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The Logic and Limits of Chapter 9: The Case of Police

Nathan E. Enfield†

I. INTRODUCTION

The American city has entered a difficult era in which it must confront the problem of providing police services without sufficient funds to pay for them. Indeed, at least twenty-eight urban municipalities have declared bankruptcy or entered state receiverships since 2007. By necessity, local officials have looked to their state insolvency regimes for support as they try to provide baseline police services in the midst of financial crisis. Scholarly commentators, too, have responded to this decline in municipal health by reevaluating the aims of state and federal insolvency laws governing local responses to crisis. In this critical moment for insolvency law, Chapter 9 of the Bankruptcy Code has assumed greater prominence, as some think it provides the tools needed to solve problems that could not otherwise be dealt with during periods of normal, non-emergency politics.

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1 "Municipality" means any “political subdivision or public agency or instrumentality of a State,” consistent with the Bankruptcy Code’s definition under 11 U.S.C. § 101(40) (2010). The definition includes cities and towns, but, as used here, does not include places where city and county governments have merged into a single municipal entity, or apply to arrangements where a single city expands across various counties. San Francisco is an example of the former, while New York City illustrates the latter.

2 See Monica Davey & Mary Williams Walsh, Billions in Debt, Detroit Tumbles into Insolvency, N.Y. TIMES (Jul. 18, 2013), http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html [https://perma.cc/NK9B-3TSC]. When a city is in receivership that usually means the state is monitoring its affairs to prevent further decline.

3 See, e.g., Michelle Wilde Anderson, The New Minimal Cities, 123 YALE L.J. 1118, 1128–29 (2014) (arguing that recent austerity measures in American cities have resulted in a shortage of public services, and cuts in police budgets should be constrained by minimum public safety standards).

This Comment contributes to the greater conversation about policing within distressed municipalities by reminding commentators of what insolvency law can and cannot accomplish. It argues that, given statutory constraints and bankruptcy courts’ limited ability to do equity, Chapter 9 of the Bankruptcy Code is best suited to provide a city relief from its police crisis when the overarching source of a public-safety problem is too much debt, as opposed to structural breakdowns in police governance or an exodus of residents that leaves a city unable to raise taxes to pay for police services.

To be sure, cities carrying too much debt may not be able to raise enough revenue to pay for desired services because residents leave for different locales that can provide better mixes of public goods, so the problems do overlap. But the litmus test for whether bankruptcy can remedy a distressed municipality’s police crisis should be whether the perceived problem would still exist in a world where the city had resources sufficient to meet residents’ demands. If the city would experience the same shortcomings in policing whether solvent or insolvent, then bankruptcy would not provide sustainable relief. The Comment illustrates this principle by examining how three municipalities—Detroit, Michigan; Camden, New Jersey; and Stockton, California—confronted deficits in police services while experiencing financial distress.

The Comment expounds upon this point about the proper limits of Chapter 9 by proposing several doctrinal solutions to obstacles that keep bankruptcy courts from solving deficiencies in police services. The first problem is that while bankruptcy courts across the country recognize that they have the authority to restructure obligations hampering a city’s ability to pay for necessary police services, police

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5 See Michael W. McConnell & Randal C. Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. CHI. L. REV. 425, 448 (1993) (“Unusually high rates of taxation also discourage economic activity and create an incentive for business and higher income taxpayers to depart the jurisdiction. Wealthier citizens and business are not only very sensitive to changes in tax rates but are also the groups most capable of relocating in order to escape the new tax burden.”).

6 This approach is consistent with the framework deployed in corporate reorganizations under Chapter 11 of the Bankruptcy Code: a firm that is insolvent due to a lack of market demand should be liquidated because a change in capital structure cannot change the fact that there is a lack of demand for its services, while a firm that consumers otherwise do find desirable can benefit from a reorganization because market forces are not causing its insolvency. See DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 58–59 (5th ed. 2010). The problem, however, is that this approach does not map perfectly on to Chapter 9 because the statute prohibits a court from liquidating a municipality. See infra Part II.A.

7 “Insolvent” means the municipality either “is generally not paying its debts as they become due” or “unable to pay its debts as they become due.” 11 U.S.C. § 101(32)(C)(i)–(ii) (2010).

8 See, e.g., In re City of Detroit, 504 B.R. 97, 150 (Bankr. E.D. Mich. 2013) (holding that Michigan’s statutory ban on impairing pension obligations in bankruptcy was preempted by Chapter 9); In re City of Stockton, 526 B.R. 35, 54 (Bankr. E.D. Cal. 2015) (holding that a
pensioners fare much better in restructurings than do other creditor groups. The result is that a city may be ensnared by the proverbial “death spiral” in which it emerges from one bankruptcy only to find itself back in court a few years later because it is again defaulting on obligations that should have been restructured more aggressively during the first proceeding. To remedy this problem, the Comment articulates a balancing test that judges can use to ensure a municipality’s long-term interest in being able to access capital markets is not sacrificed to appease the short-term impulses of dominant constituencies, like police unions, during negotiations. Second, because Chapter 9 can only provide an awkward fix at best for a crisis in police governance, the Comment proposes that states craft their insolvency laws so that emergency managers are empowered to address structural collapses in police decision making processes. Relying on bankruptcy courts to fix this aspect of the police problem is simply unlikely to work.

Part II of the Comment provides an overview of the federal law governing municipalities that file for bankruptcy. It outlines the eligibility requirements under Chapter 9 and the substantive laws bankruptcy judges apply when confirming plans of reorganization. This study of federal law is followed by an analysis of how non-uniform state laws set parameters for police reform in the midst of crisis. Part III then examines the root causes of the three police crises that are the subject of the Comment. When looking at each city's police crisis, it contemplates how state and federal law could have alleviated the public safety shortcomings, if at all, in light of the constraints examined in Part II. The thesis of Part III is that, of the three cases, Chapter 9 can only solve the police problem in Stockton because it arose from a pension burden rather than a governance breakdown or a flight of taxpayers that could have provided the internal financing for police services. In Part IV, the Comment explains how the solutions proposed above can enhance the powers of bankruptcy judges and state insolvency regimes to remedy police crises. Part V concludes by summarizing the key points of the Comment and connecting the arguments back to the fundamental aims of insolvency law.

California law prohibiting the rejection of pension obligations in bankruptcy was preempted by Chapter 9).

9 In the Detroit plan of reorganization, for example, police pensioners blocked a cut in their pension obligations and agreed to a reduction in the cost of living adjustments instead. Other workers took a 4.5% cut in their pensions and also gave up an annual cost of living adjustment. In re City of Detroit, 524 B.R. 147, 179 (Bankr. E.D. Mich. 2014).

II. FEDERAL AND STATE MUNICIPAL INSOLVENCY LAWS

Chapter 9 of the Bankruptcy Code outlines the federal requirements that municipalities must follow when using a judicial process to restructure their debt obligations. Cities can only obtain federal protection from creditors under Chapter 9 once they have satisfied prerequisites at the state level. The local laws are intended to give municipalities a chance to restructure their debts outside of bankruptcy. Even then, states must grant their municipalities the authority to file for protection under Chapter 9. The result of this interplay is a context-specific process. Indeed, while the municipalities examined in this Comment all maintained the ability to file for bankruptcy, the insolvency laws in each state varied in key respects.

A. Proving Eligibility and Confirming the Plan of Reorganization Under Chapter 9

The following subsection provides an overview of the relevant aspects of federal bankruptcy law that all municipalities must comply with once they file under Chapter 9. The Comment then examines state insolvency laws that impact a financially distressed municipality even if it does not end up in bankruptcy. For reasons that will be discussed further below, the Comment argues that the best chance a municipality has to enact structural police reforms occurs in the run-up to a Chapter 9 filing, when the municipality is still operating within the confines of its state insolvency regime.

1. Eligibility.

A municipality must satisfy Chapter 9’s eligibility requirement to survive claims that its bankruptcy petition was filed in bad faith. Eligibility turns on whether the municipality meets Chapter 9’s definition of “insolvent.” An “insolvent” municipality is one that is

12 See id.
14 See, e.g., CAL. GOV. CODE § 53760.3 (2016).
15 “Structural police reform,” as used throughout the Comment, refers to fundamental concerns like who within a department gets to choose a police strategy, how will that decision be filtered through vetogates in the municipal government, how can discretion be concentrated in certain decision makers’ hands so that different policies can be implemented, and so forth. It is used in contrast to issues related to on-the-ground compliance.
“generally not paying its debts as they become due” or “unable to pay its debts as they become due.”

17 Determining whether a municipality is generally unable to pay its debts under § 101(32)(C)(ii) requires bankruptcy judges to make predictions about how feasible it will be for the municipality to raise revenue in light of its current financial distress. 18 Although this determination is rooted in an accounting calculus, individuals who view the financial situation differently and may well have an interest in stopping the proceedings altogether can appeal the eligibility ruling.19

As indicated by recent case law, eligibility is also a function of the municipality’s ability to police its communities.20 Presenting evidence of “service delivery insolvency,” which describes a municipality that is unable to fund public health and public safety initiatives at a scale necessary to promote the general welfare, can tip the balance in favor of the municipal debtor.21 This is a noteworthy development because courts have in the past imposed high burdens of proof on cities that claimed drops in public safety supported a finding of municipal insolvency.22

2. The municipal plan of reorganization.

Once a municipality is deemed insolvent and thus eligible for bankruptcy, it must restructure obligations to creditors so that it can avoid future defaults.23 A reorganization plan can adjust a debtor’s obligations in a number of ways, ranging from extending maturities of principal repayments, to reducing interest or principal amounts, among:

17 Id. at §§ 101(32)(C)(i)–(ii) (2010).
18 Satisfying the requirement can present a difficult evidentiary burden for municipal debtors. See, e.g., In re City of Bridgeport, 129 B.R. 332, 338–39 (Bankr. D. CT. 1991) (finding that the municipality had not carried its burden of proving service delivery insolvency despite clear financial distress).

19 See Christopher Hopkins & Andrea Saavedra, The Statutory Definition of “Insolvent” – Part Two – Chapter 9 Debtors, WEIL BANKRUPTCY BLOG (Nov. 5, 2013), http://business-finance-restructuring.weil.com/chapter-9/the-statutory-definition-of-insolvent-part-two-chapter-9-debtors/ [https://perma.cc/Z7B3-ZSHY] (explaining that pension holders and other interest groups have reasons to oppose a bankruptcy filing because they may not collect the full extent of what they are owed after a restructuring of the city’s debts).

20 See, e.g., In re City of Detroit, 504 B.R. 97, 112 (Bankr. E.D. Mich. 2013) (“The City no longer has the resources to provide its residents with the basic police . . . services that its residents need for their basic health and safety.”); In re City of Stockton, 493 B.R. 772, 789–90 (Bankr. E.D. Cal. 2013) (“The crime rate has soared. Homicides are at record levels. The City has among the ten highest rates in the nation of aggravated assaults with a firearm. Police often respond only to crimes-in-progress.”).

21 See Hopkins & Saavedra, supra note 19 (discussing service delivery insolvency in the run-up to Stockton’s bankruptcy filing).

22 See id. (arguing that In re City of Bridgeport is precedent for this narrow interpretation of § 101(32)(C)).

other alternatives.\textsuperscript{24} Chapter 9 gives a debtor time and protection from claimants so that it can assemble a reorganization plan that the judge must confirm before ruling that the city is eligible to exit bankruptcy.\textsuperscript{25} While modeled after Chapter 11 reorganizations to an extent, Chapter 9 plans are substantively different from corporate reorganizations in four relevant respects. Recognizing these differences can help elucidate what a municipal bankruptcy can and cannot do for a distressed municipality seeking to improve its police services.\textsuperscript{26}

First, despite a similar requirement for corporate debtors, courts do not, as threshold matter, ask whether the municipality is financially insolvent and should thus be reorganized, or whether the municipality should be liquidated because it is economically insolvent and a new organizational scheme will not alleviate its problems.\textsuperscript{27} When a corporation is financially insolvent, its liabilities can exceed assets due to a combination of burdensome debts and poor management. It may benefit from a reorganization, therefore, because the plan can put assets to their highest productive use once certain impediments to profitability, like a poor executive officer, are removed.\textsuperscript{28} Economically insolvent entities, on the other hand, suffer from a lack of market demand for their services that a change in capital structure or management cannot repair.\textsuperscript{29} Reorganizing such a debtor would not help anyone because bankruptcy law cannot solve a problem rooted in market dynamics.\textsuperscript{30} The economically insolvent entity should thus be liquidated under Chapter 7 because selling the assets to their highest-valued user is the value-maximizing solution.\textsuperscript{31} However, Congress prohibits liquidation of municipalities by placing them beyond the reach of Chapter 7.\textsuperscript{32} Even if there is staggering population decline, an exodus of corporate taxpayers, and other signs that municipal "consumers" do not demand the city's services, Chapter 9 anticipates that the city will have a future.

Second, even though Chapter 9 presumes the municipality will continue to exist after bankruptcy, it restricts the ability of judges to change a city's government structure.\textsuperscript{33} Under § 904, "the court may

\begin{itemize}
\item \textsuperscript{24} See \textit{Collier on Bankruptcy} ¶ 900.01(1) (Alan N. Resnick and Henry J. Sommer eds., 16th ed., 2015).
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. at ¶ 900.01(2).
\item \textsuperscript{27} See id. at ¶ 900.01(1).
\item \textsuperscript{28} See \textit{Baird}, supra note 6.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} See \textit{Collier on Bankruptcy}, supra note 24, at ¶ 900.01(1).
\item \textsuperscript{33} See 11 U.S.C. § 904 (2010) ("Limitation on jurisdiction and powers of court").
\end{itemize}
not, by any stay, order, or decree, in the case or otherwise, interfere with . . . any of the political or governmental powers of the debtor" unless the municipality consents or the plan of reorganization bestows such power on the court.\textsuperscript{34} Court-imposed changes to the structures of corporate debtors are hallmarks of Chapter 11 reorganizations, but Congress has limited this power in the municipal context, despite calls for a more robust system enabling courts to alter the structural make-ups of city governments.\textsuperscript{35} Limiting the court's authority to financial matters is a striking policy choice because chronic financial difficulties severe enough to justify eligibility for bankruptcy could signal that the municipal government is broken.\textsuperscript{36} Indeed, in the case of police, a bankruptcy judge could recognize that the long-term viability of a local department depends on getting the right person to serve as chief of police, conferring or limiting the discretion of departmental leaders, creating oversight boards or introducing some other reform, yet the plain language of § 904 blocks such activism. As a result, restructuring plans proposed in Chapter 9 are designed to adjust financial obligations while ignoring structural breakdowns, thereby providing only temporary improvements in police services if the deficiency stems from a flaw in governance.\textsuperscript{37}

Third, in contrast to corporate debtors, municipalities have greater freedom to reject collective bargaining agreements in bankruptcy.\textsuperscript{38} Section 1113 only allows corporate debtors to reject such agreements as part of Chapter 11 reorganizations once they have made good faith efforts to negotiate with employee unions, but Chapter 9 does not contain a similar limitation.\textsuperscript{39} Thus, cities in theory have more leverage

\textsuperscript{34} Id.
\textsuperscript{35} See Clayton P. Gillette & David A. Skeel, Jr., Governance Reform and the Judicial Role in Municipal Bankruptcy, 125 YALE L.J. 1150, 1153–1156 (2016).
\textsuperscript{36} See McConnell & Picker, supra note 5, at 470 ("In the case of business corporations, we readily recognize that the entity's size and scope of operations can be changed, and even that the corporation can be liquidated altogether. Is it not equally true that a municipal corporation's size and scope of operations could be changed? And that bankruptcy signals the need for fundamental reform of the city's structure and affairs?").
\textsuperscript{37} But see id. at 474–75 (suggesting that courts can introduce structural changes in police governance by simply refusing to confirm a plan proposed by the municipal debtor unless it includes such reforms). While this approach complies with the text of § 904, it may not be a workable way around the language because it requires the municipality to implement changes it finds undesirable, and state laws or city charters might raise legal obstacles to the court's vision of what the police department should look like outside of bankruptcy.
\textsuperscript{38} See 11 U.S.C. § 1113 (2010). Rejecting a contract in bankruptcy means the debtor can breach and pay damages. Beneficiaries of the contract will then have an unsecured claim against the municipality, and can expect to recover less as a result of their lower priority status. See McConnell & Picker, supra note 5, at 467.
over a counterparty like a police union that may threaten to hold up a reorganization that compromises its interests. Nevertheless, the dynamics of negotiation may make municipal debtors reluctant to strike hard bargains with city employees during bankruptcy because they represent a powerful voting bloc that can provide crucial support for a proposed restructuring plan. Cities recognize that a plan with public-worker support behind it can be confirmed more quickly, and this reality can tilt negotiations in the workers' favor.

The fourth relevant difference between Chapters 9 and 11 is that only the debtor can propose a plan of reorganization during a municipal bankruptcy. Creditors may propose their own plans of reorganization under Chapter 11 if they think the debtor's proposal unreasonably impairs their interests or if they believe the debtor's plan is not feasible. This difference between the two Chapters creates a special dynamic in Chapter 9 because the municipal debtor can still use the cramdown power outlined in Chapter 11. A cramdown allows the court to approve a plan proposed by the debtor even if some classes of creditors oppose it and their opposition denies the debtor the necessary majority for court confirmation of the reorganization.

But the ability to cramdown a plan over creditor opposition does not give municipal debtors carte blanche to propose any set of terms and force lenders to agree to them. Instead, cramdowns are governed by various legal doctrines that protect creditors' interests. For example, like cramdowns under Chapter 11, cramdowns in the municipal context must be "fair and equitable," meaning the plan must incorporate the absolute priority rule requiring payment to senior creditors in full before any junior creditor may be paid at all.

The plan must also be "in the best interests of creditors and feasible." The recent opinion approving Detroit's eligibility to exit bankruptcy may have clarified some aspects of the "best interests"

40 See, e.g., Nathan Bomey & Matt Helms, Retired Police, Firefighters Reach Deal with Detroit, USA TODAY (April 15, 2014, 5:43 PM), http://www.usatoday.com/story/news/nation/2014/04/15/detroit-bankruptcy-pensions/7728569/ [https://perma.cc/3KCF-AJSK] (discussing the importance of police and firefighters to a speedy restructuring because they held such large claims).


44 See COLLIER ON BANKRUPTCY, supra note 24, at ¶ 900.02[2](e)(i).


doctrine. The opinion reasoned that the proposed plan altering the city's obligations was in the best interests of creditors because it provided more than they could reasonably expect under the circumstances and was a better alternative than dismissal of the proceeding altogether. After In re Detroit, the test seems to stand for the proposition that creditors in a municipal bankruptcy should recover at least as much as they would outside of Chapter 9. As a result, courts evaluate the plan according to whether it provides a better outcome than creditors would otherwise get if they raced to the courthouse for a writ of mandamus ordering the city to pay its debts.

The feasibility requirement means there is a reasonable prospect that the municipal debtor will be able to make the payments it agreed to as part of the restructuring. Courts look at past and projected tax revenues and expenses to determine whether the city will have funds available to fulfill its commitments to creditors outlined under the plan. But because there is an upper limit on a municipality's taxing power before residents leave for places with lower tax rates, the court must find that the amount of revenues that will be raised was all that creditors could reasonably expect.

The upshot of these rules governing plan confirmation is that the feasibility requirement sets the maximum amount that a city must pay to creditors while the fair and equitable doctrine establishes the minimum creditors must receive under any plan that the debtor proposes using the cramdown power. In practice, courts establish these minima and maxima by balancing creditors' interest in receiving a more complete recovery against the city's need to address its service delivery insolvency. But if the crisis in public services is severe enough, this balancing act will almost always tilt in favor of better settlements for public employees, in particular police officers, who are likely to argue that they need a greater share of municipal resources to do their jobs and retain members of the force.

In Detroit, for example, the hardship imposed on the city by its inability to keep residents safe

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48 See COLLIER ON BANKRUPTCY, supra note 24, at ¶ 943.03(7)(a).
50 See, e.g., In re City of Detroit, 524 B.R. at 222–23.
52 See COLLIER ON BANKRUPTCY, supra note 24, at ¶ 943.03[1f][f][i][a].
justified confirming a plan over private bondholder's objections that police pensioners should have given up more during negotiations. Thus, in light of this recent application of the doctrine, the fair and equitable test may not provide much protection for creditors who want to ensure there is as small a spread as possible between the maximum amount the city must raise in taxes under the best-interests test and the minimum they can expect to receive.

When looking at how such doctrines can promote a more favorable climate for police officers, courts as well as commentators must precisely identify the obstacles to better policing within the municipality. If debt obligations are preventing a more efficient allocation of resources toward public safety programs, then arguably the fair and equitable test should not inure to the benefit of lenders. On the other hand, if the issue is structural—i.e., if the police department is hamstrung by an external body constraining its discretion, or if a city cannot raise revenues and must depend on state funding for police services—then the justification for sacrificing creditor interests is less compelling because debt is not the overarching problem. Noting this distinction is important because how creditors fare in bankruptcy will inform bargaining over municipal bonds in the future. Indeed, lenders who believe that judges are not sensitive to the underlying causes of service delivery insolvency could be chilled from future investments because they worry that the fair and equitable doctrine provides hollow protection.

B. The Gatekeeping Function of States

While federal bankruptcy laws apply uniformly to all municipalities eligible to file under Chapter 9, the process in the run-up to bankruptcy can vary in four discrete ways depending on state law. In general, the process unfolds as follows. First, the city experiences distress, which is associated with widening budget deficits, an inability to meet payroll requirements, or carry out essential services. Second, if municipal officials respond to the distress with a combination of service cuts, worker layoffs, tax and fee increases, reserve spending or borrowing, and those measures fail, then the distress can escalate into a crisis or financial emergency declared by the state. Third, if a state-appointed emergency manager cannot shepherd the municipality through its crisis and get creditors to agree to a restructuring of the city’s obligations, then the municipality could be eligible to file for

55 See In re City of Detroit, 524 B.R. at 257.
56 See THE PEW CHARITABLE TRUSTS, supra note 13, at 8.
57 Id.
bankruptcy protection under Chapter 9. Finally, if the city is eligible for bankruptcy under Chapter 9, the court must confirm a plan of reorganization of the city’s debts before it can exit bankruptcy and return to normal politics. As explained in more detail below, the Comment argues that the best chance to enact structural police reforms is in the second phase of this process, when an emergency manager governs the municipality.

This is only the general course a municipality might follow because not all state-appointed emergency managers enjoy the same degree of latitude to govern cities in crisis. The insolvency statutes passed by each state’s legislature delimits the power vested in emergency managers. Michigan, for example, vests considerable authority in its emergency managers, permitting them to make changes to the governmental structure of a municipality. By contrast, California only permits its neutral evaluators to participate in restructuring financial obligations—governmental or managerial changes are not within the scope of their powers.

C. Seizing the Opportunity to Enact Structural Police Reform

Reformers likely have the best chance to enact structural changes in a police force once the state appoints an emergency manager to guide the city through its crisis. Given the limitation under § 904 prohibiting a judge from making changes in the governmental makeup of a municipal entity, bankruptcy courts have only a limited capacity to impose structural reforms on a police department. But emergency managers do not have to comply with this limitation under Chapter 9. Thus, the critical moment during a municipality’s decline—when the city is in crisis but not yet in bankruptcy—seems to be the ideal situation to use the tools of insolvency law to make lasting change. To see why, consider a police department that is suffering from a governmental breakdown in the form of an inept police chief. Waiting until the municipality has filed for bankruptcy to remove this officer will likely not succeed because the court’s ability to change personnel is limited under § 904. By contrast, a state-appointed emergency manager can make such a change without having to comply with the restrictions in the Bankruptcy Code.

58 Id. at 12.
59 Id.
62 See supra notes 33–37 and accompanying text.
Authority to enact change of this sort necessarily depends on the grant of power from the state legislature. As a result, municipalities in states that give their emergency managers greater latitude to restructure the organization of police decision making are better positioned to emerge from a crisis on a more sustainable path. Recognizing the relative capacities of state insolvency regimes as compared to federal bankruptcy law under Chapter 9 underscores the fundamental point that reformers must look to the right body of law to find the relief they seek. Bankruptcy is better equipped to solve the financial problem, while state insolvency laws can more directly address the governance problem through emergency managers.

III. CASE STUDIES OF POLICE REFORM IN THE MIDST OF FINANCIAL CRISIS

Examining the experiences of different distressed municipalities as they attempted to use insolvency law to improve their police services can provide valuable lessons for reform. Moreover, acknowledging nuances across various forms of police crises in distressed municipalities can illustrate the important but often overlooked insight that not all police crises have the same causes. While the symptoms of each crisis may have some overlap—in terms of rising crime rates and understaffed forces—this Part argues that the root cause of police failure in each city was substantively different, and that Chapter 9 of the Bankruptcy Code is equipped to resolve only one of them, namely the problem of excess debt manifested in Stockton.

Part III looks first at the proceedings in Detroit, which constituted the largest municipal bankruptcy in American history. It then examines the dissolution of Camden's police force outside of bankruptcy, followed by the police crisis in Stockton as it navigated through its own bankruptcy. Together, the three municipalities span a gamut that is useful for analytical purposes. Of the three states, Michigan gives its municipalities the greatest freedom to use bankruptcy as a means to resolve financial crises, while also giving emergency managers considerable power to make changes necessary to improve local government. New Jersey, by contrast, limits the collective ability of its municipalities to enter bankruptcy by aggressively intervening in local affairs following initial signs of trouble. California falls in between these two extremes, as it permits municipalities to

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64 See Davey & Marsh, supra note 2 (noting that the Detroit bankruptcy was of an unprecedented scale).
enter bankruptcy but does not permit neutral evaluators to meddle with local affairs beyond restructuring financial obligations.\textsuperscript{65}

Schematically, the insolvency laws in each state can be understood as follows:

<table>
<thead>
<tr>
<th>STATE</th>
<th>CHARACTER OF LOCAL INSOLVENCY LAWS</th>
<th>CALIFORNIA</th>
<th>NEW JERSEY</th>
</tr>
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<tbody>
<tr>
<td>MICHIGAN</td>
<td>Aggressive insolvency laws that empower emergency managers to make financial and governmental changes.</td>
<td>Limited power vested in neutral evaluators, who may only address financial matters.</td>
<td>Aggressive intervention in local affairs by the state government that is meant to prevent bankruptcy filings.</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>Permits municipalities to file for bankruptcy under Chapter 9.</td>
<td>Permits municipalities to file for bankruptcy under Chapter 9.</td>
<td>Reluctant to permit municipalities to file for bankruptcy under Chapter 9.</td>
</tr>
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A. Detroit's Board of Police Commissioners and the Failure of Fragmentation

Michigan's Governor Rick Snyder appointed Kevyn Orr as emergency manager of Detroit in March, 2013.\textsuperscript{66} An accomplished restructuring attorney, Orr had experience representing Chrysler, a major automobile manufacturer with U.S. headquarters in Michigan, during its bankruptcy in 2009.\textsuperscript{67} This fact was not lost on local representatives, as the governor's choice of a restructuring expert to manage the city signaled that a bankruptcy filing was no longer a remote possibility.\textsuperscript{68} Despite concerns about an emergency manager having too much power, Orr assumed his office with a broad statutory mandate to do what he thought was necessary to solve the city's problems.\textsuperscript{69} Public Act 436, the statute vesting the authority to govern

\textsuperscript{65} See supra notes 60–61 and accompanying text.


\textsuperscript{68} Id.

\textsuperscript{69} Residents often protest emergency managers because of a perceived lack of democratic legitimacy, and elected officials typically resent the emergency manager's power because their authority is displaced by the institutional apparatus the manager puts in place to manage the crisis, hence the resistance to Orr. See Clayton P. Gillette, Dictatorships for Democracy: Takeovers
Detroit in Orr, bestowed upon him “broad powers” to improve “the local
government’s capacity to provide or cause to be provided necessary
governmental services essential to the public health, safety, and
welfare.”70 This broad grant conceivably permitted Orr to reform the
governing structure of Detroit’s police department. If so, then Orr had
authority to reshape the decision making process governing police
strategy, a process that appeared to start and end with Detroit’s Board
of Police Commissioners.

The Board of Police Commissioners is a formidable check on the
chief of police’s discretion. Deriving its authority from § 7-802 of
Detroit’s City Charter, the eleven-member body has the following
responsibilities: conduct searches for a new chief of police and submit
its list of qualified candidates to the mayor, who then chooses a
candidate only from that list;71 establish policies, rules and regulations
in consultation with the new chief of police;72 review and approve the
departmental budget before submitting it to the Mayor;73 and act as
final authority in imposing or reviewing disciplinary sanctions of police
officers.74 Crucially, § 7-802 also allows for the Board to be composed of
former officers from previous administrations whose interests might
diverge from the current chief of police’s goals for the Department,
thereby exacerbating the tension between the two bodies.75 Seven of
the eleven members are elected to the Board from each of Detroit’s seven
non at-large districts, while the mayor appoints the four remaining
commissioners.76

To put the power of the Board of Police Commissioners in
perspective, imagine a situation in which a new chief of police wants to
implement a series of different strategies. This could include an
initiative to increase the use of special prosecutors in police misconduct


70 See MICH. COMP. LAWS § 141.1549(9)(2) (2012).
71 See DETROIT, MICH., MUN. CODE § 7-805 (2012).
72 See id. at § 7-803(1) (2012).
73 See id. at § 7-803(2) (2012).
74 See id. at § 7-803(4) (2012).
75 Currently, four members of the Board of Police served under previous administrations. See
City of Detroit, Board of Police Commissioners, http://www.detroitmi.gov/Boards/Board
OfPoliceCommissioners [https://perma.cc/ZU8F-GZC4]. This composition approximates the
membership breakdown in the run-up to Detroit’s filing for bankruptcy. See also Gillette & Skeel,
supra note 35, at 1189.
76 Detroit introduced a new City Charter effective January 1, 2013 that required voters to
elect officials from non at-large districts rather than from a pool drawing from the entire city
population. See David Sands, Detroit City Charter’s New Council by Districts Could Change
Representation, City Services, HUFFINGTON POST (Jan. 4, 2012), http://www.huffingtonpost.com/
2012/01/04/detroit-city-charter-council-by-districts_n_1183264.html [https://perma.cc/5LL9-
WEKM]. Detroit’s district system appears similar to Chicago’s ward system in that both cities
divide their territories into electoral subgroups.
investigations, changing how data is collected on fatalities involving officers, conducting implicit bias trainings for all members of the force, or some other reform to improve accountability. The first idea would undercut the Board's authority since it has final say over officer discipline pursuant to § 7-803(4), the second would at least require consultation with the Board under § 7-803(1), and the third would almost certainly require the Board to appropriate funds for such a program under § 7-803(2).\textsuperscript{77} Enacting almost any policy currently under discussion in police reform debates\textsuperscript{78} would require approval from the Board, an organization that could be staffed entirely of police officers from previous administrations and who oppose such changes.

The costs of such fragmented police decision making were quite severe in the period leading up to Detroit's bankruptcy. From 2010 to 2012, two chiefs of police resigned following sex scandals involving female officers.\textsuperscript{79} These controversies not only left the Department without a permanent head following a two-year period that witnessed a thirty-four percent increase in homicides, but also forced the Mayor to wait—as required under the City Charter—for the Board to compose its list of desired candidates, thereby increasing the cost of a prolonged vetting period for a new chief.\textsuperscript{80} Furthermore, as might be expected of a body heavily populated by commissioners who were themselves former officers, the Board only proposed insider candidates currently working within the Department to fill the opening.\textsuperscript{81} It was not until Orr took office and assumed control over the search that Detroit filled the position by appointing outsider James Craig, who returned to Detroit after long stints at other departments in Los Angeles, Portland, and Cincinnati.\textsuperscript{82} Finally, after appointing his desired candidate, Orr

\textsuperscript{77} See DETROIT, MICH., MUN. CODE § 7-803(4), (1)--(2) (2012).


\textsuperscript{80} In total, the vetting process took seven months to complete, but might well have taken longer had Orr not been appointed emergency manager during this period. See The Associated Press, Former Portland Police Chief Named Top Cop in Detroit, CENTRALMAINE.COM (May 14, 2013), http://www.centralmaine.com/2013/05/14/former-portland-police-chief-heading-to-detroit/ [https://perma.cc/JS47-3YMJ].


\textsuperscript{82} See id.
disbanded but did not abolish the Board as an oversight body. This policy choice supports the inference that Detroit’s police crisis stemmed from a fragmented decision making structure that was likely captured by interests beholden to former officers rather than to the greater polity.

Orr’s decision to bypass the Board in this manner comports with findings by criminologists and public choice scholars. Since crime rates inform firms’ decisions about where to locate and, in turn, pay local taxes, Detroit’s inability to select the person who would choose among various policing strategies likely contributed to the decline in its fiscal health. In addition, the costs of fragmented decision making structures probably outweigh any benefits when a body created to serve as a check wants to promote the narrow interests of officers from regimes past rather than the broad interests of the municipality.

But what is most striking about the way Orr dealt with the Board is that he did not use his statutory authority to disband the oversight body altogether. Instead, by leaving it intact, Orr left the task of reforming the structural makeup of the Police Department to the bankruptcy judge, who, given the limitations under § 904 prohibiting such changes, did not even contemplate this possibility. Scholars have since responded to this absence of judicial activism in the Detroit bankruptcy by renewing calls for a more robust Chapter 9 that further empowers judges to restructure governing bodies.

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85 See Gillette & Skeel, supra note 35, at 1187.

86 See id. at 1187–88.

87 The Board only recently resumed its role as an oversight body following a resolution from the City Council. See Christine Ferretti, Council to Vote on Restoring Police Commission Powers, DETROIT NEWS (Sept. 28, 2015, 11:30 PM), http://www.detroitnews.com/story/news/2015/09/28/council-vote-restoring-police-commission-powers/73001378/ [https://perma.cc/WLQ5-YMUV].

88 However, in his opinion, Judge Rhodes did acknowledge the dire state of public safety given the rampant crime in Detroit. See In re City of Detroit, 524 B.R. 147, 261 (Bankr. E.D. Mich. 2014).

89 See Gillette & Skeel, supra note 35, at 1195–1202. The bankruptcy court, however, exhibited different forms of activism previously unseen in Chapter 9 cases, but these maneuvers did not touch upon the police problem in the City. Instead, they concerned a series of soft-power dynamics intended to facilitate a speedy restructuring and exit from bankruptcy. One such move was the appointment of Judge Gerald Rosen as mediator during negotiations between the City and its creditors. As chief judge of the District Court for Eastern Michigan, Rosen would have heard all appeals from creditors that the proposed restructuring plan violated their rights. See generally Melissa B. Jacoby, Federalism Form and Function in the Detroit Bankruptcy, 33 YALE J. REG. 55, 72–99 (2016) (identifying a number of soft-power dynamics akin to appointing Rosen as mediator that expedited the bankruptcy proceedings and created leverage for the City during negotiations).
There are two key takeaways from Orr's response to the police crisis given that Chapter 9, as written, does not empower judges to impose structural changes in government. First, the failure to remedy the police governance problem in Detroit and abolish the Board constituted a shortcoming in execution rather than a breakdown in state insolvency law. The state, through Public Act 436, permitted Orr to remake the City’s government. Practical realities and political prudence might explain his reluctance to make such changes, but the fact remains that the emergency manager did not see fit to wield his power so aggressively. If states want to exert control over their cities in this manner, they should provide more explicit direction in the statutes vesting authority in emergency managers.

Second, unless future versions of Chapter 9 exclude or at least rewrite § 904, looking to federal bankruptcy law to correct the shortcomings of state insolvency regimes does not appear to be a sustainable response to problems in police governance within distressed municipalities. Even if the financial obligations that drove Detroit into bankruptcy were to disappear, the Board of Police Commissioners would still present a formidable check on the power of police chiefs. The structural dynamics that contributed to the city's decline would still be in place despite concerted efforts to use bankruptcy to put Detroit on a sustainable path. Acknowledging this dynamic should prompt commentators to realize that the road to better police governance probably goes through the state rather than federal insolvency system.

B. Camden and the Challenge of Policing During Perennial Deficits

Camden's struggle to police its communities must be understood within the context of the elaborate provisions New Jersey put in place to keep its municipalities out of bankruptcy. Only two New Jersey entities have sought relief under Chapter 9 since 1980 and both petitions were dismissed. The lack of a viable Chapter 9 alternative within the state stems from New Jersey's decision to monitor its municipalities closely through a series of debt default prevention programs intended to redress problems before they become severe enough to satisfy the Bankruptcy Code's eligibility requirements. As a

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90 See supra notes 69–70 and accompanying text.
92 JAMES E. SPIOTTO, ET AL., MUNICIPALITIES IN DISTRESS?: HOW STATES AND INVESTORS DEAL WITH LOCAL GOVERNMENT FINANCIAL EMERGENCIES 171 (2012).
93 See, e.g., N.J. STAT. ANN. § 40A:2-6 (2010).
result, all of the police reforms the city recently put in place occurred in the midst of crisis but outside bankruptcy.

Camden has operated within this intricate support system continuously over the past decade.94 The city's tax base has dwindled due to corporate exits and a shrinking population as residents have followed their corporate counterparts in search of better opportunities.95 Meanwhile, expenses have held steady or increased, thus creating a need for state aid to fill the deficit between what Camden brings in through tax revenues and what it spends on public services.96 In addition, while New Jersey has provided considerable aid to finance public safety initiatives within the City, Camden has struggled to keep its residents safe.97 The City saw a welcome reverse in crime statistics after reorganizing its police department in 2008 but that progress gave way during the Great Recession when it implemented a series of layoffs reducing the manpower of the force.98 By 2012, Camden's murder rate was higher than New York City's at six homicides per 10,000 people, despite only having about 70,000 residents.99

In response to this public safety problem, Camden took the drastic move of disbanding its police force and adopting a regional model whereby Camden County would be responsible for the safety of City residents.100 Even though local officials tend to resent emergency managers who are appointed by the state during a financial crisis,101 both Camden's officers and the overseers from Trenton agreed the City needed to chart a different course to remedy a crime problem that had spiraled out of control.102 The impetus for dissolving the police force stemmed from a perception that the current public safety infrastructure was so inadequate that the city could not justify allocating close to a third of its expenditures to shoddy police services.103 The City and state lacked the desire to continue financing

94 See THE PEW CHARITABLE TRUSTS, supra note 13, at 36–38.
95 See id. at 37.
96 See id. (noting that Camden city spends $150 million a year, but its annual tax revenue is less than $25 million).
97 See id.
99 See id.
100 See id.
101 See supra note 69.
103 See Zernike, supra note 98. (noting that in 2012, the year Camden opted for a regional
such poor performance. Thus, when the local police union refused to renegotiate expensive perks in its collective bargaining agreement, Camden’s mayor secured a vote by its City Council to initiate proceedings to obtain cheaper police services from Camden County.  

Despite the initial resistance to regionalization of the police force, the plan has thus far been heralded as a success.  

From 2012 to 2015, murders and robberies have declined fifty percent, aggravated assaults with firearms are down close to forty percent, and sexual assaults are down forty-five percent in Camden under the revamped Camden County Police Department.  

The ability to pool resources from the county government and hire officers under more favorable terms enabled Camden to acquire the additional manpower it lacked under the former police governance structure. Given this success, commentators have started referring to Camden as “the poster child for police reform.”

Regardless of the merits of Camden’s decision to resort to a regional policing model, asking a bankruptcy court to solve the City’s police crisis would not have yielded positive results. Even assuming Camden were located in a state that permitted its municipalities to file for bankruptcy more readily, the court could not solve the problems that have plagued the City for years. Bankruptcy would not be able to restore businesses, bring back residents, de-annex territory so that officers can police a smaller area more in line with a shrunken population, or force neighboring taxpayers to subsidize the police services Camden struggled to provide on its own. Just as the court would be ill-equipped to restructure a police department, it would also be powerless to implement the changes necessary to restore a tax base financially capable of supporting an adequate police infrastructure.

Recognizing this limitation of Chapter 9 should prompt commentators to direct their efforts toward how state insolvency regimes can enhance their support of distressed municipalities. If, as seems to be the case in Camden, regional approaches to policing can overcome the resource-scarcity problem without compromising public safety, then perhaps this is the better approach. Other municipalities have followed this course with success similar to Camden’s, as regional

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106 See id.

107 Id.
resource pooling has emerged as a viable substitute for public services provided by the municipality.\textsuperscript{108}

C. Stockton and the Problem of Police Pensions

Unlike the cities examined in the two previous cases studies, bankruptcy can provide a sustainable remedy to the police crisis in Stockton. When Stockton filed for bankruptcy in the summer of 2012, it “was ground zero for the subprime mortgage crisis,” with one of the highest foreclosure rates in the nation, an unemployment rate of twenty-two percent, and steep drops in property values.\textsuperscript{109} But perhaps the most troublesome aspect of this period was that Stockton had to allocate funds away from police services and toward mounting pension obligations. The City's pension system did not require contributions from employees and was based on the final years of workers' compensation. In some cases, the obligations included accrued vacation and sick leave, resulting in the phenomenon of “pension spiking,” in which a retiree's pension could be greater than the salary of the employee's final working year.\textsuperscript{110} Essentially, Stockton experienced “a trifecta of severe financial stressors—the housing crisis, overly ambitious building projects, and out-of-control employee benefits.”\textsuperscript{111}

Acute service delivery insolvency plagued the city as a result of these developments. In 2010, the violent crime rate rose to 13.81 crimes per 1000 residents while the national rate dropped.\textsuperscript{112} Aggravated assaults with a firearm rose from ninety nine in 2009 to 196 in 2011, followed by an additional thirty percent increase in such crimes during 2012.\textsuperscript{113} The Police Department had about 1.1 officers per 1000 residents, compared to a national standard of 2.7 per 1000 residents.\textsuperscript{114} Given the police shortage, officers, “during peak activity, responded only to crimes-in-progress.”\textsuperscript{115} In addition, abolishing the Narcotics Enforcement Team led to increased drug traffic and less asset forfeiture proceeds. Finally, reducing security camera monitoring from full-time

\textsuperscript{109} See In re City of Stockton, 493 B.R. 772, 778 (Bankr. E.D. Cal. 2013).
\textsuperscript{110} See id. at 779.
\textsuperscript{111} See Hopkins & Saavedra, supra note 19.
\textsuperscript{112} See In re City of Stockton, 493 B.R. at 780.
\textsuperscript{113} See id.
\textsuperscript{114} See id. at 780–81.
\textsuperscript{115} See In re City of Stockton, 493 B.R. 772, 781 (Bankr. E.D. Cal. 2013).
to part-time limited the Department’s ability to spot crime or follow pursuits.116

Once the negotiations in bankruptcy began, Stockton residents explored extra-judicial relief for their police crisis. Their efforts resulted in the passing of Measure A, which called for a “sales tax increase that provide[d] funding for bankruptcy recovery and the Marshall Plan on Crime, allowing [the Stockton Police Department] to hire additional . . . officers to address issues of crime and provid[e] for the . . . safety of [the City].”117 Stockton did not have a police governance model similar to the one in Detroit, where the Board of Police Commissioners oversaw the selection of police chiefs and other departmental affairs.118 Furthermore, unlike either Detroit or Camden, Stockton’s population expanded rather than contracted during its crisis period, which meant that the shortage of police officers created a mismatch between the geographic areas they needed to monitor and the number of people they had to keep safe.119 Nevertheless, given the police governance model and the positive tax impacts of a growing population, the structural conditions for police to be successful were satisfied. The City just needed to find the funds to pay for their services despite the debt burden.

The Marshall Plan was one response to this challenge. It aimed to provide cost-effective substitutes to fill gaps in police services while the City struggled to service its pension obligations and keep residents safe.120 In so doing, the Plan prompted a change in police strategy in the run-up to bankruptcy rather than a change in structural decision making, as was the case in Detroit under Orr.121 The aims of the initiative were “[t]o break the cycle of chronic, generational crime and improve public safety” in Stockton through a commitment to “stop, interrupt and prevent homicides by targeting high-risk persons, places

116 See id.
118 Stockton relied on its City Manager, who was appointed by the City Council, rather than the Mayor to oversee the Police Department. See Stockton Municipal Code, Charter, and Civil Service Rules § 1702, http://qcode.us/codes/stockton/view.php?version=beta&view=&topic =the_charter_of_the_city_of_stockton-xvii-1702 [https://perma.cc/KM3R-BKVV] (“Chief of Police Appointment”). Typically, only one city official, like the mayor or the city manager, has formal authority to oversee police departments, which is another reason why the governance model in Detroit was so unusual. See Gillette & Skeel, supra note 35, at 1188.
121 See id.
Accomplishing these goals entailed policing "hot' people, 'hot' places and situations that are causing problems in [Stockton]." The Marshall Plan supported the resource-strained Stockton Police Department by sponsoring ceasefires, providing "[p]eacekeepers focused on street outreach," identifying high-risk violent individuals, among other community policing strategies intended to "restor[e] [the] community, attract[ ] new businesses and jobs, and improv[e] the quality of life for the entire region." In addition, the Marshall Plan assembled the Police Chief's Community Advisory Council, which sought to inform officers of residents' concerns.

Stockton residents supported the allocation of funds to improve police services in a ballot initiative during bankruptcy, and the court seized upon this fact when declaring the City eligible for Chapter 9 protection. But in so doing, the court reduced the slice of the pie that creditors could expect to receive under any settlement, because the money allocated to pay for more officers reduced the funds available to pay off lenders. The only way creditors could come out ahead under this arrangement was if they could convince the court that pension obligations to officers and other workers needed to be restructured so that more money would be available to private lenders during negotiations.

Two obstacles stood in the way of creditors as they tried to release some of the funds tied up by pension obligations. First, California law blocked municipal governments from rejecting pension agreements in bankruptcy. Second, even if state law did not forbid municipal debtors from lumping pension beneficiaries into the unsecured creditor group, the court still needed to find that the plan was fair and

122 See id. at 2.
123 Id.
124 Id.
125 See id.
126 See In re City of Stockton, 493 B.R. 772, 790 (Bankr. E.D. Cal. 2013). Technically, under 11 U.S.C. § 943(b)(6), the court "shall" confirm plans that require electoral approval if voters have already provided their consent. Because the citizens of Stockton gave their approval to pay more in taxes to fund the Marshall Plan and other aspects of the bankruptcy recovery, the judge thought there was probative evidence that an eventual plan could be confirmed without violating legal doctrines arising under California's proposition system requiring voter approval of tax increases.
127 Creditors are typically blocked under the feasibility requirement from objecting to a plan on the ground that the municipal debtor appropriated taxpayer money for its own purposes rather than for offering lenders better terms under the restructuring plan. See supra Part II.A.2.
128 See CAL. GOV. CODE § 20487 (2016): "Notwithstanding any other provision of law, no contracting agency or public agency that becomes the subject of a case under the bankruptcy provisions of Chapter 9 . . . shall reject any contract or agreement between that agency and the [Board of Administration of the Public Employees' Retirement System] pursuant to Section 365 of Title 11 . . . ." See also CAL. GOV. CODE § 20021 (2016).
In perhaps the most intriguing part of the Stockton saga, the court sided with the creditors on this first issue and held that the Bankruptcy Code trumped a state law that made pension rejections in bankruptcy ultra vires.\textsuperscript{129}

But this aspect of the decision did not benefit dissenting creditors in the end because the court ultimately confirmed a plan that left pension obligations unchanged.\textsuperscript{130} It looked at the fact that the City had successfully amended collective bargaining agreements with police officers as evidence that public employees were making compromises during the formation of the reorganization plan.\textsuperscript{131} As a result, the judge thought he had evidence that police officers were not receiving favorable treatment compared to private creditors who also had to make sacrifices during negotiations.\textsuperscript{132} In other words, leaving pensions intact while changing other terms in collective bargaining agreements—like cost of living adjustments and sick leave—was deemed to be a valid "quid pro quo" from police officers that made the additional losses imposed on dissenting creditors fair and equitable.\textsuperscript{133}

Regardless of whether the restructuring approved in the Stockton bankruptcy ultimately solves the City's pension crisis or merely provides short-term relief from its effects on public services, the court was at least confronting a police problem that it was competent to solve. Unlike the issues arising in the other two contexts, the problems facing Stockton's police force were primarily financial rather than structural in nature. The court oversaw the negotiations and determined that no pension restructurings were required to make the plan confirmable, even though it held that such an option was permissible. The questions commentators need to ask going forward are what might be the ramifications of such a precedent that leaves pension obligations untouched, and whether bankruptcy and state insolvency laws are properly equipped to contain potential fallouts. The following section conducts this inquiry by contemplating doctrinal changes that should enhance courts' abilities to cure the underlying illness of a pension burden that contributes to a crisis in policing, rather than merely treat the symptoms of such a problem.

\[\text{129} \text{ See supra Part II.A.2.}\]
\[\text{130} \text{ See In re City of Stockton, 526 B.R. 35, 56–60 (Bankr. E.D. Cal. 2015).}\]
\[\text{131} \text{ See id. at 62.}\]
\[\text{132} \text{ See id.}\]
\[\text{133} \text{ See id.}\]
\[\text{134} \text{ See id.}\]
IV. TOWARD MORE ROBUST FEDERAL AND STATE INSOLVENCY REGIMES

The municipalities examined in the previous section provide useful data points that help illustrate the limits as well as the possibilities of using insolvency laws to enact meaningful police reform in dire circumstances. When the primary source of a police problem is too much debt, as demonstrated by Stockton, then federal bankruptcy law can alleviate this issue by appropriately restructuring the municipality’s obligations so that more capital can be freed to pay for police services. However, the need to pay for such public goods should not be pursued at all costs. Section A proposes a balancing test that courts should use in determining the right approach, and Section B considers various ideas for enhancing the powers of emergency managers, as they are the ones who operate within the insolvency system that is better equipped to solve structural breakdowns in local governance.

A. Balancing Short-Term Safety Concerns Against Long-Term Financing Needs When Dealing with Pension Burdens in Bankruptcy

The favorable terms police pensioners receive during bankruptcy negotiations could set a problematic precedent for several reasons. First, succumbing to officers’ demands that their pensions not be reduced could signal that courts are privileging the immediate need to improve the safety of the municipality over the city’s long-term ability to finance public initiatives by raising debt from creditors. While a court’s impulse to make the city as safe as possible is understandable, this desire should not be allowed to hollow out the fair and equitable doctrine, because creditors will be chilled from making future investments once they recognize that the law does not protect their interests. Second, while getting police pensioners to agree to a restructuring proposal has the strategic value of accelerating negotiations, courts might tolerate excessive writedowns by creditors because the benefits of

135 In both the Detroit and Stockton restructurings, for example, police beneficiaries did not have their pensions altered while other city pensioners agreed to reductions in what they were owed. In re City of Detroit, 524 B.R. 147, 179 (Bankr. E.D. Mich. 2014); In re City of Stockton, 526 B.R. at 62 (Bankr. E.D. Cal. 2015).

136 See Teague Patterson, Stockton Shows that Bankruptcy is No Way to Cut Pension Debt, SACRAMENTO BEE (Nov. 2, 2014, 4:00 PM), http://www.sacbee.com/opinion/op-ed/soapbox/article 3520829.html [https://perma.cc/3C9V-GEAM](discussing how city officials and the bankruptcy judge found credible officers’ threats to leave Stockton and work elsewhere so that they could still keep their pension benefits).

137 See supra Part II.B.
quickly exiting bankruptcy could outweigh the costs of allowing the process to languish.\textsuperscript{138} Police officers fared so well in the Detroit and Stockton bankruptcies not because of any unique role they played in the municipal order, but rather because they represented a large, important interest group that could accelerate negotiations once they were on board with their cities’ plans.\textsuperscript{139} Courts allowed municipal debtors to exploit this strategic value despite the fact that police pensions could be rejected.\textsuperscript{140}

Third, courts’ willingness to appease police interests might blind them to alternative measures that could save municipalities money without compromising safety. For example, in the Detroit bankruptcy, Judge Rhodes reiterated throughout his opinion confirming the plan of reorganization that creditors needed to share in the collective sacrifice to make Detroit safe and solvent.\textsuperscript{141} But the extent to which creditors sacrificed their interests to realize the court’s vision of public safety seems troubling when other alternatives might have been available. In theory, Detroit did not need its own police force immediately after exiting bankruptcy when other segments of Wayne County or the state of Michigan itself could have offered police services for an interim period until the City’s police department was financially ready to resume responsibilities. Indeed, this solution is similar to the approach taken by Camden outside of bankruptcy.\textsuperscript{142} Even if one believes the strategy is inappropriate as a permanent police reform, such an approach could still promote short-term safety within a city while avoiding the sorts of signals that might chill creditors from lending to municipal debtors.

One way to solve the problem of privileging police pensions over other municipal obligations could be to use a balancing test that requires a court to weigh immediate public safety needs against long-term financing concerns tied to the city’s ability to pay for police services. Such a framework would change how future bankruptcy judges and mediators deal with a large interest group that has immense strategic value during negotiations. It would also increase the strength of the fair and equitable doctrine.

The balancing test could be applied in a series of ways. First, courts could hold that agreements to reduce officers’ cost of living

\textsuperscript{138} See Bomey & Helms, supra note 40 (pointing out that police consent to the proposed restructuring gave the plan momentum that could lead to a swift conclusion of negotiations despite creditors’ objections to its terms).

\textsuperscript{139} See supra Part II.B.

\textsuperscript{140} See supra note 8 and accompanying text.

\textsuperscript{141} See, e.g., In re City of Detroit, 524 B.R. 147, 182 (Bankr. E.D. Mich. 2014).

\textsuperscript{142} See Rudolf, supra note 102.
adjustments are per se insufficient concessions if they do not also include amendments to pension obligations. Under a public choice theory of jurisprudence, judges should rule against medium-sized, well-organized interests who can get legislators to introduce favorable laws like those in Michigan and California that prohibited pensions from being rejected in bankruptcy. Police officers and their unions likely fit into this category given their size, organizational capacity, and importance as a voting bloc in local and state affairs. Alternatively, if a court were hesitant to embrace a per se rule meant to apply in the context-sensitive environment of a municipal bankruptcy, then the court could adopt a rebuttable presumption that failing to adjust pension obligations does not make the plan of reorganization fair and equitable.

Finally, a court could balance the municipality's long-term interests in its ability to access credit markets against its immediate safety needs by simply asking whether the terms of the plan are likely to have a chilling effect on creditors. If investors will be unlikely to lend to municipal debtors because the plan would appear grossly inattentive to creditors' interests from the perspective of future lenders, then the court should not confirm it.

Opponents of this proposal could challenge it on several grounds. For example, this solution fails to appreciate a fundamental difference between Chapter 9 and the other sections of the Bankruptcy Code, which is that courts are not supposed to balance the interest of creditors against the interests of the municipality. Instead, the interests of the municipality should trump other concerns. As a result, a balancing test like the one proposed here would be inappropriate.

This challenge is overcome by the fact that the current fair and equitable doctrine does not envision a balancing of the sort contemplated, which is precisely the problem with recent case law. The balancing test proposed is thus an effort to prompt a rethinking of what Chapter 9 can do for future insolvent municipalities that will likely have to confront pension problems of their own. In a regime where governmental changes can be proposed only awkwardly at best given the limitations under § 904, creditors will be able to tell whether the

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144 See COLLIER ON BANKRUPTCY, supra note 24, at ¶ 900.01(2) ("However, unlike chapter 11, chapter 9 does not attempt to balance the rights of the municipality and its creditors. In fact, a dissatisfied creditor is in large measure provided with only one remedy in a chapter 9 case, i.e., seeking dismissal of the chapter 9 case.").
plan confirmed solves a police problem or just postpones the next
bankruptcy filing because the city will again experience service delivery
insolvency. As a result, the balancing test could coax lenders into
extending credit at more favorable terms for municipal debtors despite
reservations engendered by recent police-friendly plans of reorganization.

There are other foreseeable objections to this proposal. First, all
parties involved in a bankruptcy have an interest in ending the
negotiations as quickly as possible. Thus, if there is strategic value in
getting pension holders on board with a plan, then the short-term
benefits might outweigh the costs. Second, if the municipality cannot
solve its crime problem soon after it exits bankruptcy, then it is not
likely to remain solvent given the connection between public safety and
financial stability. Plans of reorganization that favor police officers
should therefore be tolerated even if they make borrowing more
expensive because officer investment will be enhanced. Third, states
might react to this balancing test by making it harder for
municipalities to enter bankruptcy.

Solving these issues merely requires counseling judges to be
mindful of how creditors will view the municipality as a credit risk
after bankruptcy. The aim of the process is to put the city in a position
in which it can go to creditors and raise the capital it needs to pay for
municipal services, rather than relying on perpetual state aid to
finance initiatives. Indeed, having access to capital markets is a more
sustainable approach to municipal health than relying on the goodwill
of charities and private philanthropists to make the bankruptcy less
painful for police officers while potentially alienating creditors who will
be needed in the future.

B. Emergency Managers as Structural Police Reformers

If the police problem in a municipality is something other than
excessive debt and thus one that a bankruptcy court is not equipped to
confront, then emergency managers should assume the role of reformer.
Furthermore, states should be clear in their insolvency statutes that
emergency managers are empowered to make changes in police
governance as they see fit.

Under the interpretation of Public Act 436 advanced by this
Comment, Orr had authority to overhaul the Detroit Police

146 See supra notes 136–138 and accompanying text.
147 See supra Part II.B.
Bargain" during bankruptcy consisted of a series of donations from private charities and wealthy
individuals that were intended to alleviate the City's burden of settling with its creditors).
Department's organizational structure, not just appoint new people to occupy various positions within the existing framework.\textsuperscript{149} While Orr used his power to appoint his desired police chief and then vested the new leader with the ability to bypass the Board of Police Commissioners, he should have gone further and disbanded the body for three reasons.

First, the emergency manager serves a dual purpose under state insolvency law: to shepherd the municipality through its crisis and to put it in a position to maintain solvency after emerging from receivership.\textsuperscript{150} Appointing a new police chief is one way to solve the short-term leadership crisis, but leaving the underlying structure in place might negate efforts to put the city in a good long-term governance position no matter who is in charge. Furthermore, the adage of "never letting a serious crisis go to waste" seems to have greater resonance in the context of a state-declared financial emergency.\textsuperscript{151} The emergency manager should seize this moment as an opportunity to get the municipality off the course that led it to distress in the first place.

Second, one lesson from Detroit's bankruptcy is that the structural changes to the municipality's government likely need to be implemented before the Chapter 9 petition is filed because the bankruptcy court will focus on financial rather than governance matters.\textsuperscript{152} This narrow focus could be due to the language of § 904 prohibiting bankruptcy judges from interfering with the political affairs of a municipality,\textsuperscript{153} the fact that governance matters might be secondary to financial concerns in a bankruptcy as large as Detroit's, or just from the bankruptcy judge's sense that restraint is more appropriate than activism. Whatever the reason, the time for governmental reforms—if such reforms are deemed necessary—appears limited to the receivership window. It is unwise to leave the job to a different agent of institutional change given the hesitance to confront such issues in the Detroit episode.\textsuperscript{154}

Third, the emergency manager might be a normatively preferable reformer compared to the bankruptcy judge. In Detroit's case, Orr had a considerable amount of time to gather information, diagnose structural problems ailing the city, build coalitions, and take other

\textsuperscript{150} See Gillette, supra note 69, at 1444–45.
\textsuperscript{151} See Rahm Emanuel, You Never Want a Serious Crisis to Go to Waste, YOUTUBE (Feb. 9, 2009), https://www.youtube.com/watch?v=1yeA_kHHLow [https://perma.cc/AX8R-MY4K].
\textsuperscript{152} See supra note 88 and accompanying text.
steps to facilitate changes that he thought were necessary. By contrast, the bankruptcy judge seeks to conclude the proceedings as quickly as possible and delegates the role of mediator to a third party. While the judge can communicate what he or she thinks is necessary to put the municipality on a sustainable path, the emergency manager seems to occupy a preferable institutional position for implementing such reforms.

Someone opposed to an emergency manager wielding power to reconfigure the organizational structure of a police force would likely object to this solution in several ways. First, he or she might argue that Public Act 436 only sanctions strategic changes in policing, not reforms of the City Charter. This challenge can be overcome by noting that the plain language of the statute supports an interpretation that permits revisions of the City Charter. Furthermore, since the statute does not include language limiting the emergency manager’s power, an interpretation similar to the one advocated in this Comment would arguably not do violence to the text.

Second, the approach advocated here could be challenged on antidemocratic grounds. This critique is widespread among opponents of state takeover boards or aggressive state laws governing municipal insolvency. It presumes that laws flowing from a democratic process are preferable over laws that bypass the municipal legislative process. However, a state-declared financial emergency within the municipality could signal the local democratic process is broken. Unilateral reforms that address underlying structural breakdowns could be in the interests of citizens whose system of government has failed them or who have suffered under poor leadership. Further, the emergency manager can use his or her judgment to see if there is a broad mandate from residents or political officeholders to bring structural changes. He or she can gather data to see what is working and what is hindering effective policing in a municipality before initiating changes in police governance. Serving as a quasi-dictator

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156 See supra Part II.B.
157 MICH. COMP. LAWS § 141.1549(9)(1) (2012) (the emergency manager shall “have broad powers . . . to assure the . . . local government’s capacity to provide or cause to be provided necessary governmental services essential to the public . . . safety”).
159 See Anderson, supra note 3, at 1151–57.
160 See Gillette, supra note 69, at 1433.
161 See McConnell & Picker, supra note 5, at 472.
162 See Gillette, supra note 69, at 1433.
does not mean the emergency manager will necessarily implement nonsensical changes. Instead, the emergency manager can gather information to determine what would constitute sensible reforms. An emergency manager is arguably unlikely to make a city worse off if its economic condition is severe enough to warrant state intervention, and local officials still retain the ability to override changes the emergency manager puts in place if they prove unworkable or detrimental.

Finally, an opponent might also argue that emergency managers should not be so quick to use the crisis situation to abolish an institution like the Board of Police Commissioners. Given that Detroit's two previous police chiefs left office in scandal, residents should be thankful there was an institutional check on the Police Department to keep it from careening even further out of control. This response fails to consider that the appropriate solution to corruption or mismanagement is not necessarily another external body. Rather, mayors or city councils can provide the same oversight function without handcuffing the police chief's ability to manage the force.

V. CONCLUSION

This Comment has attempted to provide an overview of recent municipal crises that could be harbingers of challenges still to come. In so doing, it has contemplated how the tools of state insolvency law and bankruptcy can be harnessed to improve police services in the midst of financial distress. Such proposals have followed from the principle that bankruptcy law cannot solve non-bankruptcy problems. In other words, municipalities with dwindling populations, corruption that diverts attention away from effective allocations of public funds, and other social ills should not look first to their local insolvency regimes and Chapter 9 for redress. Indeed, the remedies they seek probably lie elsewhere. Nevertheless, to the extent a city in crisis can use state insolvency laws and Chapter 9 to fill deficits in police services, this Comment has advanced proposals that could be of use. Regardless of their merits, these proposed solutions will not be of much value if the underlying logic and limits of the bodies of law they are intended to improve are ignored. If these principles are put at the forefront of reform initiatives, the challenge of policing in the midst of crisis should become a little more manageable.

163 See id. at 1445–61.
165 See Baird, supra note 6, at 276 (“Legal rules cannot cure non-legal problems”).