CHAPTER ONE

POLICING AND PROFIT

When residents of Ferguson, Missouri, took to the streets last August to protest the death of Michael Brown, an unarmed black teenager killed by a white police officer, the events dramatically exposed an image of modern policing that most Americans rarely see: columns of police pointing military weaponry at peaceful protestors.[1] But the ongoing tension between residents and police in Ferguson was also indicative of another, less visual development in how the police are used to oppress impoverished communities: using law enforcement to extract revenue from the poor.

In the late 1980s, Missouri became one of the first states to let private companies purchase the probation systems of local governments.[2] In these arrangements, municipalities impose debt on individuals through criminal proceedings and then sell this debt to private businesses, which pad the debt with fees and interest. This debt can stem from fines for offenses as minor as rolling through a stop sign or failing to enroll in the right trash collection service.[3] In Ferguson, residents who fall behind on fines and don't appear in court after a warrant is

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[1] *See* Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES, Aug. 14, 2014, http://www.nytimes.com/2014/08/15/us/ferguson-missouri-in-wake-of-clashes-calls-to-demilitarize-police.html.

[2] Christine S. Schloss & Leanne F. Alarid, *Standards in the Privatization of Probation Services: A Statutory Analysis*, 32 CRIM. JUST. REV. 233, 234–35 (2007).

[3] According to the executive director of ArchCity Defenders, a St. Louis legal aid organization, the "three main infractions" Ferguson residents are indebted for are "driving without insurance, driving with a suspended license, and driving without registration." Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, MOTHER JONES (Sept. 12, 2014, 5:30 AM), http://www.motherjones.com/politics/2014/09/ferguson-might-have-break-its-habit-hitting-poor-people-big-fines [http://perma.cc/UK2L-SQ5W]. Lawyers from the ArchCity Defenders visited a municipal court in June 2014:

> At one . . . session, a large group of defendants was waiting to resolve tickets for failing to subscribe to the municipality's trash collection service, an infraction that many defendants felt was just another way for the municipality to make money. One man . . . . insisted that he did in fact get rid of his trash, but . . . couldn't afford a subscription to the only city-approved waste collection service.
>
> Another woman . . . was adamant that there were no visible signs that her home didn't have trash service and that she helped maintain the neighborhood by picking up trash from passing cars and cutting the grass of the vacant houses on either side of her property . . . . "They had to come and dig, they had to come and look in my files. There's no way you could tell I don't have trash service, that can is out there . . . ."

ARCHCITY DEFENDERS, MUNICIPAL COURTS WHITE PAPER 16–17, http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/08/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf [http://perma.cc/8BHC-7A3D].

issued for their arrest (or arrive in court after the courtroom doors close, which often happens just five minutes after the session is set to start for the day) are charged an additional $120 to $130 fine, along with a $50 fee for a new arrest warrant and 56 cents for each mile that police drive to serve it.[4] Once arrested, everyone who can't pay their fines or post bail (which is usually set to equal the amount of their total debt) is imprisoned until the next court session (which happens three days a month).[5] Anyone who is imprisoned is charged $30 to $60 a night by the jail.[6] If an arrestee owes fines in more than one of St. Louis County's eighty-one municipal courts, they are passed from one jail to another to await hearings in each town.

The number of these arrests in Ferguson is staggering: in 2013, Ferguson's population was around 21,000[7] and its municipal court issued 32,975 arrest warrants for nonviolent offenses.[8] Ferguson has a per capita income of $20,472, and nearly a quarter of residents and over a third of children live below the poverty line.[9] Court fines and fees are Ferguson's second-largest source of income, generating over $2.4 million in revenue in 2013.[10] Though many of the towns that surround St. Louis draw significant revenue through their courts,[11] Ferguson is an outlier: in 2013, its municipal court issued over twice as many arrest warrants per capita as any other town in Missouri.[12]

Widespread hostility toward Ferguson's municipal court is the tinder that helped set the town on fire after Michael Brown was killed. Professor Jelani Cobb visited the town just after the shooting and saw this hostility as one of the "intertwined economic and law-enforcement

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[4] Lurie & Quandt, *supra* note 3.

[5] *Id.*

[6] *Id.*

[7] *Ferguson (City), Missouri*, U.S. CENSUS BUREAU: ST. & COUNTY QUICKFACTS, http://quickfacts.census.gov/qfd/states/29/2923986.html (last visited Mar. 1, 2015) [http://perma.cc/N4E3-TFJN].

[8] MO. SUPREME COURT, 2013 MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2013, at 302, 303, http://www.courts.mo.gov/file.jsp?id=68905 [https://perma.cc/Y99G-4YGM].

[9] *Selected Economic Characteristics*, U.S. CENSUS BUREAU: AM. FACTFINDER, http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/DP03/0400000US29|1600000US2923986 (last visited Mar. 1, 2015).

[10] CITY OF FERGUSON, ANNUAL OPERATING BUDGET: FISCAL YEAR 2014–2015, at 50, 52, http://www.fergusoncity.com/DocumentCenter/View/1701 [http://perma.cc/BDU4-3WX3].

[11] In Edmundson, another small St. Louis town, the mayor told local police in 2014 that evidence of a "downturn in traffic and other tickets written" was "disappointing" and reminded officers that tickets "add to the revenue on which the [police department] budget is established and will directly affect pay adjustments at budget time." Memorandum from John Gwaltney, Mayor, Edmundson, Mo., to Sergeants and Patrolmen, Edmundson Police Dep't (Apr. 18, 2014), http://www.ksdk.com/story/news/local/2014/04/24/edmundson-write-more-tickets-memo/8115569.

[12] Frances Robles, *Ferguson Sets Broad Change for City Courts*, N.Y. TIMES, Sept. 8, 2014, http://www.nytimes.com/2014/09/09/us/ferguson-council-looks-to-improve-community-relations-with-police.html.

issues underlying the protests."[13] "We have people who have warrants because of traffic tickets and are effectively imprisoned in their homes," a resident told Cobb. "They can't go outside because they'll be arrested. In some cases people actually have jobs but decide the threat of arrest makes it not worth trying to commute outside their neighborhood."[14] Though state legislators are considering various reforms of municipal court practices in response to the protests,[15] Ferguson's budget for 2015 increases the town's reliance on police-issued tickets.[16]

Two months after the protests began they flared again as a result of another form of profit-based policing when an off-duty police officer killed another black teenager, this time in the nearby town of Shaw.[17] This officer was being paid by a private company to patrol the area. Though he was not on duty, the company required him to wear his official uniform.[18] Shaw is among many St. Louis neighborhoods that "pay private companies for the services of public employees to patrol public places."[19] These businesses capitalize on the fact that wealthier neighborhoods like Shaw want (and can afford) more police. In turn, towns can cut official funding to police while ensuring a separate source of income for officers.

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[13] Jelani Cobb, *What I Saw in Ferguson*, NEW YORKER (Aug. 14, 2014), http://newyorker.com/news/news-desk/saw-ferguson?currentPage=all [http://perma.cc/LL4V-RSM6]; *see also* Mike Maciag, *Skyrocketing Court Fines Are Major Revenue Generator for Ferguson*, GOVERNING (Aug. 22, 2014), http://governing.com/topics/public-justice-safety/gov-ferguson-missouri-court-fines-budget.html [http://perma.cc/2DXW-LA3J] ("[A]n assistant professor at the Saint Louis University School of Law . . . said practices of the local court system are a major driver of Ferguson residents' distrust of government and law enforcement."); Robles, *supra* note 12.

[14] Cobb, *supra* note 13 (internal quotation marks omitted).

[15] *See* Marshall Griffin, *Debate Begins on Traffic Revenue Limits in Missouri Legislature*, ST. LOUIS PUB. RADIO (Jan. 22, 2015, 8:48 PM), http://news.stlpublicradio.org/post/debate-begins-traffic-revenue-limits-missouri-legislature [http://perma.cc/H37E-SGY3]; Robles, *supra* note 12. In St. Louis, officials promised to forgive nearly a quarter million outstanding warrants for traffic offenses in response to the protests. Nicholas J.C. Pistor, *St. Louis to Forgive About 220,000 Warrants for Nonviolent Municipal Offenses*, ST. LOUIS POST-DISPATCH (Oct. 1, 2014, 12:00 AM), http://www.stltoday.com/news/local/crime-and-courts/st-louis-to-forgive-about-warrants-for-nonviolent-municipal-offenses/article_7f9dbef3-7409-5e81-ae28-3c79faa8b147.html [http://perma.cc/3BA7-84GU].

[16] *See* Katherine Smith, *Ferguson to Increase Police Ticketing to Close City's Budget Gap*, BLOOMBERG (Dec. 12, 2014, 8:27 AM), http://www.bloomberg.com/news/2014-12-12/ferguson-to-increase-police-ticketing-to-close-city-s-budget-gap.html [http://perma.cc/NPE8-REV2].

[17] Paul Hampel & Valerie Schremp Hahn, *Violence Erupts After Vigil at Shaw Shooting Scene in St. Louis*, ST. LOUIS POST-DISPATCH (Oct. 10, 2014, 7:15 AM), http://stltoday.com/news/local/violence-erupts-after-vigil-at-shaw-shooting-scene-in-st/article_84c932e2-00b9-524b-8188-145109d228ac.html [http://perma.cc/L64B-TLAP].

[18] Jeremy Kohler, *Public Police, Private Employer: A St. Louis Oddity*, ST. LOUIS POST-DISPATCH (Oct. 9, 2014, 6:00 PM), http://stltoday.com/news/local/crime-and-courts/public-police-private-employer-a-st-louis-oddity/article_f57f630d-cd97-516b-b619-1dc7fd2fea33.html [http://perma.cc/5T7X-UK9D].

[19] *Id.*

These trends of allocating police according to profit and criminalizing poverty to raise revenue extend well beyond St. Louis. Section A of this Chapter examines three examples of how governments raise revenue through policing. Section B identifies how this trend perverts the role of police. Section C examines when these developments might be unlawful.

A.

In April 2012, Tom Barrett was arrested for stealing a can of beer from a convenience store in Augusta, Georgia.[20] When Barrett appeared in court, he was offered the services of a court-appointed attorney for a $80 fee.[21] Barrett refused to pay and pled "no contest" to a shoplifting charge. The court sentenced Barrett to a $200 fine plus a year of probation.[22] Barrett's probation terms required him to wear an alcohol-monitoring bracelet. Even though Barrett's sentence did not require him to stop drinking alcohol (and the bracelet would thus detect all the alcohol Barrett chose to drink with no consequences), he was ordered to either rent this bracelet or go to jail.[23] The bracelet cost Barrett a $50 startup fee, a $39 monthly service fee, and a $12 daily usage fee. Though Barrett's $200 fine went to the city, these other fees (totaling over $400 a month) all went to Sentinel Offender Services, a private company.

Unable to pay Sentinel's fees, Barrett spent more than a month in jail before he convinced a friend to lend him the $80 startup fee.[24] But Barrett, whose only source of income at the time was selling his blood plasma, struggled to keep up with Sentinel's fees. "You can donate plasma twice a week as long as you're physically able to . . . . I'd donate as much plasma as I could and I took that money and I threw it on the leg monitor."[25] As Barrett began skipping meals to pay Sentinel, his protein levels dropped so much that he was ineligible to donate plasma. After Barrett's debt grew to over $1,000, Sentinel obtained a warrant for his arrest.[26] Barrett was arrested and told by a judge that

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[20] HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 34 (2014), http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [http://perma.cc/K6WC-T2XT].

[21] Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014, 4:58 PM), http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor.

[22] Terry Carter, *Privatized Probation Becomes a Spiral of Added Fees and Jail Time*, A.B.A. J. (Oct. 1, 2014, 5:50 AM), http://www.abajournal.com/magazine/article/probationers_prison_privatized_supervision_becomes_a_spiral_of_added_fees_j [http://perma.cc/YYK2-AU78].

[23] HUMAN RIGHTS WATCH, *supra* note 20, at 34–35.

[24] *Id.* at 34.

[25] *Id.* (internal quotation marks omitted).

[26] *Id.* at 34–35.

he could stay out of jail if he paid Sentinel several hundred dollars.[27] Barrett was still unable to pay: "I'm thinking, 'But the whole problem is, I don't have money.' So they locked me up. And I just said, 'Golly.'"[28]

Barrett's story cuts across several aspects of how local governments use policing, how private companies profit from policing, and how poor people experience policing. This section describes three examples of this development: (1) "usage" fees imposed by criminal courts, (2) private probation supervision, and (3) civil forfeiture.

1. Usage Fees. — The first example of how governments use policing to raise revenue is through fees imposed on arrestees and defendants for their arrest, adjudication, and incarceration. For example, local governments charge defendants for police investigation,[29] prosecution costs,[30] a public defender,[31] a trial (sometimes with different fees depending on how many jurors a defendant requests),[32] and incarceration.[33]

Some cities charge all arrestees a fee, thereby raising revenue "based on only the say-so and perhaps even the whim of one arresting officer, regardless of whether the arrestee was ever prosecuted or convicted, and regardless of whether the arrest was lawful in the first place."[34] In some of these schemes, fees are a way for prosecutors to avoid any inquiry into guilt. For example, arrestees in Washington, D.C., can pay police to end a case on the spot rather than exercise

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[27] *Id.* at 35.

[28] *Id.*

[29] *See, e.g.*, MICH. COMP. LAWS ANN. § 769.1f(2) (West 2000 & Supp. 2014); 42 PA. CONS. STAT. ANN. § 9728(g) (West 2014); WASH. REV. CODE ANN. § 10.01.160(2) (West 2002 & Supp. 2014); WIS. STAT. § 973.06(1)(a) (2011).

[30] *See, e.g.*, GA. CODE ANN. § 17-11-1 (2013); IOWA CODE ANN. § 815.13 (West 2003); MICH. COMP. LAWS § 769.1f(1) (2014); OHIO REV. CODE ANN. § 2947.23(A)(1) (LexisNexis 2010); 16 PA. CONS. STAT. ANN. § 1403 (West 2001) ("In any case where a defendant is convicted and sentenced to pay the costs of prosecution and trial, the expenses of the district attorney in connection with such prosecution shall be considered a part of the costs of the case and be paid by the defendant.").

[31] For decades, "every jurisdiction in the United States has [had] either a statutory or judicially recognized ability to order recoupment" from defendants for the expense of providing them Sixth Amendment counsel. Beth A. Colgan, Essay, *Paying for* Gideon, 99 IOWA L. REV. 1929, 1931 n.4 (2014).

[32] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 102.004(a) (West 2006); VA. CODE ANN. § 17.1-275.5.A (2010 & Supp. 2014). In Washington, a trial by twelve jurors requires double the fee of a trial by six jurors. WASH. REV. CODE. ANN. § 36.18.016(3)(a) (West Supp. 2014).

[33] *See, e.g.*, ALA. CODE § 14-6-22(a)(1)–(3) (2011); FLA. STAT. ANN. § 951.033(2)–(3) (West 2012); 730 ILL. COMP. STAT. 5/3-7-6, 125/20(a) (2013); MICH. COMP. LAWS ANN. § 801.83 (West 1998 & Supp. 2014); MO. ANN. STAT. § 221.070 (West 2013); N.C. GEN. STAT. ANN. § 7A-313 (West 2013).

[34] Markadonatos v. Vill. of Woodridge, 760 F.3d 545, 567 (7th Cir. 2014) (en banc) (Hamilton, J., dissenting).

their right to adjudicate the charge.[35] Prosecutors can get in on the action too by promising to suspend prosecution in exchange for a fee.[36] For example, Oklahoma prosecutors can offer to stall a case for a fee of $40 per month for up to three years, with proceeds funding the prosecutor's office.[37] State law initially limited fees to $20 a month; after this limit was raised to $40 in 2009, the number of suspects on supervision rose from 16,000 in 2008 to 38,000 in 2010.[38] Unlike plea bargains, these agreements require no finding or admission of guilt.

Because these fees are not governed by the substantial legal constraints that states impose on locally raised taxes,[39] they have emerged as an easy source of revenue for cash-strapped municipalities.[40] In 1991, around a quarter of inmates said they owed court-imposed fines, restitution, or fees.[41] By 2004, the last time the Department of Justice ran this survey,[42] that number was sixty-six percent.[43] The exceptional sovereign authority to proscribe and punish crime makes law enforcement a uniquely lucrative monopoly.

These fees serve to criminalize poverty and severely amplify the burden that criminal punishment imposes on poor communities. In many jurisdictions, debt from criminal courts carries interest and late fees,[44] thereby multiplying the financial burden solely on those debtors

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[35] *See, e.g.*, Fox v. District of Columbia, 851 F. Supp. 2d 20, 24 (D.D.C. 2012).

[36] *See generally* NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, PRETRIAL DIVERSION IN THE 21ST CENTURY 8, 15 (2009), http://napsa.org/publications/NAPSAPretrialPracticeSurvey.pdf [http://perma.cc/R2E7-GL8Y].

[37] OKLA. STAT. ANN. tit. 22, §§ 305.1, 991d(A)(1) (West Supp. 2015).

[38] *See* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1188. This change was specifically intended to offset a cut to prosecutor funding. *Id.*

[39] *See generally* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND 76–90 (2008).

[40] *See, e.g.*, CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADM'RS, 2011–2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 1 (2011), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx [http://perma.cc/FB2T-CYB9] ("In traffic infractions, whether characterized as criminal or civil, court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation."); *id.* at 9 (criticizing how these schemes "recast the role of the court as a collection agency for executive branch services"); *see also* Markadonatos v. Vill. of Woodridge, 739 F.3d 984, 1001 (7th Cir.) (Hamilton, J., dissenting) ("For governments under fiscal pressure, the temptation may be strong to raise money with such fees on a group unlikely to have political clout."), *aff'd en banc*, 760 F.3d 545 (7th Cir. 2014).

[41] 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, 1769 fig.1 (2010).

[42] *See* BUREAU OF JUSTICE STATISTICS, DATA COLLECTION: SURVEY OF INMATES IN STATE CORRECTIONAL FACILITIES (2004), http://www.bjs.gov/index.cfm?ty=dcdetail&iid=275 [http://perma.cc/VF9J-7RRV].

[43] Harris, Evans & Beckett, *supra* note 41, at 1769. In twelve states, over eighty percent of surveyed inmates reported these debts. *See id.* at 1772–73. These figures are based on prison inmates serving felony prison sentences, so the rates may be higher when counting probationers not sentenced to prison. *Id.* at 1770.

[44] *See, e.g.*, ALA. CODE § 12-17-225.4 (2012); CAL. PENAL CODE § 1214.5 (West 2004); FLA. STAT. ANN. § 28.246(6) (West 2010); 730 ILL. COMP. STAT. 5/5-9-3(e) (2013); MICH. COMP. LAWS

who are least able to pay. When probation or parole terms require payment of these fees, inability to do so can foreclose housing,[45] welfare assistance,[46] and employment options.[47] When coupled with these debilitating collateral consequences, these debts impose an enduring burden that can exceed the penalty imposed for a crime.

2. For-Profit Probation Supervision. — Some jurisdictions go further than simply charging for "use" of the criminal legal system and directly sell components of law enforcement to private businesses. While private prisons have received broad scrutiny,[48] privatization of probation supervision places discretionary law enforcement authority directly in the hands of private businesses. In these arrangements, a business buys exclusive use of a local government's probation system in exchange for assuming its full cost.[49] These companies charge cities nothing and depend entirely on the fees they charge probationers.[50] The entire business model is to pad state punishment with additional fees for whoever can't pay a fine immediately. These fees can amount to double or triple the fine directly imposed by the court.[51]

The traditional purpose of probation is to provide an opportunity for criminal offenders to earn relief from incarceration if they can meet regularly with a probation officer and satisfy various judge-ordered benchmarks for good behavior.[52] In this arrangement, probation officers are usually court employees, so their conduct is both protected and governed by the principles that apply to other judicial officers.[53] But a business whose only work is to extract fees from probationers is simply a debt collector backed by carceral power.[54] Unlike when probation officers work for a court, local governments have little control

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ANN. § 600.4803(1) (West 2013); N.C. GEN. STAT. § 7A-321(b)(1) (2013); TEX. LOC. GOV'T CODE ANN. § 133.103(a) (West 2008); WASH. REV. CODE. ANN. § 4.56.110(4) (West Supp. 2014).

45 Failure to abide by probation or parole terms can make a debtor ineligible for public housing benefits. 42 U.S.C. §§ 1437d(l)(9)(2), 1437f(d)(1)(B)(v)(II) (2012), *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

46 *See* 7 U.S.C. § 2015(k)(1)(B) (2012); 42 U.S.C. § 608(a)(9)(A)(ii).

47 *See* Harris, Evans, & Beckett, *supra* note 41, at 1762.

48 *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 440 n.4 (2005) (listing sources).

49 Carter, *supra* note 22; Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER, June 23, 2014, http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc [http://perma.cc/423E-YFSD].

50 *See* Carter, *supra* note 22 ("The industry's pitch caught on with court systems looking for ways to save money and ensure collection of what they're owed: You pay us nothing; we supervise them and collect revenues for you.").

51 *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 475 (2011).

52 *See generally* HOWARD ABADINSKY, PROBATION AND PAROLE (8th ed. 2003).

53 *See infra* note 114 and accompanying text.

54 *See* Carter, *supra* note 22 ("In states that permit private probation, the companies become, in effect, collection agencies for the courts, routinely holding the threat of arrest over the heads of those who can't pay."). *See generally* Stillman, *supra* note 49.

over how fee schemes are structured or which probationers are hounded. Yet these companies threaten probationers with incarceration or arrest, often via coercion from state officials.[55] Then, when a company decides a probationer is not complying with probation terms (or is no longer worth the cost of supervising from among all the probationers who are also not complying), the company can obtain an arrest warrant and summon the probationer to court. If a probationer fails to appear (often because the probation company has been threatening jail time based on the failure to pay fines), she can be jailed for contempt. If the probationer does show up, the decision to revoke probation is directly informed by the recommendation and representations of the probation company, with the probationer rarely represented by counsel.[56]

3. Civil Forfeiture. — Another way municipalities extract revenue through policing is civil forfeiture, a mechanism by which police confiscate assets that they claim are linked to crime. These seizures can happen even when the property owner is never arrested (or is acquitted of the underlying crime), so long as the police assert that the seized property was probably used in a crime.[57] If property owners do not come to court to contest a seizure within a certain time, police sell the property and keep the proceeds.[58] Police often preempt this process by offering not to charge the underlying crime or initiate civil sanctions

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[55] *See, e.g.*, Stillman, *supra* note 49 ("Last June, [Harriet] Cleveland received a letter from the District Attorney's office. 'Balance Due: $2,714,' it warned. 'You MUST pay this amount in full . . . or you may be ARRESTED.' Cleveland noticed that the amount she owed was far higher than the original fees she had chipped away at for more than two years . . . ."). These threats can extend to friends and family members: Cleveland, a forty-nine-year-old mother of three who was put on probation with a private company for driving without a license and insurance, reported that her probation officer "had taken down the names and phone numbers of her family members" and began telling "her daughter, her estranged mother, [and] her daughter's paternal grandmother . . . that if she couldn't come up with the money she would be sent to 'sit out' her probation debts in jail." *Id.* One Alabama judge who temporarily enjoined a municipal court's private probation system called it "a judicially sanctioned extortion racket." Burdette v. Town of Harpersville, No. CV 2010-900183, 2012 WL 2995326, at *1 (Ala. Cir. Ct. Shelby Cnty. July 11, 2012) (order granting a motion for a preliminary injunction hearing).

[56] *See, e.g.*, Stillman, *supra* note 49 ("Many cases are resolved in less than two minutes, without a lawyer representing the defendant or a court reporter present.").

[57] *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) (holding that "no personal conviction of the offender is necessary to enforce a forfeiture"); *see also* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361–62 (1984) (holding that even acquittal doesn't estop forfeiture).

[58] The fundraising justification for civil forfeiture statutes was celebrated in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989): "[T]he Government has a pecuniary interest in forfeiture . . . . The sums of money that can be raised for law enforcement this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted." *Id.* at 629 (footnote omitted).

(such as taking away the property owner's children) if the property owner promises not to contest the seizure.[59]

Civil forfeiture lets governments aggrandize their criminal authority without actually operating through criminal law. For example, police seize family homes based on allegations that a resident sold drugs or stop motorists whom they suspect might be transporting cash (even for completely benign purposes) and then seize assets based on suspicion that criminals often use these kinds of assets.[60] The legality of these seizures generally turns on the conceit that a forfeiture action is against property, not a person. This conceit has operated for centuries without any requirement that the government prove any underlying crime.[61] While civil forfeiture may seem unfair, it has been justified on the grounds that it "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable."[62]

Beginning with the war on drugs, civil forfeiture has become more a way to fund supposed crime-fighting than a way to actually fight crime. Before the modern federal forfeiture statute was enacted in 1970, "forfeiture outside the maritime context had been largely dormant."[63] This statute was later expanded to allow the Department

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[59] *See* Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 207 (2011). For vivid accounts of this coercion, see Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, http://www.newyorker.com/magazine/2013/08/12/taken [http://perma.cc/F6GG-73S5]; and Danny Robbins, *Texas DA Reportedly Offered Leniency for Cash*, HOUS. CHRON. (Oct. 25, 2011), http://www.chron.com/news/article/Texas-DA-reportedly-offered-leniency-for-cash-2235636.php [http://perma.cc/43MP-BW5A].

[60] Robert O'Harrow Jr. & Michael Sallah, *Police Intelligence Targets Cash*, WASH. POST, Sept. 7, 2014, http://www.washingtonpost.com/sf/investigative/2014/09/07/police-intelligence-targets-cash [http://perma.cc/N6K3-NLHX]. These efforts are often the product of sophisticated coordination between state and federal law enforcement officials. Using privately maintained networks, police exchange "law enforcement sensitive information about traffic stops and seizures, along with hunches and personal data about drivers, including Social Security numbers." *Id.* These private networks circulate information that is gathered from official police activity and "funneled to the DEA, ICE, CBP and other federal agencies." *Id.* The company that runs this network was founded through a grant from the Department of Homeland Security and has since received over $2.5 million in contracts with various federal agencies. *Id.*

[61] *See The Palmyra*, 25 U.S. (12 Wheat.) at 14 (upholding seizure of a Spanish ship that had fired on an American one because the ship itself was "the offender"). In a 1996 case upholding the seizure of a car in which the owner's husband had sex with a prostitute (without the owner's knowledge), the Court explained that civil forfeiture was "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." Bennis v. Michigan, 516 U.S. 442, 453 (1996) (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)) (internal quotation marks omitted).

[62] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974).

[63] El-Ali v. State, 428 S.W.3d 824, 828 (Tex. 2014) (Willett, J., dissenting); *see also* Stephan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1916–23 (1998) (book review).

of Justice to pocket proceeds from forfeitures and to allow state police to initiate seizures and keep up to 80% of the proceeds.[64] Federal agencies ranging from the Postal Service to the Department of the Treasury are now authorized to fund themselves through forfeitures.[65] In thirty-nine states, police departments are also allowed to keep forfeiture proceeds for their own use.[66] Since 2001, local police have seized over $2.5 billion through the federal statute, 81% of which came from people who were not charged with a crime.[67] Police used this revenue to pay for everything from informants and weaponry to publicity efforts (such as clowns for parties and trading cards with pictures of officers) and luxury vehicles.[68]

Civil forfeiture is even used for noncriminal conduct. For example, the IRS has a practice of seizing bank accounts to which businesses have made individual deposits smaller than $10,000 based on a suspicion that these deposits are meant to avoid income-reporting requirements.[69] States even use civil forfeiture to enforce licensing requirements, such as when "forty Detroit police officers dressed in commando gear"[70] raided an event at the Contemporary Art Institute of Detroit based on a warrant charging that the gallery had sold beer without a license.[71] Though this warrant "did not authorize any arrests or searches of patrons," police detained 130 patrons and seized the cars of 44.[72] After some of the patrons sued, the city insisted it

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[64] As a result, local police can bypass restrictions imposed by state civil forfeiture statutes and directly earn a predictable share of assets they seize through the federal law. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 51–53 (1998). These changes were meant "to encourage more robust use" of the statute. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 868 (2014). Though the DOJ has announced plans to limit one aspect of this program, initial projections suggest that the "new policy at most will restrict about 3 percent of all federal forfeiture revenue." Radley Balko, *How Much Civil Asset Forfeiture Will Holder's New Policy Actually Prevent?*, WASH. POST: THE WATCH (Jan. 20, 2015), http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent/ [http://perma.cc/M742-NWZ3].

[65] Lemos & Minzner, *supra* note 64, at 870.

[66] Marian R. Williams, *Civil Asset Forfeiture: Where Does the Money Go?*, 27 CRIM. JUST. REV. 321, 324–25 (2002).

[67] Robert O'Harrow Jr. & Steven Rich, *Asset Seizures Fuel Police Spending*, WASH. POST, Oct. 11, 2014, http://washingtonpost.com/sf/investigative/2014/10/11/cash-seizures-fuel-police-spending [http://perma.cc/YA6P-ME4M].

[68] *Id.*

[69] Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES, Oct 25, 2014, http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html.

[70] Sarah Stillman, *SWAT-Team Nation*, NEW YORKER (Aug. 8, 2013), http://www.newyorker.com/news/daily-comment/swat-team-nation [http://perma.cc/9DV2-QRDA].

[71] Mobley v. City of Detroit, 938 F. Supp. 2d 669, 675 (E.D. Mich. 2012).

[72] *Id.* Detained patrons "had to pay more than a thousand dollars for the return of their cars; if payment wasn't made promptly, the car would become city property." Stillman, *supra* note 59.

could seize any vehicle used to drive someone "to the location of an unlawful sale of alcohol."[73] For struggling cities like Detroit, these schemes promise an easy source of revenue.[74]

B.

The three examples listed in section A by no means cover the full range of how profit motives are changing policing. Instead, they each illustrate the idea that policing can be a source of revenue rather than a broadly socialized public good.[75] In turn, decisions about which laws to enforce and how people should be punished are driven by profit. Instead of distributing the cost of policing throughout society, police are allowed to single out who will shoulder this burden. Section B of this Chapter examines how this transformation threatens to pervert the role of policing.

Using law enforcement to raise revenue is part of a larger trend of thinking about government through the logic of business.[76] In the criminal context, critiques of privatization has primarily focused on how these developments transfer state authority to private actors.[77]

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[73] *Mobley*, 938 F. Supp.2d at 677. The court disagreed and enjoined the city's "widespread practice" of "detaining, searching, and prosecuting large groups of persons" where alcohol was served without a license and "impounding all the cars that are driven to such places, based solely on the drivers' mere presence." *Id.* at 684.

[74] For example, between 2003 and 2007, the revenue that Detroit raised through civil forfeiture rose more than fifty percent to at least $20.6 million. George Hunter & Doug Guthrie, *Police Property Seizures Ensnare Even the Innocent*, DETROIT NEWS, Nov. 12, 2009, http://www.detroitnews.com/article/20091112/METRO/911120388 [http://perma.cc/BBM2-TB2S].

[75] *See* Paul LaCommare, *Generating New Revenue Streams*, POLICE CHIEF, June 2010, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2108&issue_id=62010 [http://perma.cc/5QM9-NRG7] (proposing dozens of creative ways for police to generate revenue); *see also* Thomas B. Edsall, Op-Ed., *The Expanding World of Poverty Capitalism*, N.Y. TIMES, Aug. 26, 2014, http://nytimes.com/2014/08/27/opinion/thomas-edsall-the-expanding-world-of-poverty-capitalism.html; John Schwartz, *Pinched Courts Push to Collect Fees and Fines*, N.Y. TIMES, Apr. 6, 2009, http://www.nytimes.com/2009/04/07/us/07collection.html.

[76] *See, e.g.*, Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, *in* GOVERNMENT BY CONTRACT 128 (Jody Freeman & Martha Minow eds., 2009); Jon Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1156 (2015) (reviewing NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE (2013)). For analysis of how this logic maps on to policing, see Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 65–66 (2004); and David Alan Sklansky, Essay, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 96–99 (2006).

[77] This line of critique examines the structure of delegation and emphasizes how law enforcement responsibility is placed where it does not belong. *See, e.g.*, Dolovich, *supra* note 48, at 516; Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 297; Sklansky, *supra* note 76, at 94–101. Other scholarship has focused on how private parties pressure political actors to outsource government functions and take other action that benefits private contractors. *See, e.g.*, PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 40–41 (2007); Alfred C. Aman Jr., *Privatization and Democracy: Resources in Administrative Law*, *in* GOVERNMENT BY CONTRACT, *supra* note 76, at 261, 274–75;

But the examples in section A share another important feature, regardless of whether a private actor is involved: a financial motive structured right into the immense discretion (on the part of police, prosecutors, or judicial officers) that runs law enforcement.[78] These actors then use their considerable discretion to shape not only the substance of criminal law but also its funding structure, in the way a legislature normally would.[79] Budget authorities have even started to cut police funding in response to these departments' raising their own revenue, in turn spurring police to raise even more money in these ways.[80]

Coupling discretionary police power with an ability to raise revenue amplifies the pathologies that are perverting modern criminal justice. By enacting both more and broader criminal laws, legislatures have delegated immense power to police and prosecutors to choose which crimes to investigate, prosecute, and punish.[81] When this discretion encompasses an ability to extract revenue, even more legislative power is delegated since these agencies can both avoid and override normal budgeting politics.[82] This lack of political accountability is compounded by the fact that offender-funded policing solely burdens a uniquely marginalized political minority. Indeed, attempts to raise revenue through policing have been described as a regressive tax, turning the poorest segments of the population into an easy source of revenue, raised based on the discretionary whim of executive actors.[83]

Profit motives also distort the discretion of police, prosecutors, courts, and local officials in more concrete ways. When courts are used to raise money, officials have less incentive to make adjudications fair: recall Ferguson, where residents who cannot afford traffic fines must appear in a court session that is open only to whoever arrives in the first five minutes, with arrest warrants (and more fees) for anyone who shows up later. Likewise, in private probation, a private compa-

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Dolovich, *supra* note 48, at 523–36. One other type of critique emphasizes how private counterparts to police might resemble or cooperate with the state to an extent that they blur the category of state action. *See, e.g.*, Joh, *supra* note 76, at 84–86, 90–118; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1170, 1229–73 (1999).

78 *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 41–43 (2012).

79 *See* Lemos & Minzner, *supra* note 64, at 871–75.

80 *See* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007).

81 *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–23 (2001).

82 *See id.* at 554–56; Lemos & Minzner, *supra* note 64, at 871–75 (explaining how executive agencies that can raise revenue expand their authority and funding); *see also* Blumenson & Nilsen, *supra* note 64, at 86 (arguing that the federal civil forfeiture statute may be an unconstitutional delegation of lawmaking authority since "[a]gencies that can finance themselves through asset seizures need not justify their activities through any regular budgetary process").

83 Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. (forthcoming 2015) (manuscript at 5–6).

ny decides who comes to court for alleged probation violations. A company employee is then the chief witness to alleged violations and also tells the court whether to jail the probationer. This entire process is informed by the company's financial stakes. For example, if a probationer is so destitute that she could never pay a fee, it is much cheaper for the company to demand her incarceration than to continue to supervise probation. On the other hand, a company has little financial incentive to report someone who pays fees but violates more substantive conditions. Civil forfeiture changes police behavior too: the allure of cash diverts police attention from nonfinancial crimes toward more lucrative drug cases. Within drug cases, police prefer to raid drug buyers instead of sellers because the former are more likely to have cash.[84] Some police departments even select raid targets based on "wish lists" of cars or consumer electronics they covet.[85]

To be sure, some of these attempts to monetize law enforcement began with benign intentions. For example, opportunities to conditionally avoid prosecution or incarceration could be thought of as offers of leniency. But not only does charging money for these options necessarily discriminate against the poor, allowing these programs to generate revenue also tends to corrupt whatever value they might otherwise provide.[86] More broadly, the examples described can all involve offenses that need not carry direct prison time and thus do not trigger costly procedural protections such as the right to counsel.[87] In comparison to expensive mass incarceration, this approach allows governments to target and sort certain populations through measures that are not just cheaper than normal criminal adjudication but can also raise money. Through these schemes, policing is not aimed at identifying culpability and gathering evidence but at aggressively managing

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[84] Lemos & Minzner, *supra* note 64, at 869.

[85] Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES, Nov. 9, 2014, http://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html.

[86] For example, in 2008, a study found greater recidivism among a portion of 420 actual domestic-abuse offenders who were randomly sentenced to enroll in programs specifically aimed at preventing domestic violence over those who were sentenced to nothing or required to simply return to court for consultation. Melissa Labriola et al., *Do Batterer Programs Reduce Recidivism? Results from a Randomized Trial in the Bronx*, 25 JUST. Q. 252, 258, 276 (2008). Likewise, in 2013, a state-run study in Pennsylvania "found that 67 percent of inmates sent to halfway houses were rearrested or sent back to prison within three years, compared with 60 percent of inmates who were released to the streets." Sam Dolnick, *Pennsylvania Study Finds Halfway Houses Don't Reduce Recidivism*, N.Y. TIMES, Mar. 24, 2013, http://www.nytimes.com/2013/03/25/nyregion/pennsylvania-study-finds-halfway-houses-dont-reduce-recidivism.html. Despite these findings, revenue-generating programs remain an attractive option for states burdened by the immense cost of both prosecution and incarceration. For more on how profit motives explain both the failure and persistence of these schemes, see Stillman, *supra* note 49.

[87] *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

poor communities through contact with the police.[88] But rather than reducing the burden of policing, these changes threaten to fuel expansion of law enforcement.[89]

Thinking about government as a business is as old as America itself: during the initial era of federal law enforcement, policing was very much organized according to business principles and profit motives.[90] Even local policing originally emerged as a wholly private enterprise: through the first half of the nineteenth century, every aspect of law enforcement, from investigation through prosecution and imprisonment, was handled by private actors.[91] Even once governments began to take over law enforcement, business principles like profit, risk, and entrepreneurialism continued to run the show.[92] But as policing grew more pervasive over the past century, it also became one of the most paradigmatically public functions of government.[93] During the same time, a legal framework emerged that imposed many constitutional limits on what police can do.[94] These restrictions might forbid the use of policing to raise revenue.

C.

Government schemes that use policing to raise revenue could violate at least three provisions of the federal constitution: the Due Process Clause, which requires neutral administration of criminal law; the Equal Protection Clause, which bans discriminatory punishment; and the Eighth Amendment, which forbids excessive fines. By focusing on the substance of these restrictions, this Chapter takes a different (and perhaps more pedestrian) approach to financial motives in law enforcement than scholarship that focuses on how these developments

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88 *See generally* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

89 *See* Natapoff, *supra* note 83 (manuscript at 42–45).

90 *See generally* PARRILLO, *supra* note 76, at 255–94.

91 *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27–29 (1993); Sklansky, *supra* note 77, at 1202–08.

92 *See* Michaels, *supra* note 76, at 1156.

93 *See, e.g.*, LES JOHNSTON, THE REBIRTH OF PRIVATE POLICING 24 (1992) ("In the twentieth century, . . . it has generally been assumed that policing is an inherently public good, whose provision has to reside in the hands of a single, monopoly supplier, the state."); Clifford D. Shearing, *The Relation Between Public and Private Policing*, *in* MODERN POLICING 399, 409–10 (Michael Tonry & Norval Morris eds., 1992) (calling policing "a quintessentially public service"); *see also* Gilmore v. City of Montgomery, 417 U.S. 556, 574 (1974) (describing police, along with "electricity, water, and . . . fire protection," as "[t]raditional state monopolies"). This shift from private to public policing has been called "the only episode in our social history to realize Marx's prescription for the transformation of capitalistic private property into socialized property." Murray Kempton, *Son of Pinkerton*, N.Y. REV. BOOKS, May 20, 1971, http://www.nybooks.com/articles/archives/1971/may/20/son-of-pinkerton [http://perma.cc/VU3A-9SJN].

94 *See* BIBAS, *supra* note 78, at 16; FRIEDMAN, *supra* note 91, at 71–73.

delegate government authority to private actors.[95] Instead, this Chapter examines how profit motives violate the requirements of neutrality, fairness, equality, and proportionality that constitutional criminal procedure — the law of policing — imposes on law enforcement.

1. The Due Process Clause. — The Due Process Clause bars criminal adjudication by individuals who have a financial stake in cases they decide.[96] The Supreme Court has suggested that this requirement could extend to enforcement actors when the risk of bias is severe enough. In *Marshall v. Jerrico, Inc.*,[97] the Court questioned the notion "that the Due Process Clause imposes no limits" on prosecutors: instead, the Court explained, a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision."[98] *Marshall* dealt with a statute that awarded a portion of proceeds from prosecution of child labor regulations to the offices that enforced these regulations.[99] Despite its warnings about improper bias, the Court held that the bias alleged in the case was "exceptionally remote" since "[n]o government official [stood] to profit" and the awards in question were "substantially less than 1% of the [agency's] budget."[100]

Even though the Court found no risk of improper bias in *Marshall*, the modern examples of financial motives in law enforcement may reach the level of bias that the Court warned of. When a city relies on fees collected by its criminal courts or when police departments depend on the assets they seize to fund their operations, the threat of improper influence seems far less "remote" than in a scheme that generates "substantially less than 1%" of an agency's budget. The Court in *Marshall* also emphasized that the statute allowed repayment only for the expenses of prosecution, rather than reimbursement of offices based on how much their prosecutions collected.[101] In contrast, when a private probation company decides which violations to enforce based on financial motives, "a direct, personal, substantial, pecuniary inter-

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[95] This other literature is described in note 77, *supra*.

[96] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment . . . to subject [a criminal defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."). The Court recently extended this impartiality requirement even further, to require recusal of an elected judge who had indirectly received campaign contributions from a party in the case. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

[97] 446 U.S. 238 (1980).

[98] *Id.* at 249. According to the Court, "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors." *Id.*

[99] *Id.* at 245.

[100] *Id.* at 250.

[101] *Id.* at 251.

est"[102] is the whole reason the arrangement exists.[103] *Marshall* even suggests that the requirement of impartiality could govern decisions "not to enforce" a law when the influence is severe enough.[104] This requirement could forbid schemes in which prosecutors promise not to prosecute the crime underlying a forfeiture.

The Due Process Clause might also forbid combining the executive function of prosecution with the legislative function of budget management. The Court has held that the right to a neutral adjudicator is more than a protection against personal financial incentive: it also bars adjudicative actors from generally managing a government's finances because this combination of functions could make an adjudicator more likely to impose financial penalties that enrich the government.[105] This rationale may have special force when executive agents use their discretionary enforcement authority to choose who will fund their activities.[106] Since prosecutors are increasingly the most powerful discretionary actors in criminal adjudication,[107] extending this requirement to them would root out improper influences from the point where they are most pernicious.[108]

The Due Process Clause might also require special scrutiny whenever a financial motive is personal. Compared to government action, the activity of a private business is more likely to be based on arbitrary considerations. In *Young v. United States ex rel. Vuitton et Fils S.A.*,[109] the Supreme Court overturned a contempt conviction that was prosecuted by a private lawyer who also "represent[ed] the private beneficiary of the court order allegedly violated."[110] Though the Court quoted the due process reasoning from *Marshall* (that a "scheme injecting a personal interest, financial or otherwise, into the enforcement

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[102] Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

[103] In *Tumey*, the Court noted that the improper financial incentive "was not exceptional, but was the result of the normal operation of the law and the ordinance." 273 U.S. at 523.

[104] 446 U.S. at 249.

[105] *Ward*, 409 U.S. at 62 (overturning a conviction adjudicated by the town's mayor, who was not personally enriched by revenue generated through penalties but was responsible for managing the town's finances).

[106] At the least, this discretion gives rise to "a serious risk of actual bias — based on objective and reasonable perceptions." Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009).

[107] *See, e.g.*, Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

[108] In the right case, this concern about executive actors influenced by direct financial stakes in the outcomes of their enforcement decisions could have unique resonance among judges generally hostile toward administrative agencies stacking the deck in favor of proregulatory outcomes. *See generally* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. (forthcoming 2015).

[109] 481 U.S. 787 (1987).

[110] *Id.* at 814.

process may bring irrelevant or impermissible factors into the prosecutorial decision"), the Court grounded its decision in its authority to supervise the federal judiciary.[111] This reasoning about improper financial influence has even more force when a private individual threatens probationers with arrest and then tells the court to imprison them, all as part of a venture to extract revenue through this threat. These cases involve more than just a risk of financial influence: a financial bottom line is structured directly into the arrangement.

Another way the due process bar on financial interests in the outcome of criminal proceedings could apply to private probation is through the principle that probation agents perform a quasi-judicial function. The legal strictures surrounding probation presume that probation officers are unlike police and prosecutors in that they have a relationship of trust with the probationer whose conditional release the court is supervising.[112] While the Supreme Court has not considered whether this relationship requires extending the bar on personal financial stakes to probation officers, circuit courts have established that both state and federal probation officers are "neutral information gatherer[s]"[113] and "arm[s] of the court."[114] To the extent probation officers are judicial agents, they should be governed by the same requirements of neutrality as other such actors.

2. The Equal Protection Clause. — In *Bearden v. Georgia*,[115] the Supreme Court held that the Equal Protection Clause, in combination with the Due Process Clause, forbids imprisoning people simply because they cannot afford to pay a fine.[116] *Bearden* requires courts to determine whether a defendant is indigent before imposing jail time for failure to pay a fine. The Court did not distinguish the equal pro-

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[111] *Id.* at 808 (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 249–50 (1980)). Justice Blackmun filed a concurrence explaining that he believed these conflicts of interest were unconstitutional in both federal and state courts, as a violation of due process. *Id.* at 815 (Blackmun, J., concurring). Due process, he explained, "requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.* In other cases, the Court has used its supervisory authority over federal courts to develop limits that it subsequently constitutionalized as due process rights, incorporated against the states. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610, 617 n.8 (1976).

[112] *See* Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 368 (1998); Minnesota v. Murphy, 465 U.S. 420, 459 (1984) (Marshall, J., dissenting).

[113] Williams v. Chrans, 945 F.2d 926, 951 (7th Cir. 1991) (quoting United States v. Cortes, 922 F.2d 123, 127 (2d Cir. 1990)).

[114] Brown v. Butler, 811 F.2d 938, 941 (5th Cir. 1987) (describing a state probation officer as "an arm of the court charged with assisting the court in arriving at a fair sentence"); *see also, e.g.*, United States v. Horvath, 492 F.3d 1075, 1078 (9th Cir. 2007) ("[T]he probation officer . . . is acting 'as a neutral information gatherer for the judge.'"); United States v. Morris, 76 F.3d 171, 176 (7th Cir. 1996) (describing a federal probation officer as "a court-appointed judicial officer").

[115] 461 U.S. 660 (1983).

[116] *Id.* at 672–73.

tection basis of the holding in much detail,[117] but lower courts had previously decided the same issue by reasoning, for example, that imprisonment for failure to pay a fine "creates two disparately treated classes: those who can satisfy a fine immediately upon its levy, and those who can pay only over a period of time, if then."[118] But by the time *Bearden* reached the Supreme Court, the Court had already held in *San Antonio Independent School District v. Rodriguez*[119] that the Equal Protection Clause permits uniform fees that by their nature impose a heavier burden on the poor.[120] Though *Rodriguez* held that wealth is not a suspect classification under the Equal Protection Clause,[121] *Bearden* established nearly a decade later that the clause combines with the Due Process Clause to bar certain forms of wealth-based discrimination.[122] In another line of cases, the Court held that indigent defendants cannot be kept out of the judicial process through uniform fees.[123] Like *Bearden*, these cases require courts to waive uniform fees for everyone who shows they cannot pay.

But *Bearden*, which governs when probation can be *revoked*, did not address the discrimination of schemes in which people who cannot pay fines are put *on* probation. These schemes impose two different sentences depending on wealth status: someone who can pay a traffic ticket when it is levied faces no other obligation, but everyone who cannot pay is put on probation, often with a range of other conditions and restrictions. These distinct sentences, based solely on wealth, are discriminatory long before incarceration, when *Bearden* requires an inquiry into whether the failure to pay was due to poverty. Even when the only distinction between two otherwise identical sentences is the fees imposed, this still discriminates by extracting fees solely from whoever has the most difficulty paying. Not only are these burdens not uniform, they multiply and increase only for those who cannot afford them. Though the equal protection reasoning that motivated

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117 This same conflation of due process and equal protection principles appears throughout the Court's jurisprudence on when access to courts or the exercise of constitutional rights can lawfully be conditioned on payment of a fine. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 611 (1974); Griffin v. Illinois, 351 U.S. 12, 19 (1956).

118 Frazier v. Jordan, 457 F.2d 726, 728 (5th Cir. 1972). The Supreme Court cases that led to *Bearden* also featured similar reasoning. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (holding that extending a maximum prison term because a person is too poor to pay a fine violated "the basic command that justice be applied equally to all persons" since it "visited different consequences on two categories of persons").

119 411 U.S. 1 (1973).

120 *Id.* at 22–23.

121 *See id.* at 28–29.

122 Bearden v. Georgia, 461 U.S. 660, 672–73 (1983).

123 *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189 (1971); *see also generally* Henry Rose, *The Constitutionality of Government Fees as Applied to the Poor*, 33 N. ILL. U. L. REV. 293, 294–95 (2013).

Bearden seems to forbid this discrimination, *Bearden* simply requires assurance that a person who failed to pay a fine did not do so because she could not afford the fine, at the moment she would be incarcerated. But long before this point, a defendant who could not afford to pay a fine immediately will already have been asked to pay more money than whoever paid at once. *Bearden* does not require a hearing on whether the decision to pay incrementally was due to poverty rather than preference. The Equal Protection Clause should require governments to impose at most uniform financial burdens (as the Court allowed in *Rodriguez*) rather than *discriminating* based on poverty.

Though discriminatory burdens can be constitutional if they serve a sufficiently weighty government interest, schemes that multiply penalties only for the poor seem to lack a valid purpose. In *Bearden*, the Court reasoned that a state's interests in deterring crime by imprisoning people who can't pay fines can be served by alternative measures, such as reducing fines, extending deadlines, or allowing community service.[124] Elsewhere, the Court has explained that the Equal Protection Clause restricts discrimination between criminals and other individuals for the purpose of debt collection: In *James v. Strange*,[125] it unanimously held that a state could not deny indigent criminal debtors the same protections that are afforded to private debtors.[126] The Court explained that this discrimination lacked rational basis because a state's interests in collecting fines and fees "are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors."[127] Unlike civil debt, criminal-court debt is backed by the threat of arrest and incarceration either for violation of probation or for criminal contempt.[128] This is a form of coercion that private creditors trying to collect normal private debt cannot use, but private probation companies trying to enforce criminal debt can — and do. This discrepancy between indigent defendants and other debtors "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."[129]

Short of a broad prohibition on any scheme that multiplies financial penalties solely for the poor, courts could root out discrimination by requiring hearings into indigence at different points in the pro-

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124 *Bearden*, 461 U.S. at 672–73.

125 407 U.S. 128 (1972).

126 *See id.* at 138–39.

127 *Id.* at 141.

128 The Court also explained that an "indigent defendant who is found guilty is uniquely disadvantaged" because a "criminal conviction usually limits employment opportunities," especially "where a prison sentence has been served." *Id.* at 139.

129 *Id.* at 142.

cess.[130] One possibility would be to require a finding that an individual's decision to pay either incrementally or later (rather than immediately, at a smaller total cost) is not due to poverty. Another option would be to require a showing that an individual is not indigent before imposing *any* new penalty or fee (just as *Bearden* requires before incarceration).[131] After all, if the failure to pay the initial fine was due to poverty, then the additional burden would be applied solely based on separating those who can pay from those who can't. This rule would functionally ban payment plans in which a financial burden grows automatically, outside court supervision, such as through additional fees. Finally, another option might be to prohibit fees (or punishments for failing to pay fees) that extend a sentence beyond the extent authorized by the relevant substantive criminal law.[132] This rule would forbid imprisonment for offenses that were not serious enough to warrant jail time in the first place.

3. The Excessive Fines Clause. — The Eighth Amendment forbids "excessive fines."[133] This ban may be uniquely suited to restricting the use of policing to raise revenue. Though the clause applies only to penalties that are deemed *fines* (unlike the Fourth Amendment and due process clauses, which govern any seizure or denial of property), the Supreme Court has held that the clause can apply to in rem civil forfeiture proceedings given "the historical understanding of forfeiture

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[130] To the extent this inquiry requires looking at an individual's finances in a way not normally attempted to establish indigence, it may seem difficult to administer. Consider a probationer who faces a $100 fee and has to decide whether to pay it immediately, to enroll in a payment plan, or to default and assume penalties. If she chooses the second or third option, the question of whether this refusal to pay is willful is more complicated than simply checking whether she possesses $100. But this is the same inquiry *Bearden* requires, without much guidance on when exactly nonpayment is willful. One solution may be to simply require an affidavit, as suggested in the civil context in *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948): "We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'" *Id.* at 339 (omission in original).

[131] In *Alabama v. Shelton*, 535 U.S. 654 (2002), the Court similarly extended the right to counsel from any case in which imprisonment is actually imposed to any case in which the imposition of a conditional sentence makes imprisonment an eventual possibility. *Id.* at 674.

[132] This rule might not flow intuitively from equality principles and also seems hard to administer, since debtors could simply refuse to pay fees whenever imprisonment was not authorized for an offense. But this principle of congruence between the penalty authorized for a crime and the sanctions imposed to ensure payment was a feature of early cases prohibiting incarceration for nonpayment of fines: "[A] State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. . . . [T]he Equal Protection Clause . . . requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." Williams v. Illinois, 399 U.S. 235, 243–44 (1970).

[133] U.S. CONST. amend. VIII.

as punishment."[134] As for other fees and costs imposed through criminal proceedings, the historical record suggests that the clause was meant to encompass the entire burden imposed through punishment, which should include the collateral consequences of a conviction or of criminal-court debt.[135] Especially as punishment other than incarceration becomes more pervasive (and particularly in light of the increasing constitutional significance of the collateral consequences of criminal proceedings[136]), the Supreme Court may have an opportunity to specify which of these penalties come under the ambit of the clause.

Even for financial obligations that are deemed fines for the purpose of the clause, the question remains whether they are also *excessive*. This word has only been interpreted once by the Supreme Court, when it held in *United States v. Bajakajian*[137] that forcing a traveler to forfeit all the money that he had failed to report carrying out of the United States violated the Excessive Fines Clause. Rather than debating the historical meaning of the term "excessive" as in cases considering the definition of "fines,"[138] the Court imported the proportionality test it uses for the Cruel and Unusual Punishments Clause.[139] Indeed, the Court applied the stronger version of this test normally applied only in capital cases,[140] perhaps since the word "excessive" implies proportionality more clearly than does "cruel and unusual." To this day, *Bajakajian* is the only case in which the Court has held that a financial penalty violated the Excessive Fines Clause.[141] Because the clause remains undertheorized, it may be due for doctrinal development.

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134 Austin v. United States, 509 U.S. 602, 621 (1993); *see also* United States v. Bajakajian, 524 U.S. 321, 331 n.6 (1998) ("[A] forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*.").

135 *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 340–47 (2014).

136 *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1480–82 (2010) (extending constitutional significance to a lawyer's failure to advise a defendant about immigration consequences of a guilty plea, in light of how changes in law had "dramatically raised the stakes," *id.* at 1480, of these consequences in recent decades).

137 524 U.S. 321.

138 *See, e.g.*, *Austin*, 509 U.S. at 611–14. Justice Kennedy's dissenting opinion in *Bajakajian* compared the undeclared cash to property that the government had a more historically sound basis to seize. 524 U.S. at 345–46 (Kennedy, J., dissenting).

139 *Bajakajian*, 524 U.S. at 334 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

140 *See* Pamela S. Karlan, Lecture, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 900–02 (2004). The choice was perhaps peculiar since Justice Thomas, who wrote the majority opinion, would later call this kind of proportionality test "incapable of judicial application." Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment).

141 *See* Colgan, *supra* note 135, at 298.

The proportionality test in *Bajakajian* could have unique force when penalties are intended to raise money. *Bajakajian* provides "that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[142] This inquiry requires an examination of the substance of an offense to determine whether the punishment is calibrated to it. In *Bajakajian*, the Court held that the forfeiture in the case was excessive to the extent that it was calibrated to the *amount* of money an offender had failed to declare, rather than to the defendant's culpability in failing to disclose this information.[143] For comparison, fines that exist to support a private business lack a valid retributive function, especially when the financial burden is tied to delays in repayment rather than to the severity of the offense.[144] Even absent privatization, courts might hold that the Excessive Fines Clause bars financial burdens that are calibrated to the amount of debt an individual owes (or how long they have owed this debt), rather than to culpability. The majority in *Bajakajian* noted that "the maximum fine" the defendant was subject to for his conduct was "but a fraction of the penalties authorized" through forfeiture.[145] Fees and interest that significantly multiply the penalty imposed by a statute could similarly be unlawful, as could fees imposed by a private company on top of the penalty for the offense. Because these fees are not imposed based on culpability — they apply only to people who are too poor to pay — they are by definition excessive.

Applying the Excessive Fines Clause to government schemes that attempt to raise revenue through policing also channels original intent. Even though the bar on punishment for inability to pay fines arises from due process and equal protection principles,[146] the historical record suggests that the Eighth Amendment was intended to forbid fines that are so onerous they lead to imprisonment: "One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison. . . . Concern with imprisonment may explain why the Excessive Fines

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[142] *Bajakajian*, 524 U.S. at 334.

[143] *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 729 (2005).

[144] *Bajakajian* and other proportionality cases even seem to reject the idea that deterrence is a justification that can excuse excessive punishment. *Id.* at 706. The *Bajakajian* Court acknowledged that full forfeiture of undeclared assets served the purpose of deterrence, which "has traditionally been viewed as a goal of punishment," but held that this purpose did not excuse the excessiveness of the punishment. 524 U.S. at 329.

[145] *Bajakajian*, 524 U.S. at 339 n.14. Along similar lines, circuit courts have compared the value of forfeited property to potential criminal penalties for an offense to determine whether forfeitures are excessive. *See, e.g.*, United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1310 (11th Cir. 1999).

[146] *See supra* p. 1739.

Clause is coupled with, and follows right after, the Excessive Bail Clause."[147] Applying the Eighth Amendment to these cases would extend an underused constitutional right to a problem that strongly resembles its inspiration.

As for civil forfeiture, the Excessive Fines Clause could also restrict seizures that are either unrelated or disproportionate to culpability. For example, a comparison between the value of a forfeiture and the "harm" and "gravity" of an offense could forbid the seizure of cars used to drive to an art gallery that sells alcohol without a license.[148] The *Bajakajian* Court also considered whether the defendant "fit into the class of persons for whom the statute was principally designed."[149] This same comparison of an individual offender and legislative intent could limit the expansive use of civil forfeiture to raise revenue. The Excessive Fines Clause could provide for a more textured analysis of statutes that punish through financial burdens, while keeping the scope of the Fourth Amendment and due process clauses intact.[150]

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On January 26, 2014, Sharnalle Mitchell was with her children in Montgomery, Alabama when police showed up at her home to arrest her.[151] Mitchell was not accused of a crime. Instead, the police came to her home because she had not fully paid a traffic ticket from 2010. The single mother was handcuffed in front of her children (aged one and four) and taken to jail. She was ordered to either pay $2,800 or sit her debt out in jail at a rate of fifty dollars a day for fifty-nine days. Unable to pay, Mitchell wrote out the numbers one to fifty-eight on the back of her court documents and began counting days.

Financial motives are perverting law enforcement. Though effective resistance to these transformations must be political, constitutional criminal procedure also offers some doctrinal weapons. Shortly after Mitchell was released from jail, she and fifteen other Montgomery residents filed a federal lawsuit against the city alleging that their detention for failing to pay court debt was unconstitutional.[152] The judge

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147 *Bajakajian*, 524 U.S. at 354–55 (Kennedy, J., dissenting).

148 *See id.* at 339–40 (majority opinion).

149 *Id.* at 338.

150 Indeed, because the Excessive Fines Clause solely applies to pecuniary punishments, courts may be more willing to innovate with its scope than they would be with the due process clauses and the Fourth Amendment, which apply to all government seizures or denials of property.

151 Joseph Shapiro, *Alabama Settlement Could Be Model for Handling Poor Defendants in Ferguson, Mo.*, NPR (Nov. 20, 2014, 5:18 PM), http://www.npr.org/blogs/thetwo-way/2014/11/20/365510846/alabama-settlement-could-be-model-for-handling-poor-defendants-in-ferguson-mo.

152 *See* First Amended Class Action Complaint, Mitchell v. City of Montgomery, No. 2:14-cv-186 (M.D. Ala. May 23, 2014), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Complaint.pdf [http://perma.cc/3A2B-YGCY].

ordered the city to temporarily suspend its reliance on private probation companies.[153] City officials have since agreed to a settlement that requires broad reform of the city's municipal courts.[154]

Just as important as using the law to constrain these perverse innovations is rejecting the idea that gave rise to them. Policing should be focused on cooperating with communities to help them flourish. When police start going to people's homes to arrest them in front of their children for traffic fines from four years earlier, the relationship between police and the communities they claim to serve is no longer a partnership. Instead, as policing becomes a way to generate revenue, police start to "see the people they're supposed to be serving not as citizens with rights, but as potential sources of revenue, as lawbreakers to be caught."[155] This approach creates a fugitive underclass on the run from police not to hide illicit activity but to avoid arrest for debt or seizure of their purportedly suspicious assets.[156] The vast demographic and residential disparities between police and the communities they operate in further exacerbate this tension.[157] In turn, communities like Ferguson begin to see police not as trusted partners but as an occupying army constantly harassing them to raise money to pay their salaries and buy new weapons. This needs to end.

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153 *See* Preliminary Injunction Order, *Mitchell*, No. 2:14-cv-186 (May 1, 2014).

154 *See* Agreement to Settle Injunctive and Declaratory Relief Claims, *Mitchell*, No. 2:14-cv-186 (Nov. 17, 2014), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf [http://perma.cc/Q39B-LHC8].

155 Radley Balko, *Why We Need to Fix St. Louis County*, WASH. POST: THE WATCH (Oct. 16, 2014), http://washingtonpost.com/news/the-watch/wp/2014/10/16/why-we-need-to-fix-st-louis [http://perma.cc/6LA6-PBQ5].

156 *See* Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367, 385 (2014); Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339, 341, 344, 353 (2009) (describing how arrest warrants, including for court fees mean "that activities, relations, and localities that others rely on to maintain a decent and respectable identity are transformed into a system that the authorities make use of to arrest and confine them," *id.* at 353); *id.* at 353 ("The police and the courts become dangerous to interact with, as does showing up to work or going to places like hospitals."); Cobb, *supra* note 13 ("We have people who have warrants because of traffic tickets and are effectively imprisoned in their homes. . . . They can't go outside because they'll be arrested. In some cases people actually have jobs but decide the threat of arrest makes it not worth trying to commute outside their neighborhood." (quoting a Ferguson, Missouri resident) (internal quotation marks omitted)).

157 *See* Emily Badger et al., *Where Minority Communities Still Have Overwhelmingly White Police*, WASH. POST: WONKBLOG (Aug. 14, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/14/where-minority-communities-still-have-overwhelmingly-white-police [http://perma.cc/PHN7-Q7RY]; Nate Silver, *Most Police Don't Live in the Cities They Serve*, FIVETHIRTYEIGHT (Aug. 20, 2014, 4:14 PM), http://fivethirtyeight.com/datalab/most-police-dont-live-in-the-cities-they-serve [http://perma.cc/Y6L2-FFLB].