



---

Volume 62 | Issue 5

Article 3

---

12-15-2017

## Fines: The Folly of Conflating the Power to Fine with the Power to Tax

Mildred Wigfall Robinson

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

Mildred W. Robinson, *Fines: The Folly of Conflating the Power to Fine with the Power to Tax*, 62 Vill. L. Rev. 925 (2017).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol62/iss5/3>

This Symposia is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2017]

FINES: THE FOLLY OF CONFLATING THE POWER TO FINE  
WITH THE POWER TO TAX

MILDRED WIGFALL ROBINSON\*

INTRODUCTION

**F**ERGUSON, Missouri is a St. Louis suburb of roughly 21,000 people—67% of whom currently self-identify as black or African-American.<sup>1</sup> Ferguson gained instant notoriety on August 9, 2014 when Michael Brown, an unarmed black teenager, died on a Ferguson street of bullet wounds inflicted by a white police officer.<sup>2</sup> In so doing, Mr. Brown became what was then the latest victim of a confrontation between a police officer and a young black man gone wrong, and Ferguson, Missouri became one more name on the dreary list of American towns and cities in which such an interaction turned deadly in 2014 alone.<sup>3</sup>

---

\* Henry L. and Grace Doherty Charitable Foundation Professor of Law, University of Virginia School of Law. I thank my daughter, Professor Teresa Ravenell, for the invitation to participate in the VILLANOVA LAW REVIEW's 2016 Norman J. Shachoy Symposium: Exploring Police Accountability in America. This Essay expands upon remarks made during the symposium. I thank Professors Taunya L. Banks and Ruth Mason and the participants in the symposium for helpful questions and comments. I thank my research assistant, Carly Coleman (UVA Law, 2017), and our wonderful library staff for outstanding research assistance. Finally, I thank the editorial staff of the VILLANOVA LAW REVIEW for their support and understanding. All mistakes and errors are my own.

1. See *Ferguson, Mo.*, CENSUS REPORTER, <https://censusreporter.org/profiles/16000US2923986-ferguson-mo> [<https://perma.cc/GAT8-U9JV>] (last visited June 14, 2017).

2. See *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?mcubz=0> [<https://perma.cc/K5AS-E57Y>].

3. See Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM), <http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html#2014> [<https://perma.cc/9TTE-HQ7H>]. This Essay discusses other unarmed black citizens killed by police gunfire during 2014: Ezell Ford, 25, Los Angeles (8/11/14); Eric Garner, 43, New York City (7/17/14); Akai Gurley, 28, New York City (2/11/14); LaQuan McDonald, 17, Chicago, Illinois (10/20/14); Tamir Rice, 12, Cleveland, Ohio (11/22/14); and Yvette Smite, 47, Bastrop County, Texas (2/16/14). See *id.* Note here that as of 2014, there were no composite data establishing either the number of victims of police shootings in that year, black or white, or the circumstances under which such events occurred. The *Washington Post* sought to compile a record of every fatal police shooting in the nation in 2015, something no government agency had done. The project began after a police officer shot and killed Michael Brown in Ferguson, Missouri, in August 2014, provoking several nights of fiery riots, weeks of protests and a national reckoning with the nexus of race, crime, and police use of force.

[The *Washington Post* data show that since 2014,] “[r]ace remains the most volatile flash point in any accounting of police shootings. Although black men make up only 6 percent of the U.S. population, they account

On September 4, 2014, the Civil Rights Division of the United States Department of Justice (DOJ) began a wide-ranging civil rights investigation looking beyond the shooting itself into the practices of the Ferguson Police Department.<sup>4</sup> That investigation examined departmental practices in the years immediately prior to the shooting. Additional points of inquiry were driven by reports that police disproportionately targeted black motorists during traffic stops.<sup>5</sup>

The DOJ report was issued on March 4, 2015.<sup>6</sup> The DOJ found that “law enforcement practices [were] shaped by the City’s focus on revenue rather than by public safety needs.”<sup>7</sup> The report continued: “This emphasis on revenue has compromised the institutional character of Ferguson’s police department, contributing to a pattern of unconstitutional policing” especially against the city’s predominately black and poor population.<sup>8</sup> The revenues referenced in the report *were municipal fines and fees to be generated by the city’s police and court staff*. The increased collections were intended to offset significant revenue shortfalls from tax and more traditional nontax sources, which shortfalls had to be redressed if necessary municipal services were to be maintained.

As citizens, we expect the police “to protect and to serve.”<sup>9</sup> So how does a police force become revenue collector instead of protector? On

---

for 40 percent of the unarmed men shot to death by police this year [2015].

Kimberly Kindy, et. al, *A Year of Reckoning: Police Fatally Shot Nearly 1,000*, WASH. POST (Dec. 26, 2015), [http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/?utm\\_term=.2d864a8362fd](http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/?utm_term=.2d864a8362fd) [<https://perma.cc/3YDB-TFXM>]. That pattern holds through the *Washington Post* 2016 data. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [<https://perma.cc/C4Z8-8V93>] (last visited Oct. 5, 2017).

4. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/6ZNT-L63X>] [hereinafter DOJ Ferguson Report].

5. “A 2013 report by the Missouri Attorney General’s office found that Ferguson police stopped and arrested black drivers nearly twice as frequently as white motorists but were also less likely to find contraband among the black drivers.” Associated Press, *Ferguson Police to be Investigated After Shooting of Michael Brown*, GUARDIAN (Sept. 4, 2014, 05:06 PM), <https://www.theguardian.com/world/2014/sep/04/ferguson-police-practices-investigated-michael-brown-justice-department> [<https://perma.cc/G2E9-58ND>].

6. See generally DOJ Ferguson Report *supra* note 4, at 4.

7. See *id.* at 2.

8. See *id.*

9. Interestingly, a policeman initially formulated this expression of responsibility. The phrase originated with the Los Angeles Police Department which, in February 1955, conducted an internal contest for a motto for the police academy. See *The Origin of the LAPD Motto*, L.A. POLICE DEP’T, [http://www.lapdonline.org/history\\_of\\_the\\_lapd/content\\_basic\\_view/1128](http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128) [<https://perma.cc/L4HD-3HXH>] (last visited June 14, 2017). The winning entry was the motto, “To Protect and to Serve” submitted by Officer Joseph S. Dorobek. See *id.* On November 4, 1963, the Los Angeles City Council passed the necessary ordinance and the credo has now

the local level, we “purchase” through taxes police and fire protection as well as a myriad of other services. This Essay explores how reliance on traffic fines for general budgetary purposes became a matter of general practice in Ferguson and many other towns and cities. It ultimately serves as a reminder that there are very sound economic and civic reasons to rely upon “taxes as the price we pay for a civilized society.”<sup>10</sup>

Michael Brown’s tragic death catalyzes this exploration of the linkage between exploitive financial practice and discriminatory police practices in the city of Ferguson. It remains the case that even in the absence of racial overtones and dire outcomes of the type occurring in Ferguson, reliance on this kind of non-tax revenue to balance local budgets in many other American cities and towns is equally if not more problematic.<sup>11</sup> The practice is one that should be either constrained or avoided.

Recently, the existence, extent, and consequences of the pervasive and increasing use of fines as it affects individuals has been addressed primarily in the criminal law legal literature.<sup>12</sup> To date, only one article ap-

---

been placed alongside the City Seal on the Department’s patrol cars. *See id.* The phrase has since been adopted by many other police departments though the Ferguson police department does not appear to be one of these.

10. This quote is popularly attributed to Justice Holmes in a 1904 speech. It has been alternatively phrased as “Taxes are what we pay for civilized society.” *See* *Compania Gen. De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). The first variation is quoted by the Internal Revenue Service above the entrance to its headquarters at 1111 Constitution Avenue, Washington, D.C. *See Tax Quotes*, IRS, <https://www.irs.gov/newsroom/tax-quotes> [<https://perma.cc/RUL9-NV6G>] (last visited Oct. 5, 2017).

11. *See, e.g.*, Campbell Robertson et al., *Ferguson Became Symbol, but Bias Knows No Border*, N.Y. Times (Mar. 7, 2015), <https://www.nytimes.com/2015/03/08/us/ferguson-became-symbol-but-bias-knows-no-border.html> [<https://perma.cc/27L4-BHXH>]. This piece provides:

While statistics alone are not clear-cut proof of discrimination, there are cities around St. Louis with far greater racial disparities in traffic stops than Ferguson, and cities with court systems that appear even more predatory than the Justice Department says Ferguson’s is. According to a report from *Better Together*, a nonprofit group, Ferguson does not even rank among the top 20 municipalities in St. Louis County in the percentage of its budget drawn from court fines and fees. The small city of Edmondson, five miles away, brings in nearly \$600 a year in court fines for every resident, more than six times the amount in Ferguson.

*Id.* This kind of reliance is not limited to municipalities in Missouri. *See infra* note 32.

12. *See generally* Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016) (analyzing ways in which fees, fines, court costs, penalties, and interest rates combine to financial detriment of poorer citizens in violation of the Sixth Amendment); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015) (explaining that families caught within state’s debt-enforcement regime, face threats of punishment as an ever-present specter, and incarceration always looms and further explaining court fees serve as a straightforward revenue source for the state creating a hidden regressive tax that turns court and correctional officials into collection agents, burdening the system, and interfering with the proper administration of justice); Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Sys-*

pearing in legal literature has been written that examines this practice from the standpoint of municipal governance.<sup>13</sup> In this Essay, I seek to add to that sparse literature by examining the practice as a matter of municipal finance with the hope that this additional perspective will further stimulate the robust discussion that the topic merits.

My discussion will proceed as follows. In Part I of this Essay, I will briefly recount the role that the property tax has historically played in providing revenues for governmental costs on the local level.<sup>14</sup> I will also describe how local governments may react when revenues from property taxes fail to keep pace with costs.<sup>15</sup> Part II of my discussion will review Ferguson's financial story in some detail and will show how that town came to rely so heavily on non-tax sources of revenue, specifically traffic fines and fees.<sup>16</sup> It will also explore the role race played in causing the practice to be particularly egregious in Ferguson.<sup>17</sup> In Part III, I will return to a general discussion of the characteristics of general and excise taxes as compared to user charges and fees emphasizing the factors that accord to the payee in both sets of exactions protection against inordinate liability.<sup>18</sup> Part IV distinguishes fines with principal attention to traffic fines from user charges and fees with particular attention to how payee protections break down in the case of traffic fines and fees.<sup>19</sup> I will make two additional points: (1) the comparative absence of payee protections makes traffic fines and fees (and tangentially lifestyle fines) an inappropriate revenue source for defraying the general costs of governance; and (2) this concern in particularly compelling light of fines and fees' regressivity and lack of payee control over total liability.<sup>20</sup> In Part V, I will summarize the enormous civic costs on governance in general in addition to immediate and possibly disabling financial costs upon those cited as well as unforeseen and unrelated legal difficulties that may ensue when citations remain

---

*temic Reform*, 58 WM. & MARY L. REV. 1171 (2017); Beth A. Colgan, *Policing and Profit*, 128 HARV. L. REV. 1723 (2015) (criticizing use of governments policy power to raise revenues through fees imposed on arrestees and defendants); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014) (reconstructing the case for protection from excessive fines under the Eighth amendment); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837 (2015) (proposing improving economic sanctions under the Model Penal Code).

13. See Henry Ordower et al., *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations* 5 (St. Louis University School of Law, Legal Studies Research Paper Series No. 2016-14), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2854372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854372) [<https://perma.cc/L2R4-M43Z>] (“[T]his article focuses on the economic impact of discriminatory municipal law enforcement.” (footnote omitted)).

14. See *infra* notes 23–36 and accompanying text.

15. See *id.*

16. See *infra* notes 37–88 and accompanying text.

17. See *infra* notes 38–87 and accompanying text.

18. See *infra* notes 88–108 and accompanying text.

19. See *infra* notes 109–15 and accompanying text.

20. See *id.*

unpaid.<sup>21</sup> Part VI concludes and asserts in short, that given the range of undesirable, unanticipated, and unintended consequences, traffic fines cannot and should not be treated as tax substitutes and relied upon as sources of general revenue.<sup>22</sup> Further, in those rare, compelling instances where municipalities are permitted to rely on non-tax revenue to defray general governance costs, such use should be limited and strictly monitored.

#### I. THE PROPERTY TAX IN HISTORICAL AND FINANCIAL PERSPECTIVE

American governments have over time relied on three categories of taxes as sources of general revenue: income taxes—federal and state; retail sales taxes—primarily state; and property taxes—primarily local.<sup>23</sup> Since roughly the 1930s, the *ad valorem* tax on real property has been local governments' primary source of revenue.<sup>24</sup> This was largely happenstance; national and state governments had established dominance in income (federal and state) and retail sales (state) taxes. In any case, however, the property tax proved ideal for local governments. The tax is administratively feasible for what are likely to be comparatively thinly-staffed governments because the value of immovable property constitutes its base; evasion is thus quite impossible! Further, the tax is quite universally borne; it falls on property owners as well as by renters, the latter group bearing the owner's tax cost as a part of the rental.

The relatively stable base, however, provides no particular economic advantage if property values fail to keep pace with public costs. Revenues may be destabilized if property values are stagnant or decline and thus fail to keep pace with government's financial needs. Second, limitations on revenue generation may be externally imposed upon the property tax through constitutional or statutory requirements intended to provide taxpayer relief—a relatively recent but widespread practice.<sup>25</sup> In either

---

21. See *infra* notes 116–29 and accompanying text.

22. Parts II–IV of the discussion will focus exclusively on traffic fines because that is the context in which the Ferguson report was framed. I will, however, in Part V of this Essay comment on related issues raised by citations issued in response to violation of “quality-of-life” or “life-style” ordinances.

23. See generally URBAN INST. & BROOKINGS INST., THE TAX POLICY CENTER'S BRIEFING BOOK: A CITIZEN'S GUIDE TO THE FASCINATING (THOUGH OFTEN COMPLEX) ELEMENTS OF THE FEDERAL TAX SYSTEM ch. 2 (2016), [www.taxpolicycenter.org/briefing-book/what-are-sources-revenue](http://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue) [<https://perma.cc/EBE3-4X9H>] [hereinafter TPC Briefing Book].

24. In 2014, revenue from property taxes constituted the single largest source of revenue for local governments and provided approximately 30% of all revenue. See *id.* at ch. 3.

25. See generally Bing Yuan et al., *Tax and Expenditure Limitations and Local Public Finances* 149–92, in *EROSION OF THE PROPERTY TAX BASE* (Nancy Augustine et al. eds., 2009). In the states during the four decades between 1973, legislative activity (with occasional constitutional amendment) has been replete with imposition of expansive tax and expenditure limitations (TEs) having the cumulative effect of significantly diminishing the revenue productivity of the tax. See *id.* Overall tax

case, localities may have difficulty generating enough revenue from the tax alone to offset costs.<sup>26</sup>

When the property tax standing alone cannot generate necessary revenue (and to avoid deemed undesirable cuts in public services), tax revenues may be supplemented through other sources. These additional sources have come to include general retail sales taxes as well as excise taxes targeting specific transactions (e.g., tobacco and alcohol).<sup>27</sup> In addition, fees (licenses, inspections, etc.) and charges imposed upon using public parks, marinas, golf courses, libraries, and other public amenities have come to play an increasingly significant role in local finance.<sup>28</sup> Finally, excise taxes specifically targeting tourists on meals, hotels, and rental cars have become an important way of further enhancing revenue without burdening residents (at least theoretically).<sup>29</sup>

This aggregate of various collections may nonetheless leave a local government unable to achieve a balanced budget.<sup>30</sup> When faced with the

---

limitations have been enacted in virtually every state and have been both general—millage limits; rate increase limits; assessment limitations—and specific—e.g., relief targeted by age, disability, or military status. *See id.* In addition, thirty-six states now impose limits on local jurisdictions' ability to generate revenues beyond some specified point or to make expenditures. *See id.* The overall percentage of revenue from the property tax has in fact declined nationally from 34% in 1977 to 30% in 2014. *See* TPC Briefing Book, *supra* note 23, at ch. 3.

26. Localities typically respond to changes in values of underlying property by adjusting the tax rate to be applied against the base. When costs increase or property values decline, the rate is adjusted upward thus stabilizing the revenue stream. Because budgets are usually set annually, rates may change regularly. The value of property—usually defined as fair market value—is subject to less flux because such changes are generally slower to become manifest.

27. *See* TPC Briefing Book *supra* note 23, at ch. 3. Data published by the Tax Policy Center report that in 2014, revenue from sales taxes constituted 7% of general revenues; revenue from individual income taxes constituted 2% of revenues; and “other taxes” contributed slightly more than two percent of revenues. *See id.* Revenues from sales taxes increased overall during this period. *See id.*

28. For arguments in favor of users bearing the expense of public amenities or facilities, see Suellen M. Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the “Silver Bullet”?*, 26 STETSON L. REV. 727, 733–34 (1997) (outlining the “many advantages” of user charge financing); ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, FINANCING PUBLIC PHYSICAL INFRASTRUCTURE 22 (1984), <http://www.library.unt.edu/gpo/acir/Reports/policy/a-96.pdf> [<https://perma.cc/K3AD-56Q3>] (arguing that user charges provide “a means of fiscal discipline for both service providers . . . and facility users,” can “encourage better maintenance[,]” “[o]ffer more efficient allocation of public resources” and “[p]rovide widened choice”).

29. *See, e.g.*, Elaine S. Povich, *States Lure Tourists, Then Tax Them*, PEW CHARITABLE TRUSTS: STATELINE (June 15, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/6/15/states-lure-tourists-then-tax-them> [<https://perma.cc/MB7H-VGR6>] (reporting that states view taxes on services such as “rental cars, hotel rooms and restaurant meals” as a way to pass costs of state and local services to non-resident visitors). Residents who avail themselves of these services will, of course, bear these costs.

30. States, with the exception of Vermont, have statutory or constitutional language that in some manner imposes a balanced budget requirement. The spec-

prospect of a deficit budget, a locality that is unwilling to cut services or financially unable to bear the costs of new, necessary services may turn to user charges and fees to fill the budgetary gap. Localities in recent years have been confronted with requirements for increased spending—criminal justice spending being one such demand—even as the Great Recession of 2008 crippled state and local economies’ ability to accommodate increases.<sup>31</sup> Accelerating a trend that in fact began prior to 2008, many localities opted to also increase reliance on fees and fines generated through the exercise of the police power to fill the revenue gap that opened specifically within the criminal justice system as well as for general budgetary purposes.<sup>32</sup>

---

trum ranges from a few states that require only that the governor’s proposed budget be balanced to, on the other end of the spectrum, states having the most stringent requirements with a constitutional prohibition against carrying a deficit forward and requirements that the governor propose, and the legislature pass, a balanced budget. See, e.g., *State Balanced Budget Requirements Executive Summary*, NAT’L CONFERENCE OF STATE LEGISLATURES, [www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx](http://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx) [<https://perma.cc/AB6L-2JWZ>] (last visited Oct. 5, 2017). There is very little general information on balanced budget requirements in the charters of local governments. Some state constitutions restrict municipal debt, some city charters restrict debt, and some cities apparently operate without restriction. Even in the absence of explicit language, two factors work against a deficit budget on the local level: (1) local governments cannot issue debt as the federal government can; and (2) the ultimate check exists: disgruntled voters can throw offending officials out of office through the popular vote.

31. See, e.g., Tracy Gordon, *State and Local Governments and the Great Recession*, BROOKINGS INST. (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [<https://perma.cc/6XCD-QBSV>]. This article provides:

More than in past economic downturns, state and local governments were a prominent casualty of the recent recession. States in particular saw their revenues plunge. Although state taxes have been rebounding, local property taxes have dipped, consistent with a two- to three-year lag between home prices and property tax rolls. These reductions coincide with state cutbacks in local aid, further squeezing local budgets.

*Id.*

32. Fines, fees, and bail constitute the three monetary penalties of criminal justice debt. A 2015 report prepared by the Council of Economic Advisers distinguishes between the three as follows:

*Fines* are monetary punishments for infractions, misdemeanors or felonies. Fines are intended to deter crime, punish offenders, and compensate victims for losses.

*Fees* are itemized payments for court activities, supervision, or incarceration charged to defendants guilty of infractions, misdemeanors, or felonies.

...

*Bail* is a bond payment for a defendant’s release from jail prior to court proceedings, and the majority of a bail payment is returned to a defendant after case disposition.

COUNCIL OF ECON. ADVISERS, *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* 1 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/V9FF-PF54>] [hereinafter CEA Brief].



In short, law enforcement has become an important source of revenue.<sup>33</sup> For example, in fiscal year 2016, New York City collected approximately \$993 million in fines for violations of a variety of city laws and regulations: parking and moving (red light, bus lanes, speed cameras); “quality of life” (noise and littering); consumer affairs; and public health—a substantial portion of the city’s miscellaneous revenue.<sup>34</sup> More than one-half of this amount came from fines for parking violations.<sup>35</sup>

Ferguson, Missouri was thus far from alone in its increasing reliance on traffic fines to balance its municipal budget.<sup>36</sup> The events of August 9, 2014, however, provide the worst-case scenario exemplifying all that can go wrong when local government relies upon traffic fines to generate revenue making its police force and municipal court system an integral part of that effort.

---

33. The CEA Brief alludes to data reflecting reliance on use of revenue from traffic tickets and fines “not only to ensure safety but also as a tool to raise revenue [citing to one jurisdiction that responded] to a 10 percent budget shortfall by issuing 6 percent more tickets.” *See id.* at 2. For an earlier report more definitively establishing a link between local fiscal considerations and the issuance of traffic citations, see Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 88 (2009). Focusing on several counties in North Carolina, the authors empirically established a revenue motive in traffic ticketing, finding “[p]ositive changes in local revenue have no statistical effect on the changes in the tickets issued, but we find evidence that law enforcement officials issue significantly more tickets in the year following a decline in local revenue.” *See id.* Finally, writing in 2015, Daniel Hummel reported the empirical finding that there existed on a national basis “a relationship between indicators of budget health and the incidence of ticketing.” *See* Daniel Hummel, *Traffic Tickets: Public Safety Concerns or Budget Building Tools*, 47 ADMIN. & SOC. 298, 314 (2015). There are clearly significant amounts generated through traffic ticketing. The National Motorists Association Blog reported in a 2007 posting that, though it is impossible to know exactly how many traffic tickets are issued annually “somewhere between 25 million and 50 million tickets are issued each year.” It continued: “Assuming an average ticket cost of \$150.00, the total up front profit from tickets ranges from 3.75 to 7.5 billion dollars.” *See Traffic Tickets Are Big Business*, NAT’L MOTORISTS ASS’N BLOG (Oct. 12, 2007), [www.motorists.org/blog/traffic-tickets-are-big-business/](http://www.motorists.org/blog/traffic-tickets-are-big-business/) [<https://perma.cc/Y6BX-UEEM>].

34. *See* Scott M. Stringer, *NYC Budget Brief*, OFFICE OF THE N.Y. CITY COMPTROLLER 1 (May 2017), <https://comptroller.nyc.gov/wp-content/uploads/documents/New-York-City-Fine-Revenues-Update.pdf> [<https://perma.cc/NNH4-S8MP>].

35. *See id.* Moving violations ticketed by a police officer constituted a relatively insignificantly part of this total amount: less than 5% in recent years. *See id.* at 2. The bulk of moving violation revenues flow through to the state though revenue from parking violations is retained by the city. *See id.* The report also notes, however, that revenues from automated moving violations retained by the city have increased significantly in the last few years. *See id.* at 3.

36. *See Ordower et al., supra* note 13, at 3 (reporting in their study that “racism in policing and use of the municipal justice system to raise revenue as regional issues [in the St. Louis area]”).

## II. FERGUSON, MO.

The DOJ, in assessing police practices in Ferguson in 2014, determined that law enforcement was deliberately revenue driven and that these practices contributed importantly to a pattern of unconstitutional policing and discrimination against the city's predominately black and poor population.<sup>37</sup>

A brief discussion of changing demographics is helpful in establishing the financial and racial context in which this practice became extant in that city. Around 2000, Ferguson began to change in complexion as black flight from inner-city St. Louis accelerated.<sup>38</sup> The city, a suburb immediately adjacent to St. Louis (and itself earlier a residential haven for whites fleeing St. Louis) went from three-fourths white to two-thirds black by 2010.<sup>39</sup> In the meantime, Ferguson's governance and police force remained predominantly white.<sup>40</sup>

The predominantly African-American newcomers appear to have been financially stable initially, as was the town. This is an important point, for it means that as such, Ferguson was able to rely primarily on traditional revenue sources in order to pay its bills.<sup>41</sup> Residents and consequently the city itself were hard hit, however, by the Great Recession of

---

37. See DOJ Ferguson Report, *supra* note 4, at 2 ("Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. Further, Ferguson's police and municipal court practices both reflect and exacerbate racial bias, including racial stereotypes. Ferguson's own data establish clear racial disparities that adversely impact African Americans. The evidence shows that discriminatory intent is part of the reason for these disparities.").

38. See generally *id.*

39. See Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of Its Troubles*, ECON. POL'Y INST. (Oct. 15, 2014), <http://www.epi.org/publication/making-ferguson/> [<https://perma.cc/5CWR-A5G6>] ("By 1980, Ferguson was 14 percent black; by 1990, 25 percent; by 2000, 52 percent; and by 2010, 67 percent.").

40. In 2014, Ferguson had a white mayor and a school board composed of six whites and one Hispanic. Its city council had one black member and its police force was 6% black. See Jeff Smith, *In Ferguson, Black Town, White Power*, N.Y. TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/opinion/in-ferguson-black-town-white-power.html> [<https://perma.cc/4XCM-WCEA>].

41. The DOJ report summarized communications establishing the focus on revenue generation and noting that the city budgeted for "sizeable increases in municipal fines and fees each year, exhort[ing] police and court staff to deliver those revenue increases, and closely monitor[ing] whether those increases [were] achieved." See DOJ Ferguson Report, *supra* note 4, at 2. Two communications provided as examples asked that ticket writing be ramped up in order to raise collections (March 2010); and later that the police department deliver a 10% increase in order to offset an expected substantial tax shortfall. A more detailed discussion of these and other communications as well as a general discussion of the efforts to generate additional revenue can be found in part III of the report. See *id.* at 9-15 ("Ferguson Law Enforcement Efforts are Focused on Generating Revenue").

2008.<sup>42</sup> Unemployment soared from 5% to greater than 13%.<sup>43</sup> Subprime lending facilitated earlier purchases of homes that plunged in value as the housing bubble burst.<sup>44</sup> Property tax revenues thus languished as property owners encountered increasing difficulty in bearing that cost (an abnormally high number of foreclosures took place). Further, aggregate declines in property values caused shrinkage in the overall value of tax rolls.<sup>45</sup> Indeed, as recently as the second quarter of 2014, 42% of all mortgaged Ferguson properties remained underwater.<sup>46</sup> (Comparatively, the national level for under-water properties was 13.3% and the Missouri state level was 17.5%).<sup>47</sup>

---

42. See Denver Nicks, *How Ferguson Went from Middle Class to Poor in a Generation*, TIME MAG. (Aug. 18, 2014), <http://time.com/3138176/ferguson-demographic-change/> [<https://perma.cc/R9RH-EVBP>].

43. See *id.* (“In 2000, the town’s population was roughly split between black and white with an unemployment rate of 5%. By 2010, the population was two-thirds black, unemployment had exceeded 13%, and the number of residents living in poverty had doubled in a decade.”).

44. See Jim Gallagher & Walker Moskop, *Home Price Recovery Skips Some St. Louis Area Neighborhoods*, ST. LOUIS POST-DISPATCH (Aug. 8, 2016), [http://www.stltoday.com/business/local/home-price-recovery-skips-some-st-louis-area-neighborhoods/article\\_e8d6c728-f343-532c-abc7-174c84978469.html](http://www.stltoday.com/business/local/home-price-recovery-skips-some-st-louis-area-neighborhoods/article_e8d6c728-f343-532c-abc7-174c84978469.html) [<https://perma.cc/6HUV-63HW>]. Areas north of St. Louis (including Ferguson) were “ground zero for subprime lending.” That area was, after the Great Recession of 2008, hardest hit by foreclosures. See *id.* “Prices are still [at the time of this publication] 15% and more below the levels of 15 years earlier.” *Id.*; see also John Light, *Ferguson, the Foreclosure Crisis and America’s Hedge-Fund Landlords*, MOYERS & CO. (Sept. 5, 2014), <http://billmoyers.com/2014/09/05/ferguson-the-foreclosure-crisis-and-americas-hedge-fund-landlords/> [<https://perma.cc/W5JM-R47J>].

45. The already tepid recovery has stalled and property values in Ferguson have declined further in the wake of the Michael Brown shooting. See Daniel Rivero, *Ferguson Home Values Are Plummeting, and Residents Are Feeling the Pain*, SPLINTER, (Mar. 16, 2015, 07:33 AM), <http://splinternews.com/ferguson-home-values-are-plummeting-and-residents-are-1793846415> [<https://perma.cc/BMY2-P7FG>].

46. See Phil Hall, *The Other Ferguson Story: The Foreclosure Crisis*, NAT’L MORTGAGE PROFESSIONAL MAG. (Aug. 11, 2015) <http://nationalmortgageprofessional.com/news/55305/other-ferguson-story-foreclosure-crisis> [<https://perma.cc/8EVP-XTEV>].

47. See *id.* Though beyond the scope of this paper, I note that the disproportionate racial impact of combined subprime lending, the collapse of the housing market, and ensuing foreclosures extended far beyond Ferguson; it was a part of the national financial meltdown. Ferguson is simply one more unfortunate example of that coalescence of events. For example, see Carolina Reid & Elizabeth Laderman, *The Untold Costs of Subprime Lending: Examining the Links Among Higher-Priced Lending, Foreclosures and Race in California*, FED. RESERVE BANK OF S.F. (Aug. 6, 2009), <http://www.frbsf.org/community-development/files/wp2009-09.pdf> [<https://perma.cc/TB5N-KY7Y>]; see also Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL’Y 121, 124 (2009); Renae Merle, *Minorities Hit Harder by Foreclosure Crisis: Racial Disparity Expected to Continue, Lending Study Finds*, WASH. POST, June 19, 2010, A12; Debbie Gruenstein Bocian et al., *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, CTR. FOR RESPONSIBLE LENDING (June 18, 2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf> [<https://perma.cc/4LWG-5KER>].

The property tax as structured in Missouri did not permit administrative adjustments that might have resulted in increased revenue. Missouri is one of the thirty states that has a tax and spending limitation applicable to the property tax.<sup>48</sup> Revenues from the property tax can, thus, not be increased without voter approval. In any event, such approval would have proven meaningless during and after the 2008 recession in light of falling property values and high levels of taxpayer unemployment.

Further, collections of retail sales taxes, which were in fact the largest contributor to local revenues, also declined during this period.<sup>49</sup> As a result, those in charge of Ferguson governance—not wishing to trim services—turned to the policing system in order to generate needed revenue.

---

48. This is the Hancock Amendment, amending the Missouri constitution in 1980. *See* MO. CONST. art. X, §§ 16–23. The Tax Policy Center’s briefing book explains Tax and Expenditure Limitations (TEs) as follows: “TEs restrict the growth of government revenues or spending by either capping them at fixed dollar amount or limiting their growth rate to match increase in population, inflation, personal income, or some combination of those factors.” TPC Briefing Book, *supra* note 23, at ch. 5. Missouri’s TEL is among the more restrictive of these in that it is one of the six states that require voter approval to exceed the applicable limitation. *See* MO. CONST. art. X, § 16.

49. A brief perusal of Annual Operating Budgets for Ferguson, Missouri, beginning with the 2007–2008 fiscal year and ending with 2017–2018 shows the relative importance of five principal self-generating revenue sources for the city for that decade. The top in 2006–07 were (in order of revenue importance): the sales tax (by far the major revenue source generating slightly more than 30% of all revenues in 2006); the utility gross receipts tax; fines and forfeitures; and property taxes. The latter four sources were of relative equal importance at approximately 4.5% of the actual budget. Note that, even at this point, fines and forfeitures are of slightly more fiscal importance than is the property tax. *See* CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET: FISCAL YEAR 2006–07 (June 13, 2006), <http://www.fergusoncity.com/documentcenter/view/133> [<https://perma.cc/22DB-8VTC>]. By 2012, the city had experienced a sharp decline in sales tax revenues. The budget report for that year, noting that the city is “highly dependent on sales tax receipts” (anywhere from 30% to 40% of total combined revenues), and reported that, “[i]n fact, . . . sales tax collections from all sources . . . decreased from \$6,879,000 in FY 2006–2007 to \$5,804,000 in FY 2010–2011.” *See* CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET: FISCAL YEAR 2012–2013 v (June 26, 2012), <http://www.fergusoncity.com/documentcenter/view/1067> [<https://perma.cc/M6PU-4UA7>]. The report continued “[t]his is a decrease of about \$1,274,000 or almost 20%.” *See id.* By this time, revenues from fines and public safety infractions had become the third most important source of revenue remaining ahead of the property tax in fiscal importance. The importance and significance of this shift is reflected in the DOJ Report. In 2012, during a debate over the reappointment of one of the traffic court judges, “[t]he City Manager acknowledged mixed reviews of the Judge’s work but urged that the Judge be reappointed, noting that ‘[i]t goes without saying the City cannot afford to lose any efficiency in our Courts, nor experience any decrease in our Fines and Forfeitures.’” *See* DOJ Ferguson Report, *supra* note 4, at 15. The budget for fiscal year 2015–16 shows a sharp decline of about 50% in expected collections from fines and related fees and costs beginning with 2015. To reiterate, the sales tax remained the most important revenue source during that period. That continues to be the case. *See* CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET: FISCAL YEAR 2015–2016 51 (June 24, 2015), <http://www.fergusoncity.com/documentcenter/view/1849> [<https://perma.cc/46AJ-UCDL>].

The police force was instructed to become more aggressive in enforcing traffic and lifestyle regulations. In short, in deciding how to handle violations, officers were expected to exercise less discretion and cite much more aggressively.<sup>50</sup>

The DOJ report provides dozens of examples of the ways in which pressure to raise revenue led to very aggressive policing sometimes of questionable constitutionality. A few examples: Fourth Amendment violations—numerous “pedestrian checks” or disruptions of social gatherings of African-Americans for legally unsupportable reasons,<sup>51</sup> with “failure to comply” charges being particularly problematic.<sup>52</sup> First Amendment violations: Arrests and citations for indecent language or gestures or recording police actions.<sup>53</sup> And Fourth Amendment excessive force violations through the excessive use of Electronic Control Weapons and canines.<sup>54</sup>

Multiple traffic citations were the norm. A traffic stop could lead to multiple citations for the same infraction.<sup>55</sup> Or three or four charges in one stop with officers sometimes competing “to see who can issue the largest number of citations [(the highest number reported was fourteen)] during a single stop.”<sup>56</sup> A stop could trigger not only a moving violation (DWI, for example) but also other related violations like “speeding, failure to maintain a single lane, no insurance, no seat belt, etc.”<sup>57</sup> Passengers were not immune to excesses; the report details several instances in which police demanded identification from all passengers with citation for non-compliance.<sup>58</sup>

The DOJ report reflects the policing and multiplier effect of these revenue-generating practices. The issuance of what might have been *discretionary* citations fell disproportionately on black residents. Though African-Americans constituted only 67% of the population, that segment of

---

50. The DOJ Report summarized communications establishing the focus on revenue generation and noted that the city budgeted for “sizeable increases in municipal fines and fees each year, exhort[ing] police and court staff to deliver those revenue increases, and closely monitor[ing] whether those increases [were] achieved.” See DOJ Ferguson Report, *supra* note 4, at 2. Two communications provided as examples asked that ticket writing be ramped up in order to raise collections (March 2010); and later that the Police Department deliver a 10% increase in order to offset an expected substantial tax shortfall. A more detailed discussion of these and other communications as well as a general discussion of the efforts to generate additional revenue can be found in part III of the report: “Ferguson Law Enforcement Efforts are Focused on Generating Revenue.” See *id.* at 9–15.

51. See DOJ Ferguson Report, *supra* note 4, at 18.

52. See *id.* at 19–22.

53. See *id.* at 24–28.

54. See *id.* at 25, 28–42.

55. See *id.* at 4. “FPD officers routinely issue multiple citations during a single stop, often for the same violation.” *Id.* at 11.

56. See *id.*

57. See *id.* (internal quotation omitted).

58. See *id.* at 21.

the population “account[ed] for 85% of FPD’s traffic stops, 90% of FPD’s citations, and 93% of FPD’s arrests from 2012 to 2014.”<sup>59</sup> African Americans were more than twice as likely to be searched during a traffic stop and twice as likely to be cited.<sup>60</sup> Blacks were more likely to receive multiple citations when stopped receiving four or more citations during seventy-three of those stops between October 2012 and July 2014.<sup>61</sup> (Multiple citations were the case for non-African-Americans only twice during the same period).<sup>62</sup> Blacks accounted for 95% of walking charges; 94% of all failure to comply charges; and 92% of all resisting arrest charges.<sup>63</sup> And this is only a partial listing.

The Ferguson municipal courts were an integral part of this financial arrangement and were similarly expected to contribute to the city’s revenue stream.<sup>64</sup> As such, noncompliance penalties were routinely imposed upon persons cited who failed to make court appearances or pay fines in a timely manner. The report documents structural barriers to compliance as well as examples of the ensuing financial burdens on those cited. Alleged offenders, unable to simply pay and resolve the citation, encountered difficulties in the first instance in keeping court dates. Reasons for failures to appear were sometimes personal (no babysitter, work obligations, oversight, etc.)<sup>65</sup> or the result of system failure.<sup>66</sup> Assuming an appearance, roadblocks to compliance and ultimate resolution were both systemic (e.g., flawed ticketing practices,<sup>67</sup> crowded dockets,<sup>68</sup> irregular court procedures,<sup>69</sup> court personnel refusal to accept partial payments<sup>70</sup>)—and when a citizen could afford an attorney, hostile attitudes were exhibited by the court,<sup>71</sup> fear of immediate incarceration or additional penalties,<sup>72</sup> concern that driving privileges would be lost.<sup>73</sup> As road-

59. *See id.* at 62.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. Consider, for example, the following comments in the DOJ Report. “Ferguson has allowed its focus on revenue generation to fundamentally compromise the role of Ferguson’s municipal court.” *See id.* at 3. “The City has made clear to the Police Chief and the Municipal Judge that revenue generation must also be a priority in court operations.” *Id.* at 14 (emphasis added). “Court staff are keenly aware that the City considers revenue generation to be the municipal court’s *primary purpose*.” *Id.* (emphasis added).

65. *See* Ordower et al., *supra* note 13, at 6–7.

66. *See* DOJ Ferguson Report, *supra* note 4, at 43 (“It is a hallmark of due process that individuals are entitled to adequate notice of the allegations made against them and to a meaningful opportunity to be heard.” (citation omitted)).

67. *See id.* at 45.

68. *See id.* at 43.

69. *See id.* at 44.

70. *See id.* at 53.

71. *See id.* at 43–44.

72. *See id.* at 48–49.

73. *See id.* at 50.

blocks to appearance were encountered, additional fines and court costs followed the initial citation cost with attendant interest and penalties.<sup>74</sup> This financial burden was even further compounded by separate failure to appear charges.<sup>75</sup> Already financially hard-pressed offenders faced ballooning expenses though the amounts initially involved seem relative small: \$50, \$100, or \$200.<sup>76</sup> (I mention these amounts to make the point; many readers, I would guess, have been similarly cited in the past and either paid, thus ending the episode, or were availed of some other avenue to address the matter. Indeed, this latter treatment appears to have been the case with a number of white violators in Ferguson.)<sup>77</sup> As will be shown in Part IV, the possible consequences of the failure to respond appropriately to the citations issued cast a long shadow.<sup>78</sup>

It is impossible to know the actual genesis of this aggressive discretionary exercise of the police power from an individual officer's standpoint: protection of public welfare or revenue collection? The report, however, speaks convincingly to targeted disingenuous practices—revenue collection masquerading as exercise of the police power—that occurred with alarming frequency and were of questionable legality.<sup>79</sup> The citation policy in place after 2008 and until 2014 appeared to abandon traditional police discretion and was demonstrably racially discriminatory. Subsequent related judicial proceedings threw far too many citizens who were already financially hard pressed into economic peril in a process that was all too often neither easily accessible nor transparent.

Pursuant to the DOJ findings, outsized and aggressively expansive collections of fines have been halted through a consent decree negotiated between the DOJ and the City of Ferguson.<sup>80</sup> Reliance on the use of revenues from fines and penalties per se has not, however, been outlawed. Under present Missouri law, it has been the case generally that no more than 30% of a municipality's budget could be derived from such collec-

---

74. *See id.*

75. *See id.* at 42. Note that the then-incumbent municipal court judge created and implemented this expansive array of penalties with the approval of the city managers. *See id.* at 14.

76. *See id.* at 52. Ordower notes that even when fine amounts were less than \$100, fines and court costs for offenders lacking legal counsel *supra* caused final amounts to be significantly greater than \$100. *See Ordower et al., supra* note 13, at 6.

77. Examination of records show a common practice in Ferguson of writing off tickets for friends, colleagues, acquaintances, and themselves eliminating citations, fines, and fees. *See DOJ Ferguson Report, supra* note 4, at 74–75. The beneficiaries of these practice were overwhelmingly white. *See id.*

78. *See infra* notes 109–15 and accompanying text.

79. *See generally* DOJ Ferguson Report, *supra* note 4.

80. *See* Consent Decree at 9, 22, 78–88, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016), <https://www.justice.gov/opa/file/833431/download> [<https://perma.cc/5EVL-D8HZ>]; Ordower et al., *supra* note 13, at 2.

tions.<sup>81</sup> As a result of recent legislative changes, that percentage has been lowered to 20% of the operating budget for Missouri municipalities generally. For St. Louis counties (including Ferguson) and the city of St. Louis, the applicable limit will be 12.5%.<sup>82</sup> In the meantime, Ferguson voters approved a sales tax increase as well as a utility tax increase.<sup>83</sup> A property tax rate increase was rejected.<sup>84</sup>

Obviously, these changes do not and cannot guarantee the consistently defensible exercise of police discretion. Further, Ferguson's structural fiscal weaknesses remain. Property tax collections remain flat. There is little that can be done about this; depressed property values will only improve as the economy improves. Sales tax collections are increasing but slowly. Thus, the worst practices have been thwarted for the present but economic challenges persist. As such, the possibility of abuse remains.

In sum, the DOJ found that law enforcement practices were driven by revenue needs rather than a concern for public safety contributing to a pattern of unconstitutional policing and raising due process procedural concerns in the City's municipal court.<sup>85</sup> The report did not suggest that treating revenue from fines as a general revenue source was problematic per se. Nor should it have made that suggestion. I cannot, for example, as a private citizen unilaterally decide to proceed through an intersection on red and stop on green! Assuming that the violation is so blatant as to foreclose the possibility of the exercise of discretion to refrain from citation, as an offender or—worse—a serial offender I should be cited upon each violation.

But the underlying question persists: when, if ever, should punitive fines such as these constitute revenue for general public purposes even if such use is permissible under state law? The question concedes, as it must, the basic necessity of regulatory fines. Such fines are an indispensable element of the reasonable exercise of the police power.<sup>86</sup> Nevertheless, considerations of overall basic fairness in allocating the financial burdens of citizenship suggest that the power to fine should be exercised with meaningful protections in place. No one citizen or group of citizens

---

81. See DOJ Ferguson Report, *supra* note 4, at 14 n.12. For the record, Ferguson never reached this 30% limit in its reliance on fines and fees.

82. See Ordower et al., *supra* note 13, at 11.

83. See *id.* at 3.

84. See *id.* at 3.

85. See DOJ Ferguson Report, *supra* note 4, at 2.

86. See R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1802–03 (2015) (“[F]ines in the United States tend to be used primarily in courts of limited jurisdiction, particularly traffic courts. . . . In the United States, fines are used in forty-two percent of courts of general jurisdiction and eighty-six percent of cases in courts of limited jurisdiction. . . . [Fines have several clear advantages such as being] [c]heap to administer, produce revenues, can be undone in the event of a wrongful conviction, . . . [and can] be matched to the means of the offender.” (internal quotations and footnote omitted)).



should be inordinately burdened with the general cost of governance even in the face of sanctionable behavior as happens when revenue from fines is used to fill general budgetary gaps. Otherwise, there would exist a powerful temptation (or as in Ferguson, a directive) to treat offenders as ready sources of revenue.

Ordinarily, one would expect a transparent and procedurally sound judicial process to provide a reasonable level of protection against exploitation through overly aggressive policing. However, as Ferguson has demonstrated, that may not always be the case; the municipal court failed in that regard. In a nutshell, where fairness is difficult or impossible to achieve on an individual level, protection should be provided indirectly to individuals on an entity level. It is to that point that I now turn.<sup>87</sup>

### III. GOVERNMENTAL FINANCE AND TAXPAYER PROTECTIONS

To reiterate, and out of fairness to Ferguson administrators, revenues from traffic fines constituted the last financial resort for the Ferguson administrators. That source appears to have been exploited only when more traditional tax and non-tax revenues proved inadequate. Importantly, reliance on a mix of tax and non-tax revenue sources is entirely appropriate and has been a matter of common practice.<sup>88</sup> In understanding why traffic fines should not, however, be an option when localities face budgetary deficits, a brief reprise of financial options and their inherent taxpayer protections is useful.

First, taxes are the price we pay—but not voluntarily. Rather, government's power to tax (a power that dates from the dawn of the republic) exists because it is essential to the very existence of government.<sup>89</sup> Taxes are *involuntary* fees levied on individuals or corporations and enforced by a government entity, whether local, regional, or national in order to finance government activities.<sup>90</sup> The general theory of taxation puts it this

---

87. The ability to challenge a citation in a judicial proceeding is unquestionably one such protection. Nevertheless, as Ferguson establishes, that protection may or may not be available because of systemic failures. I will explore possible avenues to protect against excessive reliance on traffic and lifestyle fines specifically in Part V. See *supra* notes 116–28 and accompanying text.

88. In their 1989 study of American cities, Helen Ladd and John Yinger found that “revenue diversification and redefinition of the tax base provided substantial assistance to those cities hit hardest by economic changes” during the period 1972–82, and concluded that revenue diversification helps, though it “is unlikely to solve the fiscal problems of U.S. cities.” See HELEN F. LADD & JOHN YINGER, *AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY* 139, 141 (1989).

89. Taxation is the first power stated in the U.S. Constitution, but its foundation is “in society itself.” See *Providence Bank v. Billings*, 29 U.S. 514, 524, 563 (1830) (“[T]he power of taxing the people and their property is essential to the very existence of government . . . .” (quoting *McCulloch v. Maryland*, 17 U.S. 316, 428 (1819))).

90. See, e.g., *What are “Taxes”*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/taxes.asp> [<https://perma.cc/WN3A-B9LW>] (last visited June 16, 2017).

way: “[T]axes are imposed as a compensation for something received by the tax-payer, . . . *general* taxes are paid for the support of government in return for protection to life, liberty, and property . . . .”<sup>91</sup>

#### A. *Taxes and Inherent Protections*

Though taxes are involuntary exactions, taxpayers are protected against limitless liability. To be sure, “tax” can be a nebulous term.<sup>92</sup> Adam Smith, however, in 1776, laid out the classic criteria for a well-designed tax arguing that such a levy would always exhibit four basic characteristics:

*Equity*—Each person should contribute to government to the extent that they are able [Fairness];

*Certainty*—The time, manner and payment of the tax should be clear and certain [When and where to pay: stability and transparency];

*Convenience*—A tax should be levied at a time and in a manner that makes it convenient for the person taxes to pay it [a clear path to discharge]; and

*Efficiency*—A tax should extract from the taxpayer no more than is necessary [limit collection overhead and avoid deadweight loss].<sup>93</sup>

---

91. ROBERT DESTY, *AMERICAN LAW OF TAXATION: AS DETERMINED IN THE COURTS OF LAST RESORT IN THE UNITED STATES* 4 (1884).

92. In 1868, the Supreme Court approvingly quoted the Supreme Court of New Jersey’s definition of tax: “A tax, in its essential characteristics . . . is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the State. It is not founded on contract or agreement. It operates *in invitum*. . . .” *Lane County v. Oregon*, 74 U.S. 71, 80 (1868). Fifty years later, when attempting to distinguish between a penalty and a tax, the Court defined tax in this way: “Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government.” *New Jersey v. Anderson*, 203 U.S. 483, 140 (1908). In 1931, the Court again distinguished between a penalty and a tax: “A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.” *United States v. La Franca*, 282 U.S. 568, 572 (1931) (internal quotation marks omitted). More recently, the Court looked to the word’s “ordinary definition” to interpret a state’s particular tax scheme. *CSX Transportation, Inc. v. Alabama Dep’t of Revenue*, 562 U.S. 277, 284 (2011). The Court thus described tax as follows: “[W]e note what taxpayers have long since discovered—that the meaning of ‘tax’ is expansive. A State (or other governmental entity) seeking to raise revenue may choose among multiple forms of taxation on property, income, transactions, or activities.” *Id.* at 284–85. Indeed, although the Constitution uses the phrase “direct taxes” it too leaves the term undefined. See Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 847 (2009) (“There is no definition of ‘direct tax’ in the Constitution, and none was offered to the delegates in the 1787 Constitutional Convention.”).

93. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 371–72 (Edwin Cannan ed., 1904) (emphasis added).

Protection against excessive liability is a feature of each major governmental revenue source because liability is predicated upon identified transactions and in accordance with defined parameters each of which resonates with the Smith criteria. Income taxes are (usually) annually determined and extract a percentage of individual or corporate income appropriately defined and in accordance with set rates. Liability will thus vary in accordance with each individual base.<sup>94</sup> General retail sales taxes and excise taxes are levied on identified goods and services each time a defined transaction occurs. The amount levied will vary dependent upon the value of the underlying transaction. The absence of a limit on the number of such transactions in which a taxpayer may engage annually does not, however, vitiate taxpayer protection. Rather, with these levies it is incumbent upon the taxpayer himself to refrain from engaging in profligate spending on affected taxable transactions that might otherwise undermine his individual financial solvency. In short, that taxpayer's own resources are expected to provide protection against disproportionate liability—a self-imposed credit limit, if you will!<sup>95</sup> Finally, property tax liability is determined by applying a rate determined by the governing body against the fair market value of the property. The tax base is determined through annual appraisal and the rate to be applied against that base cannot be greater than that which is necessary in order to reach the projected budget.<sup>96</sup> Further, the levy can only be imposed annually. Thus, the cost imposed upon the taxpayer is presumed to be commensurate with what she can bear in order to retain ownership of the affected property.<sup>97</sup> The premise here is that at the end of the day, a rational taxpayer will not retain ownership of property that is too expensive to service.

Finally, particularly with regard to state and local taxes, state constitutions are replete with provisions intended to guard against unreasonable

---

94. For a summary of the design of income taxes, see Emil M. Sunley & Janet G. Stotsky, *Income Tax, Federal*, in *THE ENCYCLOPEDIA OF TAXATION & TAX POLICY* 196, 196–98 (Joseph J. Cordes et al. eds., 2d ed. 2005).

95. For a summary of the design of sales and use taxes, see M. DAVID GELFAND ET AL., *STATE AND LOCAL TAXATION AND FINANCE IN A NUTSHELL* 61–84 (3d ed. 2007).

96. For a summary of the design of property taxes, see *id.* at 44–57. This is, of course, an oversimplification but accurately describes the basic structure. Fair market value is at least legislatively mandated as the base in every jurisdiction that relies upon the tax and is more often a state constitutional requirement. The amount to be generated cannot exceed the revenues necessary to reach a balanced budget.

97. There are of course targeted mechanisms to protect those property owners who, for compelling policy reasons, are accorded relief from what might otherwise be an inordinate tax burden. See, e.g., *Property Tax Circuit Breakers*, INST. ON TAXATION AND ECON. POL'Y (2016), <https://itep.org/wp-content/uploads/circuit-breakerpb2016.pdf> [<https://perma.cc/VHR8-X9GN>] (briefly summarizing how circuit breakers work to provide targeted tax relief at lower governmental cost). An extended discussion of this and other relief measures is beyond the scope of this Essay.

liability.<sup>98</sup> In short, states impose limits on localities' ability generate property tax revenues.<sup>99</sup>

B. *Limiting Liability for Local Level Non-Tax Revenue Sources*

I earlier noted that though the property tax is the primary revenue source of for services provided by local government, when that revenue stream proves insufficient to offset those costs, the governing body may rely upon a mix of tax and non-tax alternative sources.<sup>100</sup> Included here may be taxes in addition to the property tax—general retail sales and excise taxes being the usual additional components—as well as user charges and fees. This reliance is not without risk of excessive consumer liability, however. While, as has been shown, traditional general tax revenue sources have inherent taxpayer protections, reliance upon non-tax revenues such as user charges and fees potentially undermine the expectation that each person against whom an exaction is levied will be compelled to bear no more than her fair share of public costs.<sup>101</sup> In general however, as individually structured, the additional non-tax sources listed above as presently administered also provide protections albeit in different ways.

Courts distinguish fines and user fees from general purpose and excise taxes primarily by focusing on the use to which any resultant revenues can be put. User charges and fees are quite clearly non-tax revenue sources. Tax proceeds, including those from excise taxes levied, for example, on alcohol and tobacco, are used to fund government generally.<sup>102</sup> In contrast, the proceeds of user charges imposed upon patrons of, for example, publicly provided libraries or parks or to license certain activity—whether recreational (i.e., fishing or hunting, or business i.e., construction, services, etc.)—can only be used to defray the expenses of administering and maintaining that public good or maintaining oversight for that specific activity. In short, such revenues are earmarked for a specified use.<sup>103</sup> Failure to so earmark and use can result in the invalidation of

98. See, e.g., *supra* note 48 and accompanying text alluding to language in the Missouri Constitution providing precisely this kind of protection.

99. See, e.g., David Gamage & Darien Shanske, *The Trouble with Tax Increase Limitations*, 6 ALB. GOV'T L. REV. 50, 51–52 (2013). The authors explain how the Tax Increase Limitation rules are intended to work from the voters' point of view but criticize these rules in arguing that Tax Increase Limitation rules in combination with Balanced Budget Requirements amplify revenue volatility without controlling the size of government. See *id.* at 51.

100. See *supra* note 16 and accompanying text.

101. I use “fair” here to capture the notion that no citizen will be disproportionately burdened by public levies.

102. Other examples of excise taxes that are in place in numerous locations throughout the United States also used as general funds include taxes on meals, hotel and motel rentals, and rental automobiles. See *supra* note 28 & 30 and accompanying text.

103. See generally REBECCA HELMES, BLOOMBERG: INFRASTRUCTURE INV. & POLICY REPORT, TAX-VERSUS-FEE DISTINCTION UNDERPINS MAJOR TRANSPORTATION, EMISSIONS FUNDING DEBATES (2014). “The difference between a tax and a fee generally

the levy.<sup>104</sup> Further, in the aggregate, revenues generated cannot exceed amounts needed to provide the amenity.<sup>105</sup> As such, the possibility of using such receipts for general purpose government is circumscribed. Finally, and importantly, unlike exactions under the general taxes noted, liability for user fees and charges of the kind noted to this point can be avoided entirely should the potential payee simply refrain from accessing the amenity or seeking the service. In short, unlike a tax, payment of a user charge or fee is not compulsory for a non-user.

Realistically, there remains the possibility that the cost of providing a given amenity may be substantially inflated in order to produce more revenue through fees than might be needed for that public good. In that case, unless the fee were recharacterized as a tax, overages could conceivably be diverted to some other unrelated governmental use, end-running taxpayer protections. This kind of global review is, at best, difficult to achieve because cases challenging amounts imposed are decided on an individual basis. In an important new article, Professor Darien Shanske has suggested that the inapplicability of protections in many states' fiscal constitutions to user charges and fees have left courts no alternative other than to engage in extensive substantive case-by-case review in the effort to thwart this kind of governmental legerdemain.<sup>106</sup> He argues that courts should shift the focus and undertake a procedural review of the rate-making process.<sup>107</sup> Doing so would for the first time permit a more deeply informed

---

turns on the use of the revenue. Is the revenue meant to raise money that can be used to defray the general costs of government? It is a tax. Is the revenue meant to pay for the costs of a specific government program or service? It is a fee." *Id.* For example, the U.S. Court of Appeals for the Fourth Circuit determined that tolls charged for passage on the Dulles Toll Road are user fees, not taxes, under Virginia law. *See* *Corr v. Metro Wash. Airports Auth.*, 740 F.3d 295, 302 (4th Cir. 2014) (explaining that it was a fee because toll road users pay the tolls in exchange for a particularized benefit not shared by the general public; drivers aren't compelled by government to pay the tolls or accept the benefits of the project facilities; and the tolls are collected solely to fund the project, and not to raise general revenues).

104. *See, e.g.*, *TABOR Found. v. Colo. Bridge Enter.*, 353 P.3d 896, 901 (Colo. App. 2014). The Colorado Court of Appeals affirmed that the Colorado Bridge Enterprise (CBE) didn't levy a tax prohibited by the state's Taxpayer Bill of Rights (TABOR) when it imposed a bridge safety surcharge on vehicles in the state that are subject to registration fees. *See id.* at 902. The bridge safety surcharge was found to be a fee and thereby saved from being declared an unconstitutional tax in a state where voters must approve any tax increase. *See id.*

105. *See* *Ordower et al.*, *supra* note 13, at 13. Fees incident to regulatory activity "may match the cost of issuing the license or making the inspection." *See id.* "If they do so, they are a proper exercise of the police power. If they raise revenue in excess of the actual cost of regulation, they may exceed the police power under which they are enacted." *Id.* at 13.

106. *See* Darien Shanske, *Interpreting State Fiscal Constitutions: A Modest Proposal*, 70 RUTGERS U. L. REV. (forthcoming 2017) (manuscript at 1), <http://ssrn.com/abstract=2989313> [<https://perma.cc/RM5E-RKNT>].

107. *See id.*

financial assessment of rate-setting practices and would hopefully bring heightened financial protection for consumers of the service.<sup>108</sup>

In any event, even in the absence currently of the kind of inquiry suggested by Professor Shanske, localities are generally unable to engage in limitless exploitation of either tax or non-tax revenue sources in the ongoing quest for funds. Overall, within each revenue category, there exist either explicit or tacit limits on the entity itself that bring some balance and a reasonable measure of fairness to the allocation of public costs.

The foregoing discussion has not, however, addressed *punitive* fines such as traffic fines. In the next section, I discuss and distinguish that category of exactions.

#### IV. TRAFFIC (AND OTHER) FINES AS GENERAL GOVERNMENTAL REVENUE

Like taxes, user charges, and fees, traffic fines are involuntary contributions to local government. But there the similarity ends.

Regulatory fines are not literally taxes. They do not bear any of the hallmarks of a tax. They are not (1) predicated upon notions of equity or ability to contribute to government; (2) certain as to time, manner, or payment of the levy should the person cited choose to contest a citation; (3) necessarily amenable to convenient discharge; and (4) subject to budgetary constraints that might otherwise limit overall collections. Rather, the levy is imposed as a consequence of behavior that violates some pre-determined norm for behavior. It remains an extraction intended to punish and has none of the protections against excessive collection that are inherent in a traditionally structured tax.

Professor Ordower has argued that even in the absence of these attributes, the fines and related fees levied in Ferguson through 2014 may have effectively become taxes because of their use for general governmental purposes.<sup>109</sup> In that case, such use should not protect amounts of fines that were then being levied as a constitutional exercise of the taxing power. Instead, as with other taxes—property and retail sales taxes—post 1980 increases in fine amounts (the amount of the levy) would have required voter approval in Missouri pursuant to the 1980 constitutional amendment. This did not happen. As such, taxpayers adversely affected by then-extant fining practices could be able to challenge the legality of post-1980 increases compelling a prospective roll-back to 1980 levels.<sup>110</sup> In effect, increased amounts paid post-1980 would be illegally levied taxes.

Regulatory fines are also not equivalent to user charges and fees. As has been discussed, user fees are earmarked for support of specific government services being provided to the person bearing that cost.<sup>111</sup> A traffic

108. *See id.* (manuscript at 4).

109. *See* Ordower et al., *supra* note 13, at 18–22 (“Part 3. Fines as taxes: State Constitutional Tax Limitations”).

110. *See generally id.*

111. *See supra* note 103 and accompanying text.

offender is not voluntarily purchasing a service or privilege of any kind. Moreover, though the traffic infraction might be seen as a consumer choice, the fine amount may not be controllable by the putative offender in the same sense as is the consumer who bears the cost of a transactional user charge or fee. In the wake of the alleged infraction, consumer control has been displaced by the enforcer's sole discretion regarding whether or not to cite.<sup>112</sup>

This may especially be the case where policing is revenue driven. The offender may have broken the law, but what may legitimately have been a stop for speeding (a standard that may also be difficult for a driver to anticipate<sup>113</sup>) becomes an additional citation for an expired license, failure to produce proof of insurance, etc.<sup>114</sup> The offender is cited both for an infraction and for other related possibly rarely enforced minor infractions. In short, the offender has no control over the ultimate cost of such citations.<sup>115</sup>

As such, it is one thing to have imposed and to pay a fine legitimately imposed for some "reasonable" infraction. It is quite another to be assessed a fine simply because police departments have ticketing or arrest quotas. Though a fine is an appropriate exercise of the police power when properly deployed, in the array of possible sources of support for local government, a fine has no place.

For all of these reasons and with the presumptively correct right to exercise discretion vested in the enforcer, traffic fines should *not* be treated as legitimate non-tax revenue sources available for general budgetary purposes. This follows even in the absence of applicable constitutional limits and where fines are not treated as the functional equivalent of an illegally levied tax. In other words, the practice of using fine revenue for purposes of general governance is troubling because of its overall distortive effect even without a discriminatory animus.

---

112. There is always the possibility that revenues generated through the law enforcement system would be earmarked exclusively for the support of those activities. That is clearly not the case here.

113. *See supra* note 55 and accompanying text. Traffic laws are likely to vary both in detail and enforcement practices from jurisdiction to jurisdiction.

114. *See supra* note 56 and accompanying text that reports competitions among Ferguson policemen for most citations written in a single stop.

115. *See* Ordower et al., *supra* note 13, at 8; *see also supra* note 112 and accompanying text. "While supervisors may establish general arrest policies that pressure officers to increase arrests and citation issuance to achieve departmental arrest goals, the officer nevertheless may elect to arrest, warn, or ignore any given offense." Ordower et al., *supra* note 13, at 8 (emphasis added). In an interesting twist, the state of Nevada recently found itself in a financial quandary. The revenue from traffic tickets provided the majority of the state supreme court's funding. The court found itself facing a budget deficit when "the state highway patrol shifted its focus towards more dangerous violations causing the number of tickets to decline more than 10 percent in two years." *See* Matt Ford, *The Problem with Funding Government Through Fines*, ATLANTIC (Apr. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/> [https://perma.cc/L5MJ-EKZX].

## V. EFFECTS ON GOVERNANCE AND THE CIVIC SPIRIT

Ferguson provides textbook examples of all that can go wrong when governments rely upon traffic fines as budgetary supplements. The practice had global negative effects touching government, alleged offenders, the civic spirit, and the police force itself.

Governance suffered. The financial obfuscation practiced there was corrosive and undermined the credibility of the governing entity. Taxpayers will inevitably lose confidence in a system that imposes costs that are opaque, unfair, unpredictable, and onerous.

Alleged offenders were compelled to bear a disproportionate share of the expenses of governance. Ferguson residents generally had already borne the cost of both the property tax, which is generally viewed as at least mildly regressive, and the retail sales tax which is notoriously so. Alleged offenders were effectively and (given the Ferguson racial dynamic) selectively forced to bear additional costs for local services because of the use of fines as general revenue. The regressive effect of the overall burden of civic costs on the predominantly poor residents of Ferguson was exacerbated given the combination of the retail sales tax and the very high level of citation activity. Needless to say, that regressive effect was increased even further where the same individuals were cited on multiple additional occasions.

That excessive burden imposed by the fine scheme in Ferguson also led to economic hardship for its residents on an individual basis. Professor Laura Appleman, in analyzing the explosion of criminal justice debt, refers to “[a] bewildering array of fees, fines, court costs, non-payment penalties, and high interest rates [that] have turned criminal process into a booming revenue center for state courts and corrections.”<sup>116</sup> In both the criminal justice system and local governments like Ferguson, fines constitute the first piece in that financial monstrosity. A bit of imagery may be helpful here. Think of the fine as being at the tip of an inverted pyramid. Many of those cited for infractions by the Ferguson police were unable to pay. The image makes the point; addressing fining practices is an important first step to addressing not only aggressive policing but also financial hardship stemming from interaction with the law enforcement system.

Further, unresolved citations may, in the present legal environment, constitute ticking time bombs. There presently loom far-reaching collateral consequences. In June of 2016, the United States Supreme Court decided in *Utah v. Strieff*<sup>117</sup> that a suspect subject to a valid, unrelated outstanding arrest warrant (for an unpaid parking ticket in that case) could be searched pursuant to that unrelated warrant during an unconstitutional stop and incriminating evidence seized incident to that search could be used against him. Justice Sotomayor, in her eloquent dissent, spoke to the holding’s unsettling consequence:

---

116. See Appleman, *supra* note 12, at 1483.

117. 136 S. Ct. 2056 (2016).



This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit it into evidence anything he happens to find by searching you after arresting you on the warrant.<sup>118</sup>

The DOJ Ferguson report noted that of 21,000 people living in Ferguson, 16,000 have outstanding arrest warrants.<sup>119</sup> The chilling possibilities of what might happen to some of these residents speak for themselves.

Civic costs may also be high. The DOJ report speaks eloquently to this point: When police and courts treat people unfairly, unlawfully, or disrespectfully, law enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct. Further, this loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to prevent and investigate crime.<sup>120</sup>

Finally, effective policing that protects and serves is threatened. When revenue generation becomes the focus and policing practices are geared to that objective, public safety becomes a secondary concern (if that) and community trust and cooperation are undermined. Police evaluations and promotion are driven by the number of citations issued. As a result, community residents become potential offenders and sources of revenue. This is what happened in Ferguson. It is also what ensues in numerous other localities throughout the United States where the practice has become common.<sup>121</sup>

The state of Missouri moved to limit the extent to which such revenue could be used for general purposes by imposing a cap of 30%. This obviously stops well short of barring such reliance entirely—an ideal possibly impossible to attain but is a step in the right direction. That the practice is being examined and curbed in and of itself provides a lesson worthy of emulation.

The discussion thus far has focused on traffic fines. Traffic fines, however, constitute only a part of policing practices that may morph into offensive revenue collection. In the continuous quest for enhanced

---

118. See *Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting).

119. See DOJ Ferguson Report, *supra* note 4, at 8.

120. See *id.* at 2 (“Over time, Ferguson’s police and municipal court practices have sown deep mistrust between parts of the community and the police department, undermining law enforcement legitimacy among African Americans in particular.”); see also Ordower et al., *supra* note 13, at 4 (stating perception of unfairness undermines the willingness of segments of the population to cooperate with law enforcement authorities).

121. See, e.g., Alexa Corcoran, *A Handful of Colorado Towns Rely Heavily on Money from Traffic Tickets*, ROCKY MOUNTAIN PBS NEWS (Oct. 12, 2016, 11:04 PM), <http://www.rmpbs.org/blogs/news/a-handful-of-colorado-towns-rely-heavily-on-money-from-traffic-tickets/> [<https://perma.cc/8WAM-Q3RZ>].

revenue, in addition to regulatory fines like those for traffic violations, ordinances could be enacted to target lifestyle choices or non-conforming behavior. As a result, such infractions could be cited simply because the police power enabled such regulation.<sup>122</sup> For example, the frequency of citing African-Americans for jaywalking, something less than a “moving violation,” has proven problematic in many American cities.<sup>123</sup>

This possibility becomes of even more concern when limits are placed solely on a municipality’s ability to use traffic fines as general revenues. The limitations in place speak to traffic fines and not lifestyle fines.

This latitude is particularly problematic because, in the latter set of fines, behaviors can be penalized simply because the offender is “out of sync.”<sup>124</sup> Ordinances that impose penalties for misaligned window blinds? Or children playing outside? Or young men wearing low-riders?<sup>125</sup> Such

---

122. For example, Ferguson police officers’ ability to cite under the municipal code extended to “nearly every aspect of civic life.” See DOJ Ferguson Report, *supra* note 4, at 7. The report continues

[i]n addition to mirroring some non-felony state law violations, such as assault, stealing, and traffic violations, the code establishes housing violations, such as High Grass and Weeds; requirements for permits to rent an apartment or use the City’s trash service; animal control ordinances, such as Barking Dog and Dog Running at Large; and a number of other violations, such as Manner of Walking in Roadway.

*Id.* (citations omitted). Michael Brown was first noticed by the police officer while walking in the middle of the road.

123. See generally Jane Coaston, Opinion, *Jaywalking While Black*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/opinion/jaywalking-while-black-jacksonville-florida.html> [<https://perma.cc/2GSR-M3E3>]. In Jacksonville, Florida, an African-American man was cited for jaywalking (\$62 fine) and “failing to provide I.D.” (\$136 fine). See *id.* Failing to carry identification is not a crime in Florida and “jaywalking” is a noncriminal infraction. See *id.* The op-ed goes on to note that

African Americans are disproportionately arrested for jaywalking and other small-scale offenses nationwide. Sacramento police issued more than 200 tickets for jaywalking last year in the neighborhoods of North Sacramento and Del Paso Heights. While just 15 percent of residents of that area are African-American, black residents made up around 50 percent of those ticketed. In Urbana, Ill., the disparity was even more stark: From 2007 to 2011, 91 percent of those ticketed for jaywalking were black, in an area where just 16 percent of residents are African American.

*Id.*

124. See generally RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016) (describing transformation in the United States in the 1950s and 1960s of police power over individuals through the successful challenge of long-standing vagrancy laws).

125. See, e.g., *Pagedale Municipal Fines: Class Action Lawsuit Challenges Policing for Profit in St. Louis Co. Municipal Court System*, INST. FOR JUSTICE, <http://ij.org/case/pagedale-municipal-fines/> [<https://perma.cc/2EBG-B72A>] (last visited July 4, 2017). These were all citable offences in Pagedale, Missouri—a predominantly black suburb that lies just outside of St. Louis. See *id.* The city aggressively ticketed its residents for harmless conditions and activities around their homes. See *id.*

According to the city code, Pagedale residents c[ould] be ticketed and fined for:

Having mismatched curtains;

finest should be seen as an abuse of discretion and, at best, of questionable validity. Overly aggressive enforcement of life-style ordinances or those only nominally related to traffic control will almost certainly lead to practices no less offensive than those reported in Ferguson.<sup>126</sup>

Remediation is certainly warranted when such practices occur but as Professor Ordower suggests, remediation becomes much more problematic in the absence of apparent constitutional violations.<sup>127</sup> The harm is no less real; the person fined has been involuntarily burdened without any of the protections that a taxpayer would have and improperly so. Nevertheless, there seems no clear path to relief.

Traffic court procedures remain an option. As established so clearly in the DOJ report, however, that forum may be as much a part of the problems as the police practices themselves. Even in the absence of the kind of irregularities evident in the Ferguson municipal court, traffic court is probably not the venue most receptive to either tax- or constitutional-law-based objections. Class actions remain a possibility. That approach however, may be less of an option than has been the case in years past.<sup>128</sup>

Finally, states might consider the creation of a commission charged with responsibility to review and recommend changes to traffic and non-traffic fines. The commission's task might be fourfold: (1) Standardize traffic laws and fining practices to the extent possible to eliminate inter-jurisdictional differences that confuse drivers without adding to public safety;<sup>129</sup> (2) Reform traffic courts as necessary to complement reforms under the first recommendation; (3) Make fines and fees income-sensitive; and (4) Address and limit the extent to which revenue from non-traffic fines may be used for municipal purposes. For example, states might consider earmarking such revenues for the support of local schools or for

---

Walking on the left-hand side of a crosswalk;  
Wearing pants below one's waist;  
Having holes in window screens, and;  
Having a barbeque in front of a house.

*Id.* The Institute of Justice also notes that Pagedale affirmatively moved to ticketing lifestyle offenses in the wake of new limitations on the use of revenue from traffic fines for general governmental purposes in order to replace that lost revenue. *See id.*

126. *See, e.g.*, DOJ Ferguson Report, *supra* note 4, at 21 n.15 (explaining that some quality-of-life offenses can be so overbroad and generally applicable that they could be struck down with a void for vagueness challenge).

127. *See Ordower et al., supra* note 13, at 23 ("Whenever local governments transform what was historically a police and court law enforcement function into a revenue function, state constitutional taxing limitations should apply to prevent the use of the police power to raise revenue.").

128. I raise this possibility only in the interest of raising as many options as possible. A discussion of the possibilities and ramifications of undertaking a class action lawsuit is beyond the scope of this paper.

129. As noted earlier, jurisdictions tend to lack uniformity in both the detail and enforcement of such laws. *See supra* notes 55–58 & 112–14 and accompanying text.

community enhancement projects and barring use for general governmental purposes.

#### VI. CONCLUSION

This Symposium<sup>130</sup> facilitates an important discussion, and questions of financial practices should be among those raised. There are almost certainly many more cities and towns like Ferguson dependent upon this most untraditional non-tax revenue source. Fiscal plight differs only in degree. In the face of these financial stressors and even without the dire events that catapulted Ferguson into the national spotlight, local officials must continue to strive for fairness and for transparency in the fullest meaning of that word.

Ferguson's lesson must inform this effort. The police force should not function as general tax collectors. At its best, policing should be a quintessential public good owing allegiance to the state or—more accurately—the taxpayers that the force has pledged to “protect and serve.” Police persons are simply unable to live up to this oath when those who would be protected become instead targets of financial opportunity.

---

130. This Essay was written in conjunction with my participation at the 2016 Norman J. Shachoy Symposium at the Villanova University Charles Widger School of Law.