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Commodifying Policing: A Recipe for Community-Police Tensions

Nora V. Demleitner

Washington and Lee University School of Law, demleitner@wlu.edu

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COMMODYING POLICING: A RECIPE FOR COMMUNITY-POLICE TENSIONS

*Nora V. Demleitner**

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* Roy L. Steinheimer Jr. Professor of Law, Washington and Lee University School of Law, Virginia, demleitn@wlu.edu. I am grateful to the participants in the *Georgia Law Review* Symposium “Protect and Serve: Perspectives on 21st Century Policing” and the participants in the Marquette University Law School faculty workshop for their comments and thoughts. I also acknowledge the support of the Frances Lewis Law Center at Washington and Lee University School of Law, which generously supported this publication. My distinct appreciation for introducing me to the multi-faceted topic of policing and their thoughts along the way goes to Lucius Couloute, Rachel Harmon, Vada Lindsey, Timothy MacDonnell, Michael O’Hear, Lee McGrath, Nick Sibilla, Peter Wagner, and especially Amanda Seligman. All errors are, of course, mine.

I. INTRODUCTION

Deadly police-citizen encounters do not occur in a vacuum. They reflect our times and our society. Since the fatal shooting of Michael Brown in Ferguson, Missouri, the nation's attention has been riveted on police killings. In small towns and large cities, virtually all of the victims have been African-American. In some cases, the fatal encounters led to riots. Large-scale investigations by the Department of Justice's Civil Rights Division have provided insight into some of the incidents.

Deadly police actions against citizens can be viewed as an internal police problem,¹ as a symbol of larger societal challenges, especially racism, or as a function of failed criminal justice policies. On a yet larger scale, police actions, and the ensuing community response, are intimately tied to the dominant political and economic climate. In many parts of the country decreased funding for vital governmental functions, especially since the recession of 2008, has shaped police enforcement goals and tactics. Those have contributed to the deterioration of community-police relations and the civilian death toll at the hands of police.

Not all police departments have been impacted equally, but many have had to continue to diversify their funding streams with the downturn in municipal funding. The choices made to support department budgets—and those of other governmental entities—have impacted policing priorities and strategies, often leading to more intensive policing of poorer and minority neighborhoods. In turn, those decisions have increased community tensions with police. The focus on the larger economic picture is not designed to absolve police departments of blame for decisions made but to

¹ In police abuse of civilians, the blame is often placed on a “rogue” officer. See, e.g., Laurence Miller, *The Dorner Case: When Cops Turn Rogue and How to Prevent It*, PRACTICAL POLICE PSYCHOLOGY (Feb. 14, 2013), <https://www.policeone.com/health-fitness/articles/612046-1-The-Dorner-case-When-cops-turn-rogue-and-how-to-prevent-it/> (describing an LAPD officer as a rogue officer). In other situations, entire police departments have been declared responsible for police-community tensions and unconstitutional activity. See, e.g., U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTY'S OFFICE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017) (explaining incidents of use of force inside the Chicago Police Department); U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., FERGUSON REPORT].

highlight the interdependencies between different government entities and broader challenges police will face in restructuring.

The current economic approach is often characterized as neoliberal. While some commentators have criticized the amorphous nature of the term,² a few of the key features of neoliberalism can serve as a shorthand for the overall structural approach that has created substantial economic challenges for municipalities, their agencies, and states.³

Neoliberal principles go beyond limited government funding and demands of cost-effective government.⁴ “The contraction of the state through ‘fiscal discipline’ is only part of a wider project affecting every part of society.”⁵ Some have blamed neoliberalism for greater punitiveness, though the connection may be indirect. Harsher policing has been expected as a result of market deregulation and the attendant social dislocations.⁶ Whether this is an aspect of the current tensions between minority communities and police remains unclear. I argue for a more direct connection. With the downturn in funding for all municipal activity, including policing, police forces have turned to other sources of funding. Those have included forfeitures, citations for traffic and municipal violations, free equipment, often donated by the Department of Defense, police foundations, and grants from the federal and state governments. Pressures to make their budget enhanced the incentives to seize private property and increase the issuance of tickets. The latter has led to the now well-documented

² See, e.g., Michael Tonry, *Explanations of American Punishment Policies: A National History*, PUNISHMENT AND SOCIETY, July 2009, at 377.

³ Some of the dominant features of neoliberalism are beyond the scope of this paper. Among them are globalization and privatization. The latter plays a role in policing, with the proliferation of private police forces, but also in other parts of the criminal justice system. While the privatization of prisons to house convicted inmates has not progressed as rapidly or widely in the United States as some feared, privatization of other parts of the criminal justice system continues, not only in the United States but also in Great Britain. Michael Teague, *Neoliberalism, Prisons and Probation in the United States and England and Wales*, in ORGANISING NEOLIBERALISM: MARKETS, PRIVATIZATION AND JUSTICE 45, 46 (Philip Whitehead & Paul Crawshaw eds., 2012).

⁴ This may imply a demand for cost-efficient policing but not necessarily for a large police force. Teague, *supra* note 3, at 47.

⁵ PHILIP WHITEHEAD, RECONCEPTUALISING THE MORAL ECONOMY OF CRIMINAL JUSTICE: A NEW PERSPECTIVE 76 (2015) (quoting COSTAS DOUZINAS, PHILOSOPHY AND RESISTANCE IN THE CRISIS: GREECE AND THE FUTURE OF EUROPE 11 (2013)).

⁶ Teague, *supra* note 3, at 46.

reinstitution of the so-called debtor's prison for individuals who have found themselves unable to pay off court-ordered debt. Federal government grants in turn have imposed pressure to measure performance, which is another key element of neoliberalism. Many of the traditionally used performance measures, however, fail to consider the impact of policing choices on community relations.

This Article, in Part II, begins with a description of how municipalities, at least since the recession of 2008, have fallen short of fully funding their departments. Part III focuses on four distinct outside funding components and their impact on policing. The first subsection discusses asset forfeitures, under both state and federal law. Subsection two highlights revenue derived from citations, often in the form of traffic tickets. A discussion of fees that are being added to fines, often to fund courts, probation agencies, and police departments, follows. The increasing amounts and types of fees imposed have substantially increased the burden of citations. Failure to pay or to appear for court hearings about payment triggers arrest warrants. The final subsection turns to the impact federal grant programs, including equipment donations, have had on law enforcement. Similarly, the contributions of police foundations have left their imprint on enforcement strategies. Part IV is devoted to the proliferation of measurements of police performance. Those frequently emphasize numbers of arrests, drug or money seizures, or citations issued without regard to the impact on community relations. Finally, the last section illuminates how these policies have increased the stakes in interactions between community members and police, leading to greater dangers for both sides.

II. POLICE FUNDING: THE IMPACT OF NEOLIBERALISM

Neoliberalism's market approach accounts for the marketization of society, which deems all aspects of society and government part of markets.⁷ This commodification has

⁷ *Id.*

increasingly manifested itself in various areas.⁸ Government agencies are conceived as service providers, with citizens as consumers. A market-based approach has led to the partial privatization of even core government functions, including policing and (external) defense.⁹ The proliferation of private security organizations may, therefore, be considered a result of neoliberal policies and approaches. Probation agencies have been turned from state agencies into public-private partnerships. Another aspect of the market approach is the increasing measurement and assessment of government services as if they were for-profit businesses.¹⁰ For police, this has meant, for example, that they have been held responsible for increases in the (violent) crime rate, even though that measure is particularly volatile.¹¹ In addition, police activity is not the sole factor impacting crime rates.

The result of neoliberal policies, critics charge, is an increased emphasis on “individual responsibility for behavior, less tolerance, poverty, inequality and discrimination in terms of race and ethnicity. . . .”¹² Some have argued that the societal dislocations arising from neoliberal policies—largely in the form of unemployment or underemployment—may lead to more crime, a greater law enforcement presence, and ultimately harsher punishment.¹³

Police forces generally increased in size during the decade and a half preceding the economic collapse of 2008, a development that appears to support neoliberal critics.¹⁴ Even during that time, however, they, together with the courts and parts of corrections, already faced budget restrictions. With the banking and loan crisis came dramatic funding shortages for police and local courts.¹⁵ Federal grants disappeared, and local expenditures were

⁸ Philip Whitehead & Paul Crawshaw, *Introduction: A Preliminary Mapping of the Terrain* 1, 2–3, in ORGANISING NEOLIBERALISM: MARKETS, PRIVATIZATION AND JUSTICE, *supra* note 3.

⁹ Teague, *supra* note 3, at 46.

¹⁰ Whitehead & Crawshaw, *supra* note 8, at 12.

¹¹ Teague, *supra* note 3, at 69.

¹² *Id.* at 47.

¹³ *Id.* at 47–48.

¹⁴ U.S. DEPT OF JUSTICE, STATISTICS, NCJ 749681, NATIONAL SOURCES OF LAW ENFORCEMENT DATA 2 (2016).

¹⁵ U.S. DEPARTMENT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES 10 (2011), <https://cops.usdoj>.

cut across the board. The decrease in state and local tax revenue used to fund state and local police and the courts required police to downsize and turn to or strengthen other funding mechanisms, on some of which they had already come to rely.¹⁶ In addition, some municipal courts and other criminal justice agencies have come to depend on police to assist them in funding their operations.¹⁷

Whether the developments within the criminal justice area all fit within the theoretical structure of neoliberalism and whether they are as linear as described may remain unanswered. It remains undisputed that increasingly state entities, including police and local courts, have been expected to contribute financially to their operations.¹⁸ In egregious cases, they may have been expected to self-fund or even serve as revenue centers.¹⁹ Such expectations explain the turn to outside revenue, including funding through citizen-offenders and government grants.

III. ALTERNATIVE REVENUE SOURCES FOR POLICE AND RELATED AGENCIES

Police have come to rely on a host of outside funding mechanisms. Best known and heavily disputed are civil and criminal forfeitures.²⁰ Citations and traffic tickets have been a time-tested funding source. Only recently, however, has the proliferation of fees escalated the cost of tickets. Failure to pay, even for the indigent, carries the danger of arrest and jail time, with further fees imposed throughout the process.²¹ Finally, police have been relying on police foundations, federal grant monies and

gov/Default.asp?Item=2602; POLICE EXECUTIVE RESEARCH FORUM, IS THE ECONOMIC DOWNTURN FUNDAMENTALLY CHANGING HOW WE POLICE? 1–3 (Dec. 2010) [hereinafter POLICE EXECUTIVE RESEARCH FORUM].

¹⁶ POLICE EXECUTIVE RESEARCH FORUM, *supra* note 15, at 2. See also Kevin Walby, Randy K. Lippert & Alex Luscombe, *The Police Foundation's Rise: Implications of Public Policing's Dark Money*, BRIT. J. CRIMINOL. (Sept. 15, 2017), <https://doi.org/10.1093/bjc/azx055>.

¹⁷ POLICE EXECUTIVE RESEARCH FORUM, *supra* note 15, at 2.

¹⁸ *Id.* at 1–3.

¹⁹ HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 13–14 (Feb. 2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

²⁰ Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 508 (2016).

²¹ *Id.*

equipment donations.²² The latter have accelerated the militarization of the police. All of these funding streams have impacted policing and ultimately negatively affected relationships with local communities.

A. ASSET FORFEITURES²³

For about three decades already, asset forfeitures have contributed to the coffers of federal, state, and local law enforcement agencies.²⁴ Originally forfeiture laws were intimately tied to drug enforcement, designed to incentivize police to engage in more drug-related investigations.²⁵ While still heavily focused on illicit narcotics, forfeiture of alleged proceeds or products and goods used in the commission of the crime is now also permitted for other offenses.²⁶

The best-known program that has influenced the allocation of state and local police and prosecutorial resources is “equitable sharing”—the Department of Justice Asset Forfeiture Program that allows local law-enforcement and prosecutor’s offices to share in civil forfeiture assets in cases of joint investigations or when the federal government “adopts” the state seizure.²⁷ The forfeitures, which do not require a criminal conviction, comprise all types of property, including cell phones, automobiles, real estate, and

²² *Id.* at 509; Walby, Lippert & Luscombe, *supra* note 16.

²³ The discussion in this section does not distinguish between civil and criminal forfeitures. For purposes of this Article, the incentive to forfeit property to enhance the discretionary budgets of law enforcement agencies is decisive. The specific features of the forfeiture process are irrelevant. Civil forfeiture remains, of course, the preferred method of law enforcement agencies because of the low procedural threshold. See generally DICK M. CARPENTER II ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 14 (Nov. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2-edition.pdf>.

²⁴ See, e.g., Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2118 (2007) (“DOJ’s ‘success’ in seizing assets in the early 1980s . . . brought asset forfeiture policies to the attention of state governments.”).

²⁵ *Id.* at 2114.

²⁶ 18 U.S.C. § 982(a) (2016) (authorizing forfeiture for various non-drug-related offenses).

²⁷ U.S. DEP’T OF JUSTICE, ASSET FORFEITURE & MONEY LAUNDERING SECTION, *GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES* 1, 1–2 (Apr. 2009), <https://www.justice.gov/criminal-afmls/file/794696/download> [hereinafter *GUIDE TO EQUITABLE SHARING*]. For a critique of how the federal government handles cash forfeitures generally, see U.S. Department of Justice, Office of the Inspector General, *Review of the Department’s Oversight of Cash Seizure and Forfeiture Activities* (March 2017), <https://oig.justice.gov/report/s/2017/e1702.pdf>.

cash.²⁸ Investigations are largely, though not necessarily, focused on drug offenses.

To provide a sufficient incentive for local and state law enforcement agencies to participate in a joint operation with federal agencies, they receive up to 80% of forfeited assets.²⁹ To be able to participate in the program, the states must allocate all of these funds to the investigating law-enforcement agency.³⁰ The program, embedded in the Comprehensive Crime Control Act of 1984, distributed about \$1.2 billion to state, local, federal, and foreign law enforcement agencies between 2003 and 2013.³¹ After federal budget cuts in late 2015, the Department of Justice suspended the program but resumed it in March 2016.³² Police deem “equitable sharing” allocations a federal allocation of resources and an integral component of their budgets.³³

In addition to the federal program, every state has a forfeiture law, largely focused on drug offenses. Indicative of the increasing fiscal importance of these programs is that between 2002 and 2013 the total annual forfeiture revenue more than doubled in fourteen

²⁸ GUIDE TO EQUITABLE SHARING, *supra* note 27, at 7.

²⁹ *Id.* at 8. The 80% return also holds true in cases where the federal government merely “adopts” the seized goods.

³⁰ CARPENTER ET AL., *supra* note 23, at 28.

³¹ See U.S. GOV'T ACCOUNTABILITY OFFICE GAO-14-318, *DHS Asset Forfeiture: Additional Actions Could Help Strengthen Controls over Equitable Sharing*, 14 (Mar. 2014), <http://www.gao.gov/assets/670/667076.pdf>. Other reports indicate a substantially higher payout between 2000 and 2013, in the range of \$4.7 billion. CARPENTER ET AL., *supra* note 23, at 6.

³² Christopher Ingraham, *The Feds Have Resumed a Controversial Program That Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/onk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/?utm_term=.940575d6395c.

The Justice Department ended one aspect of the “equitable sharing” program referred to as “adoptive” seizures under Attorney-General Holder but Attorney-General Sessions reinstated it in 2017. Department of Justice, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement* (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state>; Department of Justice, *Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety* (Jan. 16, 2015), <https://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>. See also Nora V. Demleitner, *How the government can steal your stuff: 6 questions about civil asset forfeiture answered*, THE CONVERSATION (Sept. 17, 2017), <https://theconversation.com/how-the-government-can-steal-your-stuff-6-questions-about-civil-asset-forfeiture-answered-81973>.

³³ CARPENTER ET AL., *supra* note 23, at 29 (quoting national president of the Fraternal Order of Police).

states.³⁴ The individual amount of forfeited property is relatively small, with the median value in Minnesota, for example, at \$451.³⁵ For limited value property, in particular, owners rarely challenge the government's forfeiture.³⁶ This is particularly true in jurisdictions that make it cumbersome to dispute forfeitures, effectively requiring an investment of time and financial resources in the form of a lawyer.

In contrast to equitable sharing, state forfeiture laws diverge widely, in terms of substance but also with respect to allocation provisions.³⁷ While seven states and the District of Columbia do not permit law enforcement access to forfeited funds, some of the other states allocate up to 100% to the seizing law enforcement agency.³⁸ Even states that ostensibly do not assign any forfeited proceeds to the investigating agency, may find themselves paying agencies for the investigations, and thereby distributing all or most of the forfeited funds to such agencies.³⁹ In states whose asset forfeitures go to a general fund rather than individual agencies, the federal program provides an alternative that allows law enforcement agencies to continue to benefit directly.⁴⁰

Once police departments or prosecutors receive the allocated share from equitable sharing, they may use it for a host of purposes, though some restrictions exist. A large amount goes to equipment purchases.⁴¹

It has been yet more challenging to determine on what types of budget items law enforcement agencies have been spending revenue received from property forfeited under state laws.⁴² Such data is available for only a handful of states. Some of them spent

³⁴ *Id.* at 5.

³⁵ *Id.* at 12.

³⁶ *Id.*

³⁷ Baicker & Jacobson, *supra* note 24, at 2116.

³⁸ See CARPENTER ET AL., *supra* note 23, at 14.

³⁹ *Id.* at 16 (Indiana, which permits agencies to be reimbursed for investigative costs, has found itself allocating all forfeited funds to these agencies).

⁴⁰ For support of this substitution effect, see John L. Worrall & Tomislav V. Kovandzic, *Is Policing For Profit? Answers from Asset Forfeiture*, 7 CRIM. & PUB. POL'Y 219, 227 (2008) (describing how some agencies circumvent state restrictions on the receipt of forfeitures by handing the proceeding over to the federal government).

⁴¹ CARPENTER ET AL., *supra* note 23, at 39–40.

⁴² *Id.* at 7 ("In 2012, agencies in four states spent \$13.7 million in state forfeiture money on 'other.'" *Id.*).

a substantial percentage, ranging from 14% to 70%, on salaries.⁴³ In police departments that fund their personnel through forfeitures, the pressure to forfeit assets is substantial. After all, without forfeitures, layoffs of colleagues will become inevitable.

For state forfeitures generally, equipment also ranked among the top budget items. Only a relatively small percentage of the revenue from forfeited goods and cash went to supporting drug programs or policing initiatives, even though those are being touted as the objects of such funding.⁴⁴ Egregious misspending on luxury items, prohibited goods, or inappropriate expenditures such as political consultants has also been reported.⁴⁵

There has been widespread criticism of civil forfeitures for privileging revenue maximization over public safety.⁴⁶ The incentives provided for forfeitures lead to the allocation of law enforcement resources to drug investigations, and away from other areas. Revenue demands, therefore, often determine local law enforcement priorities.⁴⁷ Law enforcement officials have acknowledged that civil forfeiture laws create strong incentives for seizures.⁴⁸ Once law enforcement becomes accustomed to the influx of such outside resources, budgets will be built accordingly, which will lead to yet greater dependency on forfeitures, especially when such revenue becomes a part of payroll.

The impact of forfeiture laws on the allocation of resources becomes most pronounced when state forfeiture laws and practices are considered in conjunction with equitable sharing. On the one hand, studies have indicated that a decline in state proceeds,

⁴³ *Id.* at 40–41.

⁴⁴ *Id.* at 39.

⁴⁵ *Id.* at 41.

⁴⁶ Once the concept is explained to them, the vast majority of Americans—84%—oppose civil asset forfeitures, and three quarters of all Americans object to local police departments keeping the forfeited assets. See EMILY EKINS, CATO INSTITUTE, POLICING IN AMERICA: UNDERSTANDING PUBLIC ATTITUDES TOWARD THE POLICE. RESULTS FROM A NATIONAL SURVEY 57–58 (2016). As a result many states have reformed their civil asset forfeiture laws. See, e.g., INSTITUTE FOR JUSTICE, *Civil Forfeiture Reforms on the State Level*, <http://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/> (last visited Nov. 20, 2017).

⁴⁷ Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 286–88 (2000) (suggesting a substantial increase in drug cases once police can keep assets seized in drug cases); see also Aurélie Ouss, *Incentives Structures and Criminal Justice* 1.7 (July 2015), http://aouss.github.io/juveniles_california.pdf (stating that asset forfeiture laws change policing practices).

⁴⁸ CARPENTER ET AL., *supra* note 23, at 15.

based either on greater procedural hurdles to forfeitures or a lower sharing percentage, leads to an increase in equitable sharing.⁴⁹ On the other hand, research on the impact of forfeiture laws on police budgets shows that “[l]ocal governments partially offset police seizures by reducing their spending on police the following year.”⁵⁰ This is even truer in times of tight fiscal budgets and triggers a need for more forfeitures, either under state law or with federal cooperation. Forfeiture laws, therefore, shape budgets and ultimately impact law enforcement priorities and focus.⁵¹

The asset forfeiture program indicates how the funding of even those programs considered a core government function has changed. Rather than distributing responsibility for funding police across the population through taxation, the cost is being borne by those with allegedly tainted property, many of whom will never be convicted of a criminal offense and many of whom may in fact not be involved in any criminal offending.

Traffic stops often serve as a basis for seizing and forfeiting property.⁵² Many police departments have undergone training specifically to learn how to execute warrantless highway seizures most effectively upon a traffic stop.⁵³ In addition, many have come to use traffic fines and citations more generally as a funding source.⁵⁴

B. CITATIONS: FINES FOR TRAFFIC AND MUNICIPAL VIOLATIONS

In the wake of the 2008 financial crisis, funding for municipalities, law enforcement agencies, courts, and probation departments has been upended. Long before the Department of Justice’s investigation into police and court practices in Ferguson, there were reports of towns practically funding themselves through traffic fines, especially for speeding violations. Since speeding is considered a public safety issue, it has sometimes been

⁴⁹ See Jefferson Holcomb, Tomislav Kovandzic & Marian Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 276 (2011) (describing how Missouri law enforcement agencies began using federal equitable sharing to circumvent a state law directing forfeiture funds to an education fund).

⁵⁰ Baicker & Jacobson, *supra* note 24, at 2115.

⁵¹ *Id.*

⁵² CARPENTER ET AL., *supra* note 23, at 16.

⁵³ *Id.* at 29.

⁵⁴ POLICE EXECUTIVE RESEARCH FORUM, *supra* note 15, at 1–3.

challenging to uncover the revenue-generation abuse that may accompany it.

Randolph, a small town on the opposite side of the state of Missouri from Ferguson, exemplifies the misuse of traffic tickets. Police enforcement there served solely as a speed trap for the unwary.⁵⁵ Municipal abuses of traffic fines are legion, though largely restricted to small towns. In some of the most egregious cases the alleged offenders were arrested and held in jail for minor violations, to assure payment.⁵⁶ This type of police behavior creates insecurity rather than safety in a community.⁵⁷

Even though Missouri state law mandates that ticket collections from state and federal highways not surpass about a third of a town's budget,⁵⁸ both Ferguson and Randolph violated that benchmark.⁵⁹ Other states have also limited the percentage of collections that can be dedicated to a municipality's budget. Some restrict assignment of fees for traffic violations on state highways to state coffers.⁶⁰ In return, towns receive either a percentage or a flat fee for every ticket.⁶¹ In some cases those may constitute a substantial percentage of a town's budget. Ultimately, the revenue derived from traffic tickets and municipal code violations gets allocated in various ways, depending on the state. In Minnesota, for example, fines are set by state statute, with a

⁵⁵ Todd C. Frankel, *Missouri's First Official Speed-trap Town Fingered in Audit*, ST. LOUIS POST-DISPATCH (Sept. 15, 2010), http://www.stltoday.com/news/local/missouri-s-first-official-speed-trap-town-fingered-in-audit/article_19e8a57e-c04c-11df-89fe-00127992bc8b.html.

⁵⁶ *Id.*

⁵⁷ See, e.g., Ken Armstrong, *The Woman Who Spent Six Years Fighting a Traffic Stop*, THE MARSHALL PROJECT (Aug. 10, 2015), <https://www.themarshallproject.org/2015/08/10/the-woman-who-spent-six-years-fighting-a-traffic-stop#.CLpXCrymx> (describing ticketing protestees in Woodworth, Louisiana). See also Jonathon M. Seidl, *There's Something Odd About Some Tickets in Texas – and a Judge has Resigned Over It*, THE BLAZE (June 4, 2015), <http://www.theblaze.com/stories/2015/06/04/in-a-few-small-texas-towns-police-are-issuing-so-many-speeding-tickets-a-local-judge-quit-on-principle/> (describing a Texas highway as ticket terror for drivers); SAM J. PIGNO, AUTOBIOGRAPHY OF SAM J. PIGNO: A SCHOOL SYSTEM'S FALL INTO DISGRACE 16–17 (2011).

⁵⁸ Other states have similar limitations. See Karen Aho, *The Town That Lived Off Speeding Tickets*, FOX BUS. (Oct. 21, 2011), <http://www.foxbusiness.com/features/2011/10/19/town-that-lived-off-speeding-tickets.html>.

⁵⁹ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., FERGUSON REPORT, *supra* note 1, at 13–14.

⁶⁰ *Id.* at 14.

⁶¹ See Aho, *supra* note 58.

majority of the revenue reverting to the state.⁶² The rest goes to the city, though the individual allocations differ between individual cities and the state. Because of the variability of such decisions even within the same state, specific funding schemes and the dependence of law enforcement agencies and municipalities on fines are often difficult to uncover.

While the most pervasive, traffic fines are not the only financial penalties that may benefit law enforcement. Under Tennessee law, for example, 50% of mandatory minimum fines required upon conviction of certain drug offenses will flow back to the agency responsible for the arrest that led to the conviction.⁶³ Similarly, certain code violations may underwrite law enforcement budgets.

As regulation has increased, there are ever more opportunities to run afoul of municipal codes and traffic rules. Originally designed to protect public safety, fiscal pressures have now captured enforcement. Data indicates that economically challenging times lead to a greater number of traffic tickets.⁶⁴ Even though there is no inevitable conflict between financial incentives and public safety,⁶⁵ enhanced enforcement in times of fiscal straits raises questions about the appropriateness and effectiveness of such enforcement and its community impact.

Lack of sufficient data makes it currently impossible to assess the total amount of fines imposed in the United States.⁶⁶ Generally fines have been calibrated to middle class income. Since

⁶² Heather Brown, *Good Question: Where Does Traffic Ticket Money Go?*, CBS MINNESOTA (June 27, 2013), <http://minnesota.cbslocal.com/2013/06/27/good-question-where-does-traffic-ticket-money-go/>.

⁶³ TENN. CODE ANN. § 39-17-428 (2016). See CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, *Confronting Criminal Justice Debt: A Guide for Policy Reform* 13 (Sept. 2016).

⁶⁴ See, e.g., THOMAS A. GARRET & GARY WAGNER, FED. RESERVE BANK OF ST. LOUIS, *ARE TRAFFIC TICKETS COUNTERCYCLICAL?* (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923158 (indicating that negative changes in local government revenue lead to an increase in the number of traffic tickets); Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J. LAW & ECON. 71, 71 (2009).

⁶⁵ Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 J.L. & ECON. 863, 863 (2011) (the decrease in traffic accidents in Massachusetts towns occurred with the primary enforcement target being out-of-town drivers).

⁶⁶ ANNE MORRISON PIEHL & GEOFFREY WILLIAMS, NAT'L BUREAU OF ECON. RESEARCH, *INSTITUTIONAL REQUIREMENTS FOR EFFECTIVE IMPOSITION OF FINES* 4 (2010), <http://www.nber.org/papers/w16476.pdf>.

the amounts are fixed and assessed without consideration of financial resources,⁶⁷ their impact on individuals varies dramatically. In light of the increasing income and wealth stratification in the United States, fines today range from being a nuisance to serving as a substantial punishment. The current regime of financial sanctions does not present a proportionate measure of punishment. In addition, an increase in fines imposed during economically challenging times has the most negative impact on those already heavily affected by the economic downturn.

Those able to pay promptly, and without coming into direct contact with the court system, can quickly regain their status as law-abiding citizens. Those, however, who have to appear in court and are unable to make payments, are being stigmatized and labeled as lawbreakers. Societal perception may also contribute to a self-understanding of being lawless and immoral.⁶⁸

Neither the exploitation of citations nor the racial impact of the practice is limited to Missouri. A recent report by the Lawyers Committee of San Francisco indicates that some California cities have similarly collected revenue through targeted fining.⁶⁹ The report shows that the enforcement of traffic laws does not fall equally upon all sectors of society. Instead the fining practice disproportionately impacts African-Americans and Hispanics, who statistically also fall into the economically more disadvantaged strata of society.⁷⁰ African-Americans are between two and four times more likely to be pulled over than whites. Racial disparity was also stark in Ferguson and in a number of adjacent communities.⁷¹

In many states non-payment of fines—or failure to appear, often because of inability to pay—leads to the suspension of one's

⁶⁷ See, e.g., *id.* at 14–18 (suggesting a system where fines are structured using a formula counting for net worth, income and other variables).

⁶⁸ See, e.g., Helen Wells, *Getting Around and Getting On: Self-Interested Resistance to Technology in Law Enforcement Contexts*, 11 ANN. REV. SOC. SCI. 175 (2015).

⁶⁹ STEPHEN BINGHAM ET AL., EAST BAY COMMUNITY LAW CENTER, STOPPED, FINED, ARRESTED, RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA 1 (2016).

⁷⁰ *Id.*

⁷¹ ArchCity Defenders, *Municipal Courts White Paper*, MUNICIPAL COURTS WHITE PAPER 3–5 (2014).

license.⁷² Even in states in which a means test is mandated, courts usually dispense with it and instead revoke the license. In California over 4 million drivers—17% of the adult population—have their licenses suspended for failure to appear in court or pay a fine.⁷³ In Virginia one in six drivers has similarly lost his or her license.⁷⁴ The American Association of Motor Vehicle Administrators has declared it dangerous to suspend licenses for reasons of non-payment because it diverts police from public safety priorities.⁷⁵

Because of disparate enforcement and ticketing patterns and racialized economic disadvantage, suspensions in California are five times the state average in Black and Latino communities.⁷⁶ Arrests for driving with a suspended license based on failure to pay for an infraction are also far more likely for African-American drivers.⁷⁷

Sanctions for non-payment of fines are particularly troubling as the amount owed for citations has disproportionately increased over the last few years. The reason is the proliferation of fees, imposed on top of fines. Those are largely used to fund unrelated

⁷² Aimee Picchi, *How a Minor Ticket Can Cost You Your Driver's License*, CBS NEWS (Apr. 8, 2015, 7:44 AM), <https://www.cbsnews.com/news/how-a-minor-ticket-can-cost-you-your-drivers-license/>. Suspension of driver's licenses creates not only potential law-enforcement and insurance problems. Frequently, a suspended license leads to job loss, as a New Jersey study indicates. There almost half of the people whose licenses were suspended lost their employment. Without a license, a person encounters increased challenges in regaining employment as ever more low- and middle-income jobs require a license. In fact, the possession of a driver's license predicts sustained employment more accurately than a General Educational Development (GED) diploma. *Id.*

⁷³ Alex Bader Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al., *Not Just a Ferguson problem: How Traffic Courts Drive Inequality in California* (Apr. 2015).

⁷⁴ Amanda Whiting, *75 Percent of All Suspended Drivers in Virginia Are in a Debtor's Prison Scenario*, WASHINGTONIAN (July 21, 2016), <https://www.washingtonian.com/2016/07/21/75-suspended-drivers-virginia-debtors-prison-scenario/>.

⁷⁵ Dean Seal, *Lawsuit Says DMV's License Suspension Policy Creates 'Recipe for Disaster'*, (Dec. 17, 2106), DAILY PROGRESS, http://www.dailyprogress.com/news/local/lawsuit-says-dmv-s-license-suspension-policy-creates-recipe-for/article_7c494499-ec71-5e44-a207-d3c82cc2406c.html.

⁷⁶ BINGHAM ET AL., *supra* note 69.

⁷⁷ *Id.* The report indicates, however, that police do not arrest everyone who is driving with a suspended license based on failure to pay or to appear. *Id.* at 18. Many states do not report the basis for an underlying warrant or failure to appear. It is, therefore, impossible to ascertain how many arrest warrants are executed for those reasons rather than the commission of an offense. *Id.*

state obligations, including local courts and other municipal functions.

C. COURT FEES

A host of fees have supplemented and enlarged the cost of the underlying citation, often exponentially increasing it. The amounts of fees have increased; new types of fees have been created; the number of agencies assessing criminal justice-related fees has proliferated.⁷⁸ In California, for example, a base fine of \$100, for a traffic citation, will cost the offender \$490 because of various add-ons.⁷⁹ Should the person fail to appear, the cost balloons to \$815.⁸⁰ Many offenders who would have been able to pay the fine, therefore, find themselves in default because of their inability to pay off the fees. Today, fees are assessed for a wide variety of elements integral to the criminal justice process or attendant to the collection of criminal justice debt.

Fees are not novel in the criminal justice process. At least one state assessed jail costs and fees for probationers by the 1920's.⁸¹ In 1980 ten states imposed probation supervision fees, a number that had almost tripled ten years later.⁸² The same fee explosion occurred with respect to parole supervision.

The impact of such fees falls disproportionately on the poor. The imposition of additional cost for slow payment or failure to pay—interest, late fees, collection agency fees—further aggravates the situation, leading to what has been dubbed, the “poverty trap.”⁸³ California alone currently has \$10 billion in uncollected court-ordered debt.⁸⁴

⁷⁸ AMERICAN PROBATION AND PAROLE ASSOCIATION, ISSUE PAPER: SUPERVISION FEES (2001), https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_IssuePaper&wps_key=bbe810ce-4464-4519-a1d7-4993574a8d61. This is also true for felony and misdemeanor convictions. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1758–60 (2010).

⁷⁹ BINGHAM ET AL., *supra* note 69, at 23.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² AMERICAN PROBATION AND PAROLE ASSOCIATION, *supra* note 78.

⁸³ CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, *supra* note 63, at 18.

⁸⁴ BRIGHAM ET AL., *supra* note 69.

It is not only the philosophy underlying such fees that has been questioned but also their efficacy. Data on supervision fees indicates “there is an inverse relationship between the total amount charged and the percentage collected per offender,” which counsels against fee hikes and the stacking of multiple fees.⁸⁵

Nevertheless, at least in some locales, fees appear to fulfill the purpose for which they were created, to fund criminal justice agencies and local courts. For some agencies, fees amount to half of their budget. “The criminal justice system in Orleans Parish [New Orleans] would simply cease to function,” were it not funded by fines and fees.⁸⁶ The fees assist overburdened and underfunded local law enforcement, court, and corrections budgets, and therefore indirectly provide local tax relief.⁸⁷ Often fees are budgeted to supplant other sources of revenue, creating the need to collect such fees to make the budget. Growing dependence on fees also leads to ongoing pressures to assess new fees, increase existing fees, and assure collections on these fees.⁸⁸ In turn the need for such fees, especially when their collection is built into budget models, creates conflicts of interests.⁸⁹ Some commentators have characterized these fiscal developments as “de facto privatization of local justice systems,” which is aligned with greater neoliberal tendencies, including privatization of government assets.⁹⁰

Studies indicate that in many cases revenue assumptions are ephemeral once the cost of debt collection, and especially jail cost for those failing to pay, are included in the calculation.⁹¹ In some situations, however, the beneficiaries of the revenue are able to

⁸⁵ AMERICAN PROBATION AND PAROLE ASSOCIATION, *supra* note 78.

⁸⁶ AMERICAN CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS 25 (2010) [hereinafter ACLU, IN FOR A PENNY].

⁸⁷ AMERICAN PROBATION AND PAROLE ASSOCIATION, *supra* note 78.

⁸⁸ *Id.*

⁸⁹ CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, *supra* note 63, at 7–8; ACLU, IN FOR A PENNY, *supra* note 86, at 26.

⁹⁰ Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 14 (2016).

⁹¹ See MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INSTITUTE OF JUSTICE, POST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 25 (2017). For other examples, see REBEKAH DILLER, ALICIA BANNON & MITALI NAGRECHA, BRENNAN CENTER FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 25–26 (Oct. 2010).

allocate the cost of these debt programs onto other players in the system.⁹² In too many cases, however, such costs fail to be considered. One is left to wonder, therefore, whether these fees may be designed as much for punitive as for budgetary purposes.

Increasingly, financial pressures on local governments and courts, which have triggered the propagation of fees, have led to failures to pay. After all, fee amounts are not based on an offender's means.⁹³ In addition, localities in which tax income is depressed because of economic stagnation tend to charge the highest fees, imposing the burden on an already impoverished population.⁹⁴

Even though the proponents of criminal justice fees argue that fee waivers are common and probationers and parolees are not revoked for failure to pay such fees or appear in court,⁹⁵ presumably some threat has to stand behind the payment. Collection efforts vary widely.⁹⁶ There are indications that in a substantial amount of jurisdictions arrest and jail time are being used to incentivize payments.⁹⁷ While arrest may not befall all of those with an outstanding warrant for failure to pay, the discretion built into the police response creates substantial uncertainty and tension in traffic stops. Courts generally seem to assume that failure to pay is willful, and rarely assess an offender's ability to pay either at the initial imposition of fees or at the point of revocation.⁹⁸

Opponents of fees have argued that these practices may lead an offender to (re)turn to crime to meet these financial demands,⁹⁹ or

⁹² See Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 111 (2015) (stating that the entity seeking the fine or fee is often not the same entity that is paying the cost of incarceration).

⁹³ Teague, *supra* note 3, at 61.

⁹⁴ HUMAN RIGHTS WATCH, *supra* note 19, at 14.

⁹⁵ AMERICAN PROBATION AND PAROLE ASSOCIATION, *supra* note 78.

⁹⁶ See Harris, Evans & Beckett, *supra* note 78, at 1759 (describing sources of collections efforts).

⁹⁷ See, e.g., FOSTER COOK, TASC: JEFFERSON COUNTY'S COMMUNITY CORRECTIONS PROGRAM, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 15 (2014).

⁹⁸ HUMAN RIGHTS WATCH, *supra* note 19, at 39.

⁹⁹ Teague, *supra* note 3, at 62. Empirical evidence that court fines and fees lead to the commission of crime exists at least in one U.S. state, Alabama. COOK, *supra* note 97, at 11–12. The crimes reported consist largely of drug sales and theft. *Id.* at 12. For a Finnish study

at least abscond from supervision. If an offender cannot meet required payments, there is a greater likelihood that he will not come to a probation or court meeting.¹⁰⁰ “Revocations for new crimes or for failure to report may simply mask fee overload.”¹⁰¹ In fact, criminal justice debt may be particularly detrimental for those offenders who desire to lead a socially productive life.¹⁰² Some have, therefore, suggested individualized payment plans, a partial write-off on criminal justice debt,¹⁰³ and community service in lieu of financial sanctions.

To assure payments, some jurisdictions have chosen another path. A number of states have put offenders on probation who would have otherwise received only a citation, to retain ongoing control over them. Some have chosen privately owned probation companies to supervise offenders whose sanction consisted solely of a fine.¹⁰⁴ These probation companies effectively function as collection agencies for fines and fees.

“Financial considerations and budgetary constraints played a major part in the privatization of probation supervision services.”¹⁰⁵ These services promise to operate cost-free to local and state governments and the taxpayer, with only the offender paying them a service fee,¹⁰⁶ an additional fee for the one in the worst economic position to pay it.¹⁰⁷ Failures are frequent, as the

indicating that debt default leads to an increase in crime, see generally Mikko Aaltonen, Atte Oksanen & Janne Kivivuori, *Debt Problems and Crime*, 54 CRIMINOLOGY 307 (2016).

¹⁰⁰ Christine S. Schloss & Leanne F. Alarid, *Standards in the Privatization of Probation Services: A Statutory Analysis*, 32 CRIM. J. REV. 233, 239 (2007).

¹⁰¹ AMERICAN PROBATION AND PAROLE ASSOCIATION, *supra* note 78.

¹⁰² See Aaltonen, Oksanen & Kivivuori, *supra* note 99, at 327 (discussing how debt poses obstacles to those with a criminal justice record).

¹⁰³ See, e.g., PIEHL & WILLIAMS, *supra* note 66, at 10–11; MORGAN O. REYNOLDS, NCPA POLICY REPORT, PRIVATIZING PROBATION AND PAROLE, <http://www.ncpa.org/pdfs/st233.pdf>; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 16 (2007).

¹⁰⁴ For a history of the growth of private probation, see generally Schloss & Alarid, *supra* note 100.

¹⁰⁵ *Id.* at 238.

¹⁰⁶ Teague, *supra* note 3, at 59; CSRA Probation Services, Inc., *About* (2016), <http://www.csrprobation.com/about.htm>. For a strong critique of CSRA Probation Services, see generally Human Rights Watch, *supra* note 19.

¹⁰⁷ Not only private probation agencies charge fees. In Massachusetts a probationer, with an average probation length, will owe between \$850 and \$1,300 in probation fees. The cost falls disproportionately on the poorest part of the population. WENDY SAWYER, PRISON

total cost of a relatively minor infraction has yet again been increased, often substantially.¹⁰⁸

The stakes are higher, too. Failure to pay amounts to failure on probation. That means courts will issue arrest warrants that often allow the probation officer—and any law-enforcement officer—to intervene. While these warrants are generally designed to get a probationer to a revocation hearing, the probation service uses them to exert payment pressure on the individual and his family.¹⁰⁹ Even if in most jurisdictions probationers are only very rarely revoked for failure to pay, frequently their probationary period is extended.¹¹⁰ That means yet again increased fees.¹¹¹

Monetary payments have been used not only to punish but also to guarantee certain actions, such as appearance in court. At least one commentator has even argued for probationers and parolees to post a bail-like amount to assure that they remain law abiding.¹¹² Those unable to self-finance would have access to a bail-type bondsmen. The proposed structure combines privatization with traditional government oversight, and again uses money as the primary guarantor of law-abiding behavior. This proposal, like the fines-and-fee structure, ties financial responsibility closely to accountability, and ultimately to individual choice.¹¹³ Both of those features are deemed integral components of neoliberalism.

The concept that individual offenders must pay for the system surrounding their punishment is based on the notion of individual

POLICY INITIATIVE, PUNISHING POVERTY: THE HIGH COST OF PROBATION FEES IN MASSACHUSETTS (Dec. 8, 2016), https://www.prisonpolicy.org/probation/ma_report.html.

¹⁰⁸ According to the Association of Credit and Collection Professionals, lenders that can choose their creditors will, at best, recover 92% of the debt. PIEHL & WILLIAMS, *supra* note 66, at 7. This data indicates that collection rates on fines should be substantially lower, and likely have a ceiling.

¹⁰⁹ HUMAN RIGHTS WATCH, *supra* note 19, at 51.

¹¹⁰ Schloss & Alarid, *supra* note 100, at 239 (citing a study from Wyoming). A number of Missouri jurisdictions, however, detain individuals unable to pay fines imposed upon them. ArchCity Defenders, *supra* note 71. That means either that the “free” private probation service is not entirely cost-free to the jurisdiction and its taxpayers or that those costs are carried by a third party, such as the state.

¹¹¹ For a comprehensive proposal on how to address the proliferation of criminal justice debt and its negative ramifications, see generally ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, THE END OF DEBTORS’ PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2015–2016).

¹¹² REYNOLDS, *supra* note 103.

¹¹³ *Id.* at i. Cf. Marsh & Gerrick, *supra* note 92, at 117–19.

responsibility.¹¹⁴ After all “neoliberalism prioritises individual responsibility for offending behavior and accords a lesser degree of attention to the social context of crime.”¹¹⁵ This assumption of individual culpability allows for increased punitiveness,¹¹⁶ and may also explain why judges are generally reluctant to acknowledge indigency. Monetary payments are ultimately meant to approximate the total costs the criminal justice system incurred for a violation of community norms. They function, therefore, both as accountability measures and a typical market response.

The larger issue standing behind these fiscal assessments is the definition of equality. In contrast to Western Europe where fines—or at least further penalties for failure to pay—are based on an assessment of the offender’s financial ability to pay,¹¹⁷ in the United States equality remains conceived as equal treatment without regard to context. Every offender, therefore, receives the same fine. Pilot programs that used fiscal ability to assess the punitiveness of a sanction have been limited over time or quickly abandoned. This approach to equality is tied to strong individualism and a “commitment to individual effort and responsibility.”¹¹⁸ While Americans apparently believe in welfare for the poor, they equally strongly question whether these programs assist and reward the undeserving.¹¹⁹ A similar belief likely militates against reduced fines, as those unable to pay are more likely suspected of refusing to earn an income or misrepresenting their income level. Fairness therefore has come to be defined as the imposition of the same amount of user fees once someone has violated a regulation.¹²⁰ Suspicions of lack of deservedness are closely connected to race.

¹¹⁴ HUMAN RIGHTS WATCH, *supra* note 19, at 38.

¹¹⁵ Teague, *supra* note 3, at 60; WHITEHEAD, *supra* note 5, at 46.

¹¹⁶ Teague, *supra* note 3, at 55 (explaining that legislatures have increased sentences as a result of the overall punitive climate and neoliberal culture).

¹¹⁷ See, e.g., Patricia Faraldo-Cabana, *Towards Equalisation of the Impact of the Penal Fine: Why the Wealth of the Offender Was Taken into Account*, 3 INT’L J. CRIME, JUST. & SOC. DEMOCRACY 3 (2014) (explaining Europe’s transition to establishing the amount of fines in relation to the offender’s wealth).

¹¹⁸ MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 2 (1999).

¹¹⁹ *Id.* at 2–3 (explaining that Americans largely believe government support should be tied to merit and deservedness).

¹²⁰ Brown, *supra* note 90, at 15 (“[I]t is fair to impose outsized financial burdens for administrating justice on those who run afoul of even the most petty of regulations.”).

White Americans tend to believe that most welfare recipients are black and that they are in that situation because of a lack of work ethic.¹²¹ Therefore, questions of race may (again) overshadow decisions within the criminal justice system that are based on socioeconomic differences.

A less disputed measure than the funding of law enforcement agencies through offenders has been law enforcement receipt of money from the federal government, in the form of grants. Still those have had a substantial impact on local priorities. In addition, some of the federal support has furthered the militarization of police, leading to strained community-police relations.

D. GOVERNMENT GRANTS AND EQUIPMENT “FREEBIES”

Over the last four decades local police have benefitted substantially from grant funding. While most of the grants originate with the federal or state governments, some private grants are also available to select police forces.¹²² In 1997 the Office of Justice programs expended over \$2 billion in grants.¹²³ By 1998, sixty Florida police departments in cities with populations between 10,000 and 49,000 indicated that 5% of their budgets came from grants, with almost half of them budgeting for such funds.¹²⁴ These police agencies signaled positive impact from the grants, including improved relationships with the community.

Some federal funding of local police departments has been criticized as violative of the state-federal separation of policing and as ineffective, if not downright wasteful. The COPS program, for example, which promised an additional 100,000 police officers, never achieved its goal.¹²⁵ In part, police chiefs around the country

¹²¹ GLENS, *supra* note 118, at 3.

¹²² See Sarah Whelan, *Private Funding for Public Safety: Know Where to Look for Grants*, POLICEONE.COM (May 22, 2012), <https://www.policeone.com/grants/articles/5602976-private-funding-for-public-safety-know-where-to-look-for-grants/> (describing corporate foundations, family foundations, and community foundations as public funding sources). In addition, police foundations may funnel money from private corporations to the police. See Walby, Lippert & Luscombe, *supra* note 16.

¹²³ John Van Etten, *The Impact of Grants on Police Agencies*, <https://www.fdle.state.fl.us/cms/FCJJEI/Programs1/SLP/Documents/Full-Text/VanEtten.aspx>.

¹²⁴ *Id.*

¹²⁵ See David B. Muhlhausen & Erica Little, *Grants and Crime Rates: No Connection Except for Waste and Abuse*, 2015 BACKGROUNDER 1, 4 (2007) (describing how Boston's mayor blamed the Bush Administration for his inability to properly staff the city's police department).

seem to have allocated funds to other priorities, and mayors failed to support the staffing levels once the federal grants were discontinued.¹²⁶

The impact of specific grant programs on police-community relations remains largely unexplored.¹²⁷ Presumably some departments were able to improve relations while others may have focused on changes and improvement in other areas. The accountability measurements imposed by the largest of these grant programs, the Edward Byrne Memorial Justice Assistance Grant program (JAG) may have led to more arrests, independent of their impact on the crime rate or public safety.¹²⁸ Some countervailing developments may have further thwarted any positive impact these grants may have had on communities. Despite substantial criticism of the military-style equipment delivered to local law enforcement agencies, a wide variety of programs still allow for new and surplus equipment to be dispensed to local police.¹²⁹ Among these are the so-called 1033 program, named after the section which authorized it, which allows state and local law enforcement to receive military equipment, free of charge, from the Department of Defense, the 1122 program that provides volume discounts for new equipment to be used in counter-drug activities, and the Department of Homeland Security's anti-terrorism grant programs.¹³⁰ The total amount of equipment transferred through these channels in the last two decades runs around \$4.3 billion.¹³¹ Easy access to military grade weaponry has increasingly militarized even local police, smaller and rural departments.

Another indication of the militarization of police is the proliferation of local SWAT teams since the onset of the War on

¹²⁶ *Id.*

¹²⁷ See David Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607, 623 (Dec. 1997) (explaining that community policing has been integrated into the militarization of police).

¹²⁸ See *infra* Section IV.

¹²⁹ See, e.g., NAT'L INST. OF JUSTICE, FUNDING FOR EQUIPMENT, <http://www.nij.gov/funding/g/Pages/equipment-funding.aspx> (listing nine programs that provide funding for equipment purchases).

¹³⁰ Excessive Federal Property, JUST. TECH. INFO. CTR., <https://justnet.org/resources/Excessive-Federal-Property.html> (last visited Mar. 14, 2017); *Law Enforcement Resources*, DEPT OF HOMELAND SEC., <https://www.dhs.gov/law-enforcement-resources>.

¹³¹ Christopher Ingraham, *The Pentagon Gave Nearly Half a Billion Dollars of Military Gear to Local Law Enforcement Last Year*, WASH. POST. WONKBLOG (Aug. 14, 2014).

Drugs.¹³² The spread of such units, and their increased use, may be closely connected to police concerns about the safety of officers.¹³³

Even smaller police departments have used SWAT teams, frequently as patrol units that focus on “Terry stops.”¹³⁴ They seem to apply the “broken windows” theory of policing by addressing not only violent threats but also “illegal parking, loud music, bums, neighbor troubles.”¹³⁵ Yet one of their primary focus points has been executing search and arrest warrants, usually focused on drug offenses.¹³⁶ While research is limited, annually between 50,000 and 80,000 SWAT searches are being executed, many of them involving forced entry.¹³⁷ SWAT raids focus disproportionately on African-Americans, and to a lesser extent Latinos.¹³⁸ These raids, however, do not appear targeted effectively as data confirms that in more than a third of them, no contraband is being found.¹³⁹ Highly publicized cases of false entry have added to distrust in minority communities that feel often not only over-policed but overly militarized.

As military equipment is being given out either without any expectation of compensation or for sharply reduced cost, local police departments are not required to justify their requests or account for their distribution or use of the equipment. Federal grants, on the other hand, require meticulous accounting of allocated resources. With accountability a standard feature of neoliberalism, measurements have become ubiquitous in police departments.

¹³² See Kraska & Cubellis, *supra* note 127 (noting that over 65% of departments requested a SWAT team); Timothy MacDonnell, *When More is Less? SWAT and Procedural Justice*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 135 (2016); COMM. ON POLICING REFORMS, THE CONSTITUTION PROJECT, DEMILITARIZING AMERICA’S POLICE: A CONSTITUTIONAL ANALYSIS 11 (2016) (explaining that the number of SWAT teams increased during the War on Drugs).

¹³³ Kraska & Cubellis, *supra* note 127, at 619–20.

¹³⁴ *Id.* at 616–17.

¹³⁵ See *id.* at 623–24 (quoting a SWAT-type commander).

¹³⁶ AMERICAN CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 31 (June 2014) [hereinafter ACLU, WAR COMES HOME].

¹³⁷ American Civil Liberties Union, *The Excessive Militarization of American Policing* (Apr. 2015).

¹³⁸ ACLU, WAR COMES HOME, *supra* note 136, at 5.

¹³⁹ *Id.* at 35.

IV. PERFORMANCE MEASURES

Among the features considered integral to neoliberalism is individual accountability. In the criminal justice system, this is most palpable in the demand for offender accountability.¹⁴⁰ It may take the form of fines and fees, not only to pay for the harm inflicted but also for the cost the criminal justice system incurred in addressing the rule violation. Another example is drug testing while an offender is under supervision.

Accountability in the form of performance measures is also demanded of organizations and agencies.¹⁴¹ The creation of a performance culture is an aspect of the neoliberal approach.¹⁴² The most widely known police assessment and measurement tool now is Compstat. Compstat allows police, by relying on extensive analysis of data, to react faster to crime and to put in place preventative measures more effectively.¹⁴³

Police performance measures are manifold.¹⁴⁴ Many scholars support broad performance measures that are goal-oriented and include, for example, “citizen satisfaction with police.”¹⁴⁵ Others, such as the New York Police Department (NYPD) under Chief Bratton, advocated most forcefully for reported crime as the

¹⁴⁰ Accountability and individual responsibility extend also to victims or potential victims. Self- or industry-protection in the form of electronic immobilizers and central deadlocking systems in cars or a combination of home security devices have led to a substantial decline in car theft and burglaries. Advocates of the security hypothesis, therefore, urge market incentives and preventive policies to change criminal opportunity. See generally Graham Farrell, Nick Tilley & Andromachi Tseloni, *Why the Crime Drop?*, 43 CRIME & JUST. 421 (2014).

¹⁴¹ Cf. E.R. Maguire, *Measuring the Performance of Law Enforcement Agencies: Part 1 of a 2-Part Article*, 83 CALEA UPDATE MAGAZINE, Sept. 2003 (discussing wide area of organizations, situations and individuals subjected to performance measures within the last two decades).

¹⁴² Cf. WHITEHEAD, *supra* note 5, at 47–48 (discussing introduction of performance culture in British probation service).

¹⁴³ For an introduction to Compstat, see generally BUREAU OF JUSTICE ASSISTANCE, POLICE EXEC. RESEARCH FORUM, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES (2013).

¹⁴⁴ A substantial amount of literature exists on best practices for measuring police performance. See generally MALCOLM K. SPARROW, NEW PERSPECTIVES IN POLICING: MEASURING PERFORMANCE IN A MODERN POLICE ORGANIZATION (Mar. 2015), <http://www.ncjrs.gov/pdffiles1/nij/248476.pdf>. For an outstanding overview of the literature on police performance measures, see Neena Tiwana, Garry Bass & Graham Farrell, *Police Performance Measurement: an Annotated Bibliography*, 4 CRIME SCI. 1 (2015).

¹⁴⁵ Maguire, *supra* note 141.

primary performance measure.¹⁴⁶ In addition to the latter, many police departments emphasize productivity measures, such as numbers of arrests or citations issued.¹⁴⁷ These data points are fraught with challenges, however.

National arrest data have been criticized for being incomparable and unhelpful since there is no agreed upon definition of arrest. In addition, whether an arrest was appropriate in an individual case cannot be determined from the fact that there was an arrest. For citations, there is no national database even though police departments collect such information. There is wide disparity in the use of citations, in both the form of traffic tickets and in lieu of arrests for misdemeanors. Citations and arrest data are frequently classified as “output” rather than “outcome” measures as they measure only activity but do not reflect the value of such activity.¹⁴⁸ Similarly, police frequently count money or drugs seized even though quantity does not capture the effectiveness of law enforcement.¹⁴⁹ Accountability, consistency and efficiency are laudable goals but some measurables fail to capture the full effectiveness of police work, the impact on the community and the effect on public safety and crime rates. For these reasons, commentators have advocated for measures that connote value added, such as an improvement in community-police relations.

Arrest and citation figures do not capture negative externalities of high arrest and citation policies. Those include financial costs to the department and the judicial and corrections systems. An additional negative is the impact on community relations, especially in minority neighborhoods. Trust relationships are depleted through an extensive display and use of force and authority.¹⁵⁰ While multidimensional, community-policing oriented goals are increasingly being proposed and implemented,¹⁵¹ many

¹⁴⁶ *Id.*

¹⁴⁷ SPARROW, *supra* note 144, at 2. For a sharp critique of these measurements, see *id.* at 3–5 (listing examples of performance measuring categories).

¹⁴⁸ Maguire, *supra* note 141.

¹⁴⁹ INIMAI CHETTIAR ET AL., BRENNAN CENTER FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION: A POLICY FRAMEWORK AND PROPOSAL 4 (2013).

¹⁵⁰ For an insightful analogy between crime reduction and crime reduction minus financial cost and use of force as gross and net revenue, see SPARROW, *supra* note 144, at 12–13.

¹⁵¹ Maguire, *supra* note 141.

departments have retained traditional output goals. The larger economic framework in which many police departments operate also reinforces the use of these measures.

Federal grants include specific performance measures. The JAG program, for example, requires the following: number of arrests, of gun crime charges, of warrants, and of task force cases.¹⁵² The problem with these indicators is that, again “[t]hey measure activity, not productivity.”¹⁵³ More problematically, they “distort[] incentives.”¹⁵⁴ While police chiefs recognize the difficulties with these quantitative measurements, to get grants renewed, they have to collect these data points and document effectiveness through them.

The police chief, the local chief judge, or the mayor may also set out success measures in terms of numbers of tickets written or fines imposed. When municipal or police funding depends, in part, on the income from traffic control measures, these measures will be crucial for continuing operations and retaining staffing levels. In these cases, performance evaluations of officers are intimately tied to the number of tickets written. This increases the pressure on officers to issue citations in all situations.

In some jurisdictions, the pressures exerted by performance measures have led to extensive data manipulation. The NYPD, for example, suppressed crime reports and misclassified crimes to create the impression of greater crime drops.¹⁵⁵ “[I]ntense pressure for a reduction in crime numbers is liable — for many reasons well understood throughout private industry and in public management — to produce corruption, manipulation of statistics, and other patterns of behavior not in the public interest. . . .”¹⁵⁶ Some of the data manipulation may also result from rank-and-file opposition to neoliberal reforms and the extensive demands for data measurements. Some officers believe that these performance measures undermine the distinctiveness of policing. Others see the data collections as irrelevant to the primary goal of crime

¹⁵² CHETTIAR ET AL., *supra* note 149, at 24.

¹⁵³ *Id.* (italics omitted).

¹⁵⁴ *Id.* (italics omitted). The Brennan Center report charges that these incentives lead to mass incarceration.

¹⁵⁵ SPARROW, *supra* note 144, at 25–27.

¹⁵⁶ *Id.* at 27.

fighting. Underlying the opposition may be an understanding of policing as a public good rather than a relationship between a service provider and a consumer, which is the way in which neoliberalism views community-police relations.¹⁵⁷

The newer, already available data measurements would counter some of the current, distorting incentives in policing and the demands imposed by the need for alternative funding. They may be more difficult to collect and assess than traditional output measures, however. Those reinforce the strategies used, frequently worsening relationships with the community, especially minority communities. Alternatively, communities may use neoliberal tools by demanding that police treat them as “customers.” That approach would require police to fulfill customer satisfaction demands.¹⁵⁸ As currently implemented, however, the neoliberal market orientation has not only detrimentally impacted police-community relations but also increased the dangers inherent in police-citizen encounters.

V. INCREASING THE STAKES: DANGERS IN POLICE-CITIZEN ENCOUNTERS

The assessment of inappropriately high criminal justice fees (and fines) has already led to a loss of legitimacy for law enforcement, at least in certain communities, “by supporting the perception that the [justice] system privileges budgetary imperatives over the needs of justice.”¹⁵⁹ As this perception carries from traffic enforcement through to wider policing activities the police may further lose legitimacy, especially in minority communities. There the impact is most starkly experienced in

¹⁵⁷ See MARK BEVIR, *DEMOCRATIC GOVERNANCE* 238–41 (2010) (discussing police officer responses to neoliberal reforms).

¹⁵⁸ See Rob Voigt et al., *Language from police body camera footage shows racial disparities in officer respect*, 114(25) *PROCEEDINGS OF NAT'L ACADEMY OF SCI.* 6521 (2017), <http://www.pnas.org/content/114/25/6521.full.pdf> (documenting substantial disparities in courtesy and respect police officer display toward black, as compared with white, community members in traffic stops).

¹⁵⁹ *CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL*, *supra* note 63, at 7; see also ArchCity Defenders, *supra* note 71, at 1–2, 15, 19 (describing the legitimacy problems surrounding the St. Louis municipal court system).

light of disproportionately high levels of policing and the lack of individual and community resources.¹⁶⁰

The militarization of the police has also been felt most in inner city minority communities. Confrontational street tactics, such as New York City's stop-and-frisk, have been used largely in select neighborhoods.¹⁶¹ In other parts of the country minority drivers experience a larger number of stops, often for very minor traffic infractions. SWAT-style arrests predominately target African-American and Latino households. Combined, these experiences, driven by the availability of military-style equipment, by military-style training,¹⁶² and by numerically focused measurements, have led to the deterioration of police-community relations in many areas of the country. The reactions of these disadvantaged and highly policed communities to recent highly publicized killings of African-Americans reflect pent-up frustrations with their overall treatment by law enforcement agencies and city governments. Some have argued that the federal support for local police agencies has not only contributed to their militarization but also has removed accountability to municipal governments and local communities.¹⁶³ The problem may yet be farther reaching as local governments have lost the confidence of parts of their communities because of the way in which they are being policed. Yet, communities and neighborhoods are not homogeneous. Even within minority and low-income communities, support for police exists.¹⁶⁴

¹⁶⁰ Cf. CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, *supra* note 63, at 9.

¹⁶¹ NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, STOP AND FRISK REPORT (1999), https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf. See also Brennan Center for Justice, Ames Grawert & James Cullen, *Fact Sheet: Stop and Frisk's Effect on Crime in New York City* (Oct. 7, 2016), <https://www.brennancenter.org/analysis/fact-sheet-stop-and-frisks-effect-crime-new-york-city>; Benjamin Mueller, *New York Police Dept. Agrees to Curb Stop-and-Frisk Tactics* (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/nyregion/new-york-police-dept-stop-and-frisk.html>.

¹⁶² This type of training reinforces already existing approaches to police-citizen encounters, which require officers to establish and defend their authority.

¹⁶³ See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 944 (2015) (describing the erosion of accountability due to decreased budgetary constraints).

¹⁶⁴ See EKINS, *supra* note 46, at 12–13 (detailing support for police along, among others, racial, age, income, and educational lines). In fact, minority communities are often split in their demands for greater enforcement and harsher laws. See, e.g., MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 191–95 (2015) (documenting widespread support in New York City's African-American community for Rockefeller drug laws). See generally MARY PATILLO, *BLACK ON*

While police agencies, like any organization, may harbor biased and trigger-happy officers, the larger problems that underpin the ongoing relationship crisis derive at least in part from the overall neoliberal structures that support current practices. Because of financial pressures on today's police departments and the need for police to avail themselves of alternative funding sources that enhance community-police mistrust, individual citizen-police encounters carry higher stakes for both sides than ever before. They are fraught with heightened potential for conflict. This makes policing more confrontational and more dangerous for both police and citizens.

After all, otherwise low-stakes citizen-police encounters now threaten the civilian with forfeiture, fines, and fees that will impose a substantial diminution of family resources, if those are even available.¹⁶⁵ In addition, individuals whose licenses have been suspended for failure to pay or appear, or for whom arrest warrants have been issued for these reasons, are in greater danger of being stopped.¹⁶⁶ That makes a large number of traffic encounters unnecessarily dangerous.¹⁶⁷ In addition, military-style encounters also impact citizens emotionally, triggering a loss of self-regard, and may lead to a self-perception of criminality.¹⁶⁸

THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY (2007) (discussing the impact of race and class on urban gentrification in a Chicago neighborhood).

¹⁶⁵ Some of those with arrest warrants for failure to pay may fear yet harsher ramifications, such as deportation. Shakeer Rahman & Robin Steinberg, Opinion, *Sanctuary Cities in Name Only*, N.Y. TIMES A27 (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/opinion/sanctuary-cities-in-name-only.html?mcubz=1>.

¹⁶⁶ Out of Ferguson's population of approximately 21,000, over 16,000 had outstanding arrest warrants. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., FERGUSON REPORT, *supra* note 1, at 6, 55.

Psychological reactions to legal debt—decreased “self-worth, self-respect, and self-determination”—may also result in bitterness toward law enforcement agencies. Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 217 (2016).

¹⁶⁷ For a discussion of potential dangers inherent in any traffic stop, see Jack Dunphy, *The Danger That Traffic Stops Can Present to Police*, NAT'L REV. (Sept. 26, 2015), <http://www.nationalreview.com/article/424661/police-traffic-stops-danger>; Henry Pierson Curtis, *Traffic stops among most dangerous police duties*, ORLANDO SENTINEL (Dec. 9, 2010), http://articles.orlandosentinel.com/2010-12-09/news/os-traffic-stops-deadly-20101209_1_phillipe-lo-uis-officer-jared-famularo-officer-edward-diaz.

¹⁶⁸ There is substantial literature that demonstrates the effect surveillance has on the way in which we think about ourselves. Surveillance structures the lives of those observed and changes the way in which observers think about the surveilled. See, e.g., Neil M.

As police use citizen encounters to bolster budgets and enhance performance measures, for them the stakes to succeed have also increased. The Report on Ferguson noted, “many officers appear to see some residents . . . less as constituents to be protected than as potential offenders and sources of revenue.”¹⁶⁹ That attitude may make officers more reluctant to acknowledge error. Instead they will be more inclined to issue citations and consider forfeitures. In Ferguson, police had internal competitions to see “who can issue the largest number of citations during a single stop.”¹⁷⁰ With higher stakes, job pressures and stress grow, possibly leading to greater perceptions of danger. Those developments will inevitably trigger a spiral that continues to worsen community-police relations.¹⁷¹

The neoliberal funding decreases for government and the attendant drive for accountability and performance measures have been important contributors to the deteriorating relationship between police and over-policed minority communities. Unless these underlying issues are being addressed, it is unlikely that the relationship between the two will improve substantially.

VI. CONCLUSION

The neoliberal economic lens highlights the relationship between economics, ideology, and policing. The current critique of globalization may lead to a rethinking of neoliberalism. Yet, even without a dramatic shift in the economic model, the path of other Western democracies may provide an alternative. As the German state has been retracting under the global neoliberal approach, it has acknowledged that this implies a concomitant limitation on the state’s ability to police its citizens. Criminality has been accepted as normal, as a largely temporary component of the lives

Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935 (2013) (discussing the harms surveillance poses on those watched).

¹⁶⁹ U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., FERGUSON REPORT, *supra* note 1, at 2.

¹⁷⁰ *Id.* at 11.

¹⁷¹ A possible alternative that would lead to less dangerous police-citizen encounters is the greater use of technology for traffic control. Great Britain, for example, has been using speed cameras and ACTV extensively. See, e.g., Helen Wells, *Getting Around and Getting On: Self-Interested Resistance to Technology in Law Enforcement Contexts*, 11 ANNUAL REV. OF L. & SOC. SCI. 175, 189 (2015) (discussing avoidance strategies of the citizens who view themselves as law-abiding).

of a majority of the population. With that recognition comes restrained social control and policing, scaled to the fiscal resources available.¹⁷² If we are unwilling to fund police at the level desired, the solution is not to criminalize the poorest part of the population and impose the fiscal burden for the criminal justice system upon them but rather to restrict enforcement to offenses most corrosive to society.

¹⁷² MICHAEL KUBINK, STRAFEN UND IHRE ALTERNATIVEN IM ZEITLICHEN WANDEL 547–48 (2002).