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Preemption of Police Reform: A Roadblock to Racial Justice

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PREEMPTION OF POLICE REFORM: A ROADBLOCK TO RACIAL JUSTICE

Rick Su,[†] Marissa Roy & Nestor Davidson**

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INTRODUCTION

Last summer, the movement for racial justice came to city hall. Across the country, community members reacted to the horrific police murders of Black Americans, including George Floyd and Breonna Taylor, by renewing calls on their local governments to engage in meaningful police reform. They called for a wide range of overdue reforms, such as increasing transparency and accountability, restricting use of force, and reallocating resources from law enforcement to support nonarmed emergency response and public health and human services.

Local governments heard their residents. In 2020, nearly half of the largest U.S. cities reoriented municipal spending priorities by directing money from their police budgets to social services;¹ for many cities, these budgetary changes reversed decades of increases.² Cities began implementing additional police reforms as well: New York City

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1. See Sam Levin, *These U.S. Cities Defunded Police: 'We're Transferring Money to the Community'*, *GUARDIAN* (Mar. 7, 2021), <http://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community> [<http://perma.cc/2BA6-THF8>].

2. See *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., <http://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> [<http://perma.cc/QLQ9-24Y7>] (last visited May 1, 2022).

became the first municipality to end qualified immunity for police officers³ while San Francisco shifted to deploying crisis response teams, rather than police officers, to respond to mental health calls.⁴

Instead of supporting these critical reforms, some states targeted cities that prioritized racial justice by preempting those cities' ability to engage in meaningful change. In the 2021 legislative session, ten states proposed at least twenty-four bills to preempt local governments from reducing their municipal law enforcement budgets, five of which ultimately passed.⁵ State leaders were transparent that their aim was to quash police reform and racial justice efforts: when signing House Bill 1 into law, Florida Governor Ron DeSantis stated "[t]his bill actually prevents against [sic] local government defunding law enforcement We'll be able to stop it at the state level."⁶ However, these preemption efforts have much broader implications than preventing police reforms: in Florida, as many cities face declining revenue this fiscal year, House Bill 1 allows for the takeover of a local budget if *any* reduction is made to law enforcement spending,⁷ including necessary cost-saving measures such as a voluntary early retirement program to freeze hiring across municipal departments. These new preemption measures bring the state into some of the most fundamental functions of municipal governance.

This wave of police reform preemption is relatively new and still limited in scope but should be cause for great concern. These preemption bills are racially targeted, explicitly aiming to stymie collaboration between racial justice activists and local government. And further, these bills are not sound policy, as they directly interfere with local governments' ability to respond to constituents and manage a municipal department. Rather, these bills are transparently partisan, placing conservative states' culture wars above the welfare of communities.

3. Taylor Romine, *NYPD Officers Are No Longer Protected from Civil Lawsuits After City Council Passes Police Reform Legislation*, CNN (Mar. 26, 2021), <http://www.cnn.com/2021/03/25/us/nyc-police-reform-nypd/index.html> [<http://perma.cc/46FC-59FY>].

4. Eric Westervelt, *Removing Cops from Behavioral Crisis Calls: 'We Need To Change the Model'*, NPR (Oct. 19, 2021), <https://www.npr.org/2020/10/19/924146486/removing-cops-from-behavioral-crisis-calls-we-need-to-change-the-model> [<http://perma.cc/7LL6-3U73>].

5. See S. 1333, H.R. 2310, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.R. 1, S 484, 2021 Leg. Sess. (Fla. 2021); S. 171, H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); H.R. 230, S. 1203, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.R. 67, 2020 Leg., 2d Ex. Sess., (La. 2020); S. 66, S. 26, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); S. 100, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021); Gen. Assemb. 4990, 219th Leg., 1st Ann. Sess. (N.J. 2020); S. 23, H.R. 638, S. 913, H.R. 1900, H.R. 1950; H.R. 2362; H.R. 2438, H.R. 2695, H.R. 3151, 87th Leg., Gen. Sess. (Tex. 2021); S.119, 2021 Leg. Sess. (Wis. 2021); see also KIM HADDOW, LOC. SOLS. SUPPORT CTR., 2021: A SESSION LIKE NO OTHER 20 (2021), <http://www.supportdemocracy.org/s/ASessionLikeNoOther2021-LocalSolutionsSupportCenter.pdf> [<http://perma.cc/2A3J-J7LR>]. Of these, the five enacted into law are H.R. 286 in Georgia, H.R. 1 in Florida, S. 26 in Missouri, and H.R. 1900 and S. 23 in Texas.

6. Kate Hyson, *Gainesville Might Become First Florida City To Sue Governor, State Attorney over 'Anti-Riot' Law*, WUFT (Aug. 2, 2021), <http://www.wuft.org/news/2021/08/02/gainesville-might-become-first-florida-city-to-sue-governor-state-attorney-over-anti-riot-law> [<http://perma.cc/ZYQ4-F9RH>].

7. See H.B. 1, § 1, 2021 H.R., Reg. Sess. (Fla. 2021).

Now is the time to pay attention to this new trend in preemption. Only a handful of states have targeted municipal police reform, but if left unchecked, such preemption strategies will likely spread to other states. And without scrutiny, some states will feel emboldened to encroach further on the municipal ability to control and reform police departments.

I. OVERVIEW OF THE INTERGOVERNMENTAL ADMINISTRATION OF CRIMINAL JUSTICE

Law enforcement in the United States falls within interrelated federal, state, and local government domains. While the federal government has the power to criminalize acts with interstate or national implications, states have broad police powers under our constitutional structure.⁸ Generally, what acts are deemed criminal is determined by state law, with some localities adding extra criminal penalties or covering different criminal matters within their jurisdictions, particularly in the realm of misdemeanors.⁹

Although states define the scope of most criminal acts, much of criminal investigation and law enforcement happens at the local level. The multiple local governmental entities and actors involved in the administration of criminal justice vary in their relationship with the state. Municipal police departments, county sheriffs, and district attorney's offices all work within local jurisdictions, but some have state obligations as well. In Florida, for example, state law deputizes state attorneys with specific duties, though they are locally elected and carry out their duties locally.¹⁰ Municipal police departments are locally controlled, however, because cities in Florida wield full authority to establish and manage their own police departments to meet local priorities.¹¹ Across the country, local governments generally allocate funding to police departments, appoint the chief of police, and influence or set departmental priorities and policies to ensure that policing is responsive to localized public safety concerns, even though the police are charged in part with enforcing state laws.¹²

States are dependent in large part on local public safety offices for the enforcement of state law, with municipalities deploying local resources to do the frontline work of policing in their communities. In 2008, most police forces were county and city police departments, with city police employing 52% of all public safety officers in the United States.¹³ After public education, policing accounts for the second-largest category of municipal spending—approximately 9.2% of all local spending.¹⁴ Since many states do not contribute to funding these departments, municipalities have made choices about how their local resources are best used for public safety. According to the U.S. Department

8. See U.S. CONST. amend. X.

9. See Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 994–97 (2021) (discussing the role of local governments in the structure of criminal law).

10. § 1; FLA. STAT. ANN. § 27.01 (West 2022).

11. See, e.g., 1927 Fla. Laws 1393–94, 1398.

12. See, e.g., N.Y.C. Charter §§ 28–30, 431; L.A. City Charter §§ 231–32, 240, 570, 575.

13. *Police Departments in the US: Explained*, USA FACTS (Aug. 13, 2020), <http://usafacts.org/articles/police-departments-explained> [<http://perma.cc/JXX3-M5Y8>].

14. *Id.*

of Justice, municipal governments spend over four times as much as state governments on police via direct expenditures.¹⁵

States have historically used preemption to control aspects of local policing. The most notable past exercise has been the adoption of the Law Enforcement Officers' Bill of Rights (LEOBR) starting in the 1970s.¹⁶ These LEOBRs limit the extent to which local governments can hold individual police officers accountable for misconduct under state law.¹⁷ In Maryland, where the strictest LEOBR was enacted, localities were prevented from "punishing officers for 'brutality' unless a complaint [was] filed within ninety days of the alleged incident."¹⁸ Since Maryland first adopted its LEOBR in 1972, approximately sixteen states—which currently employ over one-third of all municipal police officers in the United States—have LEOBR statutes, with eleven more considering adoption.¹⁹ While state-specific LEOBR statutes vary, each limits localities' discretion while investigating police conduct and provides additional protections for officers.²⁰

Although states have used preemption to influence local law enforcement, it has not been the dominant strategy. States generally invoke more cooperative methods, such as providing grants with conditions, in order to advance mutually agreeable law enforcement goals.²¹ And, in particular, states have not used preemption to impose divergent partisan philosophies about criminal law enforcement on local governments—until recently.

II. NEW PREEMPTION OF LOCAL POLICING

The increasing awareness of police brutality against communities of color—particularly Black communities—and growing activism have started a conversation in city halls across the nation about reimagining public safety. The murders of George Floyd and Breonna Taylor are part of a long history of police brutality against communities of color, from the colonial patrols that suppressed slaves fighting for freedom to local police forces that enforced Black codes and Jim Crow,²² to the War on

15. EMILY D. BUEHLER, U.S. DEP'T OF JUST., JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017, at 5 (2021), <http://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf> [<http://perma.cc/9NKY-7KAK>]. Direct expenditures include salary, wages, commissions, purchase of supplies, materials, and other contractual services. *Id.* at 2.

16. See generally Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005).

17. See *id.* at 185–86.

18. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1209–10 (2017).

19. *Id.* at 1209, 1211.

20. For example, in California, polygraphs are barred when interrogating police officers. Illinois requires all citizen complaints to be accompanied by a sworn affidavit, and Delaware protects officers from disclosing their personal assets. *Id.* at 1210.

21. See, e.g., *Office of Criminal Justice Grants*, FLA. DEP'T OF L. ENF'T, <http://www.fdle.state.fl.us/Grants/Home.aspx> [<http://perma.cc/B2JU-GQVM>] (last visited May 1, 2022); *State & Federal Grants Administered by DPS Director's Office*, MO. DEP'T OF PUB. SAFETY, <http://dps.mo.gov/dir/grants.php> [<http://perma.cc/8LQS-7N7J>] (last visited May 1, 2022). State grants generally make up only a small portion of local spending on policing, however. See URB. INST., *supra* note 2.

22. Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AM. BAR ASS'N HUM. RTS. MAG. (2021),

Drugs that has disproportionately incarcerated Black Americans.²³ But until recently, local governments have not taken responsibility for their role in disproportionately funding police departments in comparison to human services,²⁴ integrating federal military equipment into police forces,²⁵ and shielding police officers from accountability.²⁶

Many local officials are now leading police reform efforts in response to the interests of their residents.²⁷ But these efforts are also threatened by state preemption that limits the traditional authority of local governments. Efforts to redirect police resources to mental health and other social services are being obstructed by preemption that prohibits reducing law enforcement budgets.²⁸ Demands for police accountability are stymied by state protections that prevent cities from addressing allegations of police misconduct and abuse. Even the traditional authority of local governments to direct the activities of their police departments is being threatened by state laws that forbid enforcement of gun control laws²⁹ or that mandate participation in federal immigration enforcement.³⁰ Taken together, state preemption laws are turning police departments into detached agencies, accountable to neither the local governments of which they are a part nor the local residents that they are meant to serve. This Section highlights three trends that are characterizing the new preemption of police reform.

A. Budgeting

As police reform efforts have coalesced around demands to redirect law enforcement resources to mental health and other social services, states have begun passing laws that limit local budgetary authority as a potential avenue for reform. Rather than addressing the reasons why reform advocates are concerned about the expansive

http://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish [<http://perma.cc/9TYU-9ASS>]; Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT'L L. ENF'T MEM'L & MUSEUM: HIST.'S BLOTTER (July 10, 2019), <http://nleomf.org/slave-patrols-an-early-form-of-american-policing> [<http://perma.cc/4NQG-YEVE>].

23. See Hannah LF Cooper, *War on Drugs Policing and Police Brutality*, 80 SUBSTANCE USE & MISUSE 1188 (2015), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4800748> [<http://perma.cc/8KNN-T6KS>].

24. See URB. INST., *supra* note 2.

25. Niall McCarthy, *How Much Is The Police's Military Equipment Worth?*, STATISTA (June 10, 2020), <http://www.statista.com/chart/14027/how-much-is-the-polices-military-equipment-worth> [<http://perma.cc/WU4U-XZ7C>].

26. Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020, 7:00 AM), <http://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers> [<http://perma.cc/K3N9-UVDT>].

27. See, e.g., Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Aug. 20, 2021), <http://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/?sh=7d7fde5c29e3> [<http://perma.cc/FYY4-NVFC>].

28. See generally Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. (forthcoming 2022). See also *infra* notes 31–37 and accompanying text.

29. See Glenn Thrush, *Inside Missouri's '2nd Amendment Sanctuary' Fight*, N.Y. TIMES (Sept. 9, 2021), <http://www.nytimes.com/2021/09/09/us/politics/missouri-gun-law.html> [<http://perma.cc/2T35-QMTJ>].

30. See generally Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019).

role of police departments, state legislatures are enacting “anti-defunding” laws that prohibit and punish localities that reduce police funding for any reason. In 2021 alone, at least twenty-four anti-defunding bills were introduced in nine states.³¹ Thus far, four states—Florida, Georgia, Missouri, and Texas—have enacted such bills into law.³²

While these bills differ in what kind of funding reductions they prohibit, each represents a substantial intrusion into the budgetary discretion of local governments. For example, House Bill 1 in Florida allows the governor and his cabinet to rewrite the budget for local police departments if there is any reduction in funding from the previous year that is appealed by a dissenting member of a local commission, the state attorney, or possibly even a county sheriff.³³ The law provides no standards for what budget the governor’s office can adopt, and any such budget is binding on the local community.³⁴ House Bill 286 in Georgia prohibits any funding reduction of more than five percent over a five-year period except where revenue shortfalls exceed five percent.³⁵ But even in those cases, reduction in law enforcement funding must be proportional to the decrease in the overall budget.³⁶ House Bill 1900 in Texas imposes a host of penalties on “defunding municipalities,” including the loss of state funds, inability to raise tax and utility rates, and loss of annexed land through a state-mandated local election.³⁷

These anti-defunding bills represent an unprecedented effort by states to interfere with local budgeting authority that has historically been subject to local control. Anti-defunding bills go much further than simply overturning a local ordinance or regulation, as state preemption traditionally operates. By stripping the power to set their own budgets, anti-defunding laws intrude upon the internal governance of cities and other localities. In doing so, these laws upend the structural organization of police departments as a subdivision of local governments and the traditional authority that local residents have exercised over how their tax dollars are used to support municipal departments.

Indeed, what is striking about these anti-defunding laws is that they affect budgeting even in cities not pursuing broader reform efforts. By penalizing *any* reduction in law enforcement funding, the law in Texas forces cities to cut deeper into other municipal departments and services in times of revenue shortfalls in order to maintain their police budgets. Georgia makes an exception for revenue shortfalls³⁸ but still forces cities to maintain spending levels that may no longer be necessary. Localities in Florida could lose all budgetary control to the governor’s cabinet, which may dramatically increase the police budget for any reason and force localities to either raise taxes or cut spending elsewhere.

These laws also operate in conjunction with a number of existing budgetary constraints imposed by state law. For example, personnel expenses, which constitute the

31. *See supra* note 5.

32. *See* H.R. 1, 123d Leg., Reg. Sess. (Fla. 2021); H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); S.B. 26, 101st Gen. Assemb., Reg. Sess. (Mo. 2021); H.R. 1900, 87th Leg., Gen. Sess. (Tex. 2021).

33. H.B. 1, § 1 2021 H.R., Reg. Sess. (Fla. 2021).

34. *See id.*

35. H.B. 286, 2021 Gen. Assemb., Reg. Sess. (Ga. 2021).

36. *See id.*

37. H.B. 1900, 87th Leg., Reg. Sess. (Tx. 2021).

38. *See* H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

lion's share of police budgets,³⁹ are commonly subject to state mandates. Salary levels for police officers are statutorily set in at least fifteen states.⁴⁰ Pension contributions, established at the state level, are mandated in almost all states.⁴¹ Most states also require cities to indemnify all police officers for any liability and legal costs incurred during the course of their duty.⁴² State laws also commonly set shift schedules,⁴³ working hours,⁴⁴ and seniority rules⁴⁵ that limit the budgetary discretion of local governments. In addition, most big-city police departments operate under state-sanctioned union contracts that require a certain level of funding.⁴⁶ By restricting municipal control of the law enforcement budget further, anti-defunding preemption laws could constrain a city with existing pension obligations or discourage cities from engaging in negotiations that could increase future pension obligations.

Municipal budgeting is a complicated process. City officials must carefully balance the needs of the community with the fiscal realities of the municipality. Local leaders are stewards of taxpayer dollars, electorally accountable to local residents, and have a duty to use local public funds in the most effective and efficient way. By preempting local authority over police budgets, states are not only hampering local efforts to improve public safety but also distorting municipal budgets as a whole.

39. See BRIAN A. REAVES, DEP'T OF JUST., BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 7 (2015).

40. See, e.g., MO. ANN. REV. STAT. § 84.510 (West 2018) (salary schedule for Kansas City Police Department); MONT. CODE ANN. § 7-32-4116 (West 2021) (minimum \$750 per month in "cities of the first and second class," with annual one percent increase); 53 PA. STAT. AND CONS. STAT. ANN. § 639 (West 2011) (setting a minimum salary for borough and township police of \$5,200 annually); TEX. LOC. GOV'T CODE ANN. § 143.041 (West 2008) (establishing criteria on police salaries in cities less than 1.5 million); WYO. STAT. ANN. § 15-5-106 (West 2009) (giving a civil service commission the power to set salaries no lower than the statutory minimum of \$425).

41. See, e.g., NEB. REV. STAT. ANN. § 16-1004 (West 2020); 53 PA. STAT. AND CONS. STAT. ANN. § 767 (West 2011) (establishment of police pension funds or pension annuities; regulation and maintenance; rights of beneficiaries); see also *State Retirement Plans for Public Safety Workers – Tables*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 24, 2012), <http://www.ncsl.org/research/fiscal-policy/state-retirement-plans-public-safety-tables.aspx> [<http://perma.cc/AE2A-LP94>]; *Legal Protections for State Pension and Retiree Health Benefits*, PEW CHARITABLE TRS. (May 30, 2019), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/legal-protections-for-state-pension-and-retiree-health-benefits> [<http://perma.cc/4QD6-SUU6>].

42. See Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L. J. 229, 269 (2020).

43. See, e.g., Aubrey Jewett, *County Government Structure in Florida*, in FLORIDA COUNTY GOVERNMENT GUIDE 5 (2014), http://factor.fl-counties.com/themes/bootstrap_subtheme/sitefinity/documents/structure-chapter.pdf [<http://perma.cc/3TLY-N62N>].

44. See, e.g., WIS. STAT. ANN. § 62.13.7n (West 2021) (limiting the work day to eight hours "except in cases of positive necessity by some sudden and serious emergency").

45. See, e.g., *id.* § 62.13.5m; see also N.J. STAT. ANN. § 40A:14-115 (West 2019) (county police department); 53 PA. STAT. AND CONS. STAT. ANN. § 813 (West 2011); TEX. LOC. GOV'T CODE ANN. § 143.085 (West 2008).

46. See Rushin, *supra* note 18, at 1204 n.58.

B. Police Accountability

As municipal departments, the police should operate under the supervision of city governments in a manner that is accountable to city residents. But state laws commonly insulate police departments and officers from this kind of supervision and accountability. Many preemptive laws frustrate local efforts that investigate police misconduct and impose discipline upon officers when such misconduct is found. They have also frequently been interpreted to limit the powers of civilian review boards established by city governments to hold the police to account. Taken together, these laws have preempted many local police reform efforts. Even more important, states are expanding these protections even as allegations of police misconduct have grown.

Local accountability of the police has long been stymied by state preemption, especially the widespread adoption of the LEOBRs in the 1970s and 1980s. Yet even as LEOBRs have drawn scrutiny in the wake of the killing of George Floyd, many states have sought to expand their protections. One area where this expansion is taking place is with respect to local efforts to establish and empower civilian review boards. LEOBRs already deny most civilian review boards the “authority to directly discipline officers and modify police department policies,”⁴⁷ thus relegating them largely to an advisory role. In 2021, however, Arizona and Tennessee passed laws restricting the membership of civilian review boards. Arizona, for example, effectively preempted civilian review boards by requiring law enforcement officials to make up two-thirds of the membership of not only governmental boards that investigate police misconduct but also those that simply “influence” such an investigation or “recommend” disciplinary action.⁴⁸ In Tennessee, a recently enacted bill requires all members of a civilian review board to complete a “local law enforcement agency’s citizen police academy.”⁴⁹

States are also limiting how new technologies can be used to enhance police accountability. Many advocates for police reform believed, for example, that expanding use of body-worn cameras by police officers would make it easier to hold them accountable for their conduct.⁵⁰ But while many states now require the use of body-worn cameras, some limit who may view or access any resulting footage captured by these

47. Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 11 (2009).

48. See H.B. 2567, 55th Leg., Reg. Sess. (Ariz. 2021). In addition to the two-thirds membership, the bill requires the law enforcement officials to be from the same agency or department that the board is established to oversee. A separate bill also requires all members of a civilian review board to have completed “community college police academy” or eighty hours of “Arizona peace officer standards and training board certified training” on a list of enumerated subjects. H.B. 2462, 55th Leg., Reg. Sess. (Ariz. 2021). Besides limiting civilian review boards, Arizona also passed a law limiting the ability of prosecutors to place police officers on the state’s “Brady List,” and forbidding such placement from being used as the basis for disciplinary action against the officer. See H.B. 2295, 55th Leg., Reg. Sess. (Ariz. 2021). The “Brady List” is a database of officers who have a record of dishonesty or committing crimes. See generally Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (describing the use and limitations of Brady Lists).

49. H.B. 0374, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

50. See Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS (June 25, 2020), <http://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [http://perma.cc/VE89-BLAE].

cameras. At least nine states exempt such footage from “open record laws,” allowing them to be released only when certain conditions have been met.⁵¹ In states like North Carolina, recordings can only be released through a court order;⁵² local governments have no authority to do so on their own.

State laws have insulated police departments from local accountability for decades, from granting immunity to police officers to procedural protections like those in a LEOBR. Yet new preemption laws threaten to further insulate police officers from political accountability, especially at the local level.

C. Management of Police Departments

The ability for local communities to define the priorities and responsibilities of their police departments is also being increasingly undermined by state preemption. This is especially true with respect to the enforcement of federal laws. In some cases, states are mandating police involvement, as with “anti-sanctuary laws” that mandate local participation in federal immigration enforcement efforts.⁵³ In other cases, states prohibit police involvement, as with “Second Amendment sanctuary laws” that prohibit police from assisting in the enforcement of federal gun control laws.⁵⁴ In both of these cases, states are stripping local residents of the ability to set policing priorities for their community.

Immigration regulation is generally a federal power and federal responsibility.⁵⁵ The Constitution also prohibits the federal government from forcing local governments to enforce federal laws, including those related to immigration.⁵⁶ Yet in recent years, several states have used their preemption powers to mandate local participation in federal immigration enforcement. States like Texas require local police departments and sheriff’s offices to conduct immigration screening and report anyone suspected of being an undocumented immigrant to federal authorities.⁵⁷ States like Iowa and Tennessee require all local law enforcement officials to comply with detainer requests, in which detainees continue to be held in custody for federal officials *after* they are supposed to be released.⁵⁸ Going even further, Alabama’s anti-sanctuary measure includes a broad

51. See Jared Gans & Crawford Humphreys, *9 States with Some of the Strictest Rules on Releasing Body Cam Videos*, HILL (May 10, 2021, 1:57 PM), <http://thehill.com/homenews/state-watch/552665-9-states-with-some-of-the-strictest-rules-on-releasing-body-cam-videos> [<http://perma.cc/78HK-FRYW>].

52. N.C. GEN. STAT. ANN. § 132-1.4A(g) (West 2021).

53. See Gulasekaram et al., *supra* note 30, at 848–49.

54. See Thrush, *supra* note 29.

55. See, e.g., Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 609–10 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, . . . the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one.”).

56. See Gulasekaram et al., *supra* note 30, at 852–53.

57. See Sanya Mansoor & Cassandra Pollock, *Everything You Need To Know About Texas’ “Sanctuary Cities” Law*, TEX. TRIB. (July 6, 2017), <http://www.texastribune.org/2017/05/08/5-things-know-about-sanctuary-cities-law> [<http://perma.cc/65LR-65JS>].

58. IOWA CODE ANN. § 27A.2 (West 2022); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

catchall provision requiring all local officials to “fully comply with and . . . support the enforcement of federal [immigration] law.”⁵⁹

It is important to note that these anti-sanctuary measures differ from traditional preemption. Rather than simply preempting a city regulation, many of these anti-sanctuary measures specifically mandate actions that local officials must take. By doing so, these mandates intrude upon the authority of local governments over their own law enforcement officials. Cities are forced to dedicate resources and personnel to immigration enforcement at the expense of other law enforcement priorities. Police are required to assist the federal government, even if that assistance erodes public trust and undermines investigations into other offenses that may require community support. And when the federal government makes a mistake by issuing a detainer request against a legal immigrant or a U.S. citizen, local governments are often held liable for the civil rights violations that arise from that mistake.⁶⁰

Anti-sanctuary laws illustrate how states are using their preemption powers to mandate local participation in enforcing federal laws. But states are using their preemption powers to prevent cities from such participation as well. Indeed, in 2021 alone, at least nine states have enacted Second Amendment sanctuary laws opposing the enforcement of federal gun control laws.⁶¹ In four of these states—Texas, Tennessee, North Dakota, and Arizona—the state sanctuary law specifically prohibits local governments and their law enforcement officials from providing any assistance in the enforcement of federal gun laws. Ironically, many of the states that now ban local involvement in the federal enforcement of gun laws are the same states that passed anti-sanctuary measures mandating local participation in federal enforcement of immigration laws.⁶²

Of course, state and local governments have the discretion to choose when they wish to assist with the enforcement of any federal law. What is striking here is that states are imposing their choice upon all local governments in their jurisdiction. Thus, even if illegal guns happen to be a significant problem in a particular community, local leaders and police officials have no discretion to assist or coordinate with the federal government in the enforcement of federal gun laws. Localities are unable to make the choices best suited for their communities and to take advantage of resources and partnerships to enhance public safety. All of this intrudes upon the tradition of local control over municipal departments like the police. Indeed, this is precisely why the City of Tucson adopted a resolution refusing to comply with Arizona’s Second Amendment sanctuary law.⁶³

59. ALA. CODE § 31-13-5 (West 2022).

60. See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

61. See H.B. 2111, 55th Leg., Reg. Sess. (Ariz. 2021); H.B. 1957, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 85, 101st Gen. Assemb., Reg. Sess. (Mo. 2021); H.B. 258, 67th Leg., Reg. Sess. (Mont. 2021); H.B. 1383, 67th Leg., Reg. Sess. (N.D. 2021); S.B. 631, 58th Leg., Reg. Sess. (Okkla. 2021); H.B. 3094, 124th Gen. Assemb., Reg. Sess. (S.C. 2021); S.B. 1335, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 2622, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 2694, 85th Leg., Reg. Sess. (W. Va. 2021).

62. See Gulasekaram et al., *supra* note 30, at 848–49.

63. See Kathryn Palmer, *Tucson’s Challenge to ‘2nd Amendment Sanctuary’ Law Is Latest in Local Control Saga*, TUCSON.COM (Aug. 27, 2021),

III. THE IMPORTANCE OF LOCAL DISCRETION OVER POLICE REFORM

The growing abuse of state preemption of criminal justice reform has larger ramifications for efforts to advance equity at the local level. Preemption of local budgeting, police accountability, and police discretion hobble the work of municipalities centering the perspectives of communities of color in their administration of criminal justice, undermining the ability of local governments to advance the concerns and priorities of their residents.

There are several core grounds on which the case for preserving meaningful local discretion in police reform is critical. To begin, local governments are in a much better position than the states to understand the conditions under which law enforcement actually operates on the ground, balancing the importance of equity with the necessity for public safety. When that balance fails, the consequences are felt most strongly at the local level. That critical feedback loop between experience and governance fails when distant state capitals decide how the police should be funded, operated, and held to account.

Second, the values of local communities vary across states, and local discretion can tailor law enforcement approaches that meet the diverse needs of different communities. As general-purpose governments, municipalities can structure an equitable public safety program holistically, making reforms that respond to the local community through setting policing, housing, public health, and other priorities. Without full authority to imagine and implement law enforcement reform, local governments will not be able to structure a comprehensive community-safety agenda that makes sense in the places where policing is most immediately felt.

Third, accountability is particularly critical in criminal justice. Removing decisions about policing to the state level undermines the ability of residents impacted by local law enforcement to hold officials accountable. For communities of color in particular, accountability about policing is difficult enough at the local level—allowing decisions about how to advance equity and safety block by block, neighborhood by neighborhood to be made in distant state capitals risks significantly undermining confidence in law enforcement and engagement by the community. When states decide fundamental questions of local policy, it makes it more difficult for local voters to hold accountable the level of government most directly responsible.

States do have a role, of course, in local criminal justice. After all, states set most of the basic terms of criminal law and define the boundaries of the carceral state.⁶⁴ But on matters of implementation, states should limit the preemption of local discretion to setting an equity floor, protecting state-wide interests in civil rights and civil liberties that transcend any given locality. Because state legislation cannot be tailored to varying local needs and unique community priorities, state legislation should not prevent local governments from experimenting with equitable reform initiatives beyond the floor set by the state.

http://tucson.com/news/tucson-s-challenge-to-2nd-amendment-sanctuary-law-is-latest-in-local-control-saga/article_b8c39bae-daa3-11eb-a6c6-03a7d3d71031.html [<http://perma.cc/6XU9-5N4M>].

64. U.S. CONST. amend. X; *see also* BUREAU OF JUST. STAT., U.S. DEP'T JUST., PRISONERS IN 2020 – STATISTICAL TABLES 7 tbl. 1 (Dec. 2021), <http://bjs.ojp.gov/content/pub/pdf/p20st.pdf> [<http://perma.cc/4EZ9-7LS8>].

This Essay has documented how local power and discretion are once again being threatened by state preemption laws, many of which further insulate police departments from public accountability. But there are promising signs as well: as the ripper bills paved the way for significant home rule reform,⁶⁵ mobilizing around preemption of police reform as a fundamental issue of equity suggests paths for future advocacy.

Indeed, while many states have responded to demands for police reform by expanding the protections of police from accountability, some are rolling back existing preemption laws. Maryland is one such example. As the first state to pass a LEOBR in 1972, Maryland became the first state to repeal such a bill in 2021.⁶⁶ Another example is Louisiana, which amended its LEOBR to lower the time police officers are exempt from questioning from thirty to fourteen days and expanded the time limit for investigations from sixty to seventy-five days.⁶⁷ To be sure, even with these amendments, Louisiana still has one of the most protective preemption laws for police officers.⁶⁸ Yet the fact that the Republican-controlled state legislature felt compelled to lower those protections suggests that recent protests are working.

All of this is not to overly venerate how local governments have managed the balance between equity and public safety. The risk of local capture by the power of law enforcement unions is real, and there is a state role in setting neutral bargaining terms to preserve a fair labor process.⁶⁹ Many states have also structured local finance in ways that incentivize the local use of fines and fees to support local services, too often leading to the criminalization of poverty.⁷⁰ And local governments can face difficulties monitoring police abuse, as evidenced by federal pattern and practice investigations and settlement agreements in recent years.⁷¹ But those shortcomings must be remedied in

65. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805–06 (1992).

66. See Ben Leonard, *Maryland Becomes First State To Repeal Police Bill of Rights, Overriding Hogan Veto*, POLITICO (Apr. 10, 2021, 6:19 PM), <http://www.politico.com/news/2021/04/10/maryland-repeals-police-bill-of-rights-overriding-hogan-veto-480731> [<http://perma.cc/EU5R-27ZZ>].

67. See Wesley Muller, *Legislation To Reform Police ‘Bill of Rights’ Passes Louisiana House*, LA. ILLUMINATOR (May 10, 2021, 8:27 PM), <http://lailluminator.com/2021/05/10/police-bill-of-rights-reform-passes-house> [<http://perma.cc/7S8K-VH8U>].

68. See NAT’L POLICE ACCOUNTABILITY PROJECT, *LAW ENFORCEMENT BILL OF RIGHTS STATUTES: HOW STATE LAW LIMITATIONS CONTRIBUTE TO POLICE HARM AND COMMUNITY DISTRUST* (2021), <http://www.nlg-npap.org/wp-content/uploads/2021/12/LEOBOR-White-Paper-Final-Paper.pdf> [<http://perma.cc/6Q4L-CW3K>] (analysis showing that the new, shorter fourteen-day “cooling off” period in Louisiana was still the longest of the states studied, and that the expanded seventy-five days for investigation is still one of the “shorter deadlines” among states).

69. State protections for minimum wage, paid sick leave, and a fair collective bargaining process should, and generally do, apply to local agencies, including police departments, as well.

70. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1792–93 (2020).

71. See, e.g., Matt Hamilton, *Former Los Angeles County Sheriff Lee Baca Is Now a Prison Inmate in Texas*, L.A. TIMES (Feb. 5, 2020), <https://www.latimes.com/california/story/2020-02-05/former-los-angeles-county-sheriff-lee-baca-is-now-a-prison-inmate-in-texas> [<http://perma.cc/QY4B-VDLA>].

local communities, so many of which are innovating in policing now to advance equity—if their states will let them.