

NOTE

“DON’T ELECT ME”: SHERIFFS AND THE NEED FOR REFORM IN COUNTY LAW ENFORCEMENT

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Most state constitutions require that counties have an elected sheriff who serves as the county’s chief law enforcement officer. The sheriff’s office is over a thousand years old and today has strong cultural associations with independence and populism. Ironically, however, the sheriff’s office has not been studied in the legal literature on policing as an entity separate and distinct from municipal police departments. This Note attempts to remedy that deficiency by identifying the unique pathologies of the American sheriff and proposing dramatic reforms to county law enforcement.

Although his elected status creates a perception that the sheriff is a local county officer, this Note argues that this perception is inaccurate because the sheriff is independent of the county and is actually, in many important ways, an agent of the state. The sheriff’s hybrid state-and-local status creates misalignments between different levels of government that obstruct efforts to hold the sheriff accountable.

County law enforcement is in need of reform. This Note argues that elections are not functioning as an effective accountability mechanism and that county government must be given power to act as a check on county law enforcement. This Note further argues that, although the sheriff in his current form is emphatically not the officer for the job, the county is actually the best level of government at which to provide policing. This Note discusses the merits of two models of achieving consolidation of policing to the county level, with insights gleaned from America’s experiences with sheriffs.

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INTRODUCTION

DESPITE the last century being a story of the American sheriff's decline, the office endures both in the real world, as chief law enforcement officer of the county, and in the popular consciousness in a way that contrasts with other ancient offices like the constable. This is true for many reasons: television channels are dedicated to airing classic Western films in which the sheriff, corrupt or heroic, is often at the heart of the story. Though warped in meaning, the term "posse"—originally referring to the sheriff's *posse comitatus*—has entered the popular lexicon, as have expressions like "there's a new sheriff in town."

Sheriffs play a part in current events as well, sometimes in memorable ways: the Los Angeles County Sheriff's Department, upon discovering one of their inmates was a confidential informant for the FBI investigating the sheriff's office, moved the informant from location to location in order to keep him out of contact with his FBI handlers.¹ The Maricopa County Sheriff's Office made its prisoners stay outside in the Arizona desert in a "tent city" where internal temperatures reached upwards of 145 degrees Fahrenheit,² and once paraded prisoners in pink underwear and flip-flops between jail facilities.³ The Milwaukee County Sheriff told county residents in a taxpayer-funded radio spot that calling 911 would not provide help fast enough and their best option was to arm and protect themselves,⁴ and once accused a county executive of suffering from heroin addiction and penis envy.⁵ Two sheriffs sued because they did not want to play even a minor, temporary role in implementing the Brady Act, and won.⁶

¹ Celeste Fremon, *The Downfall of Sheriff Baca*, L.A. Mag. (May 14, 2015), <http://www.lamag.com/longform/downfall/> [https://perma.cc/4VB3-GC4B].

² Eugene Scott, *Temperatures Rise to 145 Inside Tent City*, Ariz. Republic (July 3, 2011), <http://archive.azcentral.com/arizonarepublic/local/articles/20110703tent-city-temperatures-rise-145.html> [https://perma.cc/GE8A-XHNE].

³ Randy James, *Sheriff Joe Arpaio*, Time (Oct. 13, 2009), <http://content.time.com/time/nation/article/0,8599,1929920,00.html>.

⁴ Tyler Maas, *Milwaukee's Shoot-from-the-Hip Sheriff*, Daily Beast (Oct. 31, 2015), <http://www.thedailybeast.com/articles/2015/10/31/milwaukee-s-shoot-from-the-hip-sheriff.html> [https://perma.cc/G6RM-RPLP].

⁵ Maurice Chammah, *American Sheriff*, The Atlantic (May 5, 2016), <https://www.theatlantic.com/politics/archive/2016/05/american-sheriff/481131/> [https://perma.cc/G3UC-FMGQ].

⁶ *Printz v. United States*, 521 U.S. 898 (1997).

In the popular consciousness, the sheriff represents something unique and different from the police officer or police chief. It is ironic then that within policing scholarship, the county sheriff does not have an identity separate and distinct from other local law enforcement officers. Professors David N. Falcone and L. Edward Wells summarize:

[D]iscussion of policing is generally approached as “all of one cloth,” despite significant variations in the types and locations of agencies where it is carried out. Distinctions are sometimes noted between public and private policing, and between federal, state and local policing. However, a general proposition seems to be that: at its core, policing is policing . . . and the prototype for this activity is the modern city police department.⁷

This Note attempts to begin remedying this deficiency in policing scholarship. Part I will discuss the history of the sheriff. Part II will identify some vestiges of the ancient sheriff that remain with the office today and are dangerously anachronistic. Part III will argue that sheriffs, though perceived as local county officers, are in fact independent of the county and are, in many important ways, agents of the state. Part III will also discuss misalignments that the sheriff’s hybrid state-and-local status creates between different levels of government, arguing that these problems do not stem from there being too much local control of the office, but from there not being enough. Part IV will argue for dramatic institutional reforms to county law enforcement, chief among them that county governments be given more control over county agencies. This Part will further argue that, although the sheriff’s office as it currently exists is in urgent need of reform, the county represents the best level of government at which to provide policing and that America’s experiences with sheriffs shed light on what consolidated county policing should look like. This Part will discuss the merits of two models of consolidation and argue that state law should define the relationship between counties and municipalities to maximize local accountability.

⁷David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 *Am. J. Police* 123, 123 (1995).

I. THE HISTORY OF THE SHERIFF

The sheriff is an ancient office that has undergone much change from its origins in pre-Norman Conquest England (the name comes from “shire-reeve,” essentially meaning protector of the shire or county⁸), to the American colonies, and up to today. The following is a rough sketch of the office’s history, with emphasis given to the institutional features and changes most relevant to accountability.

A. England

Historians generally place the creation of the sheriff’s office in the ninth century.⁹ The height of the sheriff’s powers was between the eleventh and thirteenth centuries,¹⁰ when his duties included law enforcement—he controlled the local military and could summon the *posse comitatus* (a force comprising all able-bodied citizens that aided in law enforcement)¹¹—tax collection, execution of writs, the “apprehension and custody of prisoners,”¹² and holding shire court, which had criminal and civil jurisdiction over pleas of the Crown.¹³ One historian referred to the office during this period as “a regional dictator with true executive authority.”¹⁴

⁸ William L. Murfree, Sr., *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 1a n.2 (2d ed. 1890).

⁹ *Id.* §§ 1, 1a (discussing the sheriff’s origins); see also David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 *J. Crim. L. & Criminology* 761, 769–70 (2015) (reviewing the historical scholarship).

¹⁰ Compare Mitchel P. Roth, *Sheriff*, *Historical Dictionary of Law Enforcement* 320 (2001) (“[T]he sheriff’s powers peaked during the reign of King John in the early thirteenth century.”), with Richard Gorski, *The Fourteenth-Century Sheriff: English Local Administration in the Late Middle Ages 1–2* (2003) (describing the period immediately following the 1066 Norman Conquest as when the sheriff reached “the height of his influence both personally and administratively”).

¹¹ C.R. Wigan & Hon. Dougall Meston, *Mather on Sheriff and Execution Law* 14 (3d ed., reprinted 1990) (1935).

¹² *Id.* at 2, 14–15.

¹³ *Id.* at 2; Nat’l Sheriffs’ Ass’n, *County Law Enforcement: An Assessment of Capabilities and Needs* 26–27 (1978).

¹⁴ Gorski, *supra* note 10, at 2.

The history of England from the thirteenth century forward is a story of the sheriff gradually losing power.¹⁵ In 1215, Magna Carta stripped the sheriff of judicial authority over all but trivial offenses.¹⁶ In the fourteenth century, the sheriff still wielded broad power, but this was becoming less a function of the sheriff's autonomy and more a function of his being an agent of the King: "[T]he sheriff was an essential keystone in . . . communication[] between the localities and the apparatus of central government [T]he sheriff was the conspicuous instrument of royal will."¹⁷ The sheriff also lost power to newly created county officers like the justice of the peace, which took over all of the sheriff's remaining judicial authority in the fifteenth century.¹⁸

By the seventeenth century, the sheriff served "as the executive official of the courts, as a principal medium of communication between the central government and the county, and as a conservator of the peace," and was "the King's bailiff in enforcing the King's rights, collecting and accounting for his personal revenues, and keeping the county court."¹⁹ The sheriff's office remained prestigious, but was of considerably less importance than in centuries past.²⁰ The financial implications of accepting the office were particularly unattractive: because the system of compensation in medieval England had led some sheriffs to engage in "unjust fines and exactions" to ensure a profit,²¹ by the Tudor period, reforms had left as the sheriff's only compensation "a very small portion of the proceeds" of collecting the King's revenues.²²

¹⁵ See F.W. Maitland, *The Constitutional History of England* 233–34 (1908) ("A very noticeable feature in English history is the decline and fall of the sheriff . . . which goes on continuously for centuries.").

¹⁶ William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 358, 364 (1905) (quoting and discussing Magna Carta of 1215 § 24).

¹⁷ Gorski, *supra* note 10, at 3.

¹⁸ McKechnie, *supra* note 16, at 364; see Lawrence L. Martin, *American County Government: An Historical Perspective*, in *County Governments in an Era of Change* 2 (David R. Berman ed., 1993).

¹⁹ Cyrus Harrel Karkaker, *The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and the Chesapeake Colonies 1607–1689*, at 15 (1930).

²⁰ See Maitland, *supra* note 15, at 234 ("[I]n the seventeenth century . . . [t]he sheriff . . . falls lower and lower in real power: his ceremonial dignity he retains—he is the greatest man in the county . . .").

²¹ McKechnie, *supra* note 16, at 373–74.

²² Irene Gladwin, *The Sheriff: The Man and His Office* 277 (1974).

On the other side of the balance sheet, the sheriff was subject to many fees associated with the office,²³ as well as being personally responsible for paying undersheriffs' salaries and liable for their mistakes.²⁴ For these reasons, the office was expensive to hold and could be difficult to fill.²⁵

The history of the sheriff is also a story of negotiation between centralized power and local power over who would control law enforcement. In fourteenth-century England, for example, it was generally one group of higher government officials who collectively appointed the sheriff of each shire.²⁶ There were, however, two short periods in that century during which shires were allowed to popularly elect their sheriffs, though it is unclear what form these elections took.²⁷ It is clear that counties did not find these elections to be an effective accountability mechanism, and both times England soon returned to the appointment model.²⁸ Instead, counties sought increased qualification requirements for the sheriff and limitations on his power. Magna Carta required that a sheriff "know the law of the realm and mean to observe it well."²⁹ Later, term limits of one year were imposed, as was a requirement that the sheriff be a substantial landholder in his county, to ensure the office would be held by a stakeholder in the community who understood its populace.³⁰

B. America

As the English sheriff was declining in importance, the office found new life in colonial America. Variation in the sheriff's duties and importance tracked the importance of counties generally in the different

²³ See *id.* at 348–55.

²⁴ Maitland, *supra* note 15, at 234.

²⁵ Gladwin, *supra* note 22, at 358–59 (“By the seventeenth century . . . [t]he bankers and merchants who [could afford to be sheriff] . . . became increasingly reluctant to undertake this public duty from which no profit but only financial loss could be expected. [H]eavy fines [were imposed] on those who refused to serve and . . . £100 [was offered] to anyone who would take the office after the selected candidates had refused.”).

²⁶ Gorski, *supra* note 10, at 12.

²⁷ Gladwin, *supra* note 22, at 195; Gorski, *supra* note 10, at 34–35.

²⁸ Gorski, *supra* note 10, at 35–36.

²⁹ Magna Carta of 1215 § 45 (*quoted in* McKechnie, *supra* note 16, at 502).

³⁰ Gorski, *supra* note 10, at 37.

colonies: in the northern colonies, counties were limited to judicial matters; in the Mid-Atlantic colonies, counties shared power with towns; and in the southern colonies, counties represented “the very foundation of local government.”³¹ This meant that in the southern colonies, the sheriff was among the most important officers, whereas the New England region relied more on town constables.³²

The colonial sheriff’s duties included “serv[ing] process papers, maintain[ing] law and order, collect[ing] taxes, and maintain[ing] jails.”³³ Sheriffs never served as judges in America.³⁴ Compensation was much more generous and reliable in America than it had been in England:

[The sheriff] was allowed to retain ten per cent of all revenues he collected and charge a fee for every writ he executed, every arrest he made, every runaway slave he recaptured, every criminal he imprisoned and every time he summoned witnesses and empanelled juries. [Sheriffs would also] tak[e] illegal cuts from the sale of slaves, impos[e] illegal levies and withhold[] money which should have been spent on food for the prisoners in gaol.³⁵

Because the fee system of compensation was associated with such corruption, some colonies began to require that the sheriff be paid a salary,³⁶ though the fee system would endure well into the twentieth century³⁷ and beyond.³⁸

The colonial sheriff remained a royal officer, beholden to the King through his colonial governor and sworn “to serve the King well and truly in his county; to keep the King’s rights; to serve and return the

³¹ J. Edwin Benton, *Counties as Service Delivery Agents: Changing Expectations and Roles* 7 (2002).

³² See Frank Richard Prassel, *The Western Peace Officer: A Legacy of Law and Order* 94 (1972).

³³ Roth, *supra* note 10, at 320.

³⁴ Steve Gullion, *Sheriffs in Search of a Role*, 142 *New L.J.* 1156, 1157 (1992).

³⁵ Gladwin, *supra* note 22, at 384–85.

³⁶ Bradley Chapin, *Criminal Justice in Colonial America, 1606–1660*, at 95–96 (1983).

³⁷ In 1929, a “large majority of American sheriffs [were] still under the fee system.” Raymond Moley, *The Sheriff and the Constable*, 146 *Annals Am. Acad. Pol. & Soc. Sci.* 28, 29 (1929).

³⁸ See *infra* Section II.A.

King's writs honestly"³⁹ Just as appointment of sheriffs in England had fallen to higher government officials,⁴⁰ in the colonies it was the job of the royal colonial governor.⁴¹ While governors usually consulted with a county's justices of the peace, governors sometimes made appointments without regard to county preferences.⁴² Virginia had at least one popular election for its sheriff in 1651, but it seems this was only a temporary departure from the usual method of appointment.⁴³

The office of the sheriff after the Revolutionary War was largely unchanged, but gradually over the nineteenth century, state constitutions were ratified or amended to require that each county have a sheriff and each sheriff be popularly elected,⁴⁴ which thinkers like Thomas Jefferson believed would promote accountability.⁴⁵ The nineteenth century also represents the beginning of the period most associated with the office of the sheriff: the Wild West. Policing during westward expansion began with informal selection of peace officers from among local leaders, who enjoyed great independence in their law enforcement capacity.⁴⁶ As formal governments were established, the West adopted the southern-state model in which counties were important service providers,⁴⁷ making the sheriff one of the most important western officers. The western sheriff's duties ranged from serving process, making arrests, and keeping the peace, to acting as tax collector, assembling a jury, and administering punishment.⁴⁸ The small populaces from which communities had to choose peace officers meant that there were very

³⁹ Karraker, *supra* note 19, at 93–94 (citing the records of three Virginia counties).

⁴⁰ See *supra* note 26 and accompanying text.

⁴¹ See, e.g., Julian P. Boyd, *The Sheriff in Colonial North Carolina*, 5 N.C. Hist. Rev. 151, 154 (1928) (describing the practice in North Carolina).

⁴² Karraker, *supra* note 19, at 79.

⁴³ *Id.* at 73–74.

⁴⁴ Martin, *supra* note 18, at 6–7 (discussing many states constitutionally mandating elected county officers between 1816 and 1838).

⁴⁵ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 *The Works of Thomas Jefferson* 3, 6–10 (Paul Leicester Ford ed., 1905) (arguing that the Virginia Constitution should be amended to provide for elective sheriffs). Virginia eventually amended its constitution to do so in 1851. Va. Const. of 1851, art. VI, § 30.

⁴⁶ Prassel, *supra* note 32, at 30.

⁴⁷ Benton, *supra* note 31, at 7.

⁴⁸ Prassel, *supra* note 32, at 101.

few required qualifications.⁴⁹ Although the sheriff was the chief county law enforcement officer, western counties retained a sense that preservation of the peace was a public duty shared by the community.⁵⁰ This history—along with sheriffs achieving elected, constitutional status—does much to explain how sheriffs, in just one hundred years, went from being royal agents answerable to the Crown to officers perceived as autonomous and locally accountable. Despite the development of professional police departments in the East during the 1830s and 1840s,⁵¹ the sheriff remained the most important western law enforcement officer throughout the nineteenth century.⁵²

While sheriffs across America were increasingly becoming popularly elected officers, their “ultimate strength came to rely not so much upon actual constituents, but those with money and organizations which could consistently produce results at the polls.”⁵³ The desirability of the position came from the promise of power and wealth: in addition to an established salary, a sheriff’s fees “might easily produce tens of thousands of dollars a year even in sparsely populated regions.”⁵⁴ In an extreme case, the sheriff of New York County obtained \$60,000 in 1916 by virtue of the fees, fines, penalties, and permits associated with the office,⁵⁵ equal to over \$1 million today.⁵⁶

C. Today

As the vast lands of the West became developed, the sheriff declined in importance. The duties and powers of sheriffs today vary greatly by region, state, and individual county.⁵⁷ Many sheriffs are now without law enforcement power, either because a county police force has taken over that task or because there are no unincorporated areas in a county

⁴⁹ *Id.* at 30.

⁵⁰ *Id.* at 30–31.

⁵¹ *Id.* at 72.

⁵² *Id.* at 101.

⁵³ *Id.* at 111.

⁵⁴ *Id.* at 114–15.

⁵⁵ Martin, *supra* note 18, at 9.

⁵⁶ CPI Inflation Calculator, Bureau of Labor Statistics, <https://data.bls.gov/cgi-bin/cpicalc.pl> [<https://perma.cc/3G8J-YQNM>].

⁵⁷ Falcone & Wells, *supra* note 7, at 125.

for the sheriff to police.⁵⁸ These sheriffs do some combination of correctional services, such as jail maintenance and prisoner transport, execution of court orders, serving process, courtroom security, seizure of property claimed by the county, collection of fees and taxes, and other administrative tasks.⁵⁹

The decline in importance of sheriffs' offices has not been accompanied by a reduction in their size. As of 2013, there were 3,012 sheriffs' offices employing 352,000 personnel.⁶⁰ Sheriffs' offices employed "34% of all full-time general purpose law enforcement personnel."⁶¹ In 2007, 57% of all sheriffs' deputies were assigned to respond to service calls.⁶² One-quarter of all sheriffs' offices, and nearly half of offices serving a population of over 500,000, regularly patrolled by foot.⁶³ The number of sheriffs' deputies is growing: between 2007 and 2013, the number of full-time sworn officers increased by 10%.⁶⁴ Most states' sheriffs serve four-year terms, though two-, three-, and six-year terms also exist.⁶⁵

There are important differences between sheriffs and police chiefs generally: sheriffs are elected and must therefore campaign for office when opposed; police chiefs are appointed.⁶⁶ The sheriff has authority throughout the county (though often with an understanding that he will not exercise this authority where municipal police departments have jurisdiction); police chiefs have authority in their municipalities.⁶⁷ The sheriff has broad duties, including serving process and maintaining the

⁵⁸ See generally S. Anthony McCann, *County-Wide Law Enforcement: A Report on a Survey of Central Police Services in 97 Urban Counties* (1975) (noting the increasing role of county governments in providing police services).

⁵⁹ Falcone & Wells, *supra* note 7, at 130–31.

⁶⁰ Andrea M. Burch, Bureau of Justice Statistics, *Sheriffs' Office Personnel, 1993–2013*, at 1 (2016).

⁶¹ *Id.*

⁶² Andrea M. Burch, Bureau of Justice Statistics, *Sheriffs' Offices, 2007 - Statistical Tables 3* (2012).

⁶³ *Id.* at 12.

⁶⁴ Burch, *supra* note 60, at 1.

⁶⁵ See Nat'l Sheriffs' Ass'n, Office of Sheriff: State-by-State Elections Information (2015), <https://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/State-by-State%20Election%20Chart%20updated%2008.13.15.pdf> [https://perma.cc/8YXW-6FPF].

⁶⁶ Falcone & Wells, *supra* note 7, at 127.

⁶⁷ *Id.* at 129, 134.

county jails, but may not have law enforcement authority; police chiefs are generally limited to law enforcement and patrol.⁶⁸ The office of the sheriff is created by most state constitutions; police departments are authorized by state statutes but created at the local level.⁶⁹

II. LEGACIES OF THE ANCIENT SHERIFF IN AMERICA TODAY

The long history of the sheriff's office and the changes it has undergone during that time are evidenced in the modern American office's variegation and regional quirks: in Colorado, the sheriff is the chief fire warden of the county.⁷⁰ In California, the sheriffs of forty-one out of fifty-eight counties are also responsible for the duties of the coroner, and thus the county's highest law enforcement officer is known as the "Sheriff-Coroner."⁷¹ However, some regional quirks and legacies of bygone eras are more dangerous and suggest the need to reform the sheriff's office.

A. Fees in Alabama

Historian Frank Richard Prassel gives a stark description of jail conditions during westward expansion: "Sadism, personal gain, and simple indifference turned the jails into incredible human jungles of depravity."⁷² A primary reason for these conditions was the fee system: "Collecting fees for care of prisoners from various governmental units, [sheriffs] could then provide food and other items for prisoner use at unconscionable prices. By hiring guards, maintaining buildings, and supplying meals at the lowest possible actual cost, profits could be maximized."⁷³

While there can be no doubt that jail conditions have improved since the mid-nineteenth century, one notable relic of that era remains in

⁶⁸ *Id.* at 130–33.

⁶⁹ *Id.* at 126–27.

⁷⁰ Colo. Rev. Stat. § 30-10-512 (2017).

⁷¹ Sheriff-Coroner, Cal. St. Ass'n of Counties, <http://www.counties.org/county-office/sheriff-coroner> [<https://perma.cc/6JSZ-64NH>] (last visited Jan. 26, 2018); see also Coroner, San Bernardino County Sheriff's Department, <http://cms.sbcounty.gov/sheriff/Divisions/Coroner.aspx> (last visited Jan. 26, 2018).

⁷² Prassel, *supra* note 32, at 123.

⁷³ *Id.*; accord Gladwin, *supra* note 22, at 384–85.

Alabama. Alabama sheriffs are tasked, as is common, with feeding prisoners in the county jails.⁷⁴ The sheriff is not required to make out a daily ration sheet or expense account of food served to prisoners,⁷⁵ and a state statute sets the amount (\$1.75 daily per capita) that the state provides sheriffs to feed prisoners.⁷⁶ The irregularity in Alabama is that the sheriff may keep as personal income any profits gained from providing the jail's daily meals for less than the daily allotted \$1.75 per prisoner.⁷⁷ In 2009, this was the practice in fifty-five of Alabama's sixty-seven counties.⁷⁸

Former Morgan County Sheriff Greg Bartlett, whose annual salary was about \$64,000, was able to accumulate an additional \$212,000 over three years by undercutting the state allotment and pocketing the remainder.⁷⁹ U.S. District Court Judge U. W. Clemon found that Bartlett accomplished this by serving "nutritionally inadequate meals" consisting of portions that were "woefully insufficient to satisfy the normal appetites of adult males," leading to inmates losing up to fifty pounds.⁸⁰ Bartlett once bought half a tractor-trailer full of hotdogs and served them at every meal until they were gone.⁸¹ Judge Clemon stated that the Alabama law was "almost an invitation to criminality" because sheriffs "have a direct pecuniary interest in not feeding inmates."⁸² This

⁷⁴ Ala. Code § 14-6-40 (2015) (duty to feed prisoners).

⁷⁵ Id. § 14-6-41.

⁷⁶ Id. § 14-6-42.

⁷⁷ Id. § 36-22-17 (explaining that sheriffs are entitled to keep and retain "the allowances and amounts received for feeding prisoners" unless the county passes a resolution to the contrary); Ala. Att'y Gen. Op. 2008-061, at 5 (Mar. 17, 2008) ("[T]he sheriff may retain any surplus in the allowances as personal income.").

⁷⁸ Associated Press, *Sheriff Jailed as Inmates Claim Lack of Food*, NBC News (Jan. 7, 2009), http://www.nbcnews.com/id/28546669/ns/us_news-crime_and_courts/t/sheriff-jailed-inmates-claim-lack-food/ [https://perma.cc/TYC3-3HAS].

⁷⁹ Adam Nossiter, *As His Inmates Grew Thinner, a Sheriff's Wallet Grew Fatter*, N.Y. Times (Jan. 8, 2009), <http://www.nytimes.com/2009/01/09/us/09sheriff.html?mcubz=0>.

⁸⁰ Amended Findings of Fact on Contempt Issue, *Maynor v. Morgan County*, No. 5:01-cv-00851-UWC, 2-3 (N.D. Ala. Jan. 9, 2009) (detailing typical meals, such as a lunch of "either two peanut butter or baloney sandwiches (with a small amount of peanut butter or an exceedingly thin slice of baloney between the two slices of white bread), a small-sized bag of corn chips, and flavored water or unsweetened tea").

⁸¹ Id. at 4.

⁸² Nossiter, *supra* note 79.

monetary incentive likely explains why a Choctaw County Sheriff served his inmates “uninspected beef . . . from cows killed on the highway and uninspected deer killed in hunting accidents or killed on the highway.”⁸³

Etowah County Administrator Patrick Simms believed this was an issue that needed investigation, but concluded, “It’s something that probably needs to be addressed at the state or federal level. . . . Local government hands are tied.”⁸⁴

B. The Posse Comitatus in Colorado

While the phrase “posse comitatus” or “sheriff’s posse” likely conjures up images of the Old West, the sheriff’s power to summon all able-bodied citizens of the county to aid in law enforcement goes back roughly as far as the office itself.⁸⁵ Over a millennium later, the posse still exists in substantial form in Colorado.⁸⁶ Seventeen county sheriffs in Colorado maintain organized posses of citizen volunteers.⁸⁷ These posse members may carry their personal firearms⁸⁸ and assist the sheriff with tasks ranging from security at county events, to hostage situations and wildfires, to pursuing fugitives like the infamous serial killer Ted Bundy.⁸⁹ While at least minor training is given to organized volunteer posses, lone officers sometimes enlist civilians ad hoc to use their personal firearms to provide backup for the officer during situations involving combative suspects, felony stops, and in-progress crimes.⁹⁰

Even organized posses, which generally receive some firearms training from the sheriff’s office, do not have to complete the state’s

⁸³ *Nicholson v. Choctaw County*, 498 F. Supp. 295, 303 (S.D. Ala. 1980).

⁸⁴ Sheryl Marsh, *Get Rich or Feed Inmates?*, Decatur Daily News (Apr. 30, 2006), <http://legacy.decaturdaily.com/decaturdaily/news/060430/sheriffs.shtml>.

⁸⁵ David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 *J. Crim. L. & Criminology* 761, 763 (2015).

⁸⁶ *Id.* at 764.

⁸⁷ *Id.* at 810.

⁸⁸ *Id.* at 814–16 (describing a manhunt in Hinsdale County for which the firearms and magazines “ran the gamut of nearly everything available at the time,” and a manhunt in Rio Blanco County for which volunteers carried “Glock .40 handguns, AR-15 rifles, shotguns, and perhaps other arms”).

⁸⁹ *Id.* at 811–12.

⁹⁰ *Id.* at 817 (discussing the Morgan County Sheriff’s Office).

peace officer standards and training commission certification required of other law enforcement officers.⁹¹ This means that civilians who regularly assist the sheriff in “searches for escaped inmates, fugitives, or missing persons; with watching inmates; in searches and in the service of search warrants; in a hostage situation; in drug surveillance of a house; and in guarding the home of a teacher who had received death threats”⁹² do so without any of the training in law enforcement ethics, victims’ rights, or risk assessment that all other Colorado law enforcement officers must receive.⁹³ While the civilian posse may be useful in some situations,⁹⁴ having armed civilians engage in law enforcement activities without the training required of law enforcement officers is disconcerting in light of the general consensus about the importance of training.⁹⁵

C. The “Constitutional” Sheriff

The history and elected status of the sheriff’s office also led some sheriffs to believe they possess special duties and powers.⁹⁶ Fringe groups emphasize the role of the sheriff and his supremacy, believing that in any given county, no state or federal official’s interpretation of state or federal law is superior to that of the local sheriff.⁹⁷ A Florida sheriff who claimed that the Second Amendment compelled him to release a man arrested on gun charges is an example of this

⁹¹ See, e.g., *id.* at 819 (discussing the Custer County Sheriff’s Office).

⁹² *Id.*

⁹³ See Colo. Office of Attorney Gen., Colorado Peace Officer Standards and Training, Basic Academic Training Program (2015), https://www.coloradopost.gov/sites/default/files/post/ACADEMY/Basic_Academic_Training_Program.pdf [<https://perma.cc/33G4-T3JB>].

⁹⁴ See Kopel, *supra* note 85, at 812–17 (arguing that posses have been helpful in emergencies).

⁹⁵ See, e.g., Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 795 (2012) (“Experts largely agree about the reforms departments should undertake to prevent misconduct. The best departments . . . require substantial initial and ongoing training.”).

⁹⁶ See generally Jonathon Thompson, The Rise of the Sagebrush Sheriffs, High Country News (Feb. 2, 2016), <http://www.hcn.org/issues/48.2/the-rise-of-the-sagebrush-sheriffs> (discussing the constitutional sheriff movement); Julia Harte & R. Jeffrey Smith, The Army to Set Our Nation Free, Ctr. for Pub. Integrity (Apr. 18, 2016), <https://www.publicintegrity.org/2016/04/18/19568/army-set-our-nation-free> [<https://perma.cc/FL6X-9NDX>] (same).

⁹⁷ Thompson, *supra* note 96.

phenomenon.⁹⁸ Nevada cattle rancher Cliven Bundy invoked the idea of sheriff supremacy when he directed his rebellious message—that the federal officials seeking to gather his cattle had to be “disarm[ed]”—at “every county sheriff in the United States.”⁹⁹

Former Arizona Sheriff Richard Mack,¹⁰⁰ who leads one such fringe group, the Constitutional Sheriffs, once stated, “[W]hen you have no place else to go, when all the courts are against you, all the legislators are against you, where else do you go? I believe to the local county sheriff . . . and if that means standing against the federal government, then so damn be it.”¹⁰¹ Waxing Thoreauvian, Mack analogizes the constitutional sheriff’s civil disobedience in refusing to enforce gun laws to a segregation-era law enforcement officer refusing to remove Rosa Parks from her bus seat or a Nazi soldier refusing to commit genocide.¹⁰² Daryl Johnson, the lead researcher of a Department of Homeland Security (“DHS”) report on right-wing extremism and an expert on domestic extremism, declared the Constitutional Sheriffs and other such groups “the biggest issue” in domestic extremism.¹⁰³ Mack claims his organization has about 4,500 dues-paying members, including two hundred sheriffs, and that the organization has trained hundreds more in its principles.¹⁰⁴

⁹⁸ Bill Cotterell, *Jury Acquits Florida Sheriff Who Freed Gun-Toting Man*, Reuters (Oct. 31, 2013), <http://www.reuters.com/article/us-usa-florida-guns/jury-acquits-florida-sheriff-who-freed-gun-toting-man-idUSBRE99U13320131031> [<https://perma.cc/HRA3-5DB7>].

⁹⁹ Dylan Scott, *Why Bundy Ranch Thinks America’s Sheriffs Can Disarm the Feds*, Talking Points Memo (Apr. 15, 2014), <http://talkingpointsmemo.com/muckraker/bundy-ranch-constitutional-sheriffs-oath-keepers> [<https://perma.cc/6UQJ-C5JF>].

¹⁰⁰ Sheriff Mack was one of the plaintiffs in *Printz v. United States*, 521 U.S. 898, 904 (1997).

¹⁰¹ Tom Jackman, *National Sheriffs’ Group, Opposed to Federal Laws on Guns and Taxes, Calls for Defiance*, Wash. Post (Apr. 28, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/04/28/national-group-of-sheriffs-opposed-to-federal-government-overreach-gains-size-momentum/?utm_term=.9340d17645a2 [<https://perma.cc/4ULZ-JRJ8>].

¹⁰² *Id.*

¹⁰³ Alice Speri, *The FBI Has Quietly Investigated White Supremacist Infiltration of Law Enforcement*, Intercept (Jan. 31, 2017), <https://theintercept.com/2017/01/31/the-fbi-has-quietly-investigated-white-supremacist-infiltration-of-law-enforcement/> [<https://perma.cc/9Z6C-5W4B>].

¹⁰⁴ Thompson, *supra* note 96.

III. COUNTY/STATE & COUNTY/CITY MISALIGNMENT

The history and laws around the sheriff also create important problems of misalignment between the county and the state, and between the county and incorporated municipalities. These problems illustrate the need for reform of law enforcement at the county level.

A. *County/State Misalignment*

The paradox of the contemporary sheriff is that an office which was historically the agent of the King came to be seen as a locally accountable, autonomous agent, despite still being in many important ways an agent of the state rather than the county.¹⁰⁵ While local elections do allow county citizens, in theory, to hold a sheriff accountable by voting him out of office, in practice, elections do not constitute an effective local check on the sheriff for a number of reasons that are discussed in Section IV.A. Moreover, the sheriff's hybrid state-and-local status insulates him from regulation by county government, by the government of any cities the sheriff may police, and sometimes even by state government.¹⁰⁶

As discussed above, most states create the sheriff's office in their state constitutions.¹⁰⁷ Where state statutes *allow* a municipality to create a local police department, state constitutions *require* that every county provide for a sheriff.¹⁰⁸ This might be called an unfunded mandate. Even more concerning is the effect this arrangement has on local accountability. Where cities have two primary checks on their police chiefs—namely, (1) hiring and firing, and (2) budgeting and the ability to defund—county governments generally lack these checks vis-à-vis the sheriff. Contrary to the perception of the sheriff as an officer of the county accountable to county citizens—subject, perhaps, to too much local control—the sheriff's institutional features actually insulate him almost entirely from attempts by local officials to hold him accountable.

¹⁰⁵ Murfree, *supra* note 8, § 1a (“[The sheriff] is a State officer, whose jurisdiction is ordinarily bounded by his own county.”).

¹⁰⁶ *Id.* § 48 (“[W]here the office of sheriff is a constitutional office, it is not competent for the legislature to diminish his official powers, or to transfer to other officers, the duties or emoluments which properly pertain to his office.”).

¹⁰⁷ See *supra* note 69 and accompanying text.

¹⁰⁸ See *id.*

Thus, the problem is not that there is too much control over the sheriff at the local level, but not enough.

1. Hiring and Firing

While police chiefs generally serve at the pleasure of the politicians who appoint them, the constitutional, elected status of sheriffs prevents local officials from removing them from office. Some states allow the governor, state attorney general, or even a county prosecutor to bring proceedings against the sheriff for suspension or removal, but this is generally limited to situations of malfeasance, nonfeasance, or the failure to enforce certain laws.¹⁰⁹ This does not allow for a county to replace a sheriff due to overly aggressive enforcement of certain crimes against certain communities or other policies that are legal but contrary to the policy goals of the county.

a. Interim Appointments of Sheriffs by the State Governor

An easy to overlook but fundamental aspect of the sheriff's state-local hybridity related to hiring and firing is what occurs when there is a vacancy in the sheriff's office. In thirteen states,¹¹⁰ it falls to the governor to appoint a new sheriff when a vacancy occurs.¹¹¹ Though detailed empirical data are lacking, the incumbency advantage that exists in local electoral races generally exists in sheriffs' races too,¹¹² which suggests that appointment will result in a substantial boost to the appointee in the next election. Thus, though the governor is responsible

¹⁰⁹ See, e.g., Fla. Const. art. IV, § 7(a) (“[T]he governor may suspend from office . . . any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony, and may fill the office by appointment for the period of suspension.”); *State ex rel. Hatton v. Joughin*, 138 So. 392, 394 (Fla. 1931) (holding that the Governor and State Senate decide whether to remove the sheriff from office).

¹¹⁰ See Nat'l Sheriffs' Ass'n, *supra* note 65.

¹¹¹ See, e.g., Ala. Code § 36-9-17 (2013) (“Vacancies in all state, county or municipal offices shall be filled by appointment of the Governor for the unexpired term of such office, unless otherwise provided by law.”).

¹¹² See Victor S. DeSantis & Tari Renner, *Governing the County: Authority, Structure, and Elections*, in *County Governments in an Era of Change* 22 (David R. Berman ed., 1993) (“[T]hese [elected county] executive officials typically operate in a political climate with a low degree of public awareness or scrutiny and may be reelected routinely with little or no serious competition.”).

only for temporary hiring in the form of filling vacancies, this is likely to become a permanent hiring if the appointee can ride the incumbency advantage to victory.

b. The Inability of Counties to Regulate the Selection of Sheriff with Term Limits

Nor are counties always able to regulate the selection of the sheriff through procedural means like term limits. In Los Angeles County, a lawsuit was brought against the county's supervisors seeking to get a measure on the ballot asking whether to impose term limits on supervisors; the suit was settled with an agreement that the ballot would include both that measure and a second measure asking whether to limit the terms of all elected county officials, including the sheriff.¹¹³ The background was a series of disputes between Sheriff Lee Baca and the supervisors concerning the sheriff exceeding his budget and the reported mistreatment of the mentally ill in a county jail.¹¹⁴ In 2002, county voters passed both ballot measures, but Sheriff Baca sued, and a court nullified the result with respect to the sheriff.¹¹⁵ The basis for this holding was case law establishing that a county government's power is limited to what is granted in the state constitution.¹¹⁶ California's constitution only allows the county government to provide for elected sheriffs' "appointment, compensation, terms and removal,"¹¹⁷ and California case law interpreted "terms" to refer to the singular prescribed period for which an officer is elected, rather than an officer's incumbency or tenure.¹¹⁸ As a result, enacting term limits on sheriffs was held to be tantamount to enacting a "qualifications" requirement, which the California constitution prohibited.¹¹⁹ The outcome of the suit was

¹¹³ Nicholas Riccardi, *Sheriff Baca Sues to Halt Vote on Term Limits*, L.A. Times (Oct. 23, 2001), <http://articles.latimes.com/2001/oct/23/local/me-60570> [<https://perma.cc/BY8R-AF4C>].

¹¹⁴ *Id.*

¹¹⁵ Jack Leonard, *Baca Wins His Battle Against Term Limits*, L.A. Times (Nov. 11, 2004), <http://articles.latimes.com/2004/nov/11/local/me-limits11> [<https://perma.cc/C9DE-DTYP>].

¹¹⁶ See 86 Cal. Att'y Gen. Op. No. 03-409, at 128 (2003) (discussing the legal issues involved in the case).

¹¹⁷ Cal. Const. art. XI, § 4(c).

¹¹⁸ *Younger v. Bd. of Supervisors*, 93 Cal. App. 3d 864, 871 (1979).

¹¹⁹ 86 Cal. Att'y Gen. Op. No. 03-409, at 129–30; Leonard, *supra* note 115.

that Sheriff Baca had no term limits, but the L.A. County supervisors did.¹²⁰ The *Los Angeles Times* editorial board asked in frustration, “If the board [of supervisors] can’t order the sheriff to do (or not do) anything, what’s the use of appointing someone to investigate problems in [Sheriff Baca’s] department and report on them to the board?”¹²¹

This episode illustrates the vast difference in local control over sheriffs and police chiefs. Because police departments are created by municipalities (as permitted by state law), nothing would have prevented the City of Los Angeles from imposing term limits on a police chief. And because police chiefs serve at the pleasure of local officials, unless generally applicable employment or constitutional law forbids it, a city council can fire a police chief at will for reasons as vague as a “lack of confidence” in the chief¹²² or the chief’s lack of leadership.¹²³ With respect to the sheriff, however, the office’s hybrid state-and-local status means that once a sheriff is elected, he is insulated in all but the most extreme circumstances from county attempts to check his power. The promise of local accountability that led Thomas Jefferson to support making the sheriff an elective office proved to be a hollow one in Los Angeles County: it was not until a much larger scandal broke—one that would ultimately result in Baca being convicted of perjury and obstruction of justice¹²⁴—that Baca resigned as sheriff.¹²⁵

¹²⁰ Editorial, *The Untouchable Sheriff?*, L.A. Times (Jan. 2, 2014), <http://www.latimes.com/opinion/editorials/la-ed-sheriff-commission-20140102-story.html> [<https://perma.cc/4CAQ-ZLT4>].

¹²¹ *Id.*

¹²² Domingo Ramirez, Jr., *Blue Mound Police Chief Fired over ‘Lack of Confidence,’* Star-Telegram (Nov. 30, 2016), <http://www.star-telegram.com/news/local/community/fort-worth/article117938618.html> [<https://perma.cc/CW3B-ANBT>].

¹²³ Patrice Clark, *Moss Point Police Chief Fired for Lack of Leadership*, WLOX (2011), <http://www.wlox.com/story/14184927/moss-point-police-chief-fired-for-lack-of-leadership>.

¹²⁴ Joel Rubin & Victoria Kim, *Former L.A. County Sheriff Lee Baca Found Guilty on Obstruction of Justice and Other Charges*, L.A. Times (Mar. 15, 2017), <http://www.latimes.com/local/lanow/la-me-ln-baca-verdict-20170314-story.html> [<https://perma.cc/JM4Y-N54G>].

¹²⁵ See *supra* note 1 and accompanying text.

2. *Budgeting and Defunding*

As with hiring and firing, the budgetary check that local entities have on police departments cannot be exercised in the same way on sheriffs' offices. As Professor Rachel Harmon explains with respect to police departments:

Overwhelmingly, police department funds come from local governments, and policing consumes a large part of municipal budgets. Those budgets provide a crucial form of political control over police departments

* * *

When a chief proposes a budget, he must specify and justify his goals, his planned programs and activities, and the resources those activities require. This process gives local government officials and voters an opportunity to weigh in on both the means and ends of law enforcement and it provides a standard by which they can later measure the department's performance. The budgeting process therefore not only allocates scarce resources, it provides an important mechanism for local governments to reject law enforcement activities that—although lawful—are inconsistent with local interest and priorities.¹²⁶

In contrast to this robust budgetary check that municipal governments possess, state law severely limits the ability of county governments to influence the sheriff's actions through their budgetary power. This section discusses Georgia and Florida because there has been substantial litigation regarding county budgets in those states. They are not unique, however. Limits on a county government's budgetary power are inherent in the sheriff's constitutional status: no county action may prevent the sheriff's execution of statutory or constitutional mandates,¹²⁷ and

¹²⁶ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 948–49 (2015).

¹²⁷ See *Cahalan v. Wayne Cty. Bd. of Comm'rs*, 286 N.W.2d 62, 66 (Mich. Ct. App. 1979) (“Where the Legislature has statutorily imposed on the county executive officers various duties and obligations, the county boards of commissioners must budget sums sufficient to allow the executive officers to carry out their duties and obligations.”); *Wis. Prof'l Police Ass'n/Law Enf't Emp. Relations Div. v. Dane County*, 439 N.W.2d 625, 629–30 (Wis. Ct. App. 1989) (“[I]t would be destructive of government itself if a public governing body,

budgetary restrictions are often seen as impermissible attempts by county government to control the sheriff's operations.¹²⁸

a. Georgia

The difference between the county's budgetary power over the sheriff and the city's budgetary power over the police department is stark in Georgia, as the Eleventh Circuit's description of the relationship between Clinch County and its sheriff illustrates:

Clinch County's financial control [over the sheriff] is attenuated because (a) the State mandates Sheriff Peterson's minimum salary . . . and (b) Clinch County sets the total budget but cannot dictate how Sheriff Peterson spends it. The Georgia Supreme Court has held that counties "must provide reasonably sufficient funds to allow the sheriff to discharge his legal duties," and that "the county commission may not dictate to the sheriff how that budget will be spent in the exercise of his duties."

* * *

Payment of Sheriff Peterson's budget, when required by the State, does not establish any control by Clinch County over his force policy at the jail or how he trains and disciplines deputies.¹²⁹

Where a county disapproves of a sheriff's practices, the county can defund the sheriff, but not to the point that the sheriff can no longer perform his duties. Nor can funding be conditioned on the sheriff performing his duties in a certain way. Essentially, the county must give the sheriff a blank check for a reasonably sufficient amount, a far cry from what is required of the police chief who must specify and justify goals that comport with the policy objectives of local officials.

through the exercise of its budgetary and fiscal controls, could render impossible the performance of the duties which devolve upon a constitutional officer . . .").

¹²⁸ See, e.g., Ill. Att'y Gen. Op. No. 84-003, at 9, 12 (1984) ("[W]hile the county board has the power to determine the amount of county funds that may be expended, the county board cannot use its financial and budgetary powers to regulate, control, or otherwise interfere in the internal operations of the various county offices [including the sheriff's office].").

¹²⁹ *Manders v. Lee*, 338 F.3d 1304, 1323-24 (11th Cir. 2003) (citations omitted).

b. Florida

The budgetary check counties have on sheriffs in Florida is more substantial, but still much weaker than that which cities can exert on their police departments. A Florida statute outlines the process by which the sheriff, in making a budget proposal, must itemize proposed expenditures into six budget items and swear that they are reasonable and necessary.¹³⁰ The board of county commissioners or the budget commission after a hearing may “amend, modify, increase, or reduce” any of the sheriff’s six general budget items.¹³¹ If the sheriff disagrees with any such change, he has the right to appeal it by petition to the Executive Office of the Governor.¹³² This is one of the clearest examples of the sheriff being a quasi-state officer: the county may try to rein the sheriff in, but he possesses a direct line to the highest authority in the state.

Reducing one of the sheriff’s six budget items, moreover, bears little resemblance to the fine-tuned regulation that Professor Harmon describes for police departments. The Florida Supreme Court in *Weitzenfeld v. Dierks* held:

[T]he internal operation of the sheriff’s office and the allocation of appropriated monies within the six items of the budget is a function which belongs uniquely to the sheriff To hold otherwise would do irreparable harm to the integrity of a constitutionally created office

* * *

Accordingly, F.S. Section 30.49(4) empowers the county to make lump sum reductions or additions of monies allocated to any of the six budget items; it does not, however, authorize an intrusion into the functions which are necessarily within the purview of the office of sheriff.¹³³

¹³⁰ Fla. Stat. § 30.49(1)–(2) (2016).

¹³¹ *Id.* at § 30.49(4). A commission or board may demand information about specific expenditures within a general budget item, but may not “amend, modify, increase, or reduce” these specific expenditures. *Id.* at § 30.49(3); see also *Weitzenfeld v. Dierks*, 312 So. 2d 194, 196 (Fla. 1975) (interpreting the statute).

¹³² Fla. Stat. § 30.49(4)–(5).

¹³³ 312 So. 2d 194, 196 (Fla. 1975).

The outcome of the case was to deny Manatee County the ability to stop its sheriff from using money allocated for “Expenses Other than Salaries” to create a helicopter program.¹³⁴ In comparison, if a police chief proposed using funds for a helicopter program, the city could deny him those funds and even fire him if the city believed his use of funds reflected poor judgment.¹³⁵ No such options were available to the Manatee County Commission.

3. Section 1983 Suits

Another area in which the state-local hybridity of the sheriff creates a disparity between the treatment of the county sheriff and the local police chief is in civil rights suits under 42 U.S.C. § 1983. In *McMillian v. Monroe County*, the Supreme Court created uncertainty about whether sheriffs act as final policymaker for the county or the state.¹³⁶ This is important because if the sheriff acts unconstitutionally in his capacity as final policymaker for the county, the county may be liable under § 1983,¹³⁷ even if the sheriff himself is entitled to qualified immunity.¹³⁸ However, if the sheriff acts for the state, there can be no county liability—because the sheriff did not act for the county—nor can the state be held liable because neither a state nor its officials acting in their official capacities are suable “persons” under § 1983.¹³⁹

In determining that the sheriff in *McMillian* was acting as a final policymaker for the state, the Court emphasized a 1901 amendment to Alabama’s constitution allowing the governor to commence impeachment proceedings against sheriffs and moving proceedings from

¹³⁴ *Id.* at 195–96.

¹³⁵ See, e.g., B.J. Pollock, *Needville Police Chief Fired*, Fort Bend Herald (Apr. 1, 2005), http://www.fbherald.com/needville-police-chief-fired/article_a2314801-4722-53c9-bd64-279ea6736ec4.html [<https://perma.cc/E3FM-DZMF>].

¹³⁶ 520 U.S. 781, 791 (1997).

¹³⁷ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986).

¹³⁸ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that executive officers are immune from damages actions under § 1983 if their “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”); *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (holding that “municipalities have no immunity from damages liability flowing from their constitutional violations”).

¹³⁹ *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

the county to the state supreme court, an amendment aimed at stopping lynch mobs from committing crimes with impunity.¹⁴⁰ As Professor Karen Blum points out, “[t]he irony is that a restructuring . . . intended to make sheriffs more accountable ultimately resulted in a Supreme Court decision sheltering the sheriff’s office from damages liability.”¹⁴¹

Since *McMillian*, courts have become fragmented.¹⁴² Sheriffs have been found to act as final policymakers for the state in Georgia,¹⁴³ but courts have found that sheriffs doing the same activities acted for the county in Wisconsin¹⁴⁴ and Florida.¹⁴⁵ California’s sheriffs were found to be acting for the county when the issue came before the Ninth Circuit, only for the California Supreme Court to hold later that they acted for the state.¹⁴⁶ While this area of law is unsettled and likely to change, it provides another example of the hybrid state-and-local status of the sheriff that hampers accountability: if a sheriff’s unconstitutional action does not result in any governmental liability, there will not be as much incentive to hold him accountable for such action.

B. County/City Misalignment

There are also misalignments involving the sheriff that occur entirely at the local level between the county and the city. Namely, incorporated municipalities often contract with the sheriff for policing services rather than forming their own police departments, which can leave municipalities with less control over how they are policed.¹⁴⁷ Cities have

¹⁴⁰ 520 U.S. at 787–88.

¹⁴¹ Karen M. Blum, Support Your Local Sheriff: Suing Sheriffs Under § 1983, 34 Stetson L. Rev. 623, 633–34 (2005).

¹⁴² See id. 628–29 (identifying post-*McMillian* split in federal courts of appeals and state supreme courts about whether sheriffs act for the state or county and arguing this is the result of lack of guidance from the Court).

¹⁴³ *Manders v. Lee*, 338 F.3d 1304, 1310–11 (11th Cir. 2003).

¹⁴⁴ *Abraham v. Piechowski*, 13 F. Supp. 2d 870, 877–79 (E.D. Wis. 1998).

¹⁴⁵ *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm’rs*, 405 F.3d 1298, 1305 (11th Cir. 2005).

¹⁴⁶ Compare *Brewster v. Shasta County*, 275 F.3d 803, 805 (9th Cir. 2001), with *Venegas v. County of Los Angeles*, 87 P.3d 1, 5, 10 (Cal. 2004).

¹⁴⁷ Of historical intrigue is that this arrangement constitutes a reversal of the interests in medieval England, where “[t]he most coveted privileges [of a borough obtaining the legal rights of self-government] consisted in exemption from the control of the county Sheriff.” *Wigan & Meston*, supra note 11, at 18–19.

been contracting with counties for policing services since 1931,¹⁴⁸ and these contracts are widespread: contracting occurs in Arizona, California, Florida, Illinois, Vermont, Washington, and many other states.¹⁴⁹ To illustrate how common this practice is in some states, nearly 30% of municipalities in California contract with the county sheriff for policing services.¹⁵⁰

In theory, these contracts are attractive. A municipality might be able to purchase precisely the quantity and quality of policing that its constituents desire from a more centralized agency, creating economies of scale. When the City of Adelanto, California had a police department, it was plagued with corruption and harassment;¹⁵¹ when the city dissolved the department to contract instead with the sheriff, the city benefitted from the larger sheriff's office's superior equipment, more specialized units, and larger roster from which to call for backup when necessary.¹⁵² These benefits might explain why contract cities in California generally have better clearance rates for violent crimes than do department cities.¹⁵³ These contracts also seem to offer savings to contract cities (though these savings may result from contract costs being passed along to department cities,¹⁵⁴ or from the fact that sheriff's deputies are significantly less likely to collectively bargain than police officers).¹⁵⁵ These contracts have another benefit in that they represent one possible solution to fragmentation—the overabundance of small

¹⁴⁸ Gordon E. Misner, *The Police Service Contract in California: An Instrument of Functional Integration*, 52 *J. Crim. L., Criminology, and Police Sci.* 445, 446 (1961).

¹⁴⁹ Peter J. Nelligan & William Bourns, *Municipal Contracting With County Sheriffs for Police Services in California: Comparison of Cost and Effectiveness*, 14 *Police Q.* 70, 71 (2011).

¹⁵⁰ *Id.* at 72.

¹⁵¹ See Phil Willon, *Police Chief Ousted Amid Debate on Force's Fate*, *L.A. Times* (Oct. 6, 2001), <http://articles.latimes.com/2001/oct/06/local/me-54103> [<https://perma.cc/NV3U-M7B6>].

¹⁵² Gary George, *Morale Improves with Adelanto's Switch to Sheriff*, *Desert Dispatch* (June 16, 2002), <http://archive.desertdispatch.com/2001-2003/102424884395573.html> [<https://perma.cc/6M2M-LQWF>].

¹⁵³ Nelligan & Bourns, *supra* note 149, at 87–89.

¹⁵⁴ See *id.* at 77.

¹⁵⁵ Casey LaFrance & MaCherie Placide, *A Quantitative Analysis of Accountability Indicators in Sheriffs' Offices and Municipal Police Departments*, *in* 10 *Law Enforcement Executive Forum: Critical Legal Issues in Law Enforcement* 107, 113–14 (2010).

police forces within one geographical area—which is a serious problem in policing today.¹⁵⁶ Contracting is one of two models of consolidation (the other being “coalescence,” where county and city policing agencies merge into one department) that has been suggested to address fragmentation.¹⁵⁷

However, these contracts create some notable problems. A relatively minor example is the inability of such contract cities to file for stimulus packages like the COPS Hiring Recovery Program, which are available only to agencies with primary law enforcement authority.¹⁵⁸ Thus, a sheriff’s office may apply for stimulus funds to be used for additional deputies in a particular contract city; however, the fact that the county as a whole or the sheriff’s office itself is generally doing well financially can preclude a grant of stimulus money even where an individual city faces budgetary issues requiring a reduction in contracted-for law enforcement personnel.¹⁵⁹

More significant to accountability is that contracting for policing with an out-of-town agency runs the risk that those who police a municipality will not be stakeholders in its community. Likewise, the potential for disparities in bargaining power, especially with respect to smaller, poorer municipalities, suggests that by contracting a city might lose some ability to regulate and hold accountable those who police it.¹⁶⁰

These issues came to bear in Maricopa County, Arizona, where the small town of Guadalupe contracts with the Maricopa County Sheriff’s

¹⁵⁶ See Police Exec. Research Forum, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County 2* (2015) (“The fragmentation of policing is inefficient, undermines police operations, and makes it difficult to form effective law enforcement partnerships . . .”); Final Report of the President’s Task Force on 21st Century Policing 29 (2015) (“[S]mall [police] forces often lack the resources for training and equipment accessible to larger departments and often are prevented by municipal boundaries and local custom from combining forces with neighboring agencies.”).

¹⁵⁷ See *infra* Section IV.D for a full discussion of the two models.

¹⁵⁸ See COPS Hiring Program (CHP), Community Oriented Policing Services U.S. Dep’t of Justice, <https://cops.usdoj.gov/default.asp?Item=2367> [<https://perma.cc/3B8F-JBZB>] (last visited Sept. 20, 2017).

¹⁵⁹ See Alfred Lee, *Contract Cities Lose Out after Sheriff’s Department Is Denied Stimulus Funds*, Whittier Daily News (Aug. 8, 2009), <http://www.whittierdailynews.com/general-news/20090808/contract-cities-lose-out-after-sheriffs-department-is-denied-stimulus-funds> [<https://perma.cc/DC9J-R8VP>].

¹⁶⁰ See Nelligan & Bourns, *supra* note 149, at 89–90 (discussing potential negative policy implications of contract policing).

Office for policing services. When Guadalupe found itself in a dispute with Sheriff Joe Arpaio over his controversial immigration sweeps in April 2008, Mayor Rebecca Jimenez confronted Sheriff Arpaio about his acting contrary to the town's wishes; Sheriff Arpaio responded: "If you don't like the way we operate, you get your own police department."¹⁶¹ Mayor Jimenez suggested she would look into doing so, and Sheriff Arpaio raised the stakes two weeks later, stating that he intended to cancel the town's contract.¹⁶² What Mayor Jimenez discovered was that reaching the capacity for the town to police itself would take up to three years and that it would not be possible to contract with the Tempe or Phoenix Police Departments in the meantime.¹⁶³ Instead, Mayor Jimenez was ousted from office, and her replacement was able to convince Sheriff Arpaio to maintain the contract.¹⁶⁴ Sheriff Arpaio claimed that even if Guadalupe stopped contracting with him, he would still have the authority to perform his sweeps within Guadalupe.¹⁶⁵ This anecdote presents a fundamental concern with the contract model: the head of the agency providing the policing is not a stakeholder in the community in the same way that a local police chief would be. Where a police chief works primarily to achieve city policy goals, a sheriff might have separate county policy goals that are contrary to the interests of the city. This problem, combined with the lack of bargaining power of communities like Guadalupe, suggests that these contracts are susceptible to abuses by county sheriffs that local officials will be powerless to stop.

However, one important development in this story is that, while Guadalupe is still under contract with the sheriff's office, the contract

¹⁶¹ Nicholas Riccardi, *Sheriff Riding Out of Town*, L.A. Times (Oct. 13, 2008), <http://articles.latimes.com/2008/oct/13/nation/na-guadalupe13> [https://perma.cc/6CWR-TDLP].

¹⁶² *Id.*

¹⁶³ See J.J. Hensley & Yvonne Wingett, *Maricopa County Set to Cancel Their Policing in Guadalupe*, AZ Central (Sept. 17, 2008), <http://archive.azcentral.com/arizonarepublic/news/articles/2008/09/17/20080917guadalupe0917.html> [https://perma.cc/NP5S-WHSY].

¹⁶⁴ *Sheriff Joe and New Guadalupe Mayor Find Common Ground*, AZ Family (Aug. 21, 2009), <http://www.azfamily.com/story/28304824/sheriff-joe-and-new-guadalupe-mayor-find-common-ground>.

¹⁶⁵ Riccardi, *supra* note 161.

was amended in 2014 with provisions favorable to Guadalupe.¹⁶⁶ One provision states, “As a condition of this contract, the Town of Guadalupe requires that Sheriff’s Office employees assigned to the town receive cultural training unique to the Town’s history and celebrations.”¹⁶⁷ The Town of Guadalupe is to provide curriculum and materials and to “reimburse the Sheriff’s Office the actual one-time cost, if any, to implement the training program.”¹⁶⁸ Most significantly, the Amendment provides:

The Town, Acting through the Town Manager, shall have the right to request in writing that any staff assigned to service within the Town by the Sheriff’s Office be reassigned or otherwise removed from service within the Town. When such request is made, the Sheriff’s Office shall comply as soon as reasonably practical, but in any case within no more than three weeks after such request is made.¹⁶⁹

The addition of these provisions suggest that even smaller, poorer cities may in some cases be able to exercise some degree of bargaining power to ensure that policing conforms to local preferences.

IV. COUNTY LAW ENFORCEMENT IS IN NEED OF DRASTIC REFORM TO PROMOTE ACCOUNTABILITY

Though this Note advocates drastic reform or abolition of the sheriff’s office, it is important not to overstate the issues: it seems that in most counties, sheriffs bravely and ably exercise the declining powers their office affords them. Where sheriffs go very far astray, the electorate may vote the sheriff out of office,¹⁷⁰ sheriffs may be prosecuted and

¹⁶⁶ Agreement for Law Enforcement Services between The Town of Guadalupe and Maricopa County on Behalf of the Sheriff’s Office C-50-12-083-3-00 (Mar. 4, 2014) (on file with the Virginia Law Review Association) [hereinafter *Guadalupe Contract*]; see Megan Cassidy & Michelle Ye Hee Lee, *Guadalupe Seeks Better Relationship with MCSO*, AZ Central (Mar. 2, 2014), <http://www.azcentral.com/story/news/2014/03/03/guadalupe-seeks-better-relationship-with-mcso/5963519/> [<https://perma.cc/NWQ8-EK4L>] (discussing the contract provisions).

¹⁶⁷ *Guadalupe Contract*, supra note 166.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., Fernanda Santos, *Sheriff Joe Arpaio Loses Bid for 7th Term in Arizona*, N.Y. Times (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/joe-arpaio-arizona-sheriff.html?mcubz=3>.

convicted of crimes,¹⁷¹ and in many states a sheriff may be removed for malfeasance or nonfeasance through legal proceedings initiated by a county prosecutor, the state attorney general, or the state governor.¹⁷² The county board may have some power over the sheriff, such as the ability to withdraw the traditional offer of free living quarters.¹⁷³ However, what these examples illustrate are the differences in how state law governs the city-police department relationship as compared with the county-sheriff relationship, and the implications these differences have for local accountability. Between the legacies of the ancient sheriff that inexplicably persist and the statutes that prevent county government from acting as a check on the sheriff, it is clear that county law enforcement must be drastically reformed. Certain reforms, like giving the county more control over hiring and budgeting, may be difficult to achieve politically but are relatively easy to formulate; others, like the role county law enforcement should play in addressing the problem of fragmentation, are more complicated—but considering America's experiences with sheriffs provides valuable insights.

A. Elections Are Not an Effective Accountability Mechanism

Any claim that the sheriff is not accountable to his constituents is likely to be met with skepticism: sheriffs, after all, are popularly elected. One might argue that elections are the best system for holding a chief law enforcement officer accountable. Under this system, the voters have a direct say in who polices them and how they are policed, instead of electing a mayor who runs on a platform within which policing is, at best, one of several salient issues. Electing a chief law enforcement officer ensures that policing is a salient issue in every election. This is the attitude many sheriffs take. During a citizens' commission on jail

¹⁷¹ See, e.g., Rubin & Kim, *supra* note 124 (discussing the conviction of Sheriff Baca). It is also worth noting that Sheriff Arpaio was convicted of criminal contempt of court but received a pardon from President Donald Trump less than one month after conviction. See Devlin Barrett & Abby Phillip, Trump Pardons Former Arizona Sheriff Joe Arpaio, *Wash. Post* (Aug. 25, 2017), https://www.washingtonpost.com/world/national-security/trump-pardons-former-arizona-sheriff-joe-arpaio/2017/08/25/afbff4b6-86b1-11e7-961d-2f373b3977ee_story.html?utm_term=.39128c08ba3d [<https://perma.cc/CG7Q-HXYF>].

¹⁷² See *supra* Subsection III.A.1.

¹⁷³ Alvin D. Sokolow, *Legislatures and Legislating in County Government*, in *County Governments in an Era of Change* 29, 39 (David R. Berman ed., 1993).

violence, Los Angeles County Sheriff Lee Baca was asked by a constituent how to hold him accountable for mistreatment of inmates and other misconduct by his office; Sheriff Baca's simple solution: "Don't elect me."¹⁷⁴ This response, which appeals to fundamental democratic principles, also encapsulates the problem of relying solely on elections as an accountability mechanism. Despite the L.A. County Sheriff's Department being the largest in America,¹⁷⁵ "at least since 1932, no incumbent L.A. County sheriff has ever been unseated."¹⁷⁶

L.A. County is not atypical in this regard. In practice, it is evident that accountability through elections is not occurring in a meaningful way. Voter turnout is low in local elections, and appears to be diminishing further.¹⁷⁷ The actions of law enforcement officers involve one-off discretionary decisions made in the course of duty, which are not as visible or easily reviewable as public policy decisions made by politicians.¹⁷⁸ Particularly in rural counties, there is the problem that those most qualified to replace a sitting sheriff are likely to be subordinates of that sheriff and therefore unlikely to be willing to break rank and run against their boss.¹⁷⁹ There is likewise the rubber stamp that voters seem to give incumbents: though definitive data are hard to come by, one policing scholar has estimated that the average sheriff's term is

¹⁷⁴ Editorial, *The Untouchable Sheriff*, *supra* note 120.

¹⁷⁵ Burch, *supra* note 62, at 23 (indicating L.A. County Sheriff's Department is the largest by number of full-time sworn personnel).

¹⁷⁶ Editorial, *Don't Run Again, Sheriff Baca*, *L.A. Times* (Aug. 4, 2013), <http://articles.latimes.com/2013/aug/04/opinion/la-ed-adv-sheriff-20130804> [<https://perma.cc/53FE-GFCL>].

¹⁷⁷ See DeSantis & Renner, *supra* note 112, at 22 ("[T]hese [elected county] executive officials typically operate in a political climate with a low degree of public awareness or scrutiny and may be reelected routinely with little or no serious competition."); Mike Maciag, *Voter Turnout Plummeting in Local Elections*, *Governing* (October 2014), <http://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html> [<https://perma.cc/Q875-H5B7>] (citing a survey of voter turnout in 144 larger cities, which found an average of 26.6% in 2001 and a 2011 average of 21%, as well as statistical evidence that there is a jump in turnout of 18.5% in presidential election years and 8.7% when an election is in November of a midterm election year).

¹⁷⁸ See Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 *Crime & Just.* 51, 73-75 (1992) (discussing the lack of visibility in discretionary policing decisions).

¹⁷⁹ Thompson, *supra* note 96; see also *Don't Run Again, Sheriff Baca*, *supra* note 176.

around twenty-four years.¹⁸⁰ All of this makes clear that elections are not functioning as a dynamic back-and-forth between county voters and the sheriff in which the sheriff is held accountable by being voted out of office.¹⁸¹ Nor do sheriffs interact with the community in the way that their elections might suggest: sheriffs' offices are much less likely to meet with community groups or even seek input from community surveys than are police departments.¹⁸² Absent a system of mandatory voting at the local level and a method by which to ensure that voters are informed of their choices, any reliance on the popular election of sheriffs as a meaningful accountability mechanism is misplaced. H.S. Gilbertson, in one of the most influential books ever written about county governments, identified the problem: "For nearly a century popular government has been galloping down the highway that leads to governmental confusion. Nowhere does the record state that because the people elected long strings of officers, the people therefore *controlled* those officers."¹⁸³ There is the additional problem of campaign finance in sheriff's elections, where large sums of money might come from outside the county to influence the election, further undermining the concept of elections as a pure expression of local choice.¹⁸⁴

¹⁸⁰ Thompson, *supra* note 96; E-mail Correspondence between Author and Casey LaFrance, Associate Professor of Political Science, Western Illinois University (Feb. 21, 2017) (on file with the Virginia Law Review Association) (explaining that his estimate is based on a qualitative study he conducted with sheriffs in Illinois, Iowa, and Wisconsin).

¹⁸¹ Similar findings have been made with elective school boards, which are analogous to sheriffs in that they are in some ways local but in many ways independent of local government. See, e.g., Lydia Segal, *Corruption Moves to the Center: An Analysis of New York's 1996 School Governance Law*, 36 Harv. J. Legis. 323, 330–31 (1999) (discussing the failure of elections as an accountability mechanism on New York City school boards).

¹⁸² Thomas Enzo Meloni et al., *Revisiting Quantitative Accountability Indicators in Municipal Police Departments and County Sheriffs' Offices*, 2 J. Law Enforcement Leadership & Ethics 56, 64–65 (2015).

¹⁸³ H.S. Gilbertson, *The County: The "Dark Continent" of American Politics* 31 (1917).

¹⁸⁴ See, e.g., Jacques Billeaud, *Voters Oust Sheriff Joe Arpaio after Charge Clouds Campaign*, Associated Press (Nov. 9, 2016), <https://www.apnews.com/d0512742a3284625a7ea68c6b3f5e86c> [<https://perma.cc/TS8K-W78X>] (discussing former Maricopa County Sheriff Joe Arpaio's recent losing campaign for reelection, which brought in \$12.3 million in donations, mostly from out-of-state donors); Scott Dolan, *County Sheriff Calls for Investigation into PAC's Campaign Spending*, Portland Press Herald (Jun. 4, 2014), <http://www.pressherald.com/2014/06/04/county-sheriff-calls-for-investigation-into-pacs-campaign-spending/> [<https://perma.cc/5K4L-WGVD>] (discussing a sheriff's race in Maine in

The best arguments for reforming county law enforcement come from those who have done so. During the political battle ultimately resulting in the abolition of the sheriff in Connecticut, Representative Michael P. Lawlor concisely concluded, “[I]t is not a good idea to run a professional agency on a political basis.”¹⁸⁵ In Riley County, Kansas (whose abolition of the sheriff will be discussed in Subsection IV.D.2), there was a similar recognition of the hollowness of elections as an accountability mechanism. Alvan Johnson, who worked in law enforcement in Riley County before and after the abolition of the sheriff and served as director of the consolidated Riley County Police Department for twenty-two years, put it best: “People like their elected officials. But the reality is, you can get rid of a police chief a lot faster than a sheriff.”¹⁸⁶

B. The Urgency of Reform

If one accepts that elections are not a meaningful accountability mechanism for county law enforcement, it quickly becomes clear that there is no reason to maintain the sheriff’s office. It may have made sense at one time to have a chief law enforcement officer who was elected. Likewise, it may have made sense for this office to handle various other duties like prison maintenance, prisoner transport, execution of court process and writs, and courthouse security, at a time when it was unclear who else would perform these duties if not the chief law enforcement officer. It is still essential to provide these services, and there still must be a county law enforcement agency to serve unincorporated municipalities where they exist. However, the twentieth century was a story of policing becoming more professionalized,¹⁸⁷ and

which a Florida company “spent nearly \$100,000 for radio ads and campaign mailings” attacking the incumbent).

¹⁸⁵ Paul Zielbauer, Reinforcement for an Effort to Abolish Sheriff System, N.Y. Times (Mar. 11, 2000), <http://www.nytimes.com/2000/03/11/nyregion/reinforcement-for-an-effort-to-abolish-sheriff-system.html?mcubz=3>.

¹⁸⁶ Scott Roach, Task Force Hears from Former Riley County Chief about Police Consolidation, Emporia Gazette (Jun. 28, 2007), http://www.emporiagazette.com/news/article_3f85f6be-8545-5b76-9244-9859e0d308d2.html [<https://perma.cc/3Z2F-A9UH>]; see also Katherine Wartell, New Center to Honor Johnson’s Decades of Law Enforcement Work, The Manhattan Mercury (Dec. 7, 2012) (discussing Alvan Johnson’s career).

¹⁸⁷ Reiss, *supra* note 178, at 68–72.

counties have increasingly found that a professional, dedicated county police department is a better organization to handle law enforcement than a jack-of-all-trades sheriff.¹⁸⁸

Where a county police department is created and the sheriff is stripped of policing authority, one might argue that it is inconsequential whether the sheriff is elected or appointed, or whether and to what extent the county can hold the sheriff accountable. It is true that the sheriff's institutional pathologies are most concerning in counties where the sheriff engages in policing, but stripping the sheriff of policing authority does not allay all fears of abuses and corruption that a lack of accountability creates. As discussed in the context of Morgan County, Alabama in Section II.A and Los Angeles County, California in Section III.A, mistreatment and abuse of prisoners in county jails remains a major problem. Additionally, over a six-month period in 2016, there were four deaths in the Milwaukee County Jail, which was run by controversial sheriff David Clarke.¹⁸⁹ Among the dead was a mentally ill man, Terrill Thomas, who died of dehydration seven days after jail staff cut off the water to the sink in his cell as a disciplinary measure.¹⁹⁰

The story of how Connecticut came to abolish the sheriff's office illustrates how dangerous the coercive power of the sheriff can be, even where the office is limited to jail, courthouse, and prisoner transport services. During the political battle for a constitutional amendment abolishing the sheriff, the rape of Sandra Caruso provided a graphic example of the human consequences that ineptitude in prisoner transportation can have.¹⁹¹ Caruso was arrested for failure to appear in court on a charge of driving with a suspended license.¹⁹² Unable to post bail, Caruso was driven to the county jail in the back of a sheriff's department van, along with thirteen male convicts, two of whom were

¹⁸⁸ See McCann, *supra* note 58, at 10.

¹⁸⁹ Katie Mettler, In Sheriff David Clarke's Jail, Water Was Kept from Mentally Ill Inmate for 7 Days Before He Died of Dehydration, *Wash. Post* (Apr. 25, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/25/in-sheriff-david-clarkes-jail-water-kept-from-mentally-ill-inmate-for-7-days-before-he-died-of-dehydration/?utm_term=.7aadf6e388f6 [<https://perma.cc/CTP4-M49Y>].

¹⁹⁰ *Id.*

¹⁹¹ Zielbauer, *supra* note 185.

¹⁹² *Id.*

sex offenders.¹⁹³ During the ride, multiple prisoners brutally raped Caruso, who had been handcuffed and shackled.¹⁹⁴ A partition in the van had been kicked down, and the deputy sheriffs had turned off an intercom that could have alerted them to the rape.¹⁹⁵ This was not a violation of the rules at the time, and the deputies were not disciplined after an internal investigation.¹⁹⁶ Connecticut citizens voted to amend the state constitution to abolish the sheriff's office in 2000.¹⁹⁷

Thus, significant damage can be done by a sheriff with only adjudicatory functions. Where a sheriff is limited to these functions, moreover, there lurks the question of what possible rationale there can be for the sheriff remaining an elected official: there is no justification for making policing the exclusive duty of appointive officials accountable to local government while leaving jail maintenance, prisoner transport, and courthouse security to elective officers unaccountable to local government. An anachronism like an elective jailer who is insulated from county regulation might seem relatively harmless, but historical inertia is no reason to retain an office with coercive authority and little accountability.

C. The Difficulties of Reform

The most important goal of reform to county law enforcement must be to ensure that county government has the authority to hire and fire the county's chief law enforcement officer, and to exercise plenary budgetary control over the agency. Whether this modified agency is called the "sheriff's office" and is headed by a "sheriff" to preserve history, or called the "county police department" and headed by a "county police chief," is inconsequential.¹⁹⁸

There will be substantial obstacles to achieving these reforms. The fact that most states establish in their constitutions the sheriff, its

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id.

¹⁹⁷ Conn. Const. art. XXX.

¹⁹⁸ To distinguish this appointive, county-controlled model from the sheriff as that office currently exists, however, this Note will generally refer to this type of agency as a "county police department."

elective status, and even sometimes the duties of the office, means that constitutional amendments will be necessary to give counties more control. Even allowing county government to have plenary budgetary control over the office would in many states require an “abolition” of the office in the sense of deleting it from the state constitution, since the sheriff’s constitutional status has proved important in analyses of whether and how the county may regulate the office.¹⁹⁹ Giving the county such authority would thus require states to amend their constitutions to remove any reference to the sheriff, and would then require state legislatures to pass statutes authorizing counties to create county police departments to perform the duties currently performed by the sheriff.

States in which the sheriff is not a constitutional creation will have a much easier time at reform. For example, in 1954, St. Louis County, Missouri voted to amend its charter to transfer nearly all of the sheriff’s powers to the newly formed county police department.²⁰⁰ Missouri was atypical in two respects: broad powers were granted to counties under the state constitution²⁰¹ and all reference to the sheriff’s office was removed in their 1945 Constitution.²⁰² This constitutional backdrop allowed the county (without any constitutional amendment) to create a county police department and disempower the sheriff. In St. Louis County, the sheriff still exists, though his duties are limited to court security and civil process, and the sheriff is court-appointed.²⁰³ The Missouri Supreme Court, in affirming the constitutionality of St. Louis County’s charter amendment, made much of the fact that the sheriff in

¹⁹⁹ See *supra* Subsections III.A.1 and III.A.2.

²⁰⁰ Gordon E. Misner, *The St. Louis County Department of Police: A Study in Functional Consolidation*, 48 *J. Crim. L., Criminology, and Police Sci.* 652, 655 (1958).

²⁰¹ The Missouri Constitution allows certain counties to create home rule charters, which “shall provide for . . . the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state.” Mo. Const. art. VI, § 18(b). The constitution also prevents the state legislature from requiring home rule counties to “provide for any other office or employee of the county” than the constitution specifically mandates. *Id.* § 18(e).

²⁰² *State v. Gamble*, 280 S.W.2d 656, 660 (Mo. 1955).

²⁰³ Sheriff’s Office, St. Louis County Courts, http://www.stlcountycourts.com/DEP_Sheriff.php [https://perma.cc/286B-U56D] (last visited Jan. 28, 2018).

Missouri was regarded as a county officer.²⁰⁴ Counties in other states will have a harder time transferring power from the sheriff to a county police department to the extent that their state is one in which the sheriff is a constitutional officer; counties are not granted substantial home-rule power; or the sheriff is considered a state, rather than a county, officer.²⁰⁵ Even in Missouri, if a county is not permitted to make a charter, or has not done so (only four counties have²⁰⁶), then state law mandates an elected sheriff.²⁰⁷

Thus, reform will take a large push at the outset to modify state constitutions or statutory law in order to allow counties to exercise control over law enforcement.

D. What Reform Should Look Like: The County as Ideal Level of Government for Policing and Lessons to Be Learned from the Sheriff

During and after this push for more county power, thought must be given to what policing at the county level should look like. This in turn should prompt analysis of what relationship county law enforcement should have with municipal law enforcement. Though this Note argues that the sheriff's office as it currently exists is anachronistic, unaccountable, and in urgent need of reform, there are also lessons to be learned from America's experiences with sheriffs that shed light on other problems facing policing today. In particular, this Section will argue that if proper reforms can be implemented, the county represents the best level of government at which to provide policing. As discussed in Section III.B, sheriffs have shown that the county can provide a solution to the fragmentation problem in policing by allowing municipalities to contract with the county for policing services. The problem of fragmentation necessitates thinking about policing on a larger scale than the municipality. Moving policing to the county level is the most natural solution because counties are relatively decentralized and already have established governments. (The existence of these governments gives a solution involving county policing an advantage

²⁰⁴ *Gamble*, 280 S.W.2d at 659–60.

²⁰⁵ See *supra* Subsection III.A.3.

²⁰⁶ Missouri Counties by Classification (Jan. 2012), http://www.mocounties.com/images/1131/flyer/2012classification_229.pdf [https://perma.cc/F572-3S9T].

²⁰⁷ Mo. Rev. Stat. § 57.010 (2016).

over solutions involving regional police forces with jurisdiction over multiple municipalities, which would suffer from the problem of there not being an existing regional governmental body to have final say over policy and operations.²⁰⁸) Consolidating the provision of policing to the county level might be accomplished under two models: the contract model, discussed in Section III.B, and the coalescence model, in which city and county police agencies merge into a unified county police department.²⁰⁹ In examining the merits of the two models, the experiences of sheriffs' offices are instructive and ultimately weigh in favor of adopting the coalescence model. This Section will discuss how to implement coalescence and the role state law should play in maximizing local accountability.

1. Shortcomings of the Contract Model of Consolidation

As the experience of the Town of Guadalupe, discussed in Section III.B, demonstrates, the contract model creates problems of misalignment between county and city. It is nonetheless a partial solution to the police fragmentation problem, and some argue that it is the most realistic solution.²¹⁰ Although this Note argues that contracting is not the best solution to fragmentation, the prevalence of these contracts and the severity of the fragmentation problem suggest that more research into policing contracts should be conducted. Contracting may be preferable to not addressing the fragmentation problem at all, and research might reveal ways to improve these contracts. For instance, the same sorts of contracts that currently exist between municipalities and county sheriffs would be possible with appointive, county-

²⁰⁸ Or, in the example of the North County Police Cooperative, which polices four municipalities in Saint Louis County, Missouri, one city operates the police department and contracts with other cities for policing services, making this simply another version of the contract model and subject to the same concerns addressed in Section III.B, *supra*. See About, North County Police Cooperative, <http://www.northcountypolice.com/about/> [https://perma.cc/E6FT-P2LP] (last visited Jan. 28, 2018); Associated Press, Charlack Dissolves Police Department, Joins North County Cooperative, Fox 2 News (Oct. 16, 2015), <http://fox2now.com/2015/10/16/charlack-dissolves-police-department-joins-north-county-cooperative/> [https://perma.cc/3PBW-293M] (identifying the cooperative as “an extension of the Vinita Park police”).

²⁰⁹ Reiss, *supra* note 178, at 64–66.

²¹⁰ See, e.g., Misner, *supra* note 148, at 445 (“Of these proposals [to address fragmentation], the police service contract offers the most feasible and practical solution.”).

controlled police departments, and this arrangement would at least avoid the problem of giving even more authority to unchecked, unaccountable sheriffs. Likewise, the specific contract provisions eventually added to the contract between the Maricopa County Sheriff's Office and the Town of Guadalupe suggest there may be ways for even smaller, poorer municipalities to negotiate for some local preferences. Ultimately, however, the problems inherent in the contract model counsel against encouraging cities and counties to address the fragmentation problem in this way when a better alternative exists.

2. The Coalescence Model Avoids the Problems of Contracting and Mitigates the Accountability Issues Inherent in Consolidation

A better solution to fragmentation is the coalescence model. This model would avoid the most problematic aspects of the contract model, while retaining its benefits. The experience of Riley County, Kansas in abolishing their sheriff and forming a consolidated county police department is an excellent model for how coalescence may be achieved.²¹¹

Riley County was able to replace its sheriff's office with a unified county police department in large part due to the work of Donn Everett, a state legislator who sought to remedy the lack of coordination between the Manhattan, Kansas Police Department and the Riley County Sheriff.²¹² Doing so required a change to Kansas law, which before 1972 allowed for the establishment of a unified county police department but required counties to have an elected sheriff as well.²¹³ In 1972, Kansas

²¹¹ William W. Childers, *Consolidation of Police Service: The Riley County Kansas Experience—A Case Study* (1977).

²¹² *Id.* at 52–53.

²¹³ See Act of March 23, 1970, ch. 117, 1970 Kan. Sess. Laws 436, 444 (allowing for unified county police departments but not the dissolution of sheriffs' offices); Act of April 23, 1965, ch. 160, § 4, 1965 Kan. Sess. Laws 359 (“A sheriff shall be elected in each organized county . . .”); Kan. Office of Revisor of Statutes, 19-801, http://www.ksrevisor.org/statutes/chapters/ch19/019_008_0001.html [<https://perma.cc/WCV6-22YW>] (last visited Jan. 28, 2018) (noting that the 1965 Act was in effect until a 1972 Act repealed it). This change did not require a constitutional amendment as it would in other states, however, because Kansas's constitution did not set forth the office of sheriff. Wyandotte Constitution, Kan. Const. art. IX, § 2 (1859) (providing that “[t]he Legislature shall provide for such county and township officers as may be necessary,” but not setting forth any such officers). N.B. Childers erroneously states that Kansas's state constitution had to be amended as part of the movement to abolish the sheriff. Childers, *supra* note 211, at 53.

passed into law House Bill No. 1795, which allowed certain counties to elect to establish their own consolidated county police departments, whereupon “[t]he sheriff of any county adopting the provisions of this act shall be and is hereby relieved of all power, authority, and responsibility now or hereafter prescribed by law.”²¹⁴ The bill only allowed ten counties out of 105 existing in Kansas to make such a change, because its applicability was limited to counties with certain population sizes and assessed tangible valuations.²¹⁵ Riley County, Kansas voted on November 7, 1972 to consolidate county and city police.²¹⁶

Adoption of the Riley County coalescence model writ large would give smaller municipalities beneficial economies of scale, while avoiding the dangers that the contract model poses with respect to accountability, local control, and lack of bargaining power. It would have the further benefit of putting the power back in the hands of the county and local governments, rather than the current system in which the sheriff has all the power and is reined in, if at all, by state actors.

There is the possible criticism that in the case of Riley County, the resolution effecting consolidation was passed by support of the City of Manhattan, despite opposition from the rural section of the county, likely due to fear that the new consolidated agency would focus on the city to the detriment of the rural areas.²¹⁷ However, when the issue came back on the ballot four years later in 1976, every precinct, urban and rural, voted to retain the consolidated county police department.²¹⁸ The benefits to rural counties included access to specialized units like “a dive team, special weapons and tactics team, a group of officers who concentrate on methamphetamine cases and even a hostage negotiations team.”²¹⁹ In 2006, Riley County’s police chief noted that Riley County “has more specialty resources than the Wichita Police Department,”

²¹⁴ Act of March 18, 1972, ch. 91, § 15, 1972 Kan. Sess. Laws 429–30.

²¹⁵ See *id.* § 23 at 433.

²¹⁶ Childers, *supra* note 211, at 54–55.

²¹⁷ *Id.* at 55–56.

²¹⁸ Rochat, *supra* note 186.

²¹⁹ Bob Johnson, Consolidation Gets Favorable Response, *Iola Register* (Dec. 2006), <http://old.iolaregister.com/Archives/News/Stories/2006/December/Consolidation%20gets%20favorable%20response.html> [<https://perma.cc/FBJ3-U3MR>].

despite the fact that “Wichita is eight times larger than our . . . department.”²²⁰

One of the hardest sells with respect to coalescence is that, unlike the contractual arrangements cities have with counties, coalescence has not been shown to save money, and may involve an initial increase in costs that may or may not produce long-term savings.²²¹ However, it should be stressed that even if there is a temporary increase in costs, there is a concomitant increase in personnel, specialized units, and equipment. And while it may be cheaper to contract with the county for such services, it is important to remember the likelihood that some of that savings comes at the expense of other cities in the same county that have their own police departments but are forced to subsidize policing of the contract cities.²²²

3. State Law Can Ensure that Municipalities Retain Control of How They Are Policed in the Coalescence Model

A final counterargument to the coalescence model is that giving so much power to the county will limit the ability of municipalities to control how they are policed.²²³ However, worries about municipal control can be allayed with the passage of state laws defining the terms of the relationship between county and municipal governments in the coalescence model.

It may reasonably be argued that what was successful for Riley County, with a population of roughly 75,000,²²⁴ is not particularly instructive for somewhere with fragmentation problems like St. Louis County, Missouri, with a population of roughly one million.²²⁵ In considering solutions to the severe fragmentation issues in St. Louis County, the think tank Police Executive Research Forum (“PERF”)

²²⁰ Id.

²²¹ Rochat, *supra* note 186 (noting that Riley County consolidation was expensive in the earlier years but was more efficient in the long run and afforded savings in administration).

²²² Nelligan & Bourns, *supra* note 149, at 77.

²²³ See *id.* at 90 (discussing municipalities’ fear of losing local control by relying on counties for policing).

²²⁴ Kansas Certified Population (2016), <http://www.rileycountyks.gov/DocumentCenter/View/13730> [<https://perma.cc/F5MU-HLGH>].

²²⁵ U.S. Census Bureau, QuickFacts St. Louis County, Missouri (2016), <http://www.census.gov/quickfacts/table/PST045215/29189> [<https://perma.cc/8U2H-UQ79>].

acknowledged the desirability of consolidation by coalescence, but ultimately found it infeasible because “the St. Louis region is large and diverse, with different crime problems and priorities, and a number of residents and community leaders we spoke with are satisfied with their police departments and work well with them.”²²⁶ Instead, PERF’s proposed solution to St. Louis County’s fragmentation problem was to create “consolidation clusters” out of contiguous municipalities that would represent a “single police district and [be] merged via contracts with either the St. Louis County Police Department” or another department.²²⁷ However, PERF’s solution, which is a slight variant on the contract model, is subject to criticisms: the model is susceptible to the disparities in bargaining power and stakeholder problems inherent in the contract model.²²⁸ PERF’s model also leaves unexplained how a consolidation cluster, comprising different local governments and lacking an obvious agent or body to represent it, will decide and negotiate for its policy preferences, or how to deal with the problem of disagreements between the individual municipalities that form a consolidation cluster. These problems are not insurmountable, but they do cast doubt on PERF’s claim that their model is more feasible than coalescence: it is unclear why communities that are satisfied with their existing police departments would reject coalescence out of hand, but consent to being grouped together with other communities as a bargaining unit to contract for law enforcement services with the county police department.

PERF was wrong to dismiss so quickly the feasibility of coalescence for large counties like St. Louis. Coalescence need not strip municipalities of control over how they are policed, nor must it result in policing becoming less tailored to individual communities’ discrete needs and preferences. In applying coalescence, the experiences of sheriffs and county police departments are instructive: counties must first be divided up into smaller geographical areas. After coalescence, the Riley County Police Department created “substations” for rural areas in the county;²²⁹ California sheriffs with municipal contracts create a

²²⁶ Police Exec. Research Forum, *supra* note 156, at 6.

²²⁷ *Id.*

²²⁸ See *supra* Section III.B and Subsection IV.D.1.

²²⁹ Childers, *supra* note 211, at 73.

“patrol station” in each contract city, which is headed by a captain;²³⁰ the St. Louis County Police Department itself is already divided into five precincts, each of which has a commanding captain.²³¹ Dividing the county into individual precincts, each headed by a captain,²³² will help county police departments service variegated communities in a way that is responsive and tailored.

A further step to allay municipalities’ fears about consolidation and to protect local accountability under coalescence is to define the county-municipal relationship in state law. Statutes could designate that every municipality above a certain size represents its own precinct and that every such municipality will retain some level of control over how its constituents are policed. As the case of Guadalupe shows, control can be given to cities under the contract model by specific contractual provisions.²³³ However, providing for municipal control by statute under the coalescence model would allow far greater protection to municipal governments: where contract provisions must be negotiated and would be subject to change at each renegotiation, codification of such provisions into law under the coalescence model would insulate the terms of the county-municipality relationship from vicissitudes in the parties’ respective bargaining power. Such a state law might provide:

Where a county elects to consolidate the county and municipal police departments into a unified County Police Department (“CPD”), the county will be divided into Precincts and each Precinct will be headed by a Captain. Each incorporated municipality with a population above _____ will represent a Municipal Precinct. Every Municipal Precinct, acting through an Officer selected by its municipal government, will

²³⁰ See Overview of LASD Patrol Stations, L.A. Cty. Sheriff’s Dep’t, http://www.la-sheriff.org/s2/page_render.aspx?pagename=patrol_detail_01 [https://perma.cc/88HJ-LXP8] (last visited Jan. 28, 2018) (explaining the organization of the Los Angeles County Sheriff’s Department); Organizational Chart, L.A. Cty. Sheriff’s Dep’t (Jul. 2, 2017), http://shq.lasdnews.net/content/uoa/EPC/LASD_Executives_Public.pdf [https://perma.cc/3T69-J42R] (same).

²³¹ Divisions of the St. Louis County Police Department, Saint Louis County, Missouri, <http://www.stlouisco.com/LawandPublicSafety/PoliceDepartment/Divisions> [https://perma.cc/9MW5-UNGR] (last visited Jan. 28, 2018).

²³² This Note uses “precinct” to refer to a geographical division of the county and “captain” to refer to the commanding officer of a precinct.

²³³ See Guadalupe Contract, *supra* note 166, and accompanying text.

have discretion to nominate and remove the Captain assigned to it, which nomination and removal CPD shall accept unless good cause for rejection is given.²³⁴ A Municipal Precinct, acting through its selected Officer, shall have the right to request in writing that any staff assigned to the Precinct by CPD be reassigned or otherwise removed from service within the Precinct. When such request is made, CPD shall comply as soon as reasonably practical.²³⁵

State law could even mandate that the officers policing a precinct receive, as in Guadalupe, “cultural training unique to [a precinct’s] history and celebrations.”²³⁶ These laws would alleviate the stakeholder problems identified in the contract model. The fact that state law, rather than a contract, creates the relationship means that bargaining power disparities between cities and counties will not give rise to the sort of brinksmanship exemplified by Sheriff Arpaio threatening to cancel Guadalupe’s contract.

CONCLUSION

While it is of course controversial to suggest that an office that has existed for over a millennium should be abolished, the office of the constable was also a feature of England for hundreds of years before coming to America, and has now almost entirely vanished. What the sheriff represents—rugged individualism, anti-bureaucratic impulse, democratic populism—are deeply held American values. However, the critical consensus today is that policing requires robust regulation, and it is evident in studying sheriffs that elections alone are not sufficient to regulate law enforcement. What perhaps made the sheriff attractive during westward expansion makes it obsolete at best and dangerously anachronistic at worst today by preventing local governments from acting as a meaningful check on the office’s powers and holding the sheriff accountable.

Whether the sheriff is abolished and replaced, or retained but transformed, the most urgent reform is that county government be given

²³⁴ “Good cause” could be statutorily defined to give the county more or less power, as could a process for the municipality to appeal this decision to a higher authority.

²³⁵ Cf. Guadalupe Contract, *supra* note 166.

²³⁶ Cf. *id.*

authority to act as a check on county law enforcement, particularly the power to hire and fire and the power to control the department's budget. Accomplishing these changes will in most states require constitutional amendment, and this should prompt a reconsideration of how policing is administered. Though the sheriff in his current form is the wrong officer for the job, counties are the ideal level of government to provide policing services because they are closer to their constituents than the state, but not so close as to create problems of fragmentation. Studying the long history of sheriffs provides a wealth of knowledge about how policing should—and more often should not—be done at the county level. While the contract model of consolidation has its benefits and is already widely used, Guadalupe's experience with the Maricopa County Sheriff illustrates the problems inherent in such contracts. Instead, the coalescence model is superior, particularly if state laws are passed defining the relationship between counties and municipalities to maximize local accountability.