“In general, the democratic goal of government in the public interest is served by citizen governance, while the concept of a permanent governing elite is antithetical to the principles of democracy.”).

169 See SVARA, \textit{Two Decades}, supra note 15, at 14–15 (presenting data on reasons council members reported running for office and noting most report “service orientation” reasons, such as “to help a neighborhood, to address issues, and/or to provide leadership for
The force of subjective preferences also helps explain why the part-time model remains the prevailing institutional design choice even in larger cities. It might be expected that as cities grow in size and face more numerous and complex policymaking choices that require more time, attention, and resources from elected officials, a full-time city council would more effectively serve the public interest. But deeply held beliefs in subjective values about citizen legislatures and limited government can drown out objective factors that otherwise indicate that the part-time model is misaligned with the complex and numerous governance needs of larger cities.170

**Background Principles of State Law.** As noted above, the prevalence of the part-time model stems in part from fiscal constraints imposed under state law as well as substantive limitations on the scope of local authority.171 But state law also operates in indirect ways to make the part-time model a likely institutional design choice for city councils. For example, permissive incorporation laws in many states set low population thresholds for the formation of new municipalities, making it likely that the types of cities that currently exist (and that are likely to be formed in the future) are the types of cities whose objective characteristics align with the part-time model for the reasons discussed above.172 The wide range of special purpose districts authorized under state law also makes it possible for cities of any size to be “minimal cities”: cities can outsource many traditional core government services, such as sanitation, stormwater management, and public safety, to special districts, and there often will be fiscal and legal advantages to doing so.173 When services are carved out to special districts, which have their own leadership and governing structures,
the burden on city lawmakers to oversee and make policy related to that subject area is correspondingly reduced, thereby making a full-time legislative body less necessary. \footnote{174} Other state laws operate more directly to promote the part-time model of city councils, such as state laws which cap permissible compensation for local elected officials or that tightly prescribe the duties of local elected officials. \footnote{175}

Background principles of state law also operate in subtle ways to contribute to the prevalence of the part-time model. For example, the legal status of cities as “creatures of the state” and the fact that city governments have traditionally been viewed primarily as service providers, and not as sites of policymaking, reinforce a view of cities as limited sites of governance, needing only limited forms of government. \footnote{176} Even in larger cities with more heterogeneous populations, diversity of interest groups, and complex sets of policy problems, their perceived “smallness” (as compared to the state) may lead to continued support for the part-time model: if the state of Texas or Arizona can function with a part-time state legislative, then arguably smaller units of government, such as Dallas or Phoenix, even if they are major cities, should be able to do so as well.

While part-time city councils are a prevalent and persistent outcome in cities for the reasons discussed above, the part-time model is not without tradeoffs. A range of arguments can be made regarding the part-time model when it is

\footnote{174} Similarly, state laws that authorize privatization make it possible for cities to contract out for many core governmental services traditionally associated with city government. \textit{See generally} Russell Nichols, \textit{The Pros and Cons of Privatizing Government Functions}, GOVERNING STATES & LOCALITIES (Dec. 2010), https://www.governing.com/topics/mgmt/pros-cons-privatizing-government-functions.html [https://perma.cc/YMV3-LZ7G] (discussing advantages and pitfalls for state and local governments contracting out tasks such as trash collection, road repair, and water management).

\footnote{175} \textit{See, e.g.}, MASS. GEN. LAWS ANN. ch. 43, § 17B (West 2018) (limiting city council member salaries to $2000 for cities with populations less than 50,000 and $3000 for cities with populations over 50,000); Eugene Curtin, \textit{Is Bellevue Ready for a Full-Time Mayor?}, BELLEVUE LEADER (Nov. 2, 2016), https://www.omaha.com/sarpy/bellevue/is-bellevue-ready-for-a-full-time-mayor/article_20c07619-9925-5686-813d-315e0926d664.html [https://perma.cc/KA2B-ZR2D] (“A debate likely to emerge in the new year is whether the City of Bellevue should declare the mayor’s job to be a full-time position, and whether a full-time mayor can be granted more power without running afoul of state laws that closely define the duties and privileges of mayors who head cities of the first class.”). In addition, some states have laws that limit how frequently a city charter may be changed, and these laws may also operate as a constraint on the ability of cities to make structural changes to their city councils. \textit{See, e.g.}, Clif LeBlanc & John Monk, \textit{Columbia Voters Reject Strong Mayor}, STATE (Dec. 3, 2013), https://www.thestate.com/news/politics-government/article13830737.html [on file with \textit{Ohio State Law Journal}] (referring to a South Carolina state law that “requires at least four years between referendums to change a city’s form of government”).

\footnote{176} \textit{See} SCHRAgger, \textit{City Power}, supra note 157, at 57 ("[T]he history of local government law in the states has been an ongoing effort to redefine, control, and limit city power, not expand it.").
contested as an institutional design choice. These range from concerns about its potential to limit elected office to only those who can afford to serve and the impacts on the diversity of elected officials;\(^ {177}\) to questions about the representativeness of an institution whose members may need to regularly recuse themselves because of conflicts related to their outside employment;\(^ {178}\) to the challenge of devising ethical rules that ensure adequate disclosure and transparency about part-time lawmakers’ outside interests without imposing requirements that are so onerous that they serve as a deterrent to public service.\(^ {179}\) Conditions in growing mid-sized and larger cities, where there is a greater diversity of competing interests and more numerous and complex governance needs, may particularly raise concerns about the welfare consequences of a part-time city council.\(^ {180}\) While much more could be written about each of these concerns, a comprehensive reckoning of all of the policy and legal implications of the part-time model is beyond the scope of this Article. The more modest goal here is to hone in on how the part-time model impacts the power of city council vis-à-vis other institutional actors, and why those power dynamics matter. The next Part develops a framework that can help clarify and refine our intuitions about what the part-time model means for local legislative power.

### III. THE POWER DYNAMICS OF PART-TIME CITY COUNCILS

Part II provided an overview of what the part-time model for city councils looks like and why it is such a prevalent institutional design choice in cities. Part III turns to analyzing the largely unexplored question of how the part-time model shapes the power dynamics of local government. Part III.A begins by analyzing why part-time city councils have less power than full-time ones, in terms of institutional resources, legislative capacity, and political capital. Part III.B deepens the analytical framework by mapping out how the part-time model can both produce power vacuums and redistribute power away from city councils to other institutional actors. In the former situation, power is unexercised


\(^ {178}\) See Johnson, supra note 129, at 767–69 (outlining the statutory requirement of recusal when faced with conflicts of interest in outside employment).


\(^ {180}\) See SVARA, TWO DECADES, supra note 15 (discussing the increasing amount and complexity of problems that elected leaders in larger cities must respond to).
by the part-time city council and no other institutional actor takes action, while in the latter situation, other institutions exercise power in ways that may diverge from how that power would have been exercised by city council.

A. The Diminished Power of Part-Time Local Legislatures

All things being equal, part-time and full-time city councils have equivalent legal powers, in terms of formal legal authority. In delegating legal authority to cities, state law typically does not make any distinction between whether that authority is exercised by a full-time city council or a part-time one. The designation of “city” under state law confers the same legal authority whether the city is a small town with a part-time city council or a major urban metropolis with a full-time city council: any incorporated municipality will typically have land use authority, authority to raise revenues through taxes and various fees, and general police power authority. Thus, from a formalistic perspective, if two cities are of the same legally designated class and home rule status under state law, a part-time city council in one city has the same formal legal authorities as a full-time city council in another city. However, as scholars have recognized in a range of contexts, formal legal authority is not the same as functional power, and there is a significant difference in how part-time and

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181 I refer here to cities that have equal formal legal authority under state law. For example, charter (i.e., home rule) cities are vested with greater legal authority and powers under state law than non-charter cities. Similarly, some states categorize municipalities into different classes (usually by population bands) and grant different levels of authority to different classes. Within these categories, however, the legal authority granted under state law generally does not distinguish between full-time or part-time city councils: the city council, whatever its form, simply can exercise the legal powers granted to the local legislative body under state law. See generally SCHRAGGER, CITY POWER, supra note 157, at 62–64 (discussing home rule cities, the fight over relative formal power, and the effort to limit the lawmaking role of the city’s legislative delegation).

182 See Briffault, supra note 14, at 73 (“Municipal corporations—variously known as cities, boroughs, towns or villages—are general purpose governments [sic], providing a broad array of public services and authorized to exercise general police powers and impose general taxes on residents within the territorial limits.”). This general statement is subject to a few caveats. As noted above, state law distinguishes between charter and non-charter cities, with the former typically being granted broad home rule authority under state law, the latter only specific grants of authority in specific state laws, such as a state zoning enabling act. There may also be some state legal authority that is dependent on population size. See BRIFFAULT & REYNOLDS, supra note 41, at 330 (“[I]n many states, home rule extends only to some cities (usually the more populous ones) and counties (usually the most urbanized ones), not to all.”); Zale, supra note 5, at 865 (“Typically, home rule local governments are given authority to set their procedures for city council compensation while general law cities’ council compensation procedures are set by state law.”).

183 See SCHRAGGER, CITY POWER, supra note 157, at 1 (examining the nature of city power and distinguishing between a city’s formal authority to engage in specific activities and its actual capacity to govern); see also Alan Rosenthal, The Good Legislature, NCSL ST. LEGISLATURES MAG. (July/Aug. 1999), http://www.ncsl.org/research/about-state-legislatures/the-good-legislature.aspx [https://perma.cc/5TYU-SHFQ] (“Although we
full-time city councils exercise their formal legal authority, due to differences in institutional resources, legislative capacity, and political capital.

Institutional Resources. As noted above, part-time city councils by definition are characterized by less staff support and fewer administrative resources (such as office budgets—or even offices) than full-time councils. Yet the substantive responsibilities that part-time city councils must respond to with their more limited resources can be substantial. For example, even in relatively small cities, city councils are responsible for making policy decisions about a wide range of service needs, determining when and how to exercise regulatory powers to advance the public health, safety, and welfare, and managing annual budgets in the millions. And as cities grow in population, there is a corresponding increase in the number and type of interest groups that compete for the attention and votes of council members. The increase in interest group activity and pressures makes the lack of institutional resources associated with a part-time council particularly acute in larger cities: one empirical survey indicated that eighty percent of council members in large cities (those with over 200,000 residents), without council staff, expressed a need for more staff support, and forty-three percent of council members in large cities, can measure the constitutional powers of governors and legislatures, their real power hinges as much on political factors and traditions as on constitutional and statutory ones.”).

184 See e.g., Nancy Hicks, City Council: Not the Perkiest Job Around, LINCOLN J. STAR (Feb. 4, 2013), https://journalstar.com/news/local/govt-and-politics/city-council-not-the-perkiest-job-around/article_0e14c38d-2e30-50ed-b3d6-b9854ff3fa3.html [https://perma.cc/RBZ5-JZLT] (“Every part-time, Lincoln, Nebraska] council member has a tiny office in the City-County Building. But no phone. And they get no reimbursement for the cost of cellphones, which most use for city-related business. The council has one staff person who handles calls at the office and does general secretarial work. But council members have no staff to help with research.”). The same article also included the following editorial correction underscoring just how few institutional resources part-time city councils may have: “There is no money in the council budget for goodies. Every council member chips in $20 for cookies and candy. When the money is gone they take up another collection. An additional Job Around[part time city council member has a tiny office in the City-County Building. But no phone. And they get no reimbursement for the cost of cellphones, which most use for city-related business. The council has one staff person who handles calls at the office and does general secretarial work. But council members have no staff to help with research.”). The same article also included the following editorial correction underscoring just how few institutional resources part-time city councils may have: “There is no money in the council budget for goodies. Every council member chips in $20 for cookies and candy. When the money is gone they take up another collection. An original version of this story was incorrect in suggesting the cookies were free.” Id.

185 See, e.g., Alvin D. Sokolov & Beth Walter Honadle, How Rural Local Governments Budget: The Alternatives to Executive Preparation, 44 PUB. ADMIN. REV. 373, 375 (1984) (presenting data on the expected expenditures of rural counties in Illinois and California); Tabori et al., supra note 158 (presenting a summary of the annual budget of University Park, Maryland and expenditures relating to general government, public works, and the police department); see also U.S. CENSUS BUREAU, 2016 STATE & LOCAL GOVERNMENT FINANCE HISTORICAL DATASETS AND TABLES, https://www.census.gov/data/datasets/2016/econ/local/public-use-datasets.html [click on US Summary & Alabama-Mississippi] [on file with Ohio State Law Journal] (indicating that as of 2016, local governments as a whole in the United States were responsible for $1,805,682,720 in revenues and $1,838,514,959 in expenditures).

186 See SVARA, TWO DECADES, supra note 15, at 34 (noting that “council members in medium-sized cities are more lik[ely] to complain about interest group pressure” and those “problems are worse as city size increases”).
where there was some existing staff support, expressed a need for more staff support.\textsuperscript{187}

The limited institutional resources of part-time city councils can also affect what council members utilize those resources to do. As noted above, in addition to their policymaking duties, city council members also spend a significant amount of time providing constituent services to residents.\textsuperscript{188} While the constituency services demanded of council members in a smaller city may be manageable on a part-time schedule,\textsuperscript{189} in mid-sized and larger cities where the part-time model is used, a single council member may have tens of thousands of constituents in their district.\textsuperscript{190} But because the institutional design of city councils often fails to adjust to changes in city population and demographics, part-time council members often still have only limited institutional resources to devote to increased constituency demands. As a result of reelection pressures, as well as obligatory norms of representative office, part-time council members may be more likely to spend their limited institutional resources on constituency services rather than policymaking. For example, rather than having their single dedicated staffer gather research about a complicated budget proposal coming up for a vote, a council member may instead decide to have the staffer provide assistance to residents with various service requests.\textsuperscript{191} While

\textsuperscript{187} Id. at 1, 28, 39 (noting the “greater scale and complexity of problems as cities get larger make it harder in large cities to achieve the same level of effectiveness than is achieved in smaller cities”).

\textsuperscript{188} See Bone, supra note 76, at 1413 (noting that studies suggest that legislators receive many requests from constituents for assistance in dealing with the government); Svara, Two Decades, supra note 15, at 11–13 (discussing how constituent services occupy a significant amount of time spent for city council members).

\textsuperscript{189} Even in smaller cities, the time commitments can be outsized. See, e.g., Chantal M. Lovell, City Council: Job Is Part-Time, But It’s a Full-Time Commitment, Napa Valley Reg. (Feb. 3, 2012), https://napavalleyregister.com/news/local/city-council-job-is-part-time-but-it-s-a/article_8f9e9d8a-4e30-11e1-87c1-0019bb29634.html [https://perma.cc/B6AJ-KUT3] (“Most part-time jobs end when employees make their final time-card punch of the day. But if that part-time job is being a member of the Napa City Council, it follows the employee home, to the grocery store, to high school sporting events. City Council members said they spend in excess of 20 hours per week on city-related business, much of which happens after hours, on weekends and in the least-suspected places.”).

\textsuperscript{190} See Squire & Moncrief, supra note 10, at 218 (“As populations grow, so, too, do the demands of the job.”); Zale, supra note 5, at 886 (“[I]t is not unusual for lawmakers of even midsize cities to be responsible for managing multimillion-dollar budgets, coordinating services for hundreds of thousands of residents, and overseeing thousands of public employees.”).

\textsuperscript{191} Empirical surveys of city council members indicate that council members in cities of all sizes spend a significant amount of their time—between one-third and one-half—on constituent services, but that council members in large cities (defined in the study as having a population greater than 200,000) who have full-time outside employment (i.e., who are serving in a part-time role in city council) spend over fifty percent of their time on constituent services, leading the study’s author to suggest that “[w]hereas constituent service is the option if you have more time in smaller cities, it appears to be the expected area of emphasis
this may be a rational allocation of institutional resources from the individual council member’s perspective, it can have the effect of reducing the policymaking impact of the council.

Legislative Capacity. Legislative capacity can be defined in a number of different ways, but at its core, it refers to the ability of a legislative institution to adequately respond to the needs and demands of constituents, to implement actions that yield their intended consequences, and to attract competent individuals to serve in office. While the capacity of every legislature is limited to a certain extent, the institutional design features of the part-time model impose particular constraints on the legislative capacity of city councils.

In particular, because part-time city council positions provide relatively low pay, council members either must maintain outside employment or have an independent source of wealth to support themselves. For those part-time council members with outside employment, the result is that they are “serving to which more scarce hours will be devoted in large cities.” SVARA, TWO DECADES, supra note 15, at 1, 11–12.

192 See Wayne Parent & Michael B. Henderson, The Party’s Over: The Rise and Stall of Louisiana Legislative Independence, 48 LOY. L. REV. 527, 536, 539–43 (2002) (“Capability, therefore, involves both a negative dimension, insulation from exterior influence, and a positive dimension, the means to determine and achieve legislative goals.”). Political scientists often conceptualize legislative capacity in terms of professionalism. See, e.g., James D. King, Changes in Professionalism in U.S. State Legislatures, 25 LEGIS. STUD. Q. 327, 329 (2000) (defining the concept of legislative professionalism as overlapping to some degree with the concept of legislative capacity and “involv[ing] the extent to which a legislature can command the full attention of its members, provide them with adequate resources to do their jobs in a manner comparable to that of other full-time political actors, and set up organizations and procedures that facilitate lawmaking”) (quoting Christopher Z. Mooney, Citizens, Structures, and Sister States: Influences on State Legislative Professionalism, 20 LEGIS. STUD. Q. 47 (1995)); see also Karl Kurtz, Full- or Part-Time Legislature: Which Is Better?, THICKET ST. LEGIS. (Feb. 14, 2013), https://ncll.typepad.com/the_thicket/2013/02/full-time-or-part-time-legislature-which-is-better.html [https://perma.cc/VT2V-4KDY] (“The concept of legislative professionalization is designed to measure the capacity of legislatures and legislators to make policy decisions. Capacity, though, does not necessarily mean performance. A legislature with high capacity can perform poorly (Congress being an example), while legislatures with low capacity can perform at high levels.”).

193 D. Roderick Kiewiet et al., The Implications of the Study of the U.S. Congress for Comparative Legislative Research, in LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES, supra note 122, at 7 (“Every legislature confronts an infinity of potential issues and policy choices but given the limits of time and labor, it can consider only a small number of proposals.”).

194 See, e.g., Turner, supra note 9 (“There are approximately 5,700 people employed by the city of Sacramento, but only nine are elected to make decisions about the future of our region. One is the mayor. The other eight are our City Council members. Fun fact: Because they are considered part-time city employees—and paid accordingly—each of them makes less than some city plumbers and parking lot supervisors. As a result, seven of the eight council members have second jobs.”).
two masters.” While conflict-of-interest rules can be adopted to address ethical concerns raised by this scenario, because council members’ time and attention are divided and they can only devote so many hours per week to government responsibilities, the council may be disadvantaged in terms of efficiency and effectiveness. For example, part-time councils may be hampered in their ability to effectively negotiate city contracts with private parties, which are typically represented by full-time lawyers, lobbyists, and other consultants. Even if there are full-time city staff that provide support to part-time council members, council members must make the ultimate decision on issues. As a result, votes may be delayed, which not only slows the implementation of substantive policies that may be needed to regulate for public health, safety, and welfare, but also can potentially result in increased costs to taxpayers.

The low pay associated with the part-time model can also impact legislature capacity more subtly because of how it may impact the type of individuals most likely to serve and the activities those council members are likely to spend time and attention on. While the part-time model in theory allows anyone to serve, since it does not require giving up outside employment for a career position, in reality only a limited number of careers offer the flexibility needed to maintain outside employment while also serving in a part-time council position. As a

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195 Id.
196 See, e.g., Ted S. McGregor, Jr., What You Pay For, INLANDER (Feb. 12, 2001), https://www.inlander.com/spokane/what-you-pay-for/Content?oid=2173372 [https://perma.cc/GY48-W8VX] (“[T]he shortcomings of a part-time council have become most clear in issues like the Lincoln Street Bridge, which no single part-time council member could ever defuse, and the River Park Square parking garage, where, it appears, a part-time council was ground into submission by its partner (made up of full-time consultants, lawyers, etc.). This is not to say that a full-time council would have averted these and other disasters, but at least the citizenry would know that their elected officials were expected to devote their full attention to the city’s business.”).
197 Particularly in growing mid-sized and larger cities, where there is more likely to be a misalignment between the numerous and complex policy issues the city council is responsible for and the constraints imposed by the part-time model on the ability of the council to effectively respond, the part-time model may result in a kind of catch-22: “It’s really irrational . . . . We don’t want to equip politicians with the resources to do their jobs, and then we blame them when things don’t work the way we want.” Thomson-DeVeaux, supra note 132.
198 See McGregor, supra note 196 (discussing the shortcomings of part-time councils in regard to negotiating contracts with private parties).
199 See, e.g., Marti Mikkelsen, Milwaukee County Board Goes Part-Time, WUWM (Apr. 18, 2016), https://www.wuwm.com/post/milwaukee-county-board-goes-part-time#stream/0 [https://perma.cc/P9S7-84VT] (“[P]art-time member Taylor still has another job and intends to keep it . . . . Taylor says she hopes the newly-reconfigured county board holds its meetings at night, so it’s easier to handle two jobs.”); see also SVARA, TWO DECADES, supra note 15, at 57 (“[A]n increasingly important question in progressively smaller cities is whether the ‘citizen-council member’ who combines regular employment with council service is being driven away from the council because of the demands of the position.”); Zale, supra note 5, at 885 (“Small business owners or independent contractors
result, rather than being filled with a wide swath of individuals from different careers and backgrounds, as the citizen legislature model aspires for, members of part-time councils are often heavily drawn from the business community. While such individuals may be just as civically minded as other residents, the legislative capacity of city councils composed of such individuals may be reduced, since evidence suggests that part-time councils comprised primarily of members from the business sector tend to focus on “running government like a business,” rather than engaging in long-term planning goals and innovative policymaking.

Political Capital. Finally, city councils utilizing the part-time model typically have less political capital to work with than full-time councils do. Political capital as used here refers to the extent to which lawmakers are entrusted by voters to engage in policymaking. While voters may trust individual part-time council members just as much—or just as little—as full-time ones, the part-time model shapes voters’ expectations of those who serve in the position. For example, part-time council members who suggest that their responsibilities are closer to full-time may face political pushback to “perform the job as designed” and be criticized for “getting up to all sorts of legislative and administrative mischief.”

Furthermore, the diminished political capital of the part-time model can create a feedback loop that may make it more challenging to attract individuals to serve in city council. As one scholar has noted: “[A]s the real policymaking discretion of nonfederal office decreases, ambitious and civic-minded citizens

may be able to do so, but hourly and salaried employees are less likely to have the flexibility to devote the additional hours needed for a part-time council position, which may entail attending weekly midday council meetings and responding to time-sensitive constituent requests. Furthermore . . . many officially part-time city councils actually impose nearly full-time responsibilities, further limiting the pool of candidates who have outside careers that can accommodate such a schedule.” (citations omitted)).

See Zale, supra note 5, at 885 (discussing how small business owners and independent contractors are more likely than hourly or salaried employees to have the necessary flexibility to serve on a part-time council).

See Larry Terry, El Paso: Professionalism over Politics in the Shift to Council-Manager Government, in MORE THAN MAYOR OR MANAGER: CAMPAIGNS TO CHANGE FORM OF GOVERNMENT IN AMERICA’S LARGEST CITIES, supra note 15, at 230 (“The elected [part-time council] positions did not pay much. Most politicians had their own wealth, and were only interested in keeping things status quo. They ran government like a business from the basic standpoint of trying to balance the budget. There was no long-term planning approach.”).

See Sharon Moloney, City Council Is Blaming Shirey for Problems That It Has Caused, CIN. POST, June 30, 1999, at 14A (describing dissatisfaction with the part-time Cincinnati city council, “which once met for a couple of hours a week, now drags meeting on for hours almost every day”).


See Moloney, supra note 202.
would abandon nonfederal politics and instead substitute other activities where their public spirit and ambition can be satisfied more fully. The loss of discretion might be an especially great deterrent to local officeholding.\textsuperscript{205}

While we may not want every city council member in every city to be a “public entrepreneur” engaging in innovative policymaking,\textsuperscript{206} the diminished political capital associated with the part-time model means that in cases where we do want such individuals to serve, it may be more challenging to attract them.\textsuperscript{207}

That part-time city councils have diminished institutional resources, legislative capacity, and political capital is in a sense baked into the institutional design of the part-time structure: these limitations are the intentional consequences of an institutional design that is often chosen precisely because of resident preferences for limited government, citizen legislators, and fiscal savings. But the impact of this institutional design choice on power dynamics in local governance has largely gone unrecognized. The next Part turns to unpacking these power dynamics.

B. Where Does Power Go?

As discussed above, a part-time city council has less power—in terms of capacity, resources, and political capital—than a full-time city council.\textsuperscript{208} Where does this power go? On one hand, the diminished power of part-time city councils may mean that power goes unexercised: ordinances that are never passed, city services that are never funded, intergovernmental agreements that are never entered into. On the other hand, the diminished power of part-time city councils may mean that power gets redistributed to other institutions—states, other city officials, other units of local government, and private actors—which exercise power in ways that may diverge from how that power would have been exercised by city council. To better understand the connections between this institutional design choice and city power, Part III.B develops a taxonomy of


\textsuperscript{206}See generally MARK SCHNEIDER ET AL., PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENTS (1995) (discussing how and why certain actors in local government—particularly, mayors, city managers, and individual citizens—emerge as forces of policy innovation).

\textsuperscript{207}See Rob Gurwitt, Are City Councils a Relic of the Past?, Governing States & Localities (Apr. 2003), http://www.governing.com/topics/politics/Are-City-Councils-Relic-Past.html [https://perma.cc/2LRY-WVE6] (“[W]hen little is expected of [city councils], because a city’s most important decisions are made elsewhere, it’s no surprise that over time the ambitions of their members shrink to take in smaller and smaller patches of turf.”). The limited discretion of city council is shaped by factors in addition to the design choice of the part-time model, such as state law limitations and the structural design of the office of mayor as a strong or weak model, which may on their own deter some civically engaged and ambitious individuals from serving. See id.

\textsuperscript{208}See supra Part III.A.
how the part-time model can produce power vacuums and redistribute power to other institutional actors. It is important to note that the discussion herein is a descriptive one; the normative implications of the power vacuums and redistributions of power catalogued below will be analyzed further in Part IV.

1. Power Unexercised

As noted above, a part-time city council has fewer institutional resources and less legislative capacity and political capital than a full-time body. It is therefore logical to expect that a part-time council will do less with its formal legal authority, even if it is equivalent to that of a full-time body. A lack of empirical data makes it challenging to come to definitive conclusions about the absence of action—for example, the fact that an ordinance is not enacted or an intergovernmental agreement is not entered into by a part-time council does not necessarily mean that it would be by a full-time one. However, a theoretical account of the circumstances, in which we might expect to see power vacuums associated with the part-time model, can be built by drawing on legal theory about the various powers and duties of city council set out in Table 1, as well as anecdotal accounts from council members and residents reported in the media. This Part catalogues the types of circumstances in which formal power, if unexercised by city council, is unlikely to be exercised by any other actor.

Powers Exclusively Vested in City Council. As indicated in Table 1, many powers held by city council are powers shared to varying extents with other institutional actors. For example, the council and the mayor are often jointly responsible for drafting a legislative agenda for the city, a policy document that lays out the city’s policy goals to be advocated and lobbied for in the state legislature. If a city council fails to exercise its power to assist in the preparation of the agenda, there is another institutional actor—the mayor’s office—legally authorized to engage in this action. Similarly, while city councils have the power to enact ordinances pursuant to the police power, state legislatures also have the power to enact state law pursuant to their police power. While specific types of home rule and other limitations of state law—such as bans on special commissions or bans on special legislation—may limit the state legislature’s ability to displace local law, for the most part, the broad scope of state police powers and state preemptive authority means that, if it chooses to, a state legislature can both displace police powers exercised by a

209 See supra Part III.A.
210 See supra Table 1.
211 See id.
212 See, e.g., Frequently Asked Questions (FAQ) About City Government, supra note 102.
213 See id.
214 See supra Table 1; BRIFFAULT & REYNOLDS, supra note 41, at 327.
215 BRIFFAULT & REYNOLDS, supra note 41, at 293–302 (describing state constitutional provisions banning special commissions and special legislation).
city council (through preemption) as well as exercise police powers left unexercised by a city council.

However, there are some powers that, if they are to be exercised at all, must be exercised by the city council itself. For example, if two or more local governments wish to enter into an intergovernmental agreement, state law typically requires an affirmative vote of the governing body of each.216 Thus, if City A and County B wish to enter into an agreement for joint services (to more efficiently provide recycling or public transportation services, for example), the agreement must be approved by both the city council and the county’s governing body.217 If a city council does not exercise its power to enter into intergovernmental agreements, no other institutional actor is legally authorized to perform this particular function.218 Similarly, if a city council is vested exclusively with the authority to create administrative commissions to advise on select policy issues and appoint members to those commissions,219 then if the city council does not exercise its power to establish and appoint members to such commissions, no other institutional actor is legally authorized to do so.

While the author is not aware of any comparative studies on how frequently cities with part-time councils enter into intergovernmental agreements or authorize the creation of administrative compared to full-time councils,220 if a part-time council fails to act with regard to these or other types of powers which it has exclusive authority over, there will not be any other actor who can step in to take action.

216 See, e.g., ARIZ. REV. STAT. ANN. § 11-952(f) (2015) (requiring “[a]ppropriate action by ordinance or resolution or otherwise pursuant to the laws applicable to the governing bodies of the participating agencies”).

217 See id.

218 See id.

219 Whether council or the mayor or both are authorized to establish administrative commissions, and the type of commissions they are authorized to establish, varies by jurisdiction. The subject matters that local administrative commissions and boards may advise on is quite diverse. See, e.g., TUCSON, ARIZ. CHARTER & GEN. ORDINANCES, ch. 10A (1987), http://library.amlegal.com/nxt/gateway.dll/Arizona/tucson_az/tucsonarizona charterandgeneralordinances?f=templates$fn=default.htm$3.0$vid=amlegal:tucson_az [on file with Ohio State Law Journal] (describing various community affairs commissions that have been established in Tucson, Arizona, including a “Youth and Delinquency Prevention Council,” a “Commission on Disability Issues,” a “Commission on Food Security, Heritage, and Economy,” and several others); Boards and Commissions, CITY OF HOUSTON, TEX., https://www.houstontx.gov/boards/ [https://perma.cc/6UT6-C45E] (describing various boards and commissions established in Houston, Texas, including a “Bicycle Advisory Committee,” a “Health Benefits Advisory Committee,” a “LGBTQ Advisory Board,” and dozens of others).

220 It should be recognized that the part-time model could actually result in greater exercise of these powers, since a particular intergovernmental agreement might reduce the responsibilities of city council, and an administrative commission may help reduce the workload of council by shifting some responsibilities to commission members. Additional empirical research on this question could thus offer interesting insights.
Political Power Versus Legislative Power. Although not mandated by law, constituent services are an integral part of any legislator’s role, whether Congressperson, state senator, or city council member.\(^{221}\) While members of Congress typically have staff who handle most constituent service needs, for many city council members—who often have no personal staff or only a single shared staff member—providing constituent services requires a significant amount of their time.\(^{222}\) Furthermore, data indicate council members in part-time bodies spend proportionately more of their time on constituent services than members of full-time bodies.\(^{223}\) It impossible to quantify precisely which legislative powers may go unexercised by a council because members are engaged in providing constituent services. However, a logical conclusion to draw from this data is that some exercises of legislative power that would otherwise occur in part-time councils do not occur because part-time council members make the rational decision to utilize their limited time, capacity, and resources to exercise more political power in the form of constituent services.

“Small” Powers. As noted in Part I.A, while high-profile city council policies get headlines—whether progressive ordinances like sanctuary city laws,\(^{224}\) or conservative ones like gun ownership mandates\(^{225}\)—many laws enacted by a typical city council are “nuts and bolts” ordinances involving seemingly mundane, but necessary, logistical and bureaucratic actions, which if left undone would risk the effective functioning of city departments and public services (and the associated voter discontent and bad press).\(^{226}\) Other council actions that may occupy a significant amount of time and attention, but which fail to make headlines, are those required to comply with state or federal law, which the city must satisfy to avoid possible lawsuits or loss of intergovernmental funding.\(^{227}\)

\(^{221}\) See SVARA, TWO DECADES, supra note 15, at 11–12.

\(^{222}\) See id.

\(^{223}\) See id. (showing survey data indicating that in medium cities with part-time councils, members spend forty-three percent of their time on constituent services, compared to medium cities with full-time councils, in which members spend thirty-three percent of their time on constituent services).


\(^{225}\) See, e.g., Nancy Lofholm, Nucla Becomes Colorado’s First and Only Town Mandating Gun Ownership, DENV. POST (Apr. 29, 2016), https://www.denverpost.com/2013/05/24/nucla-becomes-colorados-first-and-only-town-mandating-gun-ownership/ [https://perma.cc/36H4-6XDM].

\(^{226}\) See City Councils, supra note 86 (listing a number of typical city council functions).

\(^{227}\) See, e.g., US Sues Mount Vernon, Alleging Clean Water Act Violations, ASSOCIATED PRESS (June 28, 2018), https://www.apnews.com/cefd19a2b3114046a785f27a358d734 [https://perma.cc/M5RE-ESC4]. A federal lawsuit was filed against the city of Mount Vernon for violating the Clean Water Act by failing to comply with rules meant to stop raw sewage from polluting waterways. Id. The city’s mayor “blamed inaction by the city council on the crisis: ‘I need the public’s help. Tell the council: ‘Do your job,’” he said.” Id.
Because part-time councils have limited resources and capacity, it is rational for them to focus their attention on the most essential of these nuts and bolts responsibilities, and on federally or state-mandated actions. This is not to say that cities with part-time city councils fail to regulate on “small” issues: as a quick online search of local codes of ordinances will reveal, there are any number of idiosyncratic, seemingly minor aspects of local life that city councils have enacted regulations on, from requiring a permit for wearing high heels and banning hats on public property, to highly detailed design standards found in many local land use regulations. But with regard to these “small” exercises of power, if a city council does not act, it is unlikely that any other institutional actors will step in. While the absence of local regulation on high heels or hats is unlikely to be a cause for alarm (and in fact may be welcomed), the absence of regulation on other “small” issues, such as detail-oriented revisions to floodplain building standards or parking requirements for changing development patterns, may prove to be a regulatory vacuum that poses more serious public policy concerns.

2. Power Redistributed

While the diminished power of part-time city councils is likely to result in a power vacuum with respect to the types of actions discussed in Part III.B.1, for other issues—and particularly for those that are contested—the diminished power of a part-time city council may result in a redistribution of power to another institutional actor. Part III.B.2 maps out other institutional actors to

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Part-time lawmakers with less time and fewer staffers end up ceding some of their power. And “power doesn’t go away,” he said. “If you take power away from legislators, it goes to lobbyists or the administration,” said Thomas. A strong legislative branch, he added, “puts a check on a strong executive, and it enables people to look at things in depth that they wouldn’t be able to if they were making $200 a month.”
whom power is likely to be redistributed to as a result of a part-time city council. These redistributions of power can be conceptualized along four axes: (1) vertically to the state;\textsuperscript{231} (2) horizontally to other units of local government; (3) internally to other branches of city government; and (4) orthogonally to private actors.

**Vertical Redistribution of Power.** The balance of power between states and local governments, particularly cities, is one of the central concerns of local government law.\textsuperscript{232} While black letter law suggests that states have the upper hand,\textsuperscript{233} scholars have recognized that the actual power dynamics between states and cities are more nuanced, and that a range of background principles of state law as well as political considerations affect the power dynamics between states and cities.\textsuperscript{234}

The impact of internal structures of local governments on state-local relations has received less attention, but internal institutional design decisions in cities can also affect the power relationship between cities and states.\textsuperscript{235} With respect to the specific institutional design choice of a part-time city council, because such bodies have reduced capacity, resources, and political capital as discussed above, cities with part-time councils may be less likely to act in ways

\textit{Id.} (quoting Clive Thomas, former political science professor at University of Alaska Southeast); Laura Tomaka, \textit{In Midwest, States Split on Whether Legislating Should Be Part-Time or Full-Time, COUNCIL ST. GOV'TS MIDWEST} (July/Aug. 2014), https://www.csgmidwest.org/policyresearch/0814-legislatures-Midwest.aspx [https://perma.cc/X89A-6V4D] Political scientist Gary Moncrief stated that he has “never understood why some legislators want to weaken the legislative institution—which is certainly closer to ‘the people’ than the executive or the judicial institutions. Weakening the legislature simply makes the executive branch relatively stronger, and [] it makes interest groups relatively stronger as well.” (citation omitted). \textit{Id.}

\textsuperscript{231} The part-time model may also redistribute power vertically to the federal government, but given that the state is the intermediary in most federal-local interactions, the discussion herein focuses on vertical redistributions of power to the state.

\textsuperscript{232} \textit{See supra} Part II.A (citing some of the vast literature on the topic).

\textsuperscript{233} \textit{See supra} notes 39–41 and accompanying text.

\textsuperscript{234} As noted in Part II.A, there is an inherent tension between the top-down view of state control over local governments—as represented by Hunter v. Pittsburgh, 207 U.S. 161 (1907) and its progeny cases, Dillon’s Rule, and state preemption—and the view of local autonomy that legal doctrines and principles, such as home rule and bans on special legislation, support. \textit{See Richard Schragger, Decentralization and Development, 96 VA. L. REV. 1837, 1865 (2010) (“[Local government law is] an oft-changing, arguably cyclical battle between political interests (often ‘reformers’ and ‘machines’) that results in a grab bag of institutional constraints, some favoring the centralization of power and some favoring the decentralization of power. Localism is forever contested.”).}

\textsuperscript{235} In states where the state legislature is also considered part-time, the extent of the vertical redistribution of power from the systematic prevalence of part-time local government may be diminished: while the part-time model may diminish the power of city councils, if the state legislature is also part-time, it is not as likely to be a significant recipient of that redistributed power. However, power may flow to other state actors, such as the executive branch and state administrative agencies.
that challenge—or serve as a counterweight to—state authority.\textsuperscript{236} This is not to say that cities with part-time councils cannot engage in innovative policymaking or act in ways that serve as a check against the state: they can and they do.\textsuperscript{237} But for the reasons discussed in Part II, a part-time city council is more likely to spend its limited resources and capacity on running the business of local government in ways that address the immediate service needs of residents.

\textit{Horizontal Redistribution of Power.} The part-time model of city councils also may affect the horizontal distribution of power between different units of local government. In particular, cities with part-time city councils may rely more extensively on special purpose districts to provide core governmental services that would otherwise be within the city’s purview.\textsuperscript{238} Special purpose districts are a specialized form of local government authorized under state law to engage in discrete functions that would otherwise be the responsibility of the general purpose local government, such as a sanitation district, a flood control authority, or a hospital management district.\textsuperscript{239} Special districts offer fiscal and legal advantages that may make them an appealing option regardless of the part-time or full-time status of a city council,\textsuperscript{240} but it is reasonable to think that for cities with part-time councils, the transfer of authority over governmental functions to another unit of government may be particularly appealing. While this may allow the part-time council to focus its limited capacity on its remaining duties,

\textsuperscript{236}While states typically can rely on their power of preemption, as well as their significant control over local fiscal capacity to rein in local governments whose policies they disagree with, states may also on occasion force changes to the internal structure of city councils with the express goal of disempowering them. See Mikkelson, supra note 199. For example, in 2016 the Wisconsin state legislature initiated a referendum process to make the formerly full-time Milwaukee County Board of Supervisors part-time. See id.


\textsuperscript{238}Power may also be redistributed horizontally to counties, which may or may not also have part-time, elected governing boards. See Note, \textit{Impairment of Contracts by Municipalities}, 31 HARV. L. REV. 875, 880 (1918) (noting that “both legislative and administrative powers are vested in city councils and county commissioners”).


because the extent of policy issues that it controls has shrunk, the city council is also less powerful.241

**Internal Redistributions of Power.** Public administration scholars have devoted significant attention to internal power dynamics within city governments.242 For example, public administration scholarship has examined how changes in the form of government (mayor-council or council-manager), type of council elections (district, at-large, or hybrid), and use of term limits affect the balance of power between different local elected officials.243 However, the internal redistribution of power associated with part-time city councils has been less well-explored.

Because the internal structures of city governments vary, where power goes internally as a result of the part-time model of city councils will also vary, depending on the particular institutional design of a city government. In council-manager cities, the council holds legislative, executive, and quasi-judicial powers, and the manager is a city employee hired by the council and delegated administrative and executive authority.244 While formally, the manager is ultimately responsible to the city council as an appointed employee, when the city council is part-time, the result may be that the council defers to, and is more reliant on, the city manager and the administrative staff than a full-time body would be.

In a mayor-council form of government, executive powers are held by the independently elected mayor.245 The potential for power struggles between the mayor and council is built into this form of government, and the local legislature and the local executive each act as a check on the other’s power.246 The part-time status of a city council is thus likely to tip the balance of power in favor of the mayor, particularly if the mayor is of the strong mayor variety. In cities with both a part-time city council and a part-time mayor, the mayor is unlikely to receive a significant boost in power as a result of the part-time city council model, since as a part-time figure herself, her powers are already likely significantly constrained by the city charter or state law. Instead, power is likely to flow internally to the appointed city manager, as well as to the administrative bureaucracy of the city.

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241 See id. at 11.
242 See supra Part II.B.
243 See id.
244 See MORE THAN MAYOR OR MANAGER, supra note 15, at 4, 7.
245 See id. at 8.
246 See SVARA, TWO DECADES, supra note 15, at 52. In mayor-council cities, there is more competition between mayors and councils with regard to “policy initiation”:

[T]here may be tension with the mayor even if they [council] are largely in agreement about policy objectives . . . . [S]ince the council in the mayor-council city has a potentially adversarial relationship with the mayor whom it cannot control, it may be inclined to seek ways to expand its capacity to compete with the mayor or secure greater independence from the mayor.

Id.
In addition to affecting the distribution of power between the local executive (whether mayor or manager) and local legislature, the part-time model also can have implications for the power held by local boards and agencies, such as planning boards, ethics commissions, and myriad other administrative decision-making bodies. Due to its own limited resources, a part-time city council may need to rely more on such agencies, but at the same time have less capacity to oversee them.247

Public-Private Redistributions of Power. In addition to redistributing power to the various government actors described above, part-time city councils also can reshape the power dynamics between public and private actors. While every democratic polity is to some extent an aggregation of collective private interests, it is in cities where this intermingling of the private and public is arguably at its most potent. As Professor Richard Schragger has observed, “the city is an economic phenomenon and a legal one; an agglomeration of person, goods, and capital, as well as a political jurisdiction; a marketplace and constitutional entity.”248 The very term “municipal corporation” reflects the historical origins of the city as a corporate body, which was initially treated no differently under the law than were private corporations,249 and which still today often reflects private, associational values to a greater degree than other types of government.250

Part-time city councils can shift power to private interests in a number of ways. First, part-time councils may result in a shift in power to outside interests with respect to drafting local legislation because a part-time city council simply has fewer resources and less capacity to devote to the task itself.251 Although

247 See Tomaka, supra note 230 (“Michigan Rep. Amanda Price adds that the effort in her state has been fueled by groups of people ‘who believe that a full-time legislature has led to over-regulation and over-taxation of citizens in Michigan. The thought of a part-time legislature may be attractive to some in that it could save tax dollars or reduce the size of government,’ Price says. ‘However, it is important to point out that the bureaucracy would remain in place without as much oversight from elected representatives who can voice people’s concerns.’”).

248 See SCHRAGGER, CITY POWER, supra note 157, at 6–7 (discussing the dual identity of cities: “[T]he city resists our usual distinctions between market and state, private and public, business and government . . . . It is also why we struggle with the city’s legal and political authority, for much of what a city does as a policy or legal matter enhances private wealth or detracts from it.”).


250 See NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS 116–17 (1995) (“[W]hen entrepreneurs solve the collective action problem (as in the creation of many cities), the result is a government that embodies two sets of values—those of the entrepreneur and those of the citizens necessary to the formation effort.”).

251 See Michael B. Berkman, Legislative Professionalism and the Demand for Groups: The Institutional Context of Interest Population Density, 26 LEGIS. STUD. Q. 661, 665, 673 (2001) (noting that less professional state legislatures will likely be less capable of independently evaluating policy and proposing legislation, and therefore will likely rely more heavily on information provided by outside groups).
lobbyists for private industry have not traditionally been a major factor in local politics, they have increasingly turned their attention to local governments. For example, national anti-poverty and labor groups have engaged in a concerted nationwide effort to promote minimum living wage ordinances. On the other end of the political spectrum, the conservative American Legislative Exchange Council (ALEC) has brought its considerable forces to bear on cities in the form of ACCE, the American City County Exchange, which connects local lawmakers with industry groups that can offer model legislation. While one may agree or disagree with the substantive agendas of various outside lobbying groups, part-time local legislators may understandably welcome the outside lawmaking support, as it were. As one part-time city council member noted of ACCE: “[They] can act like ‘an ideal lobbyist,’ filling the void left by the lack of staff—and the ideas they might generate—at the local level.”

The part-time model also shifts power to private actors because the very design of part-time city councils—with its low pay and permissibility of outside employment—evidences a tolerance for, and even expectation of, a certain degree of intermingling of the private and public in elected officials themselves. For example, conflict-of-interest rules for part-time city councils regarding outside employment and interests retain a certain degree of “looseness” that might not be tolerated for full-time bodies, simply because of the need to allow for part-time legislators’ continued outside employment in light of the low salary provided for the position.

252 A notable exception is the so-called “growth machine” in urban land use and development politics. But outside of the land use context, lobbying for private industry at the local level has typically been limited: the sheer number of municipalities and the limited reach of each municipality’s jurisdiction have meant that, except in the case of major urban cities or with respect to particularly sensitive issues, it has been generally more logical for lobbyists to focus their efforts on state lawmakers.

253 See, e.g., Schragger, American Cities, supra note 73, at 1227.

254 See id. (noting such “efforts have generally been spearheaded by national labor and anti-poverty groups working as part of a larger cross-city effort to regulate using the tools of municipal government”).


256 Id. (quoting Todd Grayson, a member of the Perrysburg, Ohio City Council).

257 See Roderick M. Hills, Jr., Corruption and Federalism: (When) Do Federal Criminal Prosecution Improve Non-Federal Democracy?, 6 THEORETICAL INQUIRIES IN L. 113, 121–22 (2005) The nature of local elected office “precludes the sorts of conflict of interest rules used by the federal government. One cannot insist on the prophylactic separation of public and private motives where most decision-makers are part-time officials with extensive private interests . . . . Divestiture, or even disclosure, of private interests is rarely required by state law of lay decision-makers, perhaps because the cost of these remedies would deter what is, after all, unpaid and unglamorous service.” Id.

Finally, the part-time model may shift the balance of power to the private end of the spectrum because cities with part-time councils may rely more heavily on privatization of government services. While the potential cost savings of privatization may appeal to cities of all sizes, regardless of whether city council is full-time or part-time, there is likely to be an even stronger appeal for cities that have part-time city councils. By contracting out for private provision of services—whether information technology or towing services or water utilities—part-time city councils can focus their limited time and resources on other governmental matters. While they may still have to approve annual contracts for privatized services and set up a monitoring mechanism to oversee the outsourced services, there is no longer a city department with public employees and the myriad legal concerns associated with it demanding the council’s attention.

The framework developed in this Part offers a taxonomy of how the part-time model produces power vacuums and redistributes power. This framework is not meant to provide a mathematically precise measurement of how much

259 See, e.g., Russell Nichols, The Pros and Cons of Privatizing Government Functions, GOVERNING STATES & LOCALITIES (Dec. 2010), https://www.governing.com/topics/mgmt/pros-cons-privatizing-government-functions.html [https://perma.cc/YMV3-LZ7G] (“As former mayor of Philadelphia, Pennsylvania Gov. Ed Rendell saved $275 million by privatizing 49 city services. Chicago has privatized more than 40 city services. Since 2005, it has generated more than $3 billion in upfront payments from private-sector leases of city assets.”). However, it is worth emphasizing the “potential” cost savings from privatization: “For governments that forgo due diligence, choose ill-equipped contractors and fail to monitor progress, however, outsourcing deals can turn into costly disasters.” Id. Chicago’s privatization of parking meters, for example, has become a notorious example of privatization gone wrong. See Chicago’s Parking Meter Deal a Lesson in ‘Worst Practices’, BETTER GOV’T ASS’N, https://www.bettergov.org/news/chicagos-parking-meter-deal-a-lesson-in-worst-practices/ [https://perma.cc/NT4F-R58T] (describing various problems created by Chicago’s privatization of parking meters).

260 While the author is not aware of any empirical studies on the correlation of privatization with part-time city councils, empirical data on privatization and small municipalities provide indirect support for this claim. Empirical data on privatization indicate the municipalities most likely to privatize services are smaller municipalities. See, e.g., Yolanda K. Kodrzycki, Privatization of Local Public Services: Lessons for New England, NEW ENG. ECON. REV. 31, 35 (May/June 1994). Further, as noted above, the part-time model, while prevalent across cities of all sizes, is particularly likely to be utilized in smaller cities. See supra Part I.
power is unexercised versus redistributed as a result of the part-time model, nor does it capture the full extent of real-world variables that might affect when power is more likely to shift from a city council to the state versus another unit of local government or private actors. But it does offer an analytical tool to clarify and refine our intuitions about the connections between local government structures and the power of government institutions. The next Part further develops this framework by analyzing the normative implications of these power dynamics.

IV. INSTITUTIONAL DESIGN AND CITY POWER

The framework developed in the previous Part mapped out how the part-time model reduces the effective power of city councils, and how it can both produce power vacuums and redistribute power to other institutions. Once these power dynamics are recognized, a further normative question presents itself: Is the part-time model a problem? On one hand, power unexercised by a part-time city council may be desirable if there is a lack of institutional competence or a risk of city council actions that impose externalities. On the other hand, a power vacuum may be more problematic if welfare-enhancing opportunities are lost and no other institutional actor is likely to address the issue. Similarly, redistributions of power away from city councils to other institutional actors may be appropriate if those other actors have greater institutional competence or can better balance the competing needs of city residents and other parties affected by a particular exercise of power, but may raise countervailing concerns about decisions being made by institutions that are less accountable to city residents.

The challenge is translating these abstract concerns into an analytical tool to assess the normative desirability of part-time city councils. This Part suggests that one way to do so is to think about the factors that lend legitimacy to city councils as decision-makers, as well as considerations that cut against the entity’s institutional legitimacy. Part IV.A proposes a set of normative guideposts that can help us assess the power of city councils, by unpacking factors that enhance or detract from a city council’s institutional legitimacy. Part IV.B applies these guideposts to assess the normative desirability of the part-time model in different types of cities and reflects on other lessons that emerge from this Article’s analysis.

A. Assessing City Councils as Decision-Makers

Determining whether the power dynamics associated with the part-time model are normatively desirable requires grappling with the question of how much power a city council should have. There are no simple answers to this question. It depends in part on one’s view of the role of city councils: Are they more likely to be sites of small-scale civic engagement and valuable laboratories of democracy, or sources of unnecessary layers of government regulation, prone
to policymaking that imposes spillovers and undercuts statewide uniformity concerns? It also depends on one’s view of council members: Are they uniquely well-positioned to act on matters of local import, or are they likely to be well-intentioned but underqualified, drawn from a limited pool of candidates, with conflicts of interest due to outside employment?

The question of how much power a city council should have—and how institutional design can be used to calibrate council’s power—is further complicated because of the multi-dimensional power dynamics at play in city governance, from state-local to intra-local to inter-local and public-private. As a result, there invariably will be tensions in how much power we want city councils to have. For example, a less powerful city council might mitigate concerns we might have about city power in one context or with respect to one other institutional actor, but aggravate concerns we might have about lack of city power in another context or with respect to another institutional actor.

While further empirical study might prove fruitful for investigating possible correlations between metrics of power and specific characteristics of cities—for example, cities of at least W population, with X form of government, and Y type of city councils produce Z% more welfare-enhancing policies than other types of cities—we are unlikely to be able to reduce questions of city council power to a simple formula. However, there are other metrics we can draw on to inform institutional design decisions about city government. In this Part, I suggest that by thinking more deeply about factors that lend legitimacy to city councils as decision-making entities, as well as factors that cut against their legitimacy, we can develop a set of normative guideposts about the values served by city councils as decision-makers, which can in turn be used to judge the extent to which different institutional design arrangements, such as the part-time model, serve those values.

1. Legitimacy-Enhancing Features of City Councils

Representation of Diversity of Interests. Unlike executive officials who act as individuals, legislatures act collectively: when a legislature enacts policy—whether through the passage of individual laws, the approval of a budget, or the creation of an administration agency—it is the result of the collective decision-making of all members of that body. While collective decision-making has

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261 See YATES, supra note 27, at 34–36 (discussing the multi-dimensional nature of city governance as “street-fighting pluralism,” which he defines as a “pattern of unstructured, multilateral conflict in which many different combatants fight continuously with one another in a very great number of permutations and combinations”).

262 See SQUIRE & MONCRIEF, supra note 10, at 169 (discussing the representational role of state legislators). This statement obviously oversimplifies the actual practice of lawmaking in legislatures, which is shaped by internal procedural rules, committees, coalition building, logrolling, and other dynamics that have the result of making laws enacted by legislatures and not the result of collective decision-making by all members of the legislature. The general statement is used here simply to make a comparative point about the
its drawbacks—it can be slow-moving and prone to deadlock, and the compromises that emerge may be unsatisfying—its great advantage is the ability for a diversity of interests to be represented. City councils are “the one institution designed to serve as the collective voice of residents and communities” in cities.263 Members of councils represent different interests across the entire city; particularly when members are elected by a district or in a hybrid system, they can give voice to the competing concerns of neighborhoods or particular groups.264 Vesting city councils with relatively more power as decision-makers ideally produces local policies that benefit the city as a whole, but that must also take into account the needs of different neighborhoods and competing preferences of different groups.265 The risk of such a model, of course, is deadlock over compromise or deference to the preferences of a particular neighborhood or interest group over the needs of the city as a whole.266 In contrast, if other decision-makers have more power—such as the mayor—they can offer a single unifying voice representing citywide interests, but potentially at the cost of representation of a diversity of sub-local interests.267

Democratic Accountability. Unlike many of the other institutions that might make decisions about city policy—such as city managers, appointed boards and commissions, governing bodies of special districts, and private actors—city councils are directly accountable to voters. Thus, vesting relatively more power in city councils, as compared to these other actors, provides voters with an how the structure of city councils, as compared with other decision-makers, allows for a representation of diversity of interests.

263 See Gurwitt, supra note 207.

264 See MacManus, supra note 15, at 169 (“Proponents of mixed systems promote them precisely because they retain some council members who bring a citywide perspective to matters before the council but allow other councilors to represent more narrow neighborhood or group perspectives.”). The size of city councils also affects the extent to which diversity of interests are represented and how effectively they are represented in terms of number of constituents per member. See City Councils, supra note 86 (“While the number of councilmen is proportional to the population of the municipality, there is no national standard of proportion. In addition, the size of a council may reflect the complexity of services provided, the council’s workload, the diversity and size of the population, the political dynamics and preferences of the city.”). City council sizes range widely (from five to fifty-one), as do ratios of constituents per member. See id.

265 See MacManus, supra note 15, at 166 (noting that city councils have evolved from “homogeneous, consensual, part-time and deferential to mayors and city managers” to “more diverse, conflictual, and even more defiant of chief executives”); Svara, Embattled Mayors, supra note 27, at 155 (finding that “council members are more diverse in their characteristics, more activist in their orientation”).

266 See MORE THAN MAYOR OR MANAGER, supra note 15, at 14 (noting critiques of the council-manager form of government are that “city council is prone to dissension; no one can overcome dissension on the city council,” and that there are “too many masters [which] brings diffusion of power, accountability”).

267 See id.
institution to hold accountable for policymaking successes or failures in the next election.\textsuperscript{268}

\textit{Local Autonomy.} The more power held by city councils, particularly vis-à-vis the state, the more local autonomy is enhanced, since policies reflecting the needs and preferences of local residents are more likely to be enacted.\textsuperscript{269} Whether we want cities to have more autonomy, of course, is a highly contested question, as evidenced by extensive scholarly debates over the scope of home rule, preemption, and other state-local conflicts.\textsuperscript{270} But particularly where the needs or preferences of city residents differ from those of residents statewide and do not adversely impact disadvantaged groups, and where there are limited spillover effects of local variation in policymaking, local autonomy would seem to be value worth preserving. Furthermore, while high-profile local activism such as sanctuary city policies garner headlines,\textsuperscript{271} more often than not, city councils enact policy not to intentionally challenge state or federal state law, but to fill in gaps left by the inaction of higher levels of government. For example, the city council of Laredo, Texas, did not pass an ordinance to ban single-use plastic bags because it was looking for a fight with the state legislatures, but because littered plastic bags were clogging stormwater drains, imposing costs on local residents, and no other level of government was taking action on the issue.\textsuperscript{272}

2. Legitimacy-Dimining Features of City Councils

\textit{Efficiency.} The flip side of the accountability and representativeness of any legislative body is a loss of efficiency: when decisions must be made

\textsuperscript{268}See Anne Mette Kjaer, Governance and the Urban Bureaucracy, in THEORIES OF URBAN POLITICS, supra note 29, at 143 (“[I]dentifying power becomes more complex and therefore, holding the exercises of power responsible through institutions of public accountability is rendered more of a challenge.”).

\textsuperscript{269}See SVARA, TWO DECADES, supra note 15, at 29–30.

\textsuperscript{270}The literature on this topic is vast. See, e.g., Nestor Davidson, The Dilemma of Localism in an Era of Polarization, 128 YALE L.J. 954, 958 (2019). Mr. Davidson summarized the basic problem of local autonomy eloquently: “After all, as much as local governments can advance economic fairness, social justice, and policy innovation, they can—and often do—use their power as a tool of exclusion, reinforcing racial and socioeconomic inequality. This is the double-edged sword of localism: local empowerment can be used for desirable as well as pernicious ends.” Id.

\textsuperscript{271}See, e.g., Macias, supra note 224.

\textsuperscript{272}See Chuck Lindell, Cities Can’t Ban Plastic Bags, Rules Texas Supreme Court, GOVERNING STATES & LOCALITIES (June 26, 2018), https://www.governing.com/topics/transportation-infrastructure/tns-plastic-bag-ban-texas-supreme-court.html [https://perma.cc/JV69-F6CA] (“[C]ity officials . . . argued that bag bans are essential to managing litter—a goal that protects animals, saves cleanup costs and limits damage to clogged sewers and drains.”).
collectively, it almost invariably takes longer to reach agreement.\textsuperscript{273} The loss of efficiency not only means that decisions may take longer to make, but also that the decision-making process may end up being more expensive and contentious.\textsuperscript{274} Vesting power in alternative institutions, whether a local executive who does not face the challenge of collective decision-making or a special purpose government with an appointed board not directly accountable to voters, can make for more streamlined and efficient decision-making.

\textit{Need for Expertise}. Individuals elected to city council are almost always generalists with regard to the responsibilities of their role as council members.\textsuperscript{275} Individual members may have particular expertise from their own education or employment that they can draw on with regard to some issues that come before them; for example, a small business owner serving on city council may have particular insights regarding business licensing programs, and a lawyer may be able to contribute specialized knowledge with regard to a range of legal issues. However, council members are not specialists in the sense that career employees in the city planning department or sanitation department are with regard to the responsibilities of their jobs, nor in the sense of being trained professionals in the management of government, which most city managers are.\textsuperscript{276} And unlike the leadership of special districts, which focus on a single or limited set of government activities, such as flood control or fire protection, members of city councils deal with a range of service-related and policy concerns, from planning to infrastructure to economic development to coordination with federal and state governments on a multitude of issues.\textsuperscript{277} Thus, if we want decisions to be made by institutions that have specific types of expertise on particular issues, then arguably city councils are less well-positioned to do so than other actors, such as professional staff or appointed administrative bodies.\textsuperscript{278}

\textit{Tendency Towards Fragmentation}. While a more powerful city council promotes the value of local autonomy, it also creates a greater risk that the council will exercise that power in ways that may have spillover effects on those outside the city’s boundaries. Metropolitan regions are often made up of dozens—or even hundreds—of individual municipalities, which each have a


\hspace{1cm}\textsuperscript{274}See id.

\hspace{1cm}\textsuperscript{275}See generally SVARA, TWO DECADES, supra note 15.

\hspace{1cm}\textsuperscript{276}See Local Government Management: A Career Overview, ICMA, https://icma.org/local-government-management-career-overview [https://perma.cc/4KLY-Z3X5] (indicating that two-thirds of city, town, and county managers have an MPA or other advanced degree).

\hspace{1cm}\textsuperscript{277}See City Councils, supra note 86.

\hspace{1cm}\textsuperscript{278}In an informal discussion with the author, one municipal lawyer said “[t]hank God” for special districts, suggesting that if all of the governing duties that special districts are responsible for were left to part-time city councils, the results would be troubling, to say the least.
local legislative body vested with similar formal legal authority under state law to engage in the provision of services and police power regulations. The spillover problems that result from this fragmented decision-making have been the subject of extensive scholarly interest, particularly in the context of land use. While the problem of metropolitan fragmentation is the result of far more powerful forces than just the institutional design of local legislatures, the well-documented tendency of city councils to make and engage in policymaking with minimal regard to the impacts of those decisions on neighboring communities or the region as a whole cuts against their legitimacy as decision-makers.

_Electoral Disinterest._ Numerous scholarly accounts and empirical studies have documented consistent patterns showing both a lack of competition and low turnout in local government elections. In light of this situation, where council seats are often uncontested and electoral turnout is in the single digits, the legitimacy of council as a representative democratic institution and the accountability of elected officials may be called into question. Other institutional actors that attract more civic engagement, such as mayors, may have a better claim to representative legitimacy and thus may be a preferable situs of institutional power.

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280 An enormous amount of literature discusses the problem of metropolitan fragmentation and spillover effects of local decision-making. Id. at 737 (cataloguing some of this literature).
281 See OLIVER, supra note 150, at 211 (“[C]urrent arrangements and legal standing give almost supreme power to municipalities and set them in dysfunctional competition with each other. The structure of local government law basically treats municipalities as isolated actors and gives them few incentives to cooperate with each other.”).
282 See, e.g., David Schleicher, _Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law_, 23 J.L. & POL. 419, 419–24 (2007) (citing data on the lack of competition in city council elections and suggesting that the lack of competition may in part be the result of lack of partisan signals in many local elections).
283 See id. at 468 (“Mayoral elections, especially those in big cities, produce the type of electoral froth—news media coverage, campaign spending—that can help voters overcome the informational problems they face as a result of not having an accurate party heuristic. City councils do not. As such, to the extent that cities are making decisions about the allocation of political power between a local legislature and a local executive, and care about the extent to which officials are representative of the views of locals, they should grant more power to mayors, and less to councils.”).
284 See id.; see also KAUFMANN, supra note 71, at 13 (“Because the mayor is generally the most visible local official, mayoral elections are typically more salient than other forms of local elections.”); U.S. VOTE FOUND., _FIXING THE PROBLEM OF LOW VOTER TURNOUT IN US LOCAL ELECTIONS: A DATA-DRIVEN SOLUTION_ 8 (2017), https://www.usvotefoundation.org/sites/default/files/US_Vote_LOCElections_Whitepaper.pdf [https://perma.cc/WM5P-6YKR] (“Different forms of local governance can also elicit different levels of turnout. Prof. [Neil] Caren’s [University of Michigan professor] research has shown that elections for city council that appoint a council manager as the chief executive
By unpacking the factors that lend legitimacy to city councils as decision-makers, as well as considerations that cut against their legitimacy, this Part offers a set of normative guideposts for thinking about local legislative power. It should be acknowledged that this is an abstract and highly simplified account that intentionally omits a range of broader considerations about local governance. For example, the same factors that enhance the legitimacy of city councils may also enhance the legitimacy of other institutional actors: democratic accountability can be effectuated not only by a full-time city council, but also through other elected officials, such as mayors and state lawmakers. And there are other institutional design features, such as the status of the mayor as a strong mayor or weak mayor, or whether a council-manager or mayor-council form of government is used, as well as idiosyncratic factors—such as the personalities of those serving in office and the political environment in which they are operating—that can affect the legitimacy of city councils as decision-makers.

But by excluding other variables, this framework allows us to more clearly recognize a set of normative criteria by which to judge the part-time model. If we want to prioritize efficiency and expertise, and to provide a check against metropolitan fragmentation and electoral disinterest, then a part-time city council would seem to be a rational institutional design choice: the fact that power may be unexercised by a part-time council or redistributed to other institutional actors who better serve these values is a normatively desirable outcome. Conversely, if we are more concerned with local decision-making reflecting values of democratic accountability, representing a diversity of interests, and enhancing local autonomy, then a part-time city council is more problematic, since it may result in a power vacuum and redistribution of power away from the very institution that can effectuate those values. The next Part considers the implications of this analysis.

B. Implications of the Analysis

The framework developed in the preceding discussion provides a valuable theoretical account of how the internal structures of city councils affect the distribution of power in governance systems. But the framework also has practical import. Part III.2.A reflects on the implications of this Article’s analysis and suggests that three key insights emerge.

First, applying this Article’s framework allows us to respond to the question posed at the outset: Is part-time government in cities a problem? The answer, as it is so often in the legal context, is it depends. In particular, it depends on what type of city we are talking about. For the majority of cities—which, as noted in Part I.A, are small, homogeneous places that most would refer to as a suburb or small town—applying the normative guideposts above suggests that the part-
time model is in fact an appropriate institutional design choice. By redistributing power away from city councils in these types of cities, the part-time model provides a check on spillover effects associated with excessive municipal fragmentation, which is one of the more vexing problems facing metropolitan regions today.\(^\text{285}\) While it does so at the cost of sacrificing local autonomy that might be served by a more powerful full-time city council, local autonomy is not an unmitigated good. Experience has shown that local autonomy, particularly local autonomy of small, homogenous municipalities, is often exercised in an exclusionary fashion that imposes externalities on neighboring cities or the region as a whole;\(^\text{286}\) one need only look at the seemingly intractable problem of affordable housing to see how incremental decision-making by elected leaders of small, autonomous municipalities can lead to a significant policy problem.\(^\text{287}\) Particularly because state law typically grants equivalent formal legal powers to cities of the same class, regardless of whether they have a thousand or hundreds of thousands of residents,\(^\text{288}\) institutional design arrangements like a part-time city council may thus indirectly mitigate the effects of fragmentation. In the land use context, for example, the NIMBYism (Not In My Backyard) of Mt. Laurel in the 1980s,\(^\text{289}\) or affluent suburbs of


\(^{286}\) See \textit{STEER ET AL.}, supra note 172, at 727–73 (discussing cases involving this problem in the land use context).

\(^{287}\) See, e.g., \textit{Associated Home Builders of the Greater Eastbay, Inc. v. Livermore}, 557 P.2d 473, 494 (Cal. 1976) (Mosk, J., dissenting) (“[M]ay [the city of] Livermore build a Chinese Wall to insulate itself from growth problems today? And if Livermore may do so, why not every municipality in Alameda County and all other counties in Northern California?”).

\(^{288}\) As discussed in Part II.A, state law often distinguishes between home rule and non-home rule cities, with the former typically having more extensive legal authority than the latter. See supra Part II.A. State law also often creates classes of cities by population or geographic size, and may allot differing legal authority to cities of different classes. See \textit{City and Town Classification}, MRSC, http://mrsc.org/getdoc/9ffdd05f-965a-4737-b421-ac4f8749b721/City-and-Town-Classification-Overview.aspx [https://perma.cc/839J-LXLQ].

\(^{289}\) See \textit{Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)}, 336 A.2d 713 (N.J. 1975); \textit{Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)} 456 A.2d 390, 415 (N.J. 1983) (holding that municipalities must use their zoning powers to provide low- and moderate-income residents with a realistic opportunity to afford housing).
Northern California today, might have been worse if those cities had full-time city councils intent on exercising their power to restrict affordable housing.

Furthermore, although the part-time model sacrifices to a certain degree values of democratic accountability and representation of diverse interests, the positive features of many cities make these values less salient. As noted above, most cities are small places, and most small places are internally homogeneous in terms of demographics and socioeconomic characteristics of residents. Contrary to the image of a city as a major urban center with large and diverse populations and interests groups, many cities in fact look much more like a private association. And that is often the precise goal of municipal incorporation: to produce a shift in power that serves private interests, while at the same time gaining the designation of municipal corporation and the formal legal powers granted to such entities under state law. As the political scientist Eric Oliver has noted: “By creating affluent, homogeneous communities that are politically separated from the larger and more diverse metropolitan economy, affluent suburban municipalities effectively distance their residents from the problems and conflicts of the greater economy on which they depend.” While not every small, homogenous city is intent on passing exclusionary zoning ordinances, in light of the more private-facing, associational nature of many

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290 See, e.g., Marisa Kendall, State Threatens to Sue Cupertino over Housing Policy, MERCURY NEWS (Aug. 5, 2019), https://www.mercurynews.com/2019/08/05/state-threatens-to-sue-cupertino-over-housing-policy/?utm_campaign=SDU&utm_source=hs_email&utm_medium=email&utm_content=75519178&_hsenc=p2ANqtz--1X4bXUle8V7XajIkvd1FTigPExz9sH3Qr76D4-pLgF4WIIyU86a7ZN30nSrCbr3P1L33tD2D-Pt6-wj2uFStZvQ&_hsml=75519178 [https://perma.cc/HCS7-7RDG] (describing a potential lawsuit by the state of California against Cupertino, which is “often criticized by activists over a perceived reluctance to build homes,” to satisfy its housing obligations under state law); Kristen Sze & Jennifer Olney, Bay Area Housing Crisis: Many Bay Area Small Towns Caught Between Pro-Housing Advocates and Residents Who Do Not Want Change, ABC 7 NEWS (Aug. 6, 2019), https://abc7news.com/society/bay-area-towns-caught-between-pro-housing-advocates-residents-against-change/5438316/ [https://perma.cc/H57T-Z8P4] (reporting on the Bay Area housing crisis).

291 See OLIVER, supra note 150, at 84 (“Communities with internally homogenous political desires have little need for high levels of civic activity because their residents’ preferences are so easily represented . . . . Any citizen can easily speak for the whole, and citizen concerns can be represented by the most minimal of civic actions.”).

292 See id.

293 See BURNS, supra note 250, at 5 (noting that the process of creating local governments is a political one that is “time consuming, prone to failure, and expensive,” that “only certain individuals and certain kinds of groups will have the interest and resources necessary to succeed in these formation efforts,” and that when new cities are incorporated, the values embedded in the new institutions tend to be exclusionary instead of participatory).

294 See OLIVER, supra note 150, at 96.

295 The city councils (and citizens) of some small, relatively homogenous municipalities in fact have been at the forefront of enacting innovative and progressive local ordinances. See generally SCHNEIDER ET AL., supra note 206.
such cities, the fact that their part-time city councils result in power going unexercised may be an indirect benefit of the part-time model.\textsuperscript{296}

However, a second insight of this Article’s framework is that for a limited subset of cities—particularly mid-sized and larger cities that have experienced population growth and changing demographics, and an associated greater number and complexity of policy problems for lawmakers to respond to, but whose internal governance structures have remained unchanged—a part-time city council is more problematic. In these types of cities, there is more likely to be a significant diversity of interests that a part-time council may be under-equipped to serve: “The problems large cities face tend to be more complex, more interrelated, and more difficult to handle. As a consequence of these conditions, the political environment of the large city is highly charged.”\textsuperscript{297}

There is not only a wider range of interests in large cities, but also a greater capacity of interest groups to form and organize, in part due to higher levels of media attention on city government in these cities.\textsuperscript{298}

Particularly when a city council is part-time and the mayor is full-time, there may be internal redistributions of power that diminish the extent that diverse constituent interests are taken into account in city decision-making. In such situations, the mayor—who is electorally accountable to the entire population of the city—is more likely to focus on acting in the economic interests of the city as a whole, rather than the interests of neighborhoods or constituencies whose priorities diverge from city-wide ones.\textsuperscript{299} Although in theory, welfare-maximizing outcomes should result, in practice, it may mean certain groups or neighborhoods are systematically disadvantaged.\textsuperscript{300}

While moving from a less

\textsuperscript{296} The nearly inevitable commingling of public and private interests is heightened in these types of cities because of the limited pool of candidates (due to the smaller population) and the need for conflict of interest rules that are flexible enough to allow council members to serve (and vote) while retaining outside employment. Such heightened commingling also favors the diminished power of a part-time council. See Fasano v. Bd. of Cty. Comm’rs, 507 P.2d 23, 26 (Or. 1973) (“Local and small decision groups are simply not the equivalent in all respects of state and national legislatures.”).

\textsuperscript{297} More than Mayor or Manager, supra note 15, at 9 (“Large cities do not necessarily provide a broader range of functions than smaller cities, but they certainly take on a wider array of activities and are more likely to introduce innovations that may prove to be controversial.”).

\textsuperscript{298} See id. at 8–9.

\textsuperscript{299} Some scholars have also suggested that concentrating more power in the mayor may result in less progressive legislation being passed because of the fact most mayors have an outsized interest in maintaining a “pro-business” climate. See Jacob Alderdice, Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law, 7 Harv. L. & Pol’y Rev. 459, 468 (2013) (“The modern strength of the mayoralty has produced some extremes in blocking council legislation, and New York City Mayor Michael Bloomberg, as perhaps the representative of the modern strong mayor, is at the forefront.”).

\textsuperscript{300} See McGregor, supra note 196 (“Perhaps in the 1960s and ’70s, when Spokane was a less complicated place with challenges that had simpler solutions, part-time council members were more than enough. But today, in a city that is swimming upstream against just about every issue it faces... Spokane clearly needs all the help it can get.”).
powerful, part-time council to a more powerful, full-time council could tip the scale too far in the other direction (by overemphasizing neighborhood-specific interests at a cost to interests of the city as a whole), other institutional design levers—such as a strong mayor system, elimination of aldermanic prerogative,301 and use of mixed at-large and ward-based council seats—can be utilized to guard against such concerns.

The continued use of the part-time model in mid-sized and larger cities also potentially undercuts the value of local autonomy in ways that are not offset by the check on spillover effects. Both large and small municipalities may use their legal authority in ways that impose negative externalities on neighboring communities or the region at large—particularly in the context of fiscal zoning and exclusionary housing policies. However, larger cities, while not immune from imposing negative externalities on their neighbors, also have a track record of using their legal authority in ways that create positive externalities that benefit neighboring communities, such as public transportation services that ease congestion throughout the region, or minimum wage laws that make it possible for lower income workers to afford to stay in the community and provide services that neighboring areas rely on. While some mid-sized and larger cities with part-time councils have enacted innovative, positive externality-producing policies, the fact that they have done so with a part-time council begs the question of how much more they could do were the council full-time.

Identifying which of the eleven out of every twelve cities currently utilizing the part-time model are most likely to suffer adverse distributional impacts from power unexercised or redistributed is an endeavor for future scholarship. But this Article’s analysis demonstrates that for some significant number of mid-sized and larger cities, with internal governance structures that have remained unchanged for decades and that are misaligned to their current needs due to population growth and demographic changes, the power dynamics associated with the part-time model are problematic.302 This is not to say that considerations about the redistributions of power associated with the part-time model should be the only factor taken into account in debates about institutional design reforms: the city’s fiscal health, competing policy preferences of residents, and consideration of other institutional design levers—such as form of government and strong mayor versus weak mayor status—are likely to dominate discussions in cities that are considering a shift from the part-time to

301 The term “aldermanic privilege” refers to the power of city council members to initiate or block legislation specifically concerning their own wards, associated most significantly with Chicago. See Christopher Thale, Aldermanic Privilege, ENCYCLOPEDIA CHI., http://www.encyclopedia.chicagohistory.org/pages/2197.html [https://perma.cc/XJB7-S64W].

302 See MORE THAN MAYOR OR MANAGER, supra note 15, at 9 (explaining that “growth itself generates conflict and questions about purpose and direction of the city” and “may produce a demand for change not just in the occupants of public office but also in the structure of those offices”).
full-time model. But recognizing the adverse effects of the power dynamics of the part-time model may change the calculus about the continued desirability of the part-time model as an institutional design choice in some cities.

Finally, the analysis herein contributes to—and complicates—ongoing scholarly debate about state-local relations. In light of the growing volume and punitive nature of state preemption of local government actions over the past decade, a number of scholars have explored possible legal and political reforms that might respond to the increasingly aggressive posture of states towards cities. Assuming one agrees with these proposed reforms, the analysis herein suggests that we need to be mindful about whether the internal structures of cities as currently configured allow for them to meaningfully engage in such efforts. While cities with robust internal governance structures—such as those with a full-time city council or a strong mayor or both—may have the organizational architecture to support the development of legal or policy tools to respond to state preemption, the institutional design arrangements in other cities may limit their capacity to fully engage in these efforts.

303 See Hibbing, supra note 122, at 40 (noting that even if all subjective disagreements disappeared and everyone agreed a more institutionalized legislative entity were desirable, “If the constitutional arrangements and general tenor of a society are not conducive to legislative institutionalization, it should not be forced onto a system . . . . [S]ince an overly ‘viable’ legislature in a system not equipped to handle one may be a bad prescription.”).

304 However, it is worth emphasizing that simply making structural changes won’t necessarily make the people that fill particular elected roles “better” or make government work “better.” See Ehrenhalt, supra note 57 (“In a great many cities, ‘reform’ is always going to consist of whatever system hasn’t been tried there lately. ‘What you really need,’ says Terrell Blodgett, an eminent public administration scholar and an adviser to El Paso, ‘is a strong mayor, a strong council and a strong city manager. But that’s easier said than done.’”); see also MORE THAN MAYOR OR MANAGER, supra note 15, at 305 (“[S]hortcomings in city government lead some to want a change from whatever form they’ve got to a different structure.”).


306 See, e.g., Clarence N. Stone, Local Citizens and the Political Order of Cities, in THEORIES OF URBAN POLITICS 257, 264 (Jonathan S. Davies & David L. Imbroscio eds., 2009) (“Since change is not readily achieved by pulling a single lever, mobilising for change is likely to be beyond the capacity of those who are lightly resourced.”).
V. Conclusion

This Article has explored how a single institutional design choice—part-time city councils—has systematic implications for city power. By developing a taxonomy of how the part-time model can both produce power vacuums and redistribute power, as well as advancing a normative argument about the institutional legitimacy of city councils, this Article makes a novel contribution to local government literature and provides a framework to clarify and refine our intuitions about the connections between institutional design and city power.

While this Article seeks to draw attention to the understudied impacts of internal structures on the distribution of power in governance systems, I do not suggest that these impacts should be the only criteria in local government institutional design decisions. Nor do I suggest that institutional design is the most important determinant of power dynamics in governance. Other factors, such as background principles of state law and market forces, have just as much or more salience in shaping power relationships. But by exploring the power dynamics associated with part-time city councils, the account offered here aims to foster a more doctrinally complete and civically productive dialogue about local government institutional design, as well as to engage with scholars, policymakers, and citizens in thinking about more deeply about the policy implications of organizational structures in our cities.
Schools in Name Only: The Role of the Federal Judiciary in Remediying Our Nation’s Unconstitutional Schools

KAELA KING*

TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................................. 1056
II. BROWN, ITS PROGENY, AND THE CURRENT STATE OF THEIR COLLECTIVE GUARANTEES ............................................................. 1061
   A. Race-Based Education Rights .............................................................................. 1061
   B. The Right to a Minimally Adequate Education .............................................. 1064
III. THE COURT’S ROLE IN DESEGREGATION, RESEGREGATION, AND THE MODERN ACADEMIC ACHIEVEMENT GAP .......................................................... 1066
   A. The Successes of Court-Ordered Integration After Brown .................................. 1067
   B. Resegregation Following the Release of Court Orders ...................................... 1069
   C. The American Public School Landscape Today ............................................ 1071
IV. GARY B. AND THE RIGHT TO ACCESS LITERACY EDUCATION ............. 1073
   A. Equal Protection Theory .................................................................................. 1074
   B. Due Process Theory .......................................................................................... 1075
V. A PROPOSED REMEDY: COURT-ORDERED SOCIOECONOMIC INTEGRATION PROGRAMS ......................................................................................... 1076
   A. Why the Federal Judiciary Should Order Socioeconomic Integration ......... 1077
      1. School-Based Reforms Have Not Closed the Achievement Gap .................. 1077
      2. Socioeconomic Integration Ameriolates Underperforming Schools ................ 1079
      3. Voluntary Integration Programs Face Practical Limitations ........................ 1081
      4. Socioeconomic Integration Overcomes Court Scrutiny and Political Hesitation .......................................................... 1082
      5. State Courts Have Not Redressed State Education Claims ............................ 1083

*J.D. Candidate, 2020, The Ohio State University Moritz College of Law; Editor in Chief, 2019–20, Ohio State Law Journal. This Note received the Donald S. Teller Memorial Award for the student writing that contributed most significantly to the Journal. It is dedicated to my former students and to all those kids who yearn for meaningful educational experiences. Special thanks to Professor Edward B. Foley, Associate Dean Daniel P. Tokaji, Aaron Rothey, and Alyson Houk for their guidance and thoughtful suggestions. Thanks too to the entire Journal team, and especially S. Matthew Krsacok and Jessica Van Ranken, for their hard work and dedication.
I. INTRODUCTION

Every day, eighteen-year-old Gary B. wakes up in an extremely segregated city\(^2\) and tries his best to learn at a wildly underperforming school.\(^3\) He attends Osborn Evergreen Academy of Design and Alternative Energy in Detroit, Michigan and is currently in his senior year.\(^4\) Osborn Evergreen Academy is attended by almost one hundred percent minority students,\(^5\) of which zero percent have attained proficiency in mathematics, science, and social studies.\(^6\) Ironically, the school’s mission statement includes a focus on “academic rigor.”\(^7\)

Gary is not alone, nor is Osborn Evergreen Academy the only Detroit school performing at such an abysmal level.\(^8\) Other Detroit students attend similarly...


\(^4\) Id. at 2, 19.


\(^6\) Complaint, supra note 3, at 65.


\(^8\) See Complaint, supra note 3, at 2, 7.
segregated and equally low-performing schools. They attend two Detroit Public Community District schools and two Detroit-area public charter schools. In these buildings, student proficiency rates “hover near zero in nearly all subject areas.” Many of the students who attend them cannot read, write, or comprehend grade-appropriate material. Illiteracy is the norm.

In addition to these low proficiency rates, Gary and his friends are denied access to basic educational resources and safe facilities. Their schools lack textbooks altogether or contain only a few copies of outdated books that must be shared by groups of four or more students. School supplies, and even toilet paper, are scarce; these necessities are often only available to students if teachers purchase them on their own dime. Classrooms do not have enough chairs and desks for the fifty-student classes crowding them, and the schools are plagued by rodent infestations, extreme classroom temperatures, mold, and contaminated drinking water.

These are “schools in name only.”

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9 Id. at 2.

10 The schools are Osborn Academy of Mathematics and the Medicine and Community Health Academy at Cody. Id.

11 Id. The public charters implicated in the complaint include Hamilton Academy and Experiencia Preparatory Academy—the latter closed after the complaint was filed. See Kate Wells, Three Detroit Charter Schools Are Closing This Year, MICH. RADIO (June 28, 2016), http://www.michiganradio.org/post/three-detroit-charter-schools-closing-year [https://perma.cc/BT6Z-8TGZ].

12 Complaint, supra note 3, at 4 (emphasis omitted). Indeed, “[e]ach currently open school’s eleventh graders has 0% proficiency in at least one of Math, Science, or Social Studies.” Id. at 7.

13 Id. at 4. At Osborn Academy of Mathematics, 12% of students are proficient in English Language Arts (ELA), and less than 4% are proficient in mathematics. At the Medicine and Community Health Academy at Cody, fewer than 7% of students are proficient in math, and only about 20% of students are proficient in ELA. At Hamilton Academy, fewer than 10% of students are proficient in ELA, and less than 6% of students are proficient in math. See Mich. Dep’t of Educ., School Index Proficiency, MI SCHOOL DATA, https://www.mischooldata.org/SchoolIndex/Proficiency.aspx [https://perma.cc/N4ZW-L7XR] (type the desired school name in the “Search for a School” bar at the top of the page; choose the desired school from the list; and select “proficiency index” on the next page).

14 Complaint, supra note 3, at 4.

15 Id. at 8–9.

16 Id. at 8.

17 Id. at 8–9.

18 Id. at 9.


20 Complaint, supra note 3, at 1.
Dismayed by these poor conditions and academic outcomes, Gary and six other school-aged children brought a class action suit in federal court against Michigan’s then-governor, Rick Snyder, and state education officials in 2016.\(^{21}\) They advanced a novel argument for a constitutional right to access literacy education.\(^{22}\) The students assert that Michigan has failed to provide their schools with “the capacity to deliver access to literacy” through evidence-based literacy instruction and adequate school conditions, and they argue that they have been functionally excluded from the statewide system of public education.\(^{23}\) Since their schools are comprised almost exclusively of minority students, they also contend that the defendants have violated the Constitution by discriminating (either intentionally or with deliberate indifference) on the basis of the students’ race.\(^{24}\)

The students asked the federal judiciary to acknowledge that the Fourteenth Amendment guarantees the “fundamental right of access to literacy” and that defendants’ policies and practices violate the Substantive Due Process Clause, the Equal Protection Clause, and Title VI of the Civil Rights Act of 1964.\(^{25}\) They also requested the court to order the State of Michigan to provide evidence-based literacy instruction at all grade levels, to address school conditions that impair students’ access to literacy, and to establish a statewide accountability system to assess and monitor conditions that deny access to literacy.\(^{26}\)

U.S. District Court Judge Stephen Murphy III declined to issue these requested remedies.\(^{27}\) Although he acknowledged that the conditions and outcomes at these Detroit schools are “nothing short of devastating,”\(^{28}\) he nevertheless granted the defendants’ motion to dismiss the claim.\(^{29}\) Because “the Supreme Court has neither confirmed nor denied that access to literacy is a

\(^{21}\) Id. at 17–23. The State of Michigan took control of Detroit’s public schools on March 26, 1999, and the state governor has appointed the Detroit school board ever since. Monte Piliawsky, Educational Reform or Corporate Agenda? State Takeover of Detroit’s Public Schools, in COUNTERPOINTS, THE FUTURE OF EDUCATIONAL STUDIES 265 (Beth Hatt-Echeyverria et al. eds., 2003).  

\(^{22}\) The Court has not yet acknowledged either the fundamental right to literacy or the right to a minimally adequate education. See infra Part II.  

\(^{23}\) See Complaint, supra note 3, at 19–20.  

\(^{24}\) Id. at 1, 42–43.  

\(^{25}\) Id. at 120–21.  

\(^{26}\) Id. at 128–29.  


fundamental right," he concluded that precedent does not require states to “affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy[.]”

This dismissal repeats other federal court decisions that have similarly avoided recognizing that kids like Gary have the right not to be forced to attend segregated, failing schools. Nor are the five schools named in this case unique. Countless American students continue to attend racially segregated schools that fail to provide even basic levels of proficiency in core subject areas.

*Brown v. Board of Education* announced a federal constitutional right to equal educational opportunity, but ever since, the federal judiciary has both chipped away at that right and withdrawn the remedies that proved to be effective in securing it. As a result, thousands of students across the United States have no option but to attend racially (and socioeconomically) segregated, failing schools. Neither school-based reform strategies nor state court remedies have been able to slow mounting resegregation and declining student achievement in our nation’s public schools. In fact, these inequities have steadily intensified in recent decades. With no other viable option, Gary B. and his peers asked the federal judiciary to affirm a new fundamental, federal constitutional right.

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31 Id. at 366.
34 See Appendices A–D. These charts demonstrate that 35,719 students attend more than 86 such schools across just four U.S. public school districts. The tables depict one district from the East Coast (Baltimore, Maryland), one from the Midwest (Columbus, Ohio), one from the South (Jacksonville, Florida), and one from the West Coast (Oakland, California). Each graph aggregates student literacy proficiency and school composition by race and socioeconomic class.
35 See infra Part II.
37 See infra Part III.
38 Id.
Although these students experienced an initial setback at the district court, the United States Court of Appeals for the Sixth Circuit heard their appeal in October of 2019.\(^\text{40}\) Because the *Gary B.* case asserts that literacy is a necessary condition for fulfilling other constitutional rights, the appeals court confronted a novel argument for education rights.\(^\text{41}\) The Public Counsel Law Center and legal powerhouses Mark Rosenbaum, Carter Phillips, and Erwin Chemerinksy crafted this unique approach,\(^\text{42}\) which has garnered support from the ACLU, the American Federation of Teachers, and even Detroit Public Schools Community District, who each authored amici curiae in support.\(^\text{43}\) In light of these circumstances, many legal scholars predict that the case is “ultimately destined for the Supreme Court.”\(^\text{44}\)

To determine whether to acknowledge the right to a minimally adequate literacy education, the Court will undoubtedly grapple with the appropriateness and the administrability of court-ordered remedies. This Note considers why the federal judiciary should intervene and examines how it can issue effective decrees by drawing on past practices. Part II describes the race-based education right afforded by *Brown*, analyzes how subsequent cases diluted that right, and examines how dicta from those cases preserve the right to a minimally adequate education. Part III traces how the federal judiciary drastically reduced public school segregation after *Brown* in a single generation through judicial decree, but shortly thereafter enabled resegregation by releasing those decrees. The effects of both racial and socioeconomic resegregation on the current persistent achievement gaps and glaring disparities in school quality despite efforts to combat those problems, are resorting to unconventional means to bring about change.”).\(^\text{40}\) See Erin Einhorn, *How a Lawsuit over Detroit Schools Could Have an ‘Earth-Shattering’ Impact*, NBC NEWS (Oct. 28, 2019), https://www.nbcnews.com/news/us-news/how-lawsuit-over-detroit-schools-could-have-earth-shattering-impact-n1072721 [https://perma.cc/SZM7-8DLT].

\(^\text{41}\) Wong, *supra* note 39. (“If someone is functionally illiterate—unable to read at grade level—then how can we expect them to meaningfully engage in the rest of their explicit constitutional rights? . . . How can we expect them to meaningfully participate in our government and exercise the right to vote and the right to free speech if their ability to obtain information and evaluate that information is so limited because the public schools that they attended did not even given them an opportunity to become literate?” (internal quotations omitted)).


\(^\text{43}\) Brief for the American Civil Liberties Union of Michigan as Amicus Curiae Supporting Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (Nov. 26, 2018); Brief for American Federation of Teachers as Amicus Curiae Supporting Plaintiffs-Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (Nov. 26, 2018); Brief for Detroit Public Schools Community District as Amicus Curiae Supporting Plaintiffs-Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (Nov. 26, 2018).

II. Brown, Its Progeny, and the Current State of Their Collective Guarantees

The Supreme Court first recognized a right to equal education in the landmark case Brown v. Board of Education, but it has retreated from that acknowledgement ever since. Through subsequent decisions, the Court differentiated between unlawful racial discrimination and permissible segregation, drastically reducing state obligations to provide equal education and even limiting voluntary efforts. But within these race-based holdings exists essential language regarding the constitutional right to a minimally adequate education, a right distinct from race that offers potential relief for the thousands of American students who are trapped in our nation’s lowest-performing schools.

A. Race-Based Education Rights

In Brown, the Warren Court overturned the long-standing separate-but-equal doctrine and held that racially segregated public schools violate the Equal Protection Clause of the Fourteenth Amendment. With this decision, the Court struck down state-sanctioned de jure segregation, outlawing states’ purposeful racial discrimination in operating public education systems. The Court did not articulate its holding in these terms, though; in fact, it proscribed racial isolation whenever the state offers public education. However, because the Court did not specifically address whether students had the right to protection from de

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47 See infra Part II.B.
48 Brown, 347 U.S. at 495.
50 Brown, 347 U.S. at 493 (“Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).
facto segregation, it left the Brown right vulnerable to future limiting decisions.

Roughly twenty years later, the Court did indeed retreat from the original scope of the Brown right in three key cases. First, in Milliken v. Bradley, the Court explicitly held that segregated schools were constitutional so long as states did not specifically sanction race-based separation of students, formally removing de facto segregation from the previously articulated constitutional right afforded by Brown. Many argue that this distinction between de jure and de facto segregation is meaningless. Regardless, Milliken put an end to successful segregation claims under Brown, absent an overtly discriminatory state law.

Second, in San Antonio Independent School District v. Rodriguez, the Court held that public school funding disparities do not violate either equal protection or the Brown guarantee, even though those funding disparities result in separate and unequal schools. This ruling tacitly endorsed unchecked de facto segregation.

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53 Milliken v. Bradley, 418 U.S. 717, 746–47 (1974) (“Unless [the state] drew the district lines in a discriminatory fashion, or arranged for white students [to attend white-only schools], they were under no constitutional duty to make provisions for Negro students to do so.”). Moreover, only direct evidence of intent to segregate would meet the burden of proof; circumstantial evidence was deemed insufficient. See id. at 737–53.

54 These critics argue that residential isolation by race and class is not merely “the accident of economic circumstance, demographic trends, personal preference, and private discrimination,” but instead results from the long legacy of racially motivated government policies “whose effects endure to the present.” Rothstein, supra note 51; see also Jake Blumgart, Housing Is Shamefully Segregated. Who Segregated It?, SLATE (June 2, 2017), https://slate.com/business/2017/06/an-interview-with-richard-rothstein-on-the-color-of-law.html [https://perma.cc/4RZM-Z98W] (discussing the effects of housing segregation with Richard Rothstein, who argues that because these policies violate the Constitution, the federal government is responsible for permitting local authorities to perpetuate them, and concluding that the federal government should remedy the injury); Valerie Strauss, Brown v. Board Is 63 Years Old. Was the Supreme Court’s School Desegregation Ruling a Failure?, WASH. POST (May 16, 2017), http://www.washingtonpost.com/news/answer-sheet/wp/2017/05/16/the-supreme-courts-historic-brown-v-board-ruling-is-63-years-old-was-it-a-failure/?noredirect=on&utm_term=.222849842aad [https://perma.cc/J7VB-5VZX] (arguing that neighborhood segregation resulted from intentional government policy at the federal, state, and local levels during the mid-twentieth century and that residential patterns are now solidified as a result).

55 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23–24 (1973). At the time of Rodriguez, the government’s per-pupil spending was roughly 15% to 20% more for white students than it was for black students. Chemerinsky, supra note 46, at 1610.
segregation by wealth,\textsuperscript{56} thereby creating a significant obstacle to desegregating public school systems in the North.\textsuperscript{57} At the same time, the Court also removed suburban districts from involvement in any de jure remedy, which substantially limited the impact of effective solutions to even the most overt discrimination.\textsuperscript{58}

Although the Court absolved the states of an affirmative responsibility to reduce racial isolation, some school districts continued to work towards integration voluntarily through race-conscious student assignment plans.\textsuperscript{59} In response, both the circuit courts\textsuperscript{60} and the Supreme Court\textsuperscript{61} began striking down these policies in the 1990s, ruling that they were not sufficiently tailored to a state interest and therefore could not pass constitutional muster.\textsuperscript{62} That approach culminated a few years later in \textit{Parents Involved in Community Schools v. Seattle School District},\textsuperscript{63} where the Court explicitly upheld \textit{Milliken}'s de jure–de facto distinction\textsuperscript{64} and forbade district integration plans from categorizing

\textsuperscript{56} For an explanation of how advocates feared this decision would impact \textit{Brown}'s race-based education right, see Jeffrey S. Sutton, \textit{San Antonio Independent School District and Its Aftermath}, 94 Va. L. Rev. 1963, 1970 (2008) (noting that in his dissent, Justice Marshall worried “that the promises of \textit{Brown} would never be fulfilled unless the courts not only eliminated de jure segregation by race but also curbed the effects of de facto segregation by wealth”).

\textsuperscript{57} Chemerinsky, \textit{supra} note 46, at 1610 (“[R]equiring proof of discriminatory purpose created a substantial obstacle to desegregation in northern school systems, where residential segregation . . . caused school segregation.”).

\textsuperscript{58} Cf. Kahlenberg, \textit{supra} note 52, at 265–66 (describing the impact of legal theories reaching de facto segregation).


\textsuperscript{61} Between \textit{Rodriguez} and \textit{Parents Involved}, three lesser-known Rehnquist Court decisions (known as the “resegregation trilogy”) also contributed to these effects by decreasing requirements school boards needed to meet in order to be released from court orders. See Ronald Turner, \textit{The Voluntary School Integration Cases and the Contextual Equal Protection Clause}, 51 How. L.J. 251, 295 (2008).

\textsuperscript{62} Frankenberg, \textit{supra} note 60, at 681. This approach built on the rationale of the 1978 affirmative action case, \textit{Univ. of Cal. v. Bakke}, 438 U.S. 265, 267 (1978), which held that explicit racial classifications in higher education admissions programs were unconstitutional. \textit{Id.}


\textsuperscript{64} \textit{Parents Involved}, 551 U.S. at 794–95 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989) (“To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group . . . based on inherently unmeasurable claims of past wrongs.”)).
students by race after past de jure segregation had already been addressed.\textsuperscript{65}
Thus, the Court’s use of strict scrutiny halted efforts by local communities to end de facto segregation.\textsuperscript{66}

These decisions, along with the Court’s rolling back of desegregation orders,\textsuperscript{67} have effectively closed the federal courthouse doors to students who are forced to attend vastly underperforming, racially segregated schools.\textsuperscript{68} By retreating on equal educational opportunity, diluting \textit{Brown}’s race-based education right, and removing liability from suburban districts and the North, the Court facilitated the resegregation of the country’s public education system.\textsuperscript{69} Though the Warren Court once read the Constitution “to require desegregation, [it is] now . . . read to prohibit race-conscious integration.”\textsuperscript{70}

\textbf{B. The Right to a Minimally Adequate Education}

Because the post-\textit{Brown} cases steadily limited race-based education rights, students who seek federal relief today must pursue their rights under a different constitutional theory: the right to a minimally adequate education. Many schools alleged not to provide a minimally adequate education are segregated, both by race and by class,\textsuperscript{71} but the constitutional arguments that support this proposed right do not implicate the de jure–de facto distinction.\textsuperscript{72} Instead, the legal theory stems from other enumerated rights\textsuperscript{73} and from dicta within the above race-based case opinions.\textsuperscript{74} Through this language, the Court preserved the

\textsuperscript{65}See id. at 721. This view is perhaps the most common interpretation of the Court’s holding, but others believe this characterization misconstrues it. For example, the Obama administration and some education policy researchers read \textit{San Antonio} as permitting school districts to consider race to achieve racial balance. This confusion stems from the Court’s vote, which was evenly split, and Justice Kennedy’s controlling concurrence, which agreed with parts of both the plurality and the dissent. See Rachel M. Cohen, ‘\textit{Parents Involved,}’ \textit{a Decade Later}, AM. PROSPECT (June 28, 2017), https://prospect.org/article/%E2%80%98parents-involved%E2%80%99-decade-later [https://perma.cc/6PN3-WDNN].

\textsuperscript{66}Kahlenberg, \textit{supra} note 52, at 261.

\textsuperscript{67}See infra Part III.

\textsuperscript{68}See GERALD N. ROSENBERG, \textsc{The Hollow Hope: Can Courts Bring About Social Change?} 157–64 (2d ed. 2008) (noting that “the courts were of limited relevance to the actual progress of civil rights in America”).

\textsuperscript{69}Chemerinsky, \textit{supra} note 46, at 1609–18.

\textsuperscript{70}Kahlenberg, \textit{supra} note 52, at 263.


\textsuperscript{72}See infra Part IV. Litigants have argued for this right under a variety of legal theories, but none rely on the racial compositions of the public schools.


\textsuperscript{74}See Schmitz, \textit{supra} note 71, at 1641.
possibility that it will recognize a fundamental right to a minimally adequate education in the future.

As far back as *Brown*, the Court expressed its commitment to issues of broader state obligation and equality of educational opportunity (in addition to prohibited de jure segregation). When a state chooses to provide public education, the Court proclaimed, that right “must be made available to all on equal terms.” Unfortunately, the Court obfuscated its views on the non-race education issues to preserve the unanimity of its decision. That lack of clarity established a tenuous foundation for the right to equal education, which later cases eroded.

For example, *Rodriguez* “clarified” that the *Brown* language declaring an affirmative right to equal education was not intended to be interpreted literally. It announced that education is *not* a fundamental right. Somewhat paradoxically, the Court also admitted that a state public education system facilitates “an absolute denial of educational opportunities to . . . its children” when it “fails to provide each child with an opportunity to acquire . . . basic minimal skills.” Moreover, the Court described education as essential to the exercise of other constitutional rights, like freedom of speech and political participation. If a state were to deny students an “identifiable quantum of education” necessary to engage in American democracy, then the Court might be willing to review the state’s actions under heightened scrutiny. The Court likewise reserved the right to intervene in a future case if a class of students were precluded entirely from receiving an education. In spite of these concessions, the Court declined to rule formally on the constitutionality of severely underperforming schools, and it has followed that paradigm ever since.

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76 Id. at 493.
77 See Dennis J. Hutchinson, *Unanimity and Desegregation: Decision-Making in the Supreme Court, 1948-1958*, 68 Geo. L.J. 1, 87 (1979) (finding that “the Court’s continuing desire to be united outweighed its responsibility to be persuasive” on the precise meaning of the decision).
78 Id.
80 Id. at 35–37.
81 Id. at 37 (emphasis added).
82 Amar, supra note 44.
83 *Rodriguez*, 411 U.S. at 35–36.
84 See id. at 25 n.60.
85 Laird, supra note 27 (“The U.S. Supreme Court has declined opportunities to rule that access to education is a fundamental right. Sidley Austin partner Tacy Flint [said that] . . . the court did leave open, in *San Antonio Independent School District v. Rodriguez*, the question of whether it’s unconstitutional to have a school system that occasioned an absolute denial of educational opportunities to any of its children.” (internal quotations omitted)).
Even still, the Court expanded the Rodriguez concept of adequacy and echoed its reverence for democratically required educational skills about ten years later, in Plyler v. Doe.\textsuperscript{86} Plyler was issued in response to a Texas statute that excluded undocumented noncitizen students from public schooling.\textsuperscript{87} The plaintiffs argued that democratic institutions cannot refuse basic educational opportunity because democratic societies rely on having educated citizens.\textsuperscript{88} The Court agreed, holding that a state may not “deny a discrete group of innocent children” the same education it offers to other children, because “a status-based denial of basic education” contradicts our constitutional framework.\textsuperscript{89}

In light of these opinions, Justice Thurgood Marshall recognized in 1988 that the Court had “not address[ed] the question [of] whether . . . a deprivation of access [to a minimally adequate education] would violate a fundamental constitutional right.”\textsuperscript{90} In spite of the decades that have passed since, the question remains open today.\textsuperscript{91}

III. THE COURT’S ROLE IN DESEGREGATION, RESEGREGATION, AND THE MODERN ACADEMIC ACHIEVEMENT GAP

Before Brown’s race-based education right eroded, the federal judiciary successfully implemented a series of remedies that curbed public school racial isolation. During this period, court-ordered desegregation efforts dismantled homogenous student enrollment demographics and facilitated significant gains in student achievement. Unfortunately, judicial intervention was only temporary, and thus the strides it achieved were also short-lived. Even still, district court judges were able to engineer a radical restructuring of the public schools throughout the 1970s and 1980s, demonstrating that the federal judiciary can effectively redress the violation of fundamental education rights.

\textsuperscript{88} Id. (detailing the factual background for plaintiffs’ argument that “[a]n educated populace is the basis of our democratic institutions” (internal quotations omitted)).
\textsuperscript{89} Plyler, 457 U.S. at 222–30 (finding both a general constitutional incongruity and a violation of the Equal Protection Clause in particular).
\textsuperscript{91} Schmitz, \textit{supra} note 71, at 1649 n.79.
A. The Successes of Court-Ordered Integration After Brown

The Supreme Court prohibited de jure segregation in *Brown*, but it did not articulate how race-based educational injuries should be remedied until the following year, in *Brown II*. On remand, the Court sent the cases back to the federal district courts that originally heard them, charging them to order and oversee local school district desegregation plans. These changes did not begin immediately, though, because the Court initially failed to establish timetables and clear requirements for district compliance. Instead, the lower courts were told to act “with all deliberate speed,” an oxymoronic directive that allowed school districts in the South to avoid accountability for more than another decade.

After the Court intervened a second time in 1968 and insisted on immediate school district action, desegregation efforts gained substantial momentum. The Court invalidated freedom-of-choice plans, no longer permitting districts to circumvent desegregation by offering parents the choice between segregated and integrated schools. Just three years later, in 1971, the Court also affirmed the power of federal judges to include busing programs (which sought to achieve racial balance by overcoming de facto housing patterns) as part of their judicial

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93 ROSENBERG, supra note 68, at 43.

94 James E. Pfander, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 47–48, 59 (2006) (noting that the original “good faith” standard under which school district efforts were evaluated led to their recalcitrance).

95 *Brown*, 349 U.S. at 301. Widely criticized, this phrase is often cited as a primary cause for the Court’s failure to secure lasting change for *Brown* litigants. See, e.g., Trina Jones, *Brown II: A Case of Missed Opportunity?*, 24 LAW & INEQ. 9, 14–16 (2006) (“[T]he Warren Court sacrificed the ‘right of blacks to a desegregated education in favor of a remedy more palatable to whites.’” (quoting DERRICK BELL, RACE, RACISM AND AMERICAN LAW 147 (5th ed. 2004))). The vague and gradual approach the Court adopted likely resulted from its desire to preserve unanimity and avoid racial controversy. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313–21 (2004).

96 Chen, supra note 92, at 3.

97 *Id.* It was not until 1968 that the Court announced that “[t]he time for mere ‘deliberate speed’ had expired” and ordered immediate action. *Id.* (quoting Green v. Cty. Sch. Bd., 391 U.S. 430, 438 (1968)). During the ten years that followed *Brown*, nearly 99% of black children attended schools that were completely racially isolated. Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict through Litigation*, 24 LAW & INEQ. 31, 34 (2006).

98 See Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 882–83 (2010). The Court did not outline specific goals and benchmarks for desegregation orders until nearly fifteen years after *Brown*, when it finally required local officials to ensure their districts were “unitary” and “nonracial.” *Id.* (quoting Green, 391 U.S. at 440).

99 KLARMAN, supra note 95, at 318, 341–42.
decrees. The Court declared that “the scope of a district court’s equitable powers to remedy past [segregation] is broad.”

The Court’s more aggressive stance on desegregation and clearer guidelines on permissible remedies allowed for more meaningful oversight on the part of the district court judges. Over time, some judicial decrees even included mandates to redraw attendance zones or to create specialized schools to foster racial diversity. Stronger judicial oversight also pushed local school districts to adopt more vigorous approaches to desegregation while preserving local control. As a result, between 1964 and 1988 (the peak period of desegregation progress), racial composition in the public schools changed drastically. The percentage of black students in majority white schools grew from 0% to 43.5% in 1988; the percentage of black students attending schools with over 90% minority enrollment fell from 78% to a record low of 25%.

Flowing from these changes in school demographics was a significant narrowing of the achievement gap between black and white students. For example, in 1971, the academic performance gap on standardized reading tests between racial groups ranged from 35 to 53 points (depending on grade level). By 1988, that margin dropped to 18 to 29 points—not just for those

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102 See ROSENBERG, supra note 68, at 46.
104 See id. at 7.
105 Chemerinsky, supra note 46, at 1598.
110 PAUL E. BARTON & RICHARD J. COLEY, THE BLACK-WHITE ACHIEVEMENT GAP: WHEN PROGRESS STOPPED 6 (2010), https://www.ets.org/Media/Research/pdf/PICBWGAP.pdf [https://perma.cc/CX3P-TUR5]; see also Abel McDaniels, 64 YEARS
students who attended integrated districts—but nationally, for all students.111 During the same period, the black-white reading level gap closed an astonishing three and a half years.112 Court-ordered integration did not only change educational outcomes for students, either: “[I]t changed their whole lives.”113 Students who benefited from court-ordered integration were less likely to experience poverty as adults and more likely to live longer, healthier lives than their peers who remained in segregated schools.114

B. Resegregation Following the Release of Court Orders

Court-ordered desegregation plans were effective in reducing racial school segregation and in improving academic achievement, but their positive effects dissolved as quickly as they crystalized. Just six years after the federal judiciary began issuing Brown II remedies, the Milliken Court “effectively repudiated Brown’s integrationist mandate”115 by refusing to endorse inter-district remedies unless each affected district was found guilty of precipitating the constitutional violation.116 Around the same time, the Rodriguez case removed public school funding solutions from the menu of school district remedies for racial isolation.117 These constraints limited local flexibility in meeting court orders.118

Then, in the 1980s and early 1990s, the Supreme Court further retreated from desegregation efforts by announcing that it did not intend to make the Brown II remedies permanent,119 and by relaxing criteria required for release


111 Barton & Coley, supra note 110, at 6–7.
113 This American Life: The Problem We All Live With—Part One, CHI. PUB. RADIO (Aug. 5, 2017), https://www.thisamericanlife.org/562/transcript [https://perma.cc/RK3P-YVDE] [hereinafter The Problem We All Live With].
114 See id.
117 Chen, supra note 92, at 4.
118 See id.
from court oversight. If a school district was able to achieve “unitary status,” the courts generally relinquished it from desegregation orders. Though the Court never clearly defined unitary status or its requirements, school districts were found to have achieved it when they operated a “dual school system,” even when the effects of prior discrimination persisted.

As a result, between 1991 and 2009, federal courts found that at least 100 districts achieved unitary status and released them from desegregation orders. Once released from court supervision, school districts were free to return to neighborhood-based student assignment plans. These reversions compounded deep-seated discriminatory housing patterns. Combined, the rollbacks typically led to steady growth in segregation levels for the first ten years following release, which later settled at levels substantially higher than those that were attained under court order. When multiplied by the number of districts released from court orders, these trends led to the resegregation of American schools.

Today, following release from court orders, the percentage of black students who attend integrated schools has been cut in half; the percentage of black students who attend schools with 90% minority enrollment (or higher) has more than doubled; and the occurrence of “apartheid schools” (schools where the white student population is 1% or less) has ballooned in number from 2762 to

120 Sean F. Reardon et al., Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools, 31 J. POL’Y ANALYSIS & MGMT. 876, 877–78 (2012). Along with Dowell, two additional key cases facilitated this relaxation: Freeman v. Pitts, 503 U.S. 467, 471 (1992) (allowing districts that made incremental progress towards desegregation to be released from court orders gradually), and Missouri v. Jenkins, 515 U.S. 70, 100–02 (1995) (releasing school districts from decree after they restored victims to the position they would have occupied had the discriminatory state action not occurred). Id.


123 See Holley-Walker, supra note 98, at 887–90. The federal government played an active role in increasing the rate at which unitary status was granted at the direction of President George W. Bush. Id.

124 Reardon et al., supra note 120, at 879.


126 Reardon et al., supra note 120, at 899.

127 See Chemerinsky, supra note 46, at 1620–22.


129 See, e.g., infra Appendices A–D (showing that many schools in districts across the United States are comprised of more than 95% minority students); see also Hannah-Jones, supra note 108.
Segregation rates in public schools today are closer than ever to pre-Brown rates, and the federal judiciary’s poor implementation of desegregation orders helped foster this unjust modern landscape. By eroding race-based education rights and eliminating district accountability after the achievement of unitary status, the Court abandoned the promise it made in Brown after only twenty years of effort: “We somehow want this to have been easy and we gave up really fast... [T]here was really [just] one generation of school desegregation.”

C. The American Public School Landscape Today

In addition to fostering the return of racial segregation to our public schools, the release of court orders also accelerated socioeconomic segregation and hindered progress towards equal educational opportunity. School-based racial isolation has coincided with economic isolation since the early 1990s, a problem that is especially pronounced in cities with the most poor students. Today, nearly 75% of black students and 67% of Latino students attend schools where the majority of kids qualify as low-income. At least 33% of American schools are comprised entirely of poor black and Latino students, and non-integrated schools often have the highest concentrations of impoverished students.

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130 Hannah-Jones, supra note 108.
132 The Problem We All Live With, supra note 113.
133 As the courts released desegregation decrees, the students reassigned to less integrated schools suffered academically. See generally Stephen B. Billings et al., School Segregation, Educational Attainment, and Crime: Evidence from the End of Busing in Charlotte-Mecklenburg, 129 Q.J. ECON. 435 (2014) (demonstrating a sharp decline in students’ standardized test performance and graduation rates after the local school district was released from court order).
134 Rothstein, supra note 51. For example, in Detroit today, the typical black student attends a school where just 3% of the students are white and 84% of students are low-income. Id.
136 See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 103, at 58–60. Another 33% of American schools are comprised entirely of white affluent students. Id.
Thus, segregation in American public schools today is not only a problem of race but also one of poverty.\footnote{See, e.g., infra Appendix A (showing that thirty Baltimore public schools enroll more than 95% minority students and 100% low-income students); Appendix D (indicating that eleven Oakland Unified schools have student populations that are more than 90% minority and low-income); see also U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 103, at 10 (emphasizing the growth in volume of schools isolated by both poverty and race).}

Kids who grow up poor face challenges that their more advantaged peers do not, such as greater educational needs\footnote{Richard V. Reeves & Edward Rodrigue, Convenience Plus a Conscience: Lessons for School Integration, BROOKINGS INST. (Mar. 24, 2017), https://www.brookings.edu/research/convenience-plus-a-conscience-lessons-for-school-integration [https://perma.cc/T5V7-JCR3].} and burdensome stress that results from family and neighborhood hardships.\footnote{See Roey Ahram et al., Framing Urban School Challenges: The Problems to Examine When Implementing Response to Intervention, RTI ACTION NETWORK, http://www.rtinetwork.org/learn/diversity/urban-school-challenges [https://perma.cc/YJ9Y-N4MZ].} When students who face these additional barriers are concentrated in classrooms and schools, they do not benefit from interacting and growing with kids who are less burdened and who can help boost their performance.\footnote{See Sheila Ohlsson Walker & Melissa Steel King, Opinion, ‘Toxic Stress’ in the Classroom: How a Public Health Approach Could Help, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/education/wp/2016/06/06/toxic-stress-in-the-classroom-how-a-public-health-approach-could-help/?utm_term=.9dbde0eb7e90 [https://perma.cc/2MWY-GNFD].} On top of these impediments, schools with high populations of poor students offer far fewer educational opportunities than do their more prosperous institutional counterparts. High-poverty schools employ the least qualified and least experienced teachers\footnote{See generally Eric A. Hanushek et al., Why Public Schools Lose Teachers, 39 J. HUM. RESOURCES 326 (2002) (explaining the reasons that teachers in disadvantaged schools are usually less experienced and less credentialed than teachers in more affluent schools).} and withstand the highest rates of teacher absenteeism\footnote{See U.S. DEP’T EDUC., 2013–14 CIVIL RIGHTS DATA COLLECTION: KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY GAPS IN OUR NATION’S PUBLIC SCHOOLS 9 (Oct. 2016).} and teacher turnover.\footnote{Hannah-Jones, supra note 108.} Students in these schools have limited access to gifted and talented education programs, high-level math and science courses, and Advanced Placement courses.\footnote{U.S. DEP’T EDUC., supra note 143, at 6–7.} They learn in the lowest-quality educational facilities,\footnote{See Powell, supra note 121, at 682.} which offer significantly fewer
school resources. When these factors combine, “it is almost impossible to undo [the resulting] harm.”

Disparities in high-poverty schools lead to abysmal educational outcomes for the students who attend them. Today’s achievement gap is at a four-decade low, and this gap is most pronounced between socioeconomic groups. Since poor students do not benefit from the same educational opportunities, they do not attain the same academic benefits. More than 30% score at the lowest possible percentiles on national reading and math tests, and more than half will never graduate. Many American students who attend socioeconomically segregated schools are therefore denied access to a minimally adequate education.

IV. GARY B. AND THE RIGHT TO ACCESS LITERACY EDUCATION

Other litigants have attempted to identify a winning argument to support the right to a minimally adequate education, but none has been successful yet. Over the past several decades, they have rooted these arguments in a variety of


148 The Problem We All Live With, supra note 113 (“[I]t’s important to point out that it is not that something magical happens when black kids sit in a classroom next to white kids. . . . What integration does is it gets black kids in the same facilities as white kids, and therefore it gets them access to the same things that [the white] kids get—quality teachers and quality instruction.”); see also Michael Hansen, In Search of the Key to Closing Achievement Gaps, BROOKINGS INST. (Jan. 18, 2016), https://www.brookings.edu/blog/brown-center-chalkboard/2016/01/18/in-search-of-the-key-to-closing-achievement-gaps/ [https://perma.cc/3QA6-YH9S] (arguing that improved student achievement results from integrated schools for a myriad of reasons, including better access to effective teaching, peer effects, and socio-emotional benefits).

149 See infra Appendices A–D.

150 See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 103, at 9.

151 News Editor, Brown at 60 and Milliken at 40, HARV. ED. MAG. (2014), https://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40 [https://perma.cc/AA6J-GCZV] (quoting James Ryan, Dean, Harvard Graduate School of Education) (“The higher percentage of minorities in an urban school, on average, the higher the percentage of poor students. And students who attend high-poverty schools generally score lower on standardized tests, are less likely to graduate, and are less likely to go to college.”).


constitutional provisions, including the Due Process Clause,\textsuperscript{154} the Privileges and Immunities Clause,\textsuperscript{155} the Free Speech Clause,\textsuperscript{156} the Citizenship Clause,\textsuperscript{157} and even the Takings Clause.\textsuperscript{158} The Gary B. case presents an ambitious variation on the right to a minimally adequate education—the right to access a minimal literacy education.\textsuperscript{159} Building on dicta from Rodriguez,\textsuperscript{160} it contends that other constitutional rights, including the rights of expression and political participation, all necessitate an ability to read.\textsuperscript{161} This unique argument has prompted many legal scholars to predict the case will ultimately be heard by the Supreme Court, even though it faces an arduous path to achieving its intended goal.\textsuperscript{162}

Following the dismissal of the original complaint, the students filed an appeal with the Sixth Circuit.\textsuperscript{163} In that brief, the legal team expanded the constitutional justifications for recognizing this unenumerated right, both in terms of Equal Protection and Due Process.\textsuperscript{164} Both theories propose that the court should employ heightened judicial scrutiny to review the adequacy of the education these Detroit schools offer, arguing that actions by state and local education officials should not be given standard “rational basis” deference.\textsuperscript{165}

A. Equal Protection Theory

First, the students argue that they are part of a disempowered group of discrete racial and socioeconomic identities because they are all “low-income children of color.”\textsuperscript{166} They assert that Michigan state education officials have violated their equal protection rights by functionally excluding them from the state’s education system.\textsuperscript{167} Because it would be difficult to prove that the government has engaged in intentional racial favoritism in violation of the

\begin{thebibliography}{99}
\bibitem{155} See Bitensky, supra note 73, at 553.
\bibitem{156} Id.
\bibitem{159} See Complaint, supra note 3, at 30–39.
\bibitem{160} See supra Part II.B.
\bibitem{161} See Complaint, supra note 3, at 30–39.
\bibitem{162} See Stephen Sawchuk, Right-to-Read Advocates Undeterred by Court Setback, EDUC. WK. (July 17, 2018), https://www.edweek.org/ew/articles/2018/07/18/right-to-read-advocates-undeterred-by-court-setback.html [https://perma.cc/5ZP4-CDK9]; see also Amar, supra note 44.
\bibitem{163} See Brief of Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (6th Cir. Nov. 16, 2018).
\bibitem{164} Id. at 20–23.
\bibitem{165} Id. at 51–54.
\bibitem{166} See Complaint, supra note 3, at 1.
\bibitem{167} Id. at 125.
\end{thebibliography}
Constitution, the Gary B. argument focuses on how the students’ denied access to literacy education has impacted their other constitutional rights, like the right to vote. The Court has a history of inferring “impermissible intent from unequal racial effects [in] the political rights realm,” and the students hope the judges will be less willing to defer to state educational decision-making on similar grounds.

B. Due Process Theory

Setting aside racial and socioeconomic composition, the students also contend that the Fourteenth Amendment secures a “fundamental right to access to literacy” (including access to minimum levels of quality in school facilities, instructional materials, and teachers) under substantive due process doctrine. They argue that because the state compels students to attend school and therefore restrains their individual liberties, the state assumes an obligation to provide them with access to literacy education. Every state mandates compulsory education and requires minors to attend school, so all students participating in the public education system inherit the right to a minimally adequate education. This path-breaking argument defines educational adequacy as a negative right rather than an affirmative one, which also increases its likelihood of success.

However, in its present form, the criteria for satisfying or violating access to literacy education are not crisply defined. The Gary B. complaint asserts that students attend schools whose proficiency rates “hover near zero,” but their rates of lowest-level literacy proficiency range from 1.8% to 12.5%. Without providing a clearer definition or establishing a test for weighing school performance metrics and other indicators, the Justices are likely to worry about a slippery slope to claims purporting that students have the right to equal education (which the Court has already expressly rejected). As a result, this Note recommends that future appellate arguments outline precise standards that define the scope of this right.

V. A PROPOSED REMEDY: COURT.ORDERED SOCIOECONOMIC INTEGRATION PROGRAMS

In addition to its scope, the Gary B. case faces another significant legal hurdle: “[T]he practical and logistical concerns about appropriate remedies that might disincline federal courts to get deeply involved in decisions about school facilities, curricula, teacher training, and the like.”

Recently, at oral arguments in front of the Sixth Circuit, Judge Eric L. Clay articulated these concerns:

You want a decent school system set up and funded and . . . but your complaint allegations, maybe understandably, [do not] make clear how you would like the Court to assist in accomplishing that by [issuing] an injunctive order. . . . [I]f we need to devise a remedy that involves expenditure of funds, there’s the issue of legally, where could that money come from; whether we could even order an allocation of such money. Your complaint does not say anything about the practicalities of funding the kind of school system with the resources that would be needed to ameliorate the problems that you’ve

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177 See Complaint, supra note 3, at 4–7 (emphasis omitted). This range drastically impacts the number of schools implicated. In its current form, it is also unclear whether the right applies to students based on their current course enrollment and the corresponding proficiency rates of those classes; or whether it applies to all the students attending a school whose average proficiency rates fall below a particular threshold. These distinctions must be clarified for the Court to seriously consider recognizing this right.

178 Chemerinsky, supra note 46, at 1618 (“[T]he Constitution requires equal opportunity and not equal result . . . ”).

179 This Note advocates for a narrower, school-based definition of access to literacy education as a tentative judgment (one that sits uneasily but seems necessary in light of these tensions). Appendices A–D offer one possible definition: schools that achieve only 5% (or less) proficiency in literacy education, as determined by standardized state testing on English Language Arts standards. Using this definition, there are nearly 36,000 students across just four U.S. public school districts who currently attend unconstitutional schools. For more information about how this right could be defined differently, see Appendix A n.290 and Appendix B n.296.

180 Amar, supra note 44 (“Most of the other settings in which the Court has recognized a fundamental right do not involve the remedial complexity the [Gary B.] case implicates.”).
identified. What do you want us to do in that regard? What kind of injunctive remedy? And where would we get the resources if we agree with you that there is . . . a federal constitutional right to literacy?¹八十

This Note argues that there is indeed a remedy that both addresses Judge Clay’s concerns about funding and allows the Court to avoid wading into the minutia of school management, while providing the relief that students deserve. Recalling its past success in ordering desegregation decrees to effectuate the Brown race-based education right in the 1970s and ’80s,¹８２ courts can similarly order decrees that require local school districts to implement socioeconomic integration programs today. These programs are a proven mechanism for closing schools that deny access to literacy education while simultaneously replacing them with higher-quality alternatives.

A. Why the Federal Judiciary Should Order Socioeconomic Integration

Traditional school-based measures have not been effective in addressing chronic school underperformance, despite decades of effort. As an alternative to these reforms, districts have increasingly turned to socioeconomic integration programs to ameliorate the achievement gap. Data show that such programs are able to cut by significant margins the gap in proficiency levels between poor students and their more advantaged peers while also addressing the race-based gap.¹８３ However, voluntary programs face significant practical, political, and legal challenges that threaten their long-term success—even when they are promoted by executive agencies or codified by legislatures. These programs therefore need protection from the judicial branch.

1. School-Based Reforms Have Not Closed the Achievement Gap

For decades, the education field has advanced various strategies to alleviate inequities within the American public school system, but none has proved to be effective on a national scale.¹８４ Education leaders commonly focus on initiatives such as mandating more rigorous academic standards and aligned curriculum, raising standards for teacher quality,¹８５ promoting early childhood

¹８２ See ROSENBERG, supra note 68, at 46.
¹８３ The Problem We All Live With, supra note 113.
intervention, advancing early college programs, and increasing accountability through additional standardized testing. Some states have even used the legislature to induce government takeover of individual schools and entire school districts to address severe underperformance.

Of all these measures, though, none has successfully eliminated—or even substantially narrowed—the achievement gap over time. Because these solutions do not address the underlying issue of concentrated poverty (or the myriad related challenges that high-poverty schools face), they are too narrow. But research demonstrates that one solution can successfully address

have passed meaningful new oversight laws or regulations to elevate teacher education in ways that are much harder for universities to game or ignore.”)

See, e.g., Paul Reville, Why We Fail to Address the Achievement Gap, EDUC. Wk. (July 7, 2015), [https://www.edweek.org/ew/articles/2015/07/08/why-we-fail-to-address-the-achievement.html] (highlighting the shortcomings of educational solutions that only address early childhood education or that seek to offer high-performing charter schools for only limited grades). “Would any of us with privilege think of providing an intensive, comprehensive education and care program for our children for two years, then neglect them for 10 years, and eventually expect them to be just fine at the end of the dozen-year period?” Id.

See generally Julian Vasquez Heilig et al., Examining the Myth of Accountability, High-Stakes Testing, and the Achievement Gap, 18 J. FAM. STRENGTHS (2018) (suggesting that standardized testing and its corollary focus on reading, writing, and math instruction have not been effective because they result in sacrificing other non-testable learning opportunities that teach important critical thinking skills).


David N. Plank et al., State Level Strategies and Policies for Closing the Achievement Gap 1 (2008), [https://education.ucdavis.edu/sites/main/files/Plank_Policy_Brief_WEB_0.pdf] (emphasizing that in spite of these efforts, “[n]o state has had a consistent record of narrowing the gap, in all its aspects, over a significant period of time”); see also Freedberg et al., supra note 109, at 1 (asserting that poor California test results “underscored the continuing achievement gaps that decades of education reforms have failed to close”).

See generally Emma García & Elaine Weiss, Reducing and Averting Achievement Gaps, ECON. POL’Y INST. (Sept. 27, 2017), [https://www.epi.org/publication/reducing-and-averting-achievement-gaps/] (describing failed educational reforms and calling for comprehensive interventions targeting poverty to tackle the achievement gap).
high-poverty schools and the disparate academic results they produce: socioeconomic school integration.192

2. Socioeconomic Integration Ameliorates Underperforming Schools

Today, the socioeconomic status (SES)193 of a school is the factor most determinative of a student’s academic success.194 Recent social science research confirms that “a school’s socioeconomic status ha[s] as much impact on the achievement growth of high school students as a student’s individual economic status.”195 Schools that serve large numbers of low-SES students lack adequate resources, which compounds other obstacles that children from low-SES homes face, such as delayed cognitive development and underdeveloped language and memory skills.196 Correspondingly, by the ninth grade, poor students are five years behind in terms of literacy skill development,197 and they are four times likelier to drop out of high school.198

Moreover, income-based segregation between neighborhoods has increased over the past three decades.199 For example, the reading achievement gap

192 The Problem We All Live With, supra note 113 (“[W]e have this thing that we know works, that the data shows works, that we know is best for kids. And we will not talk about it . . . [I]t’s not even on the table.”).
196 See Education and Socioeconomic Status, supra note 193.
197 Sean Reardon et al., Patterns of Literacy Among U.S. Students, 22 FUTURE CHILD. 17, 17 (2012), https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/literacy_challenges_for_the_twenty-first_century_22_02_fulljournal.pdf [https://perma.cc/H8QS-BBUP] (“Black and Hispanic students enter high school with average literacy skills three years behind those of white and Asian students; students from low-income families enter high school with average literacy skills five years behind those of high-income students. These are gaps that no amount of remedial instruction in high school is likely to eliminate. And while the racial and ethnic disparities are smaller than they were forty to fifty years ago, socioeconomic disparities in literacy skills are growing.”).
198 Table 110, NAT’L CTR. FOR EDUC. STATS., http://nces.ed.gov/programs/digest/d08/tables/dt08_110.asp [https://perma.cc/ND87–JKU7].
199 Ann Owens, Inequality in Children’s Contexts: Income Segregation of Households With and Without Children, AM. SOC. REV. 549, 549 (2016); see also Richard D. Kahlenberg, Opinion, To Really Integrate Schools, Focus on Wealth, Not Race, WASH. POST. (June 7,
between students from low-SES and high-SES neighborhoods has increased by 40% over the past twenty-five years. Due to the sharp rise in income inequality, socioeconomic disparities are now as pronounced as racial disparities. Even still, black kids are ten times likelier to live in poor neighborhoods than are their white peers.

Targeting socioeconomic status through school integration breaks up concentrations of both poor and minority school populations. In fact, some districts pursue socioeconomic integration “because they value racial diversity and know that using socioeconomic status will produce a racial dividend in a race-neutral way.” According to the Urban Institute, integrating students by class results in more than 55% racial integration when the solution is intra-district, and nearly 80% racial integration when the solution is inter-district. Almost 90% of high-minority schools are also high-poverty schools, and socioeconomic integration could impact the 2.5 million students who attend them.

Socioeconomic integration also reduces disparities in academic achievement. Because academic outcomes are most heavily influenced by students’ collective socioeconomic statuses, improving schools’ SES diversity impacts the achievement gap more directly. Dispersing high concentrations

201 Id.
203 See Kahlenberg, supra note 195, at 1551–54.
204 Id. at 1554.
205 Id. at 1556.
206 Id. at 1551, 1556.
208 Id.
of impoverished students also fosters improved long-term social\textsuperscript{209} and economic\textsuperscript{210} outcomes.

3. Voluntary Integration Programs Face Practical Limitations

Recognizing that integrated schools foster better academic results, some educational leaders have voluntarily adopted socioeconomic integration programs.\textsuperscript{211} They facilitate these programs most commonly by redrawing attendance zones, implementing district-wide choice policies, offering magnet and charter schools, and designing transfer policies.\textsuperscript{212} These programs are on the rise; a recent study shows that class-based integration programs more than doubled between 2007 and 2016.\textsuperscript{213} But even with this significant increase, only 8\% of public school students attend a district that currently attempts to integrate based on socioeconomic class.\textsuperscript{214} Moreover, voluntary integration programs are usually confined to district boundaries; districts with high levels of poverty or racial homogeneity are therefore unable to meaningfully address enrollment demographics within each school.\textsuperscript{215}

Education leaders also struggle with voluntary integration program implementation due to funding and recruitment challenges.\textsuperscript{216} Agency-based grant funding typically lasts only as long as the initiating administration, and school districts fumble to plan long-term programs without more permanent funding streams.\textsuperscript{217} Legislative fiscal mechanisms generally condition financial

\textsuperscript{209} See John B. King, Jr., Delegated Deputy Sec’y, U.S. Dep’t of Educ., Address at the National Coalition on School Diversity Conference: School Integration Policy Plenary Panel (Oct. 8, 2015), https://www.youtube.com/watch?v=Lb63pgatW5c&feature=youtu.be [https://perma.cc/F5HK-GYER] (“Schools that are integrated are better at preparing students to work with diverse peers [and at] challenging students to think about how we ensure a diverse society that honors our commitment to equality of opportunity.”); see also Robert A. Garda, Jr., The White Interest in School Integration, 63 Fl. A. L. Rev. 599, 599 (2011) (arguing that integrated schools help combat bias, enabling children to navigate the multicultural marketplace more successfully); Rachel Martin & Cara McClellan, Connecticut’s Effort to Integrate Hartford Schools Is Working, HILL (July 17, 2018), http://thehill.com/opinion/education/397201-connecticuts-effort-to-integrate-hartford-schools-is-working [https://perma.cc/VPM8-UQ4J].

\textsuperscript{210} See Martin & McClellan, supra note 209.

\textsuperscript{211} See Holley-Walker, supra note 98, at 898–901.

\textsuperscript{212} Id. at 899–901.

\textsuperscript{213} Halley Potter et al., A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity, CENTURY FOUND. (Feb. 9, 2016), https://tcf.org/content/report/a-new-wave-of-school-integration/?session=1 [on file with Ohio State Law Journal].

\textsuperscript{214} Id.

\textsuperscript{215} Holley-Walker, supra note 98, at 905–06.

\textsuperscript{216} See, e.g., Cohen, supra note 65 (describing the challenges that result from temporary grant programs and political uncertainty).

support on suburban student participation, which creates external limits on program enrollment. Relatedly, recruiting students to opt-in to voluntary integration programs often falls on the shoulders of under-resourced staff who are tasked with family outreach across multiple school districts. These challenges threaten the continued viability of such voluntary programs. Because voluntary integration programs are not subject to formal authoritative oversight and depend on tenuous, temporary support, student rights would be better protected if the judiciary effectuated them.

4. Socioeconomic Integration Overcomes Court Scrutiny and Political Hesitation

Voluntary integration programs that employ racial classifications face both legal challenges and political resistance. For example, a group of Connecticut parents recently filed a federal lawsuit against their local school district, which voluntarily operates an inter-district integration program. The parents allege that the program’s enrollment requirements impose an impermissible race-based quota in violation of the Equal Protection Clause of the Fourteenth Amendment. The legal challenge hinges on whether the Court revisits its

new-champions-of-school-integration/ [https://perma.cc/CS22-U794]. The Obama administration created a grant-based program, “Opening Doors, Expanding Opportunities” to try to foster integration, and over twenty-five school districts expressed interest in participating. The U.S. Department of Education rescinded that program, however, after President Trump took office. Id.

For example, the funding mechanisms underlying legislatively created inter-district programs usually condition the budget on the number of suburban students who choose to enroll. As a result, the number of students who want the opportunity to attend school outside their residential district often surpasses the number of lottery slots that afford such an opportunity. When magnet schools are unable to meet these requirements, seats remain empty to preserve state funding, despite the large numbers of district students who are eager for the chance to participate. See Progress in Hartford Schools, But Illegal Segregation Persists, HARTFORD COURANT (Mar. 19, 2017), https://www.courant.com/opinion/editorials/20170318-story.html [https://perma.cc/V49Q-M8GU]; see also Jane R. Price & Janet R. Stern, Magnet Schools as a Strategy for Integration and School Reform, 5 YALE L. & POL’Y REV. 291, 292 (1987) (highlighting that voluntary programs benefit only a limited group of children, at the expense of others).

219 See The Problem We All Live With, supra note 113.
221 Complaint, supra note 220, at 19; see also Erika Frankenberg et al., School Integration Efforts After Parents Involved, 37 HUM. RTS. 10, 13 (2010) (arguing for the
affirmative action jurisprudence, and on how the Court applies strict scrutiny to the race-based elements of the program. At best, the future of the program is extremely uncertain.

Differentiation based on socioeconomic status, on the other hand, offers a “legally promising strategy” because it evokes a less demanding form of judicial review—the rational basis test—and therefore does not pose the same legal hurdles. Additionally, socioeconomic integration carries less political riskiness, both for the judges who issue court orders and the local decisionmakers who create the programs in accordance with judicial decree. In the past, these actors have been hesitant to take meaningful steps towards remedying “racial isolation of neighborhoods, or the school segregation that flows from it” because the issue is so politically charged. Class-based integration allows judges and local officials to engage in a solution without assuming that risk.

5. State Courts Have Not Redressed State Education Claims

Since the Supreme Court has not yet recognized a federal constitutional right to a minimally adequate education, student plaintiffs most commonly pursue relief in state court. State-level claims are based on violations of education rights that are secured under state constitutions, and they typically

necessity of federal guidance and outlining what is allowable for districts interested in utilizing voluntary desegregation programs).


225 Kahlenberg, supra note 195, at 1555 (“Even opponents of using race in student assignment concede that using socioeconomic status is perfectly legal.”).

226 See Rothstein, supra note 51.

227 Id.


229 Id. Most state constitutions guarantee the right to an adequate education. See RANDY J. HOLLAND ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 598 (2d ed. 2010) (highlighting unique state constitution educational provisions that have no federal constitutional equivalent).
target the adequacy of the state educational system. In response to this litigation, the state courts have issued clearer definitions of educational adequacy than have the federal judiciary or state legislatures. Indeed, state courts have found that many school districts serving primarily minority and poor students fall below state constitutional requirements, and these decisions have yielded some initial plaintiff success in state-level educational adequacy cases.

But most of these victories have been only temporary. Where the state courts were favorable to student plaintiffs in the 1990s, that trend has all but disappeared. Today, even when state judges recognize that schools and districts foster unconstitutional deprivations and disparities, those same judges eschew their responsibility to issue a responsive remedy. Political and economic pressures have caused these state judges to balk and instead engage in “remedial abstention.” As a result, state court judges have largely downgraded the right to education and have functionally removed the issue from justiciability altogether.

State courts have proven to be overwhelmingly ineffective in ensuring that students have access to minimally adequate schools, despite decades of effort. State judge inaction obstructs “efforts to remove barriers to equal education.

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230 Holland et al., supra note 229, at 598 (noting that many of these cases criticized funding mechanisms as insufficient for guaranteeing educational opportunities to all children and families).


233 See, e.g., Linda Conner Lambeck, State Supreme Court Reverses Lower Ruling on Education Funding, CT POST (Jan. 18, 2018), https://www.ctpost.com/local/article/State-wins-school-funding-case-12505168.php [https://perma.cc/HXR8-LAEW] (describing a state minimal educational claim that won at trial but was overruled by the appellate court shortly thereafter).


235 Joshua E. Weishart, Aligning Education Rights and Remedies, 27 Kan. J.L. & PUB. POL’Y 346, 348–49 (2018). Even in a rare instance where the state court specified a remedy for an educational adequacy violation, the same court later “enabled the legislature to stray considerably from [its] direction.” Id. at 350.


237 Weishart, supra note 235, at 347 (finding that six states denied legal remedies for student plaintiffs throughout the 1990s and early 2000s, downgrading the right to education and avoiding judicial review). For a recent specific example of a state court declining to grant a remedy to student-plaintiffs who alleged a state constitutional violation of their education rights, see Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 75 (Conn. 2018).

opportunities for low-income and minority students." 239 The federal judiciary, on the other hand, has a proven track record in improving the achievement gap and in diversifying isolated student populations within the public school system through court-ordered integration efforts. 240 No other educational solution has been able to effect system-wide improvements to a comparable degree. 241 Federal judicial intervention works, and district court judges should intervene again.

B. What the Federal Judiciary Should Order

Few enduring examples of inter-district school integration exist today. 242 While voluntary socioeconomic integration programs have increased in recent years, they are typically confined to operating within a single school district. 243 Since most urban segregation occurs not within but across districts, 244 single-district solutions are limited in the extent to which they can redistribute school compositions. But an ongoing effort to integrate public education across district boundaries in Connecticut provides a useful template for facilitating an inter-district integration program and offers data on the results such an effort can produce. Federal judges should look to the Connecticut program as a guide when prescribing remedies and overseeing local school district efforts.

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239 Id.
240 See supra Part III.
241 See Schmitz, supra note 71, at 1640.
242 See, e.g., The Problem We All Live With, supra note 113. One recent example of inter-district school integration occurred in Normandy, Missouri. Id. After Normandy Public School District (NPSD) lost its accreditation, an antiquated state law afforded students the option to attend a suburban school district thirty miles away through a busing program. Id. Over one thousand students opted to participate before the state reversed the accreditation status of NPSD and ended the program. Id.; see also This American Life: The Problem We All Live With—Part Two, CHI. PUB. RADIO (Aug. 7, 2015), https://www.thisamericanlife.org/563/transcript [https://perma.cc/33W4-4MP2] (providing further reflection on school district segregation in part two of this podcast).
243 For example, the State of New York initiated an effort to increase diversity at low-performing New York City Public Schools through a socioeconomic integration pilot program. The state announced a competitive grant program after voluntary diversity efforts in Brooklyn’s District 13 experienced initial success. Geoff Decker, In Brooklyn’s District 13, A Task Force Aims to Engineer Socioeconomic Integration, CHALKBEAT (Feb. 12, 2014), https://ny.chalkbeat.org/posts/ny/2014/02/12/in-brooklyns-district-13-a-task-force-aims-to-engineer-socioeconomic-integration/ [https://perma.cc/R9KG-NM4U].
1. The Hartford, Connecticut Program Model

In 1997, Connecticut passed a bipartisan bill outlining mechanisms for school integration in Hartford after the Connecticut Supreme Court ruled that Hartford schools violated students’ education rights under the state’s constitution. Though the court did not mandate a specific remedy to resolve the extreme disparities within the state’s public education system, the general assembly designed a program to integrate the schools. The resulting statewide inter-district public school “Open Choice” program was adopted to improve academic achievement and to reduce racial, ethnic, and economic educational disparities.

The State Board of Education funds the Open Choice program, while three agencies, including the Capitol Region Education Commission, have authority to operate the program and carry out its objectives. The program centers on the establishment of inter-district magnet schools. These schools serve students across district lines as well as public school students who reside within

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246 Because the Connecticut Constitution “contemplates free public elementary and secondary schools that, at the least, are minimally adequate” and also includes explicit anti-segregation and anti-discrimination clauses, the Court held that the state had the authority “to integrate students by class and race.” Lincoln Caplan, Two Connecticut School Systems, For the Rich and Poor, NEW YORKER (Sept. 14, 2016), https://www.newyorker.com/news/news-desk/two-connecticut-school-districts-for-the-rich-and-poor [https://perma.cc/2DS9-7TCQ] (internal quotations omitted).


248 See GARY ORFIELD & JONGYEON EE, CONNECTICUT SCHOOL INTEGRATION: MOVING FORWARD AS THE NORTHEAST RETREATS 10–12 (2015). Connecticut is one of the wealthiest states, and it has a disproportionately low number of children who qualify for federally subsidized or free school lunches. Even still, the “comparative inequality in racial exposure to poor students is more extreme in Connecticut” compared to national averages; minority students are three times likelier to be poor than their white peers, who are “overwhelmingly middle class.” Id. at 29.

249 The general assembly’s first attempt at addressing school integration was unsuccessful. Eventually, Connecticut Governor Rowland intervened and worked with the legislature to pass this voluntary, inter-district program. CONN. SCH. FIN. PROJECT, GUIDE TO CONNECTICUT’S MAGNET SCHOOLS 4 (Nov. 2018).

250 Id. at 13.


252 A “magnet” school is so termed because it is “intended to attract students away from their neighborhood schools.” Their key characteristics include a specialized school curriculum or theme, voluntary enrollment, and a student body hailing from many attendance zones. Price & Stern, supra note 218, at 292.
the district where the magnet school is located. Students can choose to attend specialized schools in more than thirty surrounding districts through a lottery. This new system allowed the state to close chronically under-performing schools and replace them with high-quality alternatives.

The plan is funded by a multi-tier budget mechanism. First, competitive grants support construction of state-of-the-art magnet schools in Hartford and nearby districts (New Haven and Bridgeport, in particular). Second, per-student state allocations fund districts receiving students who live outside their borders. Additional incentives attach to these allocations for any district that increases its Open Choice enrollment and serves high percentages of non-resident students also receive increased funding. Third, per-student losses are capped so that sending districts who lose students do not sustain crippling budget deficits. Finally, the state provides transportation funding for Open Choice students.

Today, Connecticut offers ninety-one inter-district magnet schools. Over 22,000 Hartford students attend integrated schools, which is nearly half of the school district’s total population. Statewide, about 40,000 students participate. These statistics represent a more than doubling of students who attend integrated schools across the state in just under twenty years.

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255 Christine Campbell & Betheny Gross, Improving Student Opportunities and Outcomes in Hartford Public Schools, CTR. REINVENTING PUB. EDUC. 3 (June 2013), https://www.crpe.org/sites/default/files/Pub_EvidenceProject_Hartford_jul13.pdf (explaining that lotteries are weighted to preserve or enhance heterogeneous school composition among the participating districts).
256 Conn. Sch. Fin. Project, supra note 249, at 13–16 (“Interdistrict magnet school building projects developed for the purposes of increasing diversity are eligible to have up to 80 percent of the costs of construction reimbursed by the State.”).
258 Id.
259 Conn. Sch. Fin. Project, supra note 249, at 12.
262 Id. at 6.
263 Martin & McClellan, supra note 209.
264 See Progress in Hartford Schools, But Illegal Segregation Persists, supra note 218.
265 Conn. Sch. Fin. Project, supra note 249, at 6.
266 Prior to the integration program, less than 17% of Hartford students attended integrated schools; by 2008, that number rose to 43%. Lucretia Anne Witte, Can School Integration Increase Student Achievement? Evidence from Hartford Public Schools 11 (Apr. 12, 2016) (unpublished M.P.P. thesis, Georgetown University), https://repository.library.georgetown.edu/bitstream/handle/10822/1040840/Witte_georgetown_0076M_13272.pdf?sequence=1&isAllowed=y (https://perma.cc/XLT4-HCX5).
Commensurate with these demographic improvements, student achievement has improved by significant margins. For example, minority students who attend Hartford’s integrated schools have increased their reading proficiency rates by 10.9%. Poor students in Hartford’s integrated schools perform substantially above statewide averages for low-income students. Graduation rates have also improved. These academic gains are attributable to replacing chronically low-performing schools with redesign schools, which show significant improvements in reading scores. In roughly one generation, the Open Choice program has helped close the state’s significantly underperforming schools and raised student literacy rates by creating strategically located, high-quality magnet schools in high-poverty neighborhoods.

A similar program is viable in nearly any state or community, as model variations can accommodate a wide range of local education challenges and community preferences. Indeed, a variety of geographic areas have implemented pilot integration programs to address their respective, individualized needs. Cities or regions that need to address only a few discrete unconstitutional schools may be able to rectify them by transitioning just those schools into inter-district magnet programs. Lansing, Michigan; Raleigh, North Carolina; and Cambridge, Massachusetts have all successfully redressed their failing schools using this approach, which has diversified school demographics and improved student literacy outcomes. Cities or regions with numerous or systemic unconstitutional schools can implement a more robust inter-district model, with collaboration between multiple districts and the state. Both Omaha, Nebraska and the State of New York have recently adopted this

267 Id. at 27–32. Data also reveal a positive correlation between time a student spends in integrated schools and improved academic outcomes. Kimberly Quick, Hartford Public Schools: Striving for Equity through Interdistrict Programs, CENTURY FOUND. (Oct. 14, 2016), https://tcf.org/content/report/hartford-public-schools/?agreed=1 [on file with Ohio State Law Journal].
268 Quick, supra note 267.
269 CAMPBELL & GROSS, supra note 255, at 14.
270 Id. at 9–11, 15.
271 Id. at 3.
272 See Kahlenberg, supra note 52, at 263–79.
274 See, e.g., infra Appendix B.
276 See, e.g., infra Appendices A and D.
277 WAGNER, supra note 36, at 18. In Omaha, eleven districts across the metropolitan area merged their funding to offer cross-district transfer school options to students in order to increase school diversity. Id.
When the Court considers how to design remedies for the right to access literacy education, it should look to the Open Choice program as a practical, effective, and flexible model that can remedy unconstitutional schools in a wide range of geographic areas and educational landscapes.

2. Federal Court Mechanisms for Implementation

Moreover, federal judges should order and oversee inter-district programs because nearly two-thirds of segregation occurs between districts, not within districts. This reality can be addressed by a court-ordered, inter-district transfer plan similar to the one that has been successful in Hartford. Like the Hartford model, such a plan would necessarily consist of two parts: (1) offering magnet schools in low-SES neighborhoods to attract students from nearby, more affluent districts, and (2) including an incentive payment scheme to encourage affluent districts to enroll low-SES students. This type of “controlled choice” maximizes socioeconomic integration within and across school districts while also respecting parental choice of schools.

To oversee the design and implementation of these programs and their funding streams, district court judges can appoint “special masters.” The federal judiciary commonly employs special masters to help manage remedies in complex civil cases by addressing judicial limitations and helping to implement equitable decrees in public institutional reform. Non-attorney special masters, who offer specialized knowledge in a needed field or subject, often oversee post-trial activity, such as monitoring compliance with a court order. In fact, special masters oversaw the post-Brown desegregation decrees in the 1970s and 1980s. Special masters with both educational expertise and mediation skills would be well-poised to facilitate agreement among local school districts and state education officials; to preserve local educational autonomy and decision-making authority; and to ensure that the judicial remedy comes to fruition.

To support a geographic region in developing the specific details of a locally tailored integration program, the special master can utilize design strategies that increase the likelihood of a program’s success, including incorporating

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278 Id. at 19. These programs were implemented only recently, as pilots supported by a one-time federal grant. Id.
280 See Basile, supra note 224, at 130.
281 See id.
community input and offering choices to families in school assignment plans. Because the special master can oversee the remedy on behalf of the court while empowering local educational control throughout the design and implementation processes, this role is a critical element of court-ordered inter-district integration orders. While judicial decrees and the special masters who effectuate them are unlikely to eliminate entirely disparate school populations and the academic achievement gap in today’s American schools, they can utilize a practical, proven strategy for facilitating the end of our lowest-performing, unconstitutional schools.

VI. CONCLUSION

For now, Gary B. has no option but to attend school each day at a racially and socioeconomically segregated institution, where none of the students have gained proficiency in core subject areas. Reports condemning Detroit for its educational failures have been in the public eye for decades and continue today, but state and local education officials have not been successful in resolving them. Detroit students have requested relief from the state court system, but it has been similarly ineffectual. In today’s educational landscape, kids who want the opportunity to attain the literacy skills they need for democratic participation have turned to the federal judiciary for help.

As the Court considers whether to acknowledge a right to access literacy education, it will no doubt consider the administrability of a corresponding remedy. That question, however, is fairly easy to resolve. District court judges made substantial progress towards securing the Brown race-based right to education throughout the 1970s and ’80s by issuing orders and using special masters to oversee school district efforts to integrate. Those efforts cultivated transformative academic gains for minority and low-income students in just a single generation. Since that time, no other attempt has guaranteed that all

286 See WAGNER, supra note 36, at 18 (presenting The Center for Public Education’s recommended best practices and policy solutions for implementing public school integration programs).

287 Complaint, supra note 3, at 65.


kids—regardless of their race, class, or neighborhood—can universally attend minimally adequate schools. If our country is genuinely committed to providing educational opportunities for all its children, federal judges must act. Their intervention is the only proven remedy for our unconstitutional schools.
APPENDIX A\textsuperscript{291}

Baltimore, Maryland\textsuperscript{292}

<table>
<thead>
<tr>
<th>School that Does Not Provide Minimal Access to Literacy Education</th>
<th>Proficiency Rate</th>
<th>Minority Enrollment \textsuperscript{293}</th>
<th>Low Income Enrollment \textsuperscript{294}</th>
<th>Students Enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Academy for College and Career</td>
<td>1.3%</td>
<td>98.0%</td>
<td>100.0%</td>
<td>513</td>
</tr>
<tr>
<td>Achievement Academy at Harbor City</td>
<td>0.0%</td>
<td>98.4%</td>
<td>100.0%</td>
<td>343</td>
</tr>
<tr>
<td>Arundel Elementary/Middle</td>
<td>3.2%</td>
<td>99.4%</td>
<td>98.5%</td>
<td>343</td>
</tr>
<tr>
<td>Augusta Fells Savage Institute</td>
<td>5.4%</td>
<td>99.7%</td>
<td>98.5%</td>
<td>480</td>
</tr>
<tr>
<td>Baltimore Design School</td>
<td>5.1%</td>
<td>95.6%</td>
<td>89.1%</td>
<td>510</td>
</tr>
<tr>
<td>Banneker Blake Academy</td>
<td>5.6%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>260</td>
</tr>
<tr>
<td>Bluford Drew Jemison STEM Academy</td>
<td>0.8%</td>
<td>98.6%</td>
<td>100.0%</td>
<td>379</td>
</tr>
<tr>
<td>Booker T. Washington Middle School</td>
<td>1.6%</td>
<td>98.1%</td>
<td>100.0%</td>
<td>220</td>
</tr>
<tr>
<td>Brehms Lane Public Charter School</td>
<td>5.9%</td>
<td>98.4%</td>
<td>100.0%</td>
<td>680</td>
</tr>
<tr>
<td>Calverton Elementary/Middle</td>
<td>0.0%</td>
<td>98.3%</td>
<td>99.1%</td>
<td>646</td>
</tr>
<tr>
<td>Carver Vocational-Technical High</td>
<td>2.9%</td>
<td>99.2%</td>
<td>98.5%</td>
<td>891</td>
</tr>
<tr>
<td>Cherry Hill Elementary/Middle</td>
<td>4.4%</td>
<td>99.0%</td>
<td>100.0%</td>
<td>457</td>
</tr>
<tr>
<td>Coldstream Park Elementary</td>
<td>4.3%</td>
<td>98.9%</td>
<td>100.0%</td>
<td>266</td>
</tr>
<tr>
<td>Collington Square Elementary</td>
<td>5.8%</td>
<td>99.4%</td>
<td>99.0%</td>
<td>340</td>
</tr>
</tbody>
</table>

\textsuperscript{291} Author-created appendices. Because the Gary B. argument does not define minimal access to literacy education in terms of proficiency benchmarks, this Note aggregates data assuming that schools with 6% proficiency or less would satisfy any future court criterion. The figures present school report card data, which identify student literacy proficiency rates based on state-administered standardized assessments.


\textsuperscript{293} School Performance Data, SCHOOLDIGGER, https://www.schooldigger.com [https://perma.cc/9F5N-XPN4] (select Maryland from U.S. map; then search school lookup field by school name). Maryland state report cards do not include student enrollment data on race or socioeconomic status.

\textsuperscript{294} Id. (defining low-income students as those who qualify for free or reduced-cost lunch through federal subsidies).
<table>
<thead>
<tr>
<th>School that Does Not Provide Minimal Access to Literacy Education</th>
<th>Proficiency Rate</th>
<th>Minority Enrollment</th>
<th>Low Income Enrollment</th>
<th>Students Enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td>ConneXions: A Community Based Art</td>
<td>3.5%</td>
<td>99.6%</td>
<td>100.0%</td>
<td>481</td>
</tr>
<tr>
<td>Curtis Bay Elementary</td>
<td>1.9%</td>
<td>60.5%</td>
<td>98.4%</td>
<td>559</td>
</tr>
<tr>
<td>Dallas F. Nicholas Sr. Elementary</td>
<td>3.0%</td>
<td>100%</td>
<td>100.0%</td>
<td>274</td>
</tr>
<tr>
<td>Dorothy I. Height Elementary School</td>
<td>2.6%</td>
<td>97.5%</td>
<td>100.0%</td>
<td>319</td>
</tr>
<tr>
<td>Dr. Bernard Harris Sr. Elementary</td>
<td>2.9%</td>
<td>98.6%</td>
<td>100.0%</td>
<td>352</td>
</tr>
<tr>
<td>Dr. Carter Godwin Woodson</td>
<td>1.0%</td>
<td>99.5%</td>
<td>100.0%</td>
<td>361</td>
</tr>
<tr>
<td>Dr. Martin Luther King, Jr. Elementary</td>
<td>5.0%</td>
<td>99.7%</td>
<td>100.0%</td>
<td>306</td>
</tr>
<tr>
<td>Edgewood Elementary</td>
<td>3.3%</td>
<td>97.0%</td>
<td>100.0%</td>
<td>219</td>
</tr>
<tr>
<td>Eutaw-Marshburn Elementary</td>
<td>0.0%</td>
<td>97.3%</td>
<td>100.0%</td>
<td>296</td>
</tr>
<tr>
<td>Forest Park High</td>
<td>4.2%</td>
<td>98.1%</td>
<td>96.8%</td>
<td>623</td>
</tr>
<tr>
<td>Fort Worthington Elementary</td>
<td>4.3%</td>
<td>99.3%</td>
<td>100.0%</td>
<td>684</td>
</tr>
<tr>
<td>Frederick Douglass High</td>
<td>3.4%</td>
<td>99.1%</td>
<td>99.4%</td>
<td>906</td>
</tr>
<tr>
<td>Frederick Elementary</td>
<td>4.3%</td>
<td>92.5%</td>
<td>98.0%</td>
<td>466</td>
</tr>
<tr>
<td>Friendship Academy of Engineering</td>
<td>4.8%</td>
<td>98.5%</td>
<td>90.1%</td>
<td>306</td>
</tr>
<tr>
<td>Garrett Heights Elementary/Middle</td>
<td>5.5%</td>
<td>91.9%</td>
<td>95.7%</td>
<td>389</td>
</tr>
<tr>
<td>Gilmor Elementary</td>
<td>2.2%</td>
<td>99.2%</td>
<td>100.0%</td>
<td>264</td>
</tr>
<tr>
<td>Guildford Elementary/Middle</td>
<td>5.2%</td>
<td>95.5%</td>
<td>99.0%</td>
<td>311</td>
</tr>
<tr>
<td>Harlem Park Elementary</td>
<td>1.2%</td>
<td>99.2%</td>
<td>100.0%</td>
<td>334</td>
</tr>
<tr>
<td>Hazelwood Elementary/Middle</td>
<td>3.1%</td>
<td>97.3%</td>
<td>100.0%</td>
<td>465</td>
</tr>
<tr>
<td>James McHenry Elementary</td>
<td>4.9%</td>
<td>97.8%</td>
<td>82.9%</td>
<td>389</td>
</tr>
<tr>
<td>Lillie May Carroll Jackson School</td>
<td>0.0%</td>
<td>99.4%</td>
<td>78.3%</td>
<td>197</td>
</tr>
<tr>
<td>Knowledge and Success Academy</td>
<td>5.9%</td>
<td>97.2%</td>
<td>100.0%</td>
<td>370</td>
</tr>
<tr>
<td>Matthew A. Henson Elementary</td>
<td>2.0%</td>
<td>99.7%</td>
<td>100.0%</td>
<td>360</td>
</tr>
<tr>
<td>N.A.C.A. Freedom and Democracy II</td>
<td>1.7%</td>
<td>98.7%</td>
<td>87.2%</td>
<td>223</td>
</tr>
<tr>
<td>New Era Academy</td>
<td>0.0%</td>
<td>93.7%</td>
<td>95.6%</td>
<td>334</td>
</tr>
<tr>
<td>Patterson High</td>
<td>2.1%</td>
<td>92.4%</td>
<td>77.3%</td>
<td>1,103</td>
</tr>
<tr>
<td>Reginald F. Lewis High School</td>
<td>5.0%</td>
<td>98.8%</td>
<td>90.1%</td>
<td>564</td>
</tr>
<tr>
<td>School that Does Not Provide Minimal Access to Literacy Education</td>
<td>Proficiency Rate</td>
<td>Minority Enrollment</td>
<td>Low Income Enrollment</td>
<td>Students Enrolled</td>
</tr>
<tr>
<td>---------------------------------------------------------------</td>
<td>-----------------</td>
<td>---------------------</td>
<td>----------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Renaissance Academy</td>
<td>2.7%</td>
<td>98.6%</td>
<td>100.0%</td>
<td>246</td>
</tr>
<tr>
<td>Robert W. Coleman Elementary</td>
<td>2.5%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>336</td>
</tr>
<tr>
<td>Rognel Heights Elementary/Middle</td>
<td>5.3%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>250</td>
</tr>
<tr>
<td>Roots and Branches School</td>
<td>4.8%</td>
<td>96.7%</td>
<td>98.7%</td>
<td>156</td>
</tr>
<tr>
<td>Sarah M. Roach Elementary</td>
<td>5.9%</td>
<td>95.2%</td>
<td>100.0%</td>
<td>235</td>
</tr>
<tr>
<td>Samuel Coleridge-Taylor School</td>
<td>3.1%</td>
<td>95.2%</td>
<td>100.0%</td>
<td>357</td>
</tr>
<tr>
<td>The Reach! Partnership Academy</td>
<td>3.1%</td>
<td>99.1%</td>
<td>100.0%</td>
<td>526</td>
</tr>
<tr>
<td>Waverly Elementary</td>
<td>5.8%</td>
<td>98.4%</td>
<td>100.0%</td>
<td>640</td>
</tr>
<tr>
<td>William Pinderhughes Elementary</td>
<td>5.0%</td>
<td>100.0%</td>
<td>100.0%</td>
<td>263</td>
</tr>
</tbody>
</table>

**Total Students: 20,792**

**Percent of Students Enrolled in an Unconstitutional School: 26.2%** \(^{295}\)

Columbus, Ohio

School that Does Not Provide Minimal Access to Literacy Education

<table>
<thead>
<tr>
<th>School Name</th>
<th>Proficiency Rate</th>
<th>Minority Enrollment</th>
<th>Low Income Enrollment</th>
<th>Students Enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trevitt Elementary School</td>
<td>2.1%</td>
<td>94.4%</td>
<td>100.0%</td>
<td>234</td>
</tr>
<tr>
<td>Windsor STEM Academy</td>
<td>5.6%</td>
<td>94.7%</td>
<td>100.0%</td>
<td>413</td>
</tr>
</tbody>
</table>

Total Students: 647

Percent of Students Enrolled in an Unconstitutional School: 1.3%

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297 The Gary B. case argues for a right to minimal access to literacy education, but the Complaint also cites the extreme low performance of students in other subject areas, such as math and science. See supra Part IV. If the right to a minimally adequate education were expanded to include at proficiency in mathematics, the figure above would be drastically different. For example, in Columbus City Schools, six additional schools have achieved mathematical proficiency in less than 6% of students, implicating an additional 3532 students. By this measure, 8.19% of Columbus City Schools students attend an unconstitutional school.

298 Columbus City Schools serves approximately 51,000 students. See COLUMBUS CITY SCHS., https://www.ccsoh.us/domain/154 [https://perma.cc/4CAV-Y5KP].
APPENDIX C

Memphis, Tennessee

<table>
<thead>
<tr>
<th>School That Does Not Provide Minimal Access to Literacy Education</th>
<th>Proficiency Rate</th>
<th>Minority Enrollment</th>
<th>Low Income Enrollment</th>
<th>Students Enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aspire Henley Elementary</td>
<td>5.3%</td>
<td>100.0%</td>
<td>78.8%</td>
<td>495</td>
</tr>
<tr>
<td>Aspire Middle School</td>
<td>5.3%</td>
<td>99.6%</td>
<td>77.8%</td>
<td>225</td>
</tr>
<tr>
<td>Cummings Elementary</td>
<td>5.7%</td>
<td>100.0%</td>
<td>86.4%</td>
<td>493</td>
</tr>
<tr>
<td>Douglass High School</td>
<td>5.6%</td>
<td>100.0%</td>
<td>Unavailable</td>
<td>476</td>
</tr>
<tr>
<td>Dubois Middle School of Arts Technology</td>
<td>&lt; 5.0%</td>
<td>98.7%</td>
<td>73.4%</td>
<td>158</td>
</tr>
<tr>
<td>Fairley High School</td>
<td>5.0%</td>
<td>99.4%</td>
<td>74.2%</td>
<td>519</td>
</tr>
<tr>
<td>Grad Academy Memphis</td>
<td>&lt; 5.0%</td>
<td>99.8%</td>
<td>69.3%</td>
<td>479</td>
</tr>
<tr>
<td>Geeter Middle School</td>
<td>5.5%</td>
<td>100.0%</td>
<td>81.5%</td>
<td>276</td>
</tr>
<tr>
<td>Hamilton High School</td>
<td>&lt; 5.0%</td>
<td>99.7%</td>
<td>83.0%</td>
<td>622</td>
</tr>
<tr>
<td>Hawkins Mill Elementary School</td>
<td>5.3%</td>
<td>98.7%</td>
<td>89.1%</td>
<td>312</td>
</tr>
<tr>
<td>Hilcrest High School</td>
<td>5.8%</td>
<td>98.9%</td>
<td>71.5%</td>
<td>442</td>
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<tr>
<td>KIPP Memphis Collegiate High School</td>
<td>5.4%</td>
<td>98.6%</td>
<td>64.5%</td>
<td>515</td>
</tr>
<tr>
<td>Kirby High</td>
<td>5.1%</td>
<td>99.4%</td>
<td>59.2%</td>
<td>894</td>
</tr>
<tr>
<td>Martin Luther King Preparatory School</td>
<td>5.8%</td>
<td>98.6%</td>
<td>78.3%</td>
<td>576</td>
</tr>
<tr>
<td>Melrose High School</td>
<td>5.8%</td>
<td>99.7%</td>
<td>73.6%</td>
<td>587</td>
</tr>
<tr>
<td>Memphis Scholars Raleigh-Egypt</td>
<td>5.6%</td>
<td>100.0%</td>
<td>49.5%</td>
<td>99</td>
</tr>
<tr>
<td>Northwest Prep Academy</td>
<td>&lt; 5.0%</td>
<td>100.0%</td>
<td>79.9%</td>
<td>159</td>
</tr>
<tr>
<td>Oakhaven Middle School</td>
<td>5.4%</td>
<td>99.0%</td>
<td>71.6%</td>
<td>310</td>
</tr>
<tr>
<td>Sheffield Elementary</td>
<td>5.4%</td>
<td>99.0%</td>
<td>72.6%</td>
<td>594</td>
</tr>
<tr>
<td>Trezevant High</td>
<td>&lt; 5.0%</td>
<td>99.4%</td>
<td>79.8%</td>
<td>544</td>
</tr>
<tr>
<td>Westside Achievement Middle School</td>
<td>5.1%</td>
<td>94.9%</td>
<td>99.7%</td>
<td>296</td>
</tr>
</tbody>
</table>

Total Students: 9,071

Percent of Students Enrolled in an Unconstitutional School: 9.1%  

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299 Shelby County Public Schools, TENN. DEP’T EDUC., https://reportcard.tnk12.gov/ [https://perma.cc/8KXX-3WCW] (select Shelby County from State map; toggle search to School; enter school name in search bar).  
300 Tennessee school report cards do not list precise proficiency rates when they fall below 5%.  
301 Shelby County Public Schools serve approximately 100,000 students. See SHELBY COUNTY PUB. SCHS., http://www.scsk12.org/about/ [https://perma.cc/DLA8-EXMB].
### Appendix D

**Oakland, California**

<table>
<thead>
<tr>
<th>School that Does Not Provide Minimal Access to Literacy Education</th>
<th>Distance From Standard</th>
<th>Minority Enrollment</th>
<th>Low Income Enrollment</th>
<th>Students Enrolled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alliance Academy</td>
<td>- 114.0</td>
<td>99.2%</td>
<td>96.1%</td>
<td>358</td>
</tr>
<tr>
<td>Castlemont High School</td>
<td>- 191.3</td>
<td>99.3%</td>
<td>93.7%</td>
<td>858</td>
</tr>
<tr>
<td>Community United Elementary</td>
<td>- 106.3</td>
<td>97.5%</td>
<td>96.2%</td>
<td>368</td>
</tr>
<tr>
<td>Fremont High School</td>
<td>- 146.2</td>
<td>97.9%</td>
<td>95.5%</td>
<td>827</td>
</tr>
<tr>
<td>Frick Middle School</td>
<td>- 126.8</td>
<td>99.1%</td>
<td>94.3%</td>
<td>227</td>
</tr>
<tr>
<td>Fruitvale Elementary School</td>
<td>- 116.7</td>
<td>95.9%</td>
<td>88.3%</td>
<td>367</td>
</tr>
<tr>
<td>Hoover Elementary</td>
<td>- 110.4</td>
<td>92.1%</td>
<td>95.7%</td>
<td>278</td>
</tr>
<tr>
<td>Horace Mann Elementary School</td>
<td>- 113.4</td>
<td>98.0%</td>
<td>94.8%</td>
<td>345</td>
</tr>
<tr>
<td>Markham Elementary School</td>
<td>- 119.5</td>
<td>99.1%</td>
<td>97.6%</td>
<td>340</td>
</tr>
<tr>
<td>Oakland International High School</td>
<td>- 203.8</td>
<td>92.9%</td>
<td>97.0%</td>
<td>370</td>
</tr>
<tr>
<td>ROOTS International Academy</td>
<td>- 111.5</td>
<td>96.4%</td>
<td>98.4%</td>
<td>309</td>
</tr>
<tr>
<td>West Oakland Middle School</td>
<td>- 106.9</td>
<td>91.6%</td>
<td>96.5%</td>
<td>202</td>
</tr>
<tr>
<td>Westlake Middle School</td>
<td>- 102.5</td>
<td>95.3%</td>
<td>85.6%</td>
<td>360</td>
</tr>
</tbody>
</table>

**Total Students: 5,209**

Percent of Students Enrolled in an Unconstitutional School: **14.4%**

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303 California public school report cards do not include proficiency percentages. Instead, they aggregate the “Distance from the Standard” (DFS), which is the deviation from the lowest possible score for meeting the standard, for each student. The DFS is then averaged for the school. See Academic Indicator, CAL. SCH. DASHBOARD (Nov. 2018), https://www.cde.ca.gov/ta/ac/cm/documents/academicindicator.pdf [https://perma.cc/D3YL-JTK5]. The state indicates that a school is in “Very Low” status when the DFS for English Language Arts assessments is below 70.1 points and when the school declined by more than 15 points from the prior year. This Appendix includes only those schools with a DFS average of negative 100 points or more. See 2018 California School Dashboard Technical Guide FINAL VERSION: 2018–19 School Year, CAL. DEP’T EDUC. (Dec. 2018), https://www.cde.ca.gov/ta/ac/cm/documents/dashboardguide18.pdf [https://perma.cc/4HQP-HXK5].