
WHAT THE FEDS CAN DO TO REIN IN LOCAL MERCENARY CRIMINAL JUSTICE

Wayne A. Logan*

Although physical and psychological harms caused by local police are the most common bases for federal intervention and reform efforts, this Article focuses on the financial harms local police can cause. As the U.S. Department of Justice’s Ferguson Report and numerous other studies highlight, local police departments are front-line players in a broader governmental strategy to generate revenue from individuals ensnared in the criminal justice system. The strategy is problematic for a variety of reasons, including the skewing effect it has on enforcement priorities and the major negative personal impact it has on those targeted (very often, people of color and economically disadvantaged individuals). Aggravating matters, the mercenary practices of local criminal justice system actors are complemented by private business entities that secure significant profits from the business local governments send their way. This Article surveys the adverse consequences of local mercenary criminal justice for governance, residents, and their communities; the many, quite distinct obstacles that federal reform efforts face; and the several possible avenues for reform and their likelihood of success.

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* Gary & Sallyn Pajcic Professor of Law, Florida State University College of Law. Thanks to Professors Jason Mazzone and Stephen Rushin for inviting me to participate in the symposium, and thanks to members of the Illinois Law Review for their gracious hosting of the event.

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I. INTRODUCTION

This symposium examines what the federal government can do to reform local policing. Interest in doing so has spiked of late as the result of police use of excessive, and indeed deadly, force on street patrol, evidenced in the killings of several unarmed African-American men. Their names are now well-known: Eric Garner in New York; Freddie Gray in Baltimore; Laquan McDonald in Chicago; Michael Brown in Ferguson, Missouri.¹ My fellow panelists' presentations and papers focus on federal efforts to curb these killings and police street patrol abuses more generally, in cities and towns across the nation.

My focus differs: I address a different kind of justice system violence—of an economic kind, with victims whose names have not become the subject of common public knowledge. People like Cindy Rodriguez of Rutherford County, Tennessee, who had never been in legal trouble before and subsisted on disability payments of \$735 per month. She pled guilty to shoplifting, was assessed almost \$600 in fines and fees, and was forced to pay a \$35–45 monthly probation supervision fee for her almost year-long term of probation.² Ms. Rodriguez was also required to pay for a drug test, despite not being charged with a drug-related offense.³ When she lacked money to pay, she was jailed, without judicial process, contrary to law.⁴ Upon release, she sold her van to make payments, was eventually rendered homeless, and lacked money to purchase food for herself and her daughter.⁵

Experiences like that of Ms. Rodriguez have become increasingly common in recent years as local governments, left to fend for themselves after the Great Recession of 2008, looked to the criminal justice system as a revenue source.⁶ Police have become foot soldiers, front-line actors, in a justice system remade over the last decade—one where community members serve as targets for revenue generation based on the imposition of Legal Financial Obligations (“LFOs”).⁷

1. Haeyoun Park & Jasmine C. Lee, *Looking for Accountability in Police-Involved Deaths of Blacks*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/interactive/2016/07/12/us/looking-for-accountability-in-police-involved-deaths-of-blacks.html>.

2. HUMAN RIGHTS WATCH, “SET UP TO FAIL”: THE IMPACT OF PRIVATE OFFENDER-FUNDED PROBATION ON THE POOR 1 (2018), https://www.hrw.org/sites/default/files/report_pdf/usprobation0218_web.pdf [hereinafter HRW, SET UP TO FAIL].

3. *Id.*

4. See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (barring imprisonment except upon judicial finding that probationer “willfully” refused to pay).

5. HRW, SET UP TO FAIL, *supra* note 2, at 1–2.

6. Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1844–45 (2015).

7. *Id.* at 1844.

Today, it is estimated that 10 million people hold criminal debt of some kind, totaling over \$50 billion.⁸ Viewed historically, government-imposed monetary sanctions are not unusual: fines, usually specified by statute and calibrated to seriousness of offense, have long been imposed,⁹ and victim restitution dates back centuries.¹⁰ New-era LFOs, however, differ significantly in kind and number, assuming a bewildering variety of forms, and serve neither of the goals of fines (retribution and deterrence) nor restitution (reparation for the victim). For example, governments levy “usage” fees (for police investigation, public defenders, prosecution, and incarceration); arrest surcharges; booking, probation, and pre-trial diversion fees; and even medical assessment fees imposed on those convicted of crimes, regardless of whether they or any victim received any medical treatment.¹¹ Taken together, it is not uncommon for costs, fees, surcharges, and the like to exceed the amount levied in restitution and fines.¹²

The phenomenon has been described in many ways, such as “charging for justice”¹³ or “cash-register justice.”¹⁴ In a recent article, my colleague Ron Wright and I thought the phrase “mercenary criminal justice” best captures the phenomenon.¹⁵ Mercenary mentality and practice affect all three branches of government. The local (and sometimes state) legislative body authorizes the LFO; a member of the executive branch—a police officer—triggers it by issuing a ticket, summons, or arrest of the individual, and another—a prosecutor—enforces it in court; and a judge imposes it.¹⁶ When they began proliferating several years ago, LFOs often sought recoupment of government costs expend-

8. Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, NEW THINKING IN COMM. CORRECTIONS BULL., JAN. 2017, at 1, 5, <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf>.

9. Patricia Faraldo-Cabana, *Towards Equalisation of the Impact of the Penal Fine: Why the Wealth of the Offender Was Taken into Account*, 3 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY 3, 4 (2014).

10. Daniel W. Van Ness, *Restorative Justice*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 7, 7 (Burt Galaway & Joe Hudson eds., 1990).

11. See Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 ILL. L. REV. 1175, 1190–92; *Policing and Profit*, 128 HARV. L. REV. 1723, 1727–29 (2015).

12. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

13. MATHILDE LAISNE ET AL., VERA INST. OF JUSTICE, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 1 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf.

14. See, e.g., David Angley, *Modern Debtors' Prison in the State of Florida: How the State's Brand of Cash Register Justice Leads to Imprisonment for Debt*, 21 BARRY L. REV. 179, 185 (2016); Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1483 (2016).

15. Logan & Wright, *supra* note 11, at 1175.

16. CARL REYNOLDS & JEFF HALL, COUNCIL OF STATE GOV'TS, 2011–2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 9 (2011), <https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf> (noting that the dynamic “recast[s] the role of the court as a collection agency for executive branch services”).

ed, for instance, “pay to stay” assessments for jail.¹⁷ Now, LFOs materialize at every point of the system, not simply to recoup costs but to sustain the justice system and even expand its reach. Fueling the nature and extent of LFOs, private businesses frequently provide services, often prioritizing profits over the best interests of individuals and exercising influence over local policymakers.¹⁸

From a policy perspective, LFOs are arguably appropriate. They might instill a sense of accountability in those targeted and hence have rehabilitative value.¹⁹ Furthermore, as a matter of principle, they can be thought justified because the individuals targeted have required a government expenditure: they are (unwilling) consumers of a public good—the criminal justice process.²⁰

Critics, on the other hand, often assert that LFOs, which typically are imposed without regard for their aggregate impact on individuals and their realistic ability to pay, can increase the likelihood of criminal re-offending²¹ and crowd out other obligations (including child support and victim restitution).²² Critics also embrace the opposite principled view to that noted above, asserting that governments should absorb the cost of operating their criminal justice systems.²³ As the Oregon Court of Appeals stated in disapproving of an LFO, “The public either must make an expenditure in order to maintain and operate a government agency, or not.”²⁴ Failure to absorb such costs, critics contend, obscures the true cost of a local justice system, which should be a matter of public awareness and discussion,²⁵ and undercuts a key moderating influence in pub-

17. On the private sector pressuring political actors to outsource government functions more generally, see, for example, PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 40–41 (2007).

18. See *infra* notes 56, 68, and 76 and accompanying text.

19. Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 351 (2010).

20. C. Morgan Kinghorn, *User Fees at the Environmental Protection Agency*, in *FEDERAL USER FEES: PROCEEDINGS OF A SYMPOSIUM* 28, 28 (Thomas D. Hopkins ed., 1988) (commending user fee structures for their ability to allow agencies to be self-sustaining); Logan & Wright, *supra* note 11, at 1218.

21. See *infra* note 68 and accompanying text.

22. BANNON ET AL., *supra* note 12, at 16; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, *COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS* 2–3 (2007).

23. See, e.g., HARVARD LAW SCHOOL, *CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM* 1 (2016), <http://cjpp.law.harvard.edu/assets/Confronting-Criminal-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> [hereinafter HLS, *CONFRONTING*] (“[T]he legal system is a public good that benefits all members of the community and thus should be funded from general revenue.”); see also, e.g., Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1749–50 (2015) (“A working justice system and corrections system is the responsibility of all citizens, and should be funded accordingly.”).

24. *State v. Kuehner*, 288 P.3d 578, 581 (Or. Ct. App. 2012); see also OR. REV. STAT. § 161.665(1) (2014) (excluding from costs imposed those supporting “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law”); cf. *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 340 (1978) (noting that a “fee . . . is incident to a voluntary act”).

25. Logan & Wright, *supra* note 11, at 1219. A similar principled argument can be made for requiring that an individual in effect pay for (or defray) costs associated with a conferred constitutional right. For instance, many states charge for juries. See John D. King, *Privatizing Criminal Procedure*, 107 *Geo. L.J.* (forthcoming 2019) (manuscript at 26–28). Or require that individuals who qualify for publicly appointed counsel pay a fee. See generally Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for*

lic-safety politics: cost, typically covered by local taxpayers.²⁶ As one commentator has observed, a “government that can fob off costs on criminals has an incentive to find criminals everywhere.”²⁷

Finally, as many studies have highlighted, mercenary justice practices disproportionately burden the poor and racial minorities,²⁸ amounting to a regressive tax²⁹ they are often ill-equipped to pay.³⁰ In Ferguson, Missouri, for instance, the U.S. Department of Justice found that police aggressively enforced *malum prohibitum* municipal code violations, viewing residents “less as constituents to be protected than as potential offenders and sources of revenue.”³¹ In Ferguson, police used the justice system as a blunt enforcement mechanism, with the threat of an arrest, search, and detention in an often unsanitary and possibly scary local jail serving as an incentive for payment.³²

Whatever the merits of these critiques, it is likely that LFOs in some shape or form will remain a fixture of local criminal justice systems. They are simply too woven into the nation’s criminal justice system, which today is marked not only by mass incarceration but also mass convictions,³³ operating alongside the many nonfinancial collateral consequences that have also proliferated in recent years.³⁴ Indeed, for a variety of reasons, LFOs likely enjoy even greater staying power because they operate locally (typically outside the public limelight), often target socio-economically (and politically) disadvantaged communities, benefit private-business interests, and can augment rather

Indigent Criminal Defense, 47 WM. & MARY L. REV. 2045 (2006) [hereinafter Wright & Logan, *The Political Economy*]. Professor King likens such quid pro quo monetary requirements to poll taxes. King, *supra*, at 39.

26. HLS, CONFRONTING, *supra* note 23, at 1.

27. Kevin Baker, *Cruel and Usual: Why Prisoners Shouldn't Pay Their Debt*, AM. HERITAGE MAG., July 2006, at 22, 22.

28. See, e.g., HLS, CONFRONTING, *supra* note 23, at 1–2; MCLEAN & THOMPSON, *supra* note 22, at 7.

29. See, e.g., Reitz, *supra* note 23, at 1763 (“As a group, convicted offenders still under the jurisdiction of the criminal courts may be the worst candidates in America to be designated as special taxpayers to make up shortfalls in legislative appropriations for correctional programming. They by and large come from the lowest rungs of the economic ladder and are struggling with the stark employment-market disadvantages that come along with criminal convictions.”).

30. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons*, 72 MD. L. REV. 486, 516 (2016) (“The adverse impact of this two-tiered system on the poor and minorities is reflected in the disproportionate assessment of fees, additional monetary sanctions, barriers to re-entry, and stress on families.”).

31. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter DOJ, FERGUSON REPORT].

32. *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1023 (E.D. Mo. 2015).

33. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012).

34. See generally MARGARET LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION (3d ed. 2018) (forthcoming).

than drain government budgets (as prisons and jails do).³⁵ They are, in short, a prime manifestation of the contemporary criminal justice system “piling on.”³⁶

This Article assesses the prospects for successful federal intervention to remedy local mercenary criminal justice and proceeds as follows. Part II provides a brief overview of the myriad kinds of LFOs and the many criticisms lodged against them. Part III examines the many obstacles to reforming and limiting local mercenary criminal justice. Part IV surveys several possible routes for federal reform efforts and their likelihood of success. The Article concludes with an assessment of the likelihood of the federal government actually undertaking and succeeding at such reform efforts.

II. LFOs: THEIR FORMS AND THE CONCERNS THEY RAISE

The nature and extent of LFOs have been extensively chronicled by public advocacy groups such as the Brennan Center,³⁷ quasi-governmental organizations,³⁸ scholars,³⁹ and the media.⁴⁰ LFOs can be triggered at the very outset

35. See U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013) (discussing need to lower imprisonment costs by finding alternatives to incarceration).

36. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1872 (2015).

37. See BANNON ET AL., *supra* note 12; REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES 1 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf>; REBEKAH DILLER ET AL., BRENNAN CTR. FOR JUSTICE, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 1 (2009), <https://www.brennancenter.org/sites/default/files/legacy/publications/MD.Fees.Fines.pdf> [hereinafter DILLER ET AL., MARYLAND'S PAROLE]. See also, e.g., ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf [hereinafter ACLU, IN FOR A PENNY]; HLS, CONFRONTING, *supra* note 23; HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [hereinafter HRW, PROFITING FROM PROBATION]; LAISNE ET AL., *supra* note 13.

38. KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE (2008), <http://seattletimes.nwsourc.com/ABPub/2009/02/24/2008780289.pdf>; GORDON M. GRILLER ET AL., NAT'L CTR. FOR STATE COURTS, MISSOURI MUNICIPAL COURTS: BEST PRACTICE RECOMMENDATIONS (2015), <https://www.courts.mo.gov/file.jsp?id=95287>; MCLEAN & THOMPSON, *supra* note 22; NAT'L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS: FINES, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES (Deborah W. Smith et al. eds., 2017), <http://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx> [hereinafter TRENDS]; ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2016), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

39. See, e.g., ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016); Appleman, *supra* note 14, at 1528; Eaglin, *supra* note 6, at 1844; Sobol, *supra* note 30, at 491.

40. See, e.g., Terry Carter, *Privatized Probation Becomes a Spiral of Added Fees and Jail Time*, A.B.A. J. (Oct. 2014), http://www.abajournal.com/magazine/article/probationers_prison_privatized_supervision_becomes_a_spiral_of_added_fees_j; Daniel Denvir, *Philly Courts Rein In Debt-Collection Campaign*, INVESTIGATIVE FUND (Oct. 9, 2014), <https://www.theinvestigativefund.org/blog/2014/10/09/philly-courts-rein-debt-collection-campaign>; Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, MOTHER JONES (Sept. 12, 2014, 10:30 AM), <https://www.motherjones.com/politics/2014/09/ferguson-might-have-break-its-habit-hitting-poor-people-big-fines/>; Alana Semuels, *The Fines and Fees*

of the process, by arrest and booking⁴¹ or the issuance of an arrest warrant.⁴² Early in the adjudicative process, they manifest in assessments for pre-trial diversion and deferred prosecution agreements, requiring satisfaction of probation-like conditions, with revenue commonly going to prosecutors' offices.⁴³ An individual might be able to avoid prosecution and conviction altogether by paying an abatement fee, which entails expenditure of an additional amount above that required for the violation itself.⁴⁴ Others without financial means, on the other hand, might be denied access to diversion or probation altogether.⁴⁵ Costs for investigation, prosecution, and the use of juries and courts,⁴⁶ and probation and parole fees, often quite significant, are also very commonly imposed.⁴⁷ LFOs even apply to indigent defendants who, while deemed poor enough to qualify for publicly paid defense counsel, must pay an up-front "application" or "co-payment" fee.⁴⁸

Although studies have noted LFOs for some time,⁴⁹ they attracted particular public attention and criticism after the police killing of Michael Brown in Ferguson, Missouri, which cast a spotlight on the city's aggressive revenue-generation practices, and the ensuing public protests there and elsewhere.⁵⁰ Critics have condemned LFOs for any number of reasons, including because they have their greatest practical impact on the poor, who overwhelmingly dominate the criminal justice system.⁵¹ Struggling to pay, poor individuals are

That Keep Prisoners Poor, ATLANTIC (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026>; Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 23, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>; Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternative-to-Incarceration Industry Profit from Insurance?*, NEW YORKER (June 23, 2014), <https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>.

41. For examples of state laws authorizing imposition of such fees, see, for example, CAL. GOV. CODE § 29950.1 (West 2018); COLO. REV. STAT. § 30-1-104 (2018); MICH. COMP. LAWS § 801.4b (2018); MINN. STAT. § 641.12 (2018); OHIO REV. CODE ANN. § 341.12 (West 2018); WASH. REV. CODE § 70.48.390 (2018).

42. See, e.g., WASH. REV. CODE § 10.01.160(2) (2018).

43. See Logan & Wright, *supra* note 11, at 1187–88.

44. *Id.* at 1188.

45. *Id.* at 1192–93.

46. *Id.* at 1190–91.

47. *Id.* at 1192.

48. *Id.* at 1189.

49. See, e.g., CONFERENCE OF STATE COURT ADMINISTRATORS, POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS (2003); CONFERENCE OF STATE COURT ADMINISTRATORS, STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES AND A NATIONAL SURVEY OF PRACTICE (1986); DALE PARENT, NAT'L INST. OF JUSTICE, RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES (1990); Adam Liptak, *Debt to Society Is Least of Costs for Ex-Convicts*, N.Y. TIMES (Feb. 23, 2006), <https://www.nytimes.com/2006/02/23/us/debt-to-society-is-least-of-costs-for-exconvicts.html>; R.I. FAMILY LIFE CTR., JAILING THE POOR: COURT DEBT AND INCARCERATION IN RHODE ISLAND (2007), <https://csgjusticecenter.org/wp-content/uploads/2013/07/2007-RI-Family-Life-Center.pdf>; R. Barry Ruback et al., *Perception and Payment of Economic Sanctions: A Survey of Offenders*, 70 FED. PROB. 26 (2006).

50. Angela Harris, *Law, Political Economy and Municipal Finance in Keilee Fant v. City of Ferguson*, Missouri, LAW & POL. ECON. (May 23, 2018), <https://lpeblog.org/2018/05/23/law-political-economy-and-municipal-finance-in-keilee-fant-v-city-of-ferguson-missouri/>.

51. See MCLEAN & THOMPSON, *supra* note 22, at 2 (noting that nationally, two-thirds of people detained in jail report an annual income under \$12,000 prior to arrest); WHITE HOUSE COUNCIL OF ECON. ADVISERS,

often subject to “poverty penalties,”⁵² which due to under- and un-employment, very often accumulate and grow, lasting for years on end.⁵³ LFOs, which can bear no relation to the defendant’s misconduct,⁵⁴ typically are imposed without regard for their aggregated effect on individuals,⁵⁵ and when payments are missed or are late, they trigger additional charges.⁵⁶ Unpaid amounts negatively impact credit and can result in the loss of a driver’s license,⁵⁷ disqualification from public benefits,⁵⁸ and even loss of the ability to vote.⁵⁹ The mere inability to pay can also result in incarceration,⁶⁰ notwithstanding Supreme Court precedent barring the practice.⁶¹

Illustrative of the coercion that can be employed, in Alabama, a local judge provided an individual who fell behind on payments with a choice: either

FINES, FEES AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR (2015).

52. BANNON ET AL., *supra* note 12, at 32.

53. HRW, PROFITING FROM PROBATION, *supra* note 37, at 22–23 (discussing “[n]ever-ending [p]robation”).

54. *See, e.g.*, WASH. REV. CODE § 7.68.035 (requiring payment of a “Victim Penalty Assessment,” regardless of whether the offense is victimless).

55. *See* Reitz, *supra* note 23, at 1741, 1758 (LFOs “are assessed in small or great amounts, and are allowed to compound, with little regard for their effects on proportionality in punishment” and are imposed “with no thought given to their effects on proportionality of sentences or the offenders’ efforts to rebuild a life in the free community”).

56. HRW, PROFITING FROM PROBATION, *supra* note 37, at 22–23.

57. PEPIN, *supra* note 38, at 5; Justin Wm. Moyer, *Millions of Drivers Lost Their Licenses for Failing to Pay Court Fees, Study Finds*, WASH. POST (Sept. 26, 2017), https://www.washingtonpost.com/local/trafficandcommuting/millions-of-drivers-lost-their-licenses-for-failing-to-pay-court-fees-study-finds/2017/09/25/c495aed6-9f01-11e7-84fb-b4831436e807_story.html?utm_term=.c6381d7cf2ec (noting that only four states require courts to assess whether a defendant can pay outstanding LFO before suspending a license).

58. ROOPAL PATEL & MEGHNA PHILLIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 6 (2012), <https://csgjusticecenter.org/wp-content/uploads/2013/07/2012-Brennan-Toolkit.pdf> (noting that probation violations, including for failure to pay fees and surcharges, render people ineligible for Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program benefits (including food stamps), low-income housing assistance, and Supplemental Security Income).

59. *Id.* (noting that several states do not restore franchise until criminal justice debt is satisfied); Karin Martin & Anne Stuhldreher, *These People Have Been Barred from Voting Today Because They’re in Debt*, WASH. POST: POSTEVERYTHING (Nov. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/08/they-served-their-time-but-many-ex-offenders-cant-vote-if-they-still-owe-fines/?utm_term=.5d213bc2e337. This outcome has been likened to a new-era poll tax. Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 311 (2017).

60. *See, e.g.*, Claire Greenberg et al., *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 48 CONN. L. REV. 1079, 1084 (2016); Shaila Dewan, *A Surreptitious Courtroom Video Prompts Changes in a Georgia Town*, N.Y. TIMES (Sept. 4, 2015) <https://www.nytimes.com/2015/09/05/us/a-surreptitious-courtroom-video-prompts-changes-in-a-georgia-town.html>. Individuals can, as a result, end up serving more time in jail or prison for failure to pay than for their original misconduct. *See, e.g.*, Jody Lawrence-Turner, *Debt to Society: Unpaid Court Fees Can Land Released Convicts Back in Jail*, THE SPOKESMAN-REVIEW (May 24, 2009), <http://www.spokesman.com/stories/2009/may/24/debt-to-society>.

61. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (barring imprisonment except upon judicial finding of “willful” refusal to pay).

go to jail or donate blood.⁶² In Washington State, an employer who paid the balance owed by an employee, told the court, when referring to the employee, “As of today, I own him.”⁶³ Inability to pay can also prolong probation, despite satisfaction of other requirements.⁶⁴

LFOs can have significant, life-impairing effects that can undercut prospects for rehabilitation and reentry.⁶⁵ Especially when combined with other obligations such as child support,⁶⁶ LFOs can foster hopelessness⁶⁷ and encourage re-offending to secure needed money,⁶⁸ aggravating challenges posed by having a criminal record.⁶⁹ Faced with the prospect of added costs, penalties, or even jail time for nonpayment,⁷⁰ individuals forego training and education that would enhance their employment and longer-term life prospects.⁷¹ The financial burdens also impair the ability to pay rent and cover other life necessities.⁷² Falling behind on payments, which is especially likely with juveniles,⁷³ can result in family members being targeted by collection efforts.⁷⁴ To the extent that

62. Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), <https://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html>.

63. HARRIS, *supra* note 39, at 154–55; *see also id.* at 155 (asserting that “[j]ust like social control systems of the past—slavery, indentured servitude, and convict leasing—the system of monetary sanctions generates perverse, indeterminate, and punitive relationships both within and outside the criminal justice system”).

64. PATEL & PHILLIP, *supra* note 58, at 20; Reitz, *supra* note 23, at 1762 (noting that at least thirteen states allow probation to be extended for failure to pay). Two states—Virginia and Ohio—prohibit keeping offenders on probation for failure to pay. PEPIN, *supra* note 38, at 10. At least 12% of probation violations occur as the result of failing to pay debt. MCLEAN & THOMPSON, *supra* note 22, at 8.

65. *See* Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 509–11 (2011); Alex R. Piquero & Wesley G. Jennings, Research Note, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325, 326 (2016).

66. Beckett & Harris, *supra* note 65, at 517–23.

67. *See, e.g.*, DILLER ET AL., MARYLAND’S PAROLE, *supra* note 37, at 20 (saying that, with respect to LFOs associated with parole, “[t]he financial burden can also give the individual a sense that the system is not interested in having him or her succeed; that punishment just continues in a new form after time in prison has been served”).

68. *See, e.g.*, FOSTER COOK, JEFFERSON COUNTY’S COMMUNITY CORRECTIONS PROGRAM, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 11 (2014) (reporting survey results of Alabama residents with LFO debt and noting that 17% engaged in new crimes to secure money to pay debt); DILLER ET AL., MARYLAND’S PAROLE, *supra* note 37, at 18; Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL’Y 555, 566 (2011).

69. *See* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105 (2013).

70. *See* BANNON ET AL., *supra* note 12, at 1.

71. *See* Alexes Harris et al., *Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1786–87 (2016).

72. Beckett & Harris, *supra* note 65, at 517–23.

73. JESSICA FEIRMAN ET AL., DEBTORS’ PRISON FOR KIDS?: THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6 (2016); POLICY ADVOCACY CLINIC, UC BERKELEY SCHOOL OF LAW, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA 9 (2017).

74. MARY ANN SCALI & HILLELA SIMPSON, THE PROBLEM WITH MAKING CHILDREN PAY FOR PROBATION SUPERVISION 57 (2017), <http://www.ncsc.org/~media/Microsites/Files/Trends%202017/Problem-with-Making-Children-Pay-Trends-2017.ashx>.

individuals feel that they are being treated unfairly,⁷⁵ reintegration into society can become more difficult and law-abidingness can be undermined,⁷⁶ a concern prominently raised in the Justice Department's Ferguson Report.⁷⁷

Any discussion of LFOs must also take account of the central role played by private business interests. A court, for example, might place an individual on probation for public drunkenness and assess a fine of \$270.⁷⁸ The private probation company will then add a \$15 "enrollment fee" and \$39 per month for supervision and services.⁷⁹ Or a court might direct business to a private vendor to electronically monitor a probationer or parolee⁸⁰ or provide halfway-house services.⁸¹ Private vendors can also get a piece of the action by requiring that individuals sentenced to community service pay for insurance policies.⁸²

The involvement of for-profit, private companies creates obvious moral hazard risk. When more time on probation means more revenue, providers have an incentive to prolong probationary terms, perhaps by requesting consecutive (not concurrent) sentences⁸³ or by insisting that an individual pay all money owed before being discharged (resulting in more time on probation and more money for the provider) regardless of any negative result on rehabilitation.⁸⁴ On the other extreme, individuals can be prevented from participating in treatment programs if they are unable to pay program fees demanded by the company.⁸⁵ With "pay-only" probation, those able to pay at the time of sentencing "can walk free and wash their hands of the criminal justice system. Those who can't are put on a long-term payment plan and sentenced to probation."⁸⁶ The discretionary power of companies is such that a probationer can be required to take and pay for a drug test when none was required by a court.⁸⁷

Worse yet, a company has little financial incentive to report those who violate the terms of probation or parole (*e.g.*, as the result of a failed drug test) but can pay required sums. In Harpersville, Alabama, the cozy relationship between a local court and private vendors was enjoined based on a federal judge's

75. *See, e.g.*, BECKETT ET AL., *supra* note 38, at 65 (noting a "high degree of variability" in the way LFOs are imposed in Washington State based on factors such as race, gender, and county); LAISNE ET AL., *supra* note 13, at 12 (describing practice regarding "court costs" in New Orleans).

76. *See generally* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 25–27 (2002).

77. DOJ, FERGUSON REPORT, *supra* note 31, at 79–90.

78. Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_r=0.

79. *See id.*; Carter, *supra* note 40; Stillman, *supra* note 40.

80. HRW, PROFITING FROM PROBATION, *supra* note 37, at 33–35.

81. Logan & Wright, *Mercenary Criminal Justice*, *supra* note 11, at 1193.

82. Liptak, *supra* note 49.

83. ACLU, IN FOR A PENNY, *supra* note 37, at 60.

84. BANNON ET AL., *supra* note 12, at 25.

85. *Id.* at 22.

86. HRW, PROFITING FROM PROBATION, *supra* note 37, at 25.

87. Kate Brumback, *Lawsuit: Private Probation Company Forced Illegal Drug Tests*, WASH. TIMES (Feb. 17, 2016), <https://www.washingtontimes.com/news/2016/feb/17/lawsuit-private-probation-company-forced-illegal-d/>.

finding that it was a “judicially sanctioned extortion racket,” generating revenue from LFOs three times greater than that generated by sales taxes.⁸⁸ Private commercial bail companies are allowed to attach high interest to loans paid to individuals unable to pay surety amounts,⁸⁹ and states can tack on “administrative” LFOs that they collect from bondsmen or defendants, including when an acquittal results.⁹⁰

Private vendors also benefit by the collection of LFOs. In Florida, for instance, statutory law allows collectors to impose up to a 40% surcharge on amounts collected.⁹¹ Maricopa County, Arizona allows collection of an 18% surcharge.⁹² In at least three states (Kentucky, Florida, and Missouri), local courts and judges select the private probation provider,⁹³ and judges ask probation companies (rather than their own clerks) to prepare arrest warrants in instances of alleged probation violations.⁹⁴ Not surprisingly, the lax or nonexistent regulatory oversight of such companies can result in corruption among employees.⁹⁵

The U.S. Department of Justice report on Ferguson, Missouri vividly highlighted the broader negative impact of LFOs.⁹⁶ Many residents saw Ferguson police as a “collection agency,” felt regarded “less as constituents to be protected than as potential offenders and sources of revenue,”⁹⁷ and feared venturing outside for risk of being targeted and arrested due to a single missed payment.⁹⁸ To generate revenue, police issued massive numbers of summons for alleged municipal code violations such as “Manner of Walking in the

88. Hannah Rappleye & Lisa Riordan Seville, *The Town that Turned Poverty into a Prison Sentence*, NATION (Mar. 14, 2014), <https://www.thenation.com/article/town-turned-poverty-prison-sentence/> (noting and discussing *Burdette v. Town of Harpersville*, No. CV 2010-9000183, 2012 WL 2995326 (Ala. Cir. Ct. July 11, 2012)).

89. Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news>.

90. See, e.g., LA. STAT. ANN. § 22:822 (2016) (imposing a 2% “fee on premiums for all commercial surety underwriters who write criminal bail bonds in the State of Louisiana”); *Tennessee Bail Bonds*, BAIL BONDS NETWORK, <https://bailbondsnetwork.com/tennessee-bail-bonds.html> (last visited Aug. 30, 2018) (discussing Tennessee bail bond fee).

91. See BANNON ET AL., *supra* note 12, at 6; see also *id.* at 45–46 & n.94 (20% private surcharge in Missouri).

92. *Id.* at 45 n.94.

93. HRW, SET UP TO FAIL, *supra* note 2, at 19. According to a Human Rights Watch study, “[t]he temptation is to adopt a ‘hear no evil, see no evil’ approach to hiring probation companies, where courts happily accept the checks probation companies cut them without asking too many questions about how collections are secured.” HRW, PROFITING FROM PROBATION, *supra* note 37, at 57.

94. HRW, PROFITING FROM PROBATION, *supra* note 37, at 5.

95. See, e.g., *id.*, at 66–67 (recounting instances of “skimming”).

96. See DOJ, FERGUSON REPORT, *supra* note 31, at 79–90.

97. *Id.* at 2.

98. Jelani Cobb, *What I Saw in Ferguson*, NEW YORKER (Aug. 14, 2014), <https://www.newyorker.com/news/news-desk/saw-ferguson>.

Roadway” and “Failure to Comply” with police,⁹⁹ with revenue for the resulting LFOs allocated to local budgets (not the state, which would be required if parallel state provisions were utilized).¹⁰⁰ The Department concluded that aggressive targeting of Ferguson’s residents, who were predominantly poor and African-American,¹⁰¹ was not intended to provide better services or promote public safety but to secure more revenue, resulting in widespread distrust and dislike of police.¹⁰²

In short, local mercenary criminal justice, while certainly not as dire as unjustified killings by police, has very negative effects on individuals and the communities in which they live. It also fosters the appearance and actuality of systemic conflicts of interest¹⁰³ and corruption,¹⁰⁴ and it skews law enforcement priorities at the expense of the public good.¹⁰⁵ In so doing, it creates a two-tier system of justice that especially disadvantages the poor, who lack the resources to buy their way out of the system.¹⁰⁶

99. Consent Decree at 23, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016), <https://www.justice.gov/crt/file/883846/download> (noting that 67% of Ferguson residents are black but blacks received 95% of former and 94% of latter charges). On power of municipalities more generally to enact ordinances concerning low-level criminal and quasi-criminal offenses (at times replicating state laws targeting the same or similar conduct), see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1430 (2001).

100. DOJ, FERGUSON REPORT, *supra* note 31, at 9–10.

101. *See id.* at 5.

102. *Id.* at 79. *See also, e.g.*, Brian Scott, Comment, *From Macks Creek to Ferguson: How Illinois Can Learn from Missouri to Prevent Predatory Enforcement Practices by Municipalities*, 40 S. ILL. U. L.J. 513, 529 (2016) (recounting Chicago’s shortening of traffic yellow light times to increase revenue as well as DuPage County, Illinois when DUI defendants were able to keep their driver’s license after paying a higher fine and fee). *Cf.* Logan & Wright, *supra* note 11, at 1179–85 (surveying historical practices of private enforcement of criminal law creating similar public-safety risks).

103. *See, e.g.*, ACLU, IN FOR A PENNY, *supra* note 37, at 9 (noting acknowledgement by chief judge in New Orleans criminal court that “it creates an appearance of impropriety when judges must rely in part on collecting LFOs from poor defendants to keep their courts running”); Reitz, *supra* note 23, at 1761 (“[LFOs] do not serve the goals of the sentencing system, but are imposed for the side purpose of revenue generation. The self-interest of courts, correctional agencies, and service providers is at the forefront; other public goals are ignored or sacrificed. This creates serious conflicts of interest that should not be tolerated in a system that aspires to the even-handed administration of criminal law.”).

104. *See, e.g.*, Stillman, *supra* note 40 (noting that a Tennessee judge was convicted after an FBI probe found that he accepted kickbacks estimated to be as large as \$100,000 from a private probation company and a driving school in exchange for sending them offenders).

105. *See supra* notes 25–27 and accompanying text; *see also, e.g.*, Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, URBAN AFF. REV. (Aug. 11, 2018), [https://](https://journals.sagepub.com/doi/10.1177/1078087418791775)

journals.sagepub.com/doi/10.1177/1078087418791775 (reporting results of a study showing the negative relation between LFO focus and violent crime clearance rates, with the effect especially pronounced in small population locales); Martin et al., *supra* note 8, at 6 (“[T]he basic conflict that emerges when a public institution is both the originator and the beneficiary of financial obligations is that resources are directed away from other critical, but less lucrative, law-enforcing or adjudicating tasks (e.g., clearing backlogs of DNA analysis or testing rape kits).”).

106. *See, e.g., supra* notes 33–48 and accompanying text (discussing inability of poor to secure pretrial abatement and probation services). *Cf.* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

III. DISTINCTIVE OBSTACLES TO LFO REFORM

The serious problems that LFOs present have not been lost on reformers.¹⁰⁷ Among the most notable reform efforts was that of the Conference of State Court Administrators and Conference of Chief Justices, which in 2016 published a series of “principles.”¹⁰⁸ Among other things, the Conference recommended prohibiting LFOs for funding nonjustice-system-related matters, requiring that the amounts assessed not exceed the cost incurred in a case, and ensuring that “core functions” of courts be funded by general tax revenue.¹⁰⁹ Also, to the extent LFOs are warranted, the Conference advised that they should be legislatively established by states and imposed consistently within jurisdictions, and that revenues generated be periodically reviewed to ensure they are being properly and not excessively applied.¹¹⁰ Furthermore, the Conference suggested that limits be imposed on private vendors.¹¹¹ The American Law Institute also urged reform in its recently revised provisions on sentencing,¹¹² which Co-Reporter Kevin Reitz characterized as “call[ing] for an across-the-board rethinking of [LFOs] and significant reductions in their use.”¹¹³ The Department of Justice, in its report on Ferguson, Missouri, provided a long list of proposed reforms as well.¹¹⁴ One academic commentator has gone so far as to advocate enactment of a federal law to regulate collection excesses akin to the Fair Debt Collection Practices Act and to create something like the Consumer Financial Protection Bureau.¹¹⁵

107. See, e.g., MCLEAN & THOMPSON, *supra* note 22, at 11–40; U.S. DEP’T OF JUST., OFFICE OF JUSTICE PROGRAMS, RESOURCE GUIDE: REFORMING THE ASSESSMENT AND ENFORCEMENT OF FINES AND FEES 2 (2016), <https://ojp.gov/docs/finesfeesresguide.pdf>; PATEL & PHILLIP, *supra* note 58, at 2; TRENDS, *supra* note 38, at 1.

108. NAT’L CTR. FOR STATE COURTS, NAT’L TASK FORCE ON FINES, FEES AND BAIL PRACTICES, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 1 (2017), <http://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx>.

109. See *id.* at 4 (“While situations occur where user fees and surcharges are necessary, such fees and surcharges should always be minimized, and should never fund activities outside the justice system. . . . [I]n no case should the amount of such fee or surcharge exceed the actual costs of providing the service. The core functions of courts, such as personnel and salaries, should be primarily funded by general tax revenue.”).

110. *Id.* at 6–7 (“Legal financial obligations should be established by the state legislature in consultation with judicial branch officials. Such obligations should also be uniform and consistently assessed throughout the state, and periodically reviewed and modified as necessary to ensure that revenue generated as a result of their imposition is being used for its stated purpose and not generating an amount in excess of what is needed to satisfy the stated purpose”).

111. See *id.* at 7–8, (“All agreements for services with third party collectors should contain provisions binding such vendors to applicable laws and policies relating to notice to defendant, sanctions for defendant’s nonpayment, avoidance of penalties, and the availability of non-monetary alternatives to satisfying defendant’s legal financial obligation.”).

112. *Model Penal Code: Sentencing*, AM. L. INST., <https://www.ali.org/projects/show/sentencing/> (last visited Sept. 3, 2018).

113. Reitz, *supra* note 23, at 1739.

114. Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016), <https://www.justice.gov/crt/file/883846/download>; DOJ, FERGUSON REPORT, *supra* note 31, at 97–102.

115. See Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 884 (2017). The idea was backed by the U.S. Commission on Civil

To date, a handful of reforms have been enacted by states,¹¹⁶ and work on the important basic task of identifying and cataloging LFOs is underway.¹¹⁷ The efforts have been piecemeal and halting, however, far short of the comprehensive reform that is needed. This Part examines the several reasons behind this intransigence.

A. *Lack of Incentive to Change*

First and perhaps foremost, local governments have insufficient incentive to change because LFOs provide a ready and easily created basis for revenue generation, and today they play an explicit and often quite large role in local-government fiscal-balance sheets.¹¹⁸

In 2013, for instance, LFOs constituted Ferguson's second largest source of income, generating over \$2.4 million.¹¹⁹ Even as of 2006, before the recession, 46% of the probation department of Travis County, Texas's \$18 million budget was based on recovered fees.¹²⁰ In Jefferson County, Texas, half of the government's 2008 budget resulted from fees collected from probationers (over \$3.6 million),¹²¹ and in New Orleans, LFOs account for almost two-thirds of the criminal court's operating budget.¹²² In Edmundson, Missouri, the mayor told local police in 2014 that a "downturn in traffic and other tickets written" was "disappointing" and reminded officers that tickets "add to the revenue on which the police department budget is established and will directly affect pay adjustments at budget time."¹²³ A court administrator in Allegan County, Michigan—where LFOs go toward "the salaries of court employees, for heat, telephones, copy machines and even to underwrite the cost of the county employees' fitness gym"—related that "[t]he only reason that the court is . . . doing

Rights. U.S. COMMISSION ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 68 (2017).

116. See Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 303–07 (2015). Georgia, for instance, after intense scrutiny and criticism from Human Rights Watch and others, required companies doing business with the state to provide quarterly statements summarizing such things as amount of surcharges and fees collected and the number of individuals under supervision. HLS, CONFRONTING, *supra* note 23, at 36.

117. See Emily Shaw, *Help Uncover the Nation's Dependence on Local Court Fees and Fines*, MUCKROCK (Nov. 30, 2015), <https://www.muckrock.com/news/archives/2015/nov/30/help-uncover-nations-dependence-local-court-fees-a/>; *National Task Force on Fines, Fees and Bail Practices: Resource Center*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Fines-and-Fees-Resource-Guide.aspx> (last visited Sept. 3, 2018); *CJPP Launches Criminal Justice Debt Reform Builder, a 50-State Web Resource*, CRIM. JUST. POL'Y PROGRAM (Apr. 14, 2017), <http://cjpp.law.harvard.edu/news-article/launch-50-state-web-tool-criminal-justice-debt>.

118. See Reitz, *supra* note 23, at 1749 ("It is not uncommon to hear that major shares of agencies' operating budgets are funded by offenders' payments. Here we are not talking about traditional criminal justice purposes, but goals like making payroll, purchasing equipment otherwise not budgeted for, or contributing to general funds unrelated to criminal justice.").

119. DOJ, FERGUSON REPORT, *supra* note 31, at 9–10.

120. MCLEAN & THOMPSON, *supra* note 22, at 8.

121. Paul Peterson, *Supervision Fees: State Policies and Practice*, 76 FED. PROB. 40, 42 (2012).

122. ACLU, IN FOR A PENNY, *supra* note 37, at 8.

123. *Policing and Profit*, *supra* note 11, at 1724 n.11.

business . . . is because that defendant has come in and is a user of those services. [Defendants] don't necessarily see themselves as a customer because, obviously, they're not choosing to be there. But in reality they are."¹²⁴

If reforming local police departments to curb use of excessive force is difficult, which it surely is, weening localities from LFOs is even more so.¹²⁵ Historical experience with fee-earning local justices of the peace, a system that successfully resisted reform from the early-mid nineteenth century until being outlawed by the Supreme Court in the 1920s, provides a telling example of the resistance.¹²⁶ Aggravating matters, local criminal justice systems often evade public scrutiny,¹²⁷ processing multitudes of low-level offenders¹²⁸ who often, as in Ferguson, are politically disempowered and lack the wherewithal to draw attention to problems.¹²⁹

B. Local Governmental Structure and Independence

The structure and operation of a particular local government's judicial system also can be an impediment. It is not uncommon, for instance, for local courts to have final say over themselves,¹³⁰ and they are accustomed to operating on their own terms.¹³¹ Again, experience in Ferguson affords an example of the problems this can create.¹³² According to the U.S. Department of Justice Report, Ferguson police quite consciously cited and arrested individuals for

124. Shapiro, *supra* note 40.

125. See Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 272 (2017).

126. Logan & Wright, *supra* note 11, at 1184–85.

127. See AMERICAN CIVIL LIBERTIES UNION, JUSTICE DERAILED: A CASE STUDY OF ABUSIVE AND UNCONSTITUTIONAL PRACTICES IN COLORADO CITY COURTS 1 (2017) [hereinafter ACLU, JUSTICE DERAILED] (“Colorado’s municipal courts operate in the shadow of state law, with little meaningful statewide oversight or accountability. Without such oversight, Colorado municipal court judges function largely unchecked as they determine daily how their city will mete out justice.”); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 907–08 (2013) (discussing reasons accounting for lack of public salience). For additional discussion of the unique institutional factors influencing local criminal justice policy-making see Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369 (2018).

128. See generally Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014). As a recent report by Human Rights Watch noted, the mass-volume system is custom-made for the private probation industry: “The probation business thrives on volume. Relatively low margins on a per-offender basis can translate into significant profits when multiplied out over large numbers of probationers.” HRW, PROFITING FROM PROBATION, *supra* note 37, at 17.

129. See *Markadonatos v. Vill. of Woodridge*, 739 F.3d 984, 1001 (7th Cir. 2014), *aff’d en banc*, 760 F.3d 545 (7th Cir. 2014) (Hamilton, J., dissenting) (“For governments under fiscal pressure, the temptation may be strong to raise money with such fees on a group unlikely to have political clout.”).

130. Maureen O’Connor & Laurie K. Dudgeon, *The Work of the National Task Force on Fines, Fees and Bail Practices*, in TRENDS, *supra* note 38, at 59, 60 (“The issue is made more complex because supervisory authority over many municipal courts resides with the municipality rather than the state court system, exacerbating the pressure to produce revenue.”).

131. ACLU, IN FOR A PENNY, *supra* note 37, at 9 (noting that judges pressured one another to secure their “fair share” of LFOs and would be allocated less in the way of operating funds if they did not).

132. See, e.g., Peter Joy, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers at the Same Time: Legal Ethics and Municipal Courts*, 51 WASH. U. J. L. & POL’Y 23 (2016).

minor (often make-weight or fabricated¹³³) municipal code offenses, which often shadowed offenses contained in the state criminal code.¹³⁴ They did so because invoking the local code—as opposed to the state code—allowed the matter to be resolved in municipal court.¹³⁵ This was significant because the presiding judge could be counted on to prioritize revenue generation,¹³⁶ and proceeds went to Ferguson’s coffers, not those of the State of Missouri education fund.¹³⁷ According to Judge Karl DeMarce, an associate circuit judge for the Circuit Court of Scotland County, Missouri, the design of the state’s municipal court system made it “highly susceptible to pressure to maximize the revenues derived” from LFOs.¹³⁸ Under this arrangement, which the Ferguson Report noted as involving “[c]ity, police, and court officials,”¹³⁹ revenues in Ferguson from 2007 through 2014 increased dramatically.¹⁴⁰

Local governments can also enjoy a significant degree of political power and independence. In Louisiana, for instance, where a Standing Committee was instituted to evaluate the propriety of individual LFOs, a legislative change in 2011 stripped the Committee of purview over proposals by “mayor’s courts,” which the Committee called “essentially revenue generators for local public safety and other municipal operations that may not be associated with the administration of justice”¹⁴¹ Similarly, in New York “in the 1990s, after the state allowed localities to impose and keep an administrative fee of \$30 a month on each DWI probationer, localities enacted their own laws allowing for fees to be collected from non-DWI probationers.”¹⁴² In 2003, an opinion by the New York State Attorney General concluded that these local initiatives were unlawful because they were preempted by state law; nevertheless, the local practices continued, along with the revenue stream afforded.¹⁴³ In Missouri, in the wake of state efforts to limit local LFO collections, “the cities are already exerting pressure upon the state legislature to roll back the recent statutory reforms.”¹⁴⁴

133. DOJ, FERGUSON REPORT, *supra* note 31, at 19–22, 25–26, 52, 62.

134. *Id.*

135. *Id.* at 7–8.

136. *Id.* at 10–15.

137. Martin et al., *supra* note 8, at 6.

138. Karl A.W. DeMarce, *How the Fines and Fees Issue Impacted the Missouri Courts*, in TRENDS, *supra* note 38, at 2, 3. Judge DeMarce also noted that there were several dozen municipalities that had “succumbed to the temptation to use their police and their municipal courts primarily to generate additional revenue.” *Id.*

139. DOJ, FERGUSON REPORT, *supra* note 31, at 10 (“City, police, and court officials for years worked in concert to maximize revenue at every stage of the enforcement process.”).

140. *Id.* at 9–15.

141. Logan & Wright, *supra* note 11, at 1222 n.345.

142. *Id.* at 1222 n.349.

143. *Id.* at 1222–23 & n.349.

144. DeMarce, *supra* note 138, at 6. Judge DeMarce also stated that “[m]any in law enforcement and city government now contend that [changes] have not only negatively impacted municipal budgets, but also effectively eliminated any meaningful deterrent against violation of municipal ordinances.” *Id.*

C. *Infused Nature*

A third concern is that mercenary practices can be quite pervasively infused in local governments. Many individuals, departments, and causes have their hands out and have become accustomed to getting funds. Not only do police departments benefit but also prosecutors (*e.g.*, for pre-trial diversion),¹⁴⁵ public defenders (for fees, which can be required even if the individual is acquitted),¹⁴⁶ correctional agencies (for pay-to-stay),¹⁴⁷ court clerks,¹⁴⁸ and the courts themselves (through court assessments).¹⁴⁹ Once collected, the LFOs are often dispersed such that no single governmental entity knows either the total amount that originally was assessed or the defendant's remaining balance.¹⁵⁰ Representative of the far-flung beneficiaries, Arizona directs surcharges to go to a "clean elections" fund;¹⁵¹ the 3% fee imposed on bail bonds in New Orleans is distributed among the district court, district attorney, public defender, and sheriff;¹⁵² and Tennessee imposes a "privilege tax" upon conviction for many crimes, with proceeds going to fourteen different programs and funds.¹⁵³

The end result of the many interests benefiting from LFOs is that political resistance and pressure can be brought to bear from many different quarters, magnifying the resistance to reform.

D. *Private-Sector Influence*

As noted earlier, profit-motivated private businesses often play a very central role in the LFO industry, especially with probation services.¹⁵⁴ For local governments, the allure of their involvement is easy to understand. Sentinel Offenders Services, LLC, one of the nation's largest private probation providers, for instance, boasts that it allows localities to handle probationers at "zero cost" on an "offender-funded" business model.¹⁵⁵ The pitch of Georgia-based Free-

145. Logan & Wright, *supra* note 11, at 1187–88, 1190, 1211, 1213–14.

146. Wright & Logan, *The Political Economy*, *supra* note 25, at 2046–49.

147. Logan & Wright, *supra* note 11, at 1192.

148. *See, e.g.*, FLA. STAT. § 938.06(2) (2018) (stating that the clerk shall retain \$3 of \$20 assessed on all convictions); FLA. STAT. § 938.19(4)(b) (2018) (stating that the clerk shall withhold 5% of all assessments imposed for "teen court" as "fee income" for the office).

149. Logan & Wright, *supra* note 11, at 1191, 1194, 1212. *See also* Shapiro, *supra* note 40 (noting that in Allegan County, Michigan, court fees pay for "the salaries of court employees, for heat, telephones, copy machines and even to underwrite the cost of the county employees' fitness gym").

150. CARL REYNOLDS ET AL., A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION, AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES 23–24 (2009). For discussion of the obvious conflicts of interest concerns presented by allocating such proceeds to public defenders, see Wright & Logan, *The Political Economy*, *supra* note 25, at 2059–66. In New Orleans, the perennially underfunded public defender office secures 41% of its budget from LFOs. LAISNE ET AL., *supra* note 13, at 21.

151. Logan & Wright, *supra* note 11, at 1206.

152. LAISNE ET AL., *supra* note 13, at 6.

153. HLS, CONFRONTING, *supra* note 23, at 10.

154. *See supra* notes 78–87 and accompanying text.

155. HRW, PROFITING FROM PROBATION, *supra* note 37, at 15–16; *see also* Carter, *supra* note 40 ("The industry's pitch caught on with court systems looking for ways to save money and ensure collection of what they're owed: You pay us nothing; we supervise them and collect revenues for you.")

dom Probation Services is similar: “If your municipality is looking to reduce incarceration rates and to increase the collection of fines and court costs in the municipal court, please give our office a call today.”¹⁵⁶

Private business involvement can create a host of problems. Profit motivation can come at the expense of both the care and rehabilitation of probationers and public safety.¹⁵⁷ Moreover, the companies, which typically are subject to very little or no regulatory oversight,¹⁵⁸ charge generous fees for services—such as for electronic monitoring, which can entail a set-up fee, daily rental, and monthly maintenance, which together costs over \$100 a month.¹⁵⁹ When a probationer is unable to make payments and falls behind, the company charges late fees that they collect, or they assign to another private entity that gets a portion of any collected proceeds.¹⁶⁰

As elsewhere in politics, wealthy companies wield influence and naturally resist reforms that might negatively affect their balance sheets.¹⁶¹ While reforms directed at excessive force among local police surely face significant obstacles, resistance from private industry is not typically one of them,¹⁶² another reason why LFO reform is distinct.¹⁶³

E. State Resistance

Finally, states like and depend upon local mercenary justice.¹⁶⁴ They directly benefit when local money goes to state coffers and indirectly benefit when they can divert what were once local government budgetary allocations to

156. Stillman, *supra* note 40; *see also* HRW, PROFITING FROM PROBATION, *supra* note 37, at 15 (quoting website advertisement of Judicial Correction Services: “Supervision is completely offender-funded. This means your tax dollars are not going to support the probation office Court collections have increased in every community that has made the transition to JCS. This helps fund the court itself.”).

157. *See supra* notes 65–77 and accompanying text.

158. HRW, PROFITING FROM PROBATION, *supra* note 37, at 55–62.

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

160. BANNON ET AL., *supra* note 12, at 6. In Georgia, after the massive profits earned by private probation companies attracted intense scrutiny and highly critical media accounts, the legislature required such entities to provide information regarding the number of probationers under supervision, the amount of money collected, and the number of warrants issued. *See* HLS, CONFRONTING, *supra* note 23, at 36.

161. *See, e.g.*, James McNair, *Inside Kentucky's Unregulated Private Probation Industry*, KY. CTR. FOR INVESTIGATIVE REPORTING (Jan. 20, 2016), <http://kycir.org/2016/01/20/inside-kentuckys-unregulated-private-probation-industry> (discussing concerns raised over judicial campaign contributions made by officers and directors of a private probation services company).

162. Police unions, which wield considerable power and can resist such reforms, are akin to private-sector forces, but their political influence, such as their wherewithal to contribute money, distinguish them from the wealthy private businesses interests discussed in the text.

163. Concern over undue influence of private business interests is especially salient today, a time unlike the past when private business interests pushed back against government revenue generation, such as when businesses successfully curtailed prisoner-related industries that were undercutting their market share. Today, private business interests directly benefit, courtesy of government policy, and thus cannot reasonably be expected to exercise countervailing influence.

164. *See, e.g.*, PEPIN, *supra* note 38, at 2 (noting “the reality that legislative bodies have and will continue to require that courts impose fees”).

other needs. Emblematic of the dynamic, in the last forty years the Alabama Legislature has approved more than 400 local acts establishing LFOs in various counties.¹⁶⁵ In 2014, the Oklahoma Legislature praised local courts, which recently had experienced major budget cuts, for achieving “the highest court fund collections possible.”¹⁶⁶ Texas statutory law requires that municipalities and counties of a certain size employ an individual to devise a collections program designed to “improve the collection of court costs, fees, and fines” that have been imposed.¹⁶⁷ Such efforts mitigate or obviate the need for state legislators to raise state taxes, which has well-known political risks. Meanwhile, state-level political actors feel the influence of their local counterparts, who can be expected to resist state efforts to limit LFO revenue generation.¹⁶⁸

IV. POTENTIAL BASES FOR FEDERAL INTERVENTION

The pervasive nature of LFOs and the barriers to change just discussed raise serious questions over whether the federal government can play a role in reform. In several high-profile instances in recent years, concerns over police excessive force and aggressive street patrol practices more generally prompted the U.S. Department of Justice to intervene with investigations and litigation, seeking reform.¹⁶⁹ Over time as well, Congress has gotten involved, but not always in ways aligned with progressives’ desires, such as by providing local police with military-type gear and incentivizing arrests for drug possessions.¹⁷⁰ Presuming the desirability of reforms noted earlier, this Part examines the like-

165. Greenberg et al., *supra* note 60, at 1111.

166. Eaglin, *supra* note 6, at 1867.

167. TEX. CODE CRIM. PROC. ANN. art. 103.0033(a)(3) (West 2018); 1 TEX. ADMIN. CODE § 175.1(c) (West 2018). The Missouri Legislature, it bears mention, did act to limit local power to charge and collect LFOs, first capping the percentage of municipal revenue generated from non-traffic ordinance violations (e.g., excessive height of grass, manner of walking) to a limit of 20%, the same as for traffic violations. Kurt Erickson, *Missouri Governor Signs Law Targeting Municipal Courts*, ST. LOUIS POST-DISPATCH (June 17, 2016), http://www.stltoday.com/news/local/govt-and-politics/missouri-governor-signs-law-targeting-municipal-courts/article_39b4461e-aa27-57b8-a614-33bc583c0a97.html; Alex Stuckey, *Cap on Non-Traffic Violation Revenue Passed by Missouri Senate*, ST. LOUIS POST-DISPATCH (Jan. 28, 2016), https://www.stltoday.com/news/local/govt-and-politics/cap-on-non-traffic-violation-revenue-passed-by-missouri-senate/article_093c9fb2-67a6-54f6-97b8-7bc6f4e3a986.html. While notable, it remains debatable whether such legislation in Missouri would come to pass in the absence of revelations contained in the DOJ Ferguson Report, the intense media attention generated by the Michael Brown killing, and the massive protests in Ferguson and the nation as a whole.

168. See Richard Briffault, *OUR LOCALISM: PART I—THE STRUCTURE OF LOCAL GOVERNMENT LAW*, 90 COLUM. L. REV. 1, 1 (1990) (“The insistence on local legal powerlessness reflects a lack of understanding of the scope of local legal authority. Most local governments in this country are far from legally powerless. Many enjoy considerable autonomy over matters of local concern. State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities.”).

169. See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 (2015) (noting investigations and litigation targeting police departments in Los Angeles, Detroit, Seattle, Newark, Pittsburgh, Cincinnati, Washington, D.C., and New Orleans).

170. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 898–913 (2015).

likelihood of federal efforts being initiated and actually achieving meaningful constructive reform of local mercenary criminal justice practices.

A. 34 U.S.C. § 12601

Perhaps the most obvious possible route to reform would be an investigation and litigation initiated by the U.S. Attorney General pursuant to 34 U.S.C. § 12601 (previously codified at 42 U.S.C. § 14141), which makes it unlawful for a police department to engage in a pattern or practice of unconstitutional misconduct.¹⁷¹ The statute authorizes the Attorney General to seek injunctive or equitable relief to remedy identified misconduct,¹⁷² and any resulting consent decree or memorandum of agreement entered into by the targeted department and the federal government allows the federal courts to monitor and enforce its requirements.¹⁷³

A large literature has explored the benefits and pitfalls of § 12601 actions, which are often referred to as Structural Reform Litigation (“SRL”).¹⁷⁴ The benefits are seen in several success stories involving modification or cessation of problematic practices within particular police departments. In Pittsburgh, for instance, a consent decree resulted in significant improvements in police conduct regarding, *inter alia*, use of excessive force and lack of public accountability.¹⁷⁵ Similar positive outcomes were achieved in other locations such as Los Angeles¹⁷⁶ and Cincinnati.¹⁷⁷ Professor Stephen Rushin, a leading authority on SRL, has written that it can “facilitate organizational change in law enforcement agencies”; force “local governments to prioritize investments into police reform, even if such investments are not politically popular”; ensure by “external monitoring . . . that frontline officers substantively comply with top-down mandates”; and “provide[] police executives with legal cover to implement wide-ranging policy and procedural reforms aimed at curbing misconduct.”¹⁷⁸

SRL, however, is far from a panacea for police abuse and has been subject to considerable criticism. Reform efforts can be very prolonged and expensive, beyond the realistic fiscal wherewithal of local governments.¹⁷⁹ Concern also exists over whether changes undertaken are actually sustained in the long term,

171. 34 U.S.C. § 12601(a) (2012) (previously codified at 42 U.S.C. § 14141).

172. *Id.* § 12601(b).

173. *Id.*

174. See Rushin, *supra* note 169, at 1349.

175. See, e.g., ROBERT C. DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE 5–17 (2005).

176. CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD i (2009); OFFICE OF THE INDEP. MONITOR OF THE L.A. POLICE DEP’T, FINAL REPORT 143 (2009).

177. GREG RIDGEWAY ET AL., POLICE-COMMUNITY RELATIONS IN CINCINNATI xvii (2009).

178. Rushin, *supra* note 169, at 1349.

179. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 373–77 (2011).

after the federal monitoring period has expired.¹⁸⁰ Also, as a practical matter, the federal government lacks the resources to target more than a handful of departments at any given time and has challenged the practices of only a relative few.¹⁸¹ There are approximately 20,000 police and sheriff departments in the nation,¹⁸² and it is estimated that less than 1% of major urban police departments have been investigated under § 12601.¹⁸³ The DOJ has mainly focused on large urban departments,¹⁸⁴ not the multitude of smaller local-government departments,¹⁸⁵ making it statistically very unlikely that the federal government will intervene.¹⁸⁶ Aggravating matters, it is not unusual for departments previously investigated and thought remedied to require renewed attention after Justice oversight ends,¹⁸⁷ which of course requires additional resources.¹⁸⁸

In short, SRL is rightly regarded as too piecemeal, sporadic, and reactive in nature to provide a meaningful basis for widespread institutional reform. For a variety of reasons, moreover, it is unlikely that SRL targeting local LFOs in particular will yield much in the way of concrete results.

First of all, it might not always be the case that local extraction of LFOs, even if abusive, qualifies as a basis for federal intervention because the abuses might not create sufficient constitutional concern. Under § 12601, Justice can challenge a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured by the Constitution or laws of the United States.”¹⁸⁹ The Supreme Court, for its part, has found fault with LFOs in only particular circumstances, most often when a judge secured a distinct financial reward for performing a judicial task,¹⁹⁰ and the Court

180. See Ivana Dukanovic, Note, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911, 924–26 (2016).

181. See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 50 (2012) [hereinafter Harmon, *Limited Leverage*]; see also Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3 (2009) [hereinafter Harmon, *Promoting Civil Rights*] (noting the relative inefficacy of litigation “in promoting reform in law enforcement agencies”); Mazzone & Rushin, *supra* note 125, at 282 (noting that current “mechanisms rely on piecemeal, reactive litigation—a strategy that is woefully inadequate to securing widespread and enduring reform”).

182. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE: BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2 (2011).

183. Harmon, *Promoting Civil Rights*, *supra* note 181, at 52.

184. Rushin, *supra* note 169, at 1415 (“To compensate for [its resource] limitation, the DOJ has seemingly prioritized the investigation of major police agencies that serve large swaths of the American population . . .”).

185. *Id.*; Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 141–48 (2016).

186. Rushin, *supra* note 169, at 1416 (“[G]iven that there are around 18,000 local and state police agencies in the United States, the likelihood that any one agency will be subject to federal intervention in a given year appears to be relatively low.”).

187. See Samuel Walker & Morgan MacDonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON C.R. L.J. 479, 481 (2009) (“Serious questions remain about whether reforms effected through litigation will be sustained once the consent decree or [Memorandum of Agreement] is terminated.”).

188. Dukanovic, *supra* note 180, at 924–26; Harmon, *Limited Leverage*, *supra* note 181, at 50.

189. 34 U.S.C. § 12601(a) (2012).

190. See *Connally v. Georgia*, 429 U.S. 245, 251 (1977) (invalidating on due process grounds a system where justices of the peace earned a \$5 fee when issuing a warrant but no fee when a warrant was refused);

has not signaled concern over LFOs in principle.¹⁹¹ Standing alone, the economic war waged on Ferguson's citizens by its police and judiciary, while itself very likely constitutionally problematic or at least a contributing factor driving unconstitutional policing practices,¹⁹² might not have prompted federal intervention.¹⁹³

Furthermore, a question might exist concerning whether the federal government has jurisdiction to initiate a § 12601 action. The local governmental structure in Ferguson was rather unique in that the municipal court, the practices of which the Department found especially problematic, was actually part of the police department.¹⁹⁴ Notably, it was the combined impact of the municipal court and police practices that the Justice Department saw as "reflect[ing] an approach to law enforcement in Ferguson that violates the Constitution."¹⁹⁵ In other words, in the more common case where the court system and police departments are independent, jurisdiction might not lie.¹⁹⁶

Another reason SRL might not be well suited to combatting LFO abuse stems from the nature of local government itself. Not only are local government practices more likely to fly under the radar (absent a high-profile event like the

Tumey v. Ohio, 273 U.S. 510, 532 (1927) (invalidating on due process grounds a regime where judges received a \$12 fee for a conviction but not an acquittal).

191. See *Fuller v. Oregon*, 417 U.S. 40, 50 (1974) (upholding Oregon law requiring indigent defendants to repay the county for legal counsel afforded to them); *Schilb v. Kuebel*, 404 U.S. 357, 372 (1971) (upholding an Illinois statutory "bail surcharge" of 1%, designed to offset costs of operating bail system).

192. See DOJ FERGUSON REPORT, *supra* note 31, at 15 (concluding that Ferguson's revenue-generation practices "fostered practices...that are themselves unconstitutional or that contribute to constitutional violations").

193. This is not to say, however, that litigation by private parties (not available under § 12601) is not possible. For discussion of such claims see Logan & Wright, *supra* note 11, at 1207–10; *Policing and Profit*, *supra* note 11, at 1737–46. Also, individuals, in litigation often marshalled by public interest law groups, are having some success in challenging instances of courts jailing people for failure to pay LFOs, contrary to the "inability to pay" finding required by *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). See HLS, CONFRONTING, *supra* note 23, at 40 n.17 (noting lawsuits filed in Alabama, Mississippi, Georgia, Missouri, Louisiana, and Washington). Equal Justice Under the Law, a nonprofit group, sued Rutherford County, Tennessee and Providence Community Corrections ("PCC"), alleging that the latter "ran an extortion scheme that conspired to extract as much money as possible from people who were threatened with jail time if they could not pay court fees and fines. In five years, PCC collected over \$17 million from probationers in Rutherford County." Appleman, *supra* note 14, at 1538 (internal citations and quotations omitted). The suit further accused PCC and the County of being a "racketeering enterprise that misappropriates the probation process for profit." *Id.* (internal quotations omitted).

194. DOJ, FERGUSON REPORT, *supra* note 31, at 8. In Ferguson, the Justice Department could investigate the behavior of local courts because of their unique relationship to "conduct by law enforcement officials." U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 65 (2017), http://www.newamericancivilrightsproject.org/wp-content/uploads/2018/01/Statutory_Enforcement_Report2017.pdf [hereinafter BRIEFING REPORT].

195. DOJ, FERGUSON REPORT, *supra* note 31, at 42.

196. BRIEFING REPORT, *supra* note 194, at 65 ("[T]he pattern or practice statutory authority is of limited use for redressing municipal court fines and fees. The Commission received testimony noting that if the Department [of Justice] had explicit statutory authority to investigate courts, 'you would see more of this work.'"). Indeed, the Ferguson Consent Decree is the only decree that has entailed changes in a locality's judicial system. *Special Litigation Section Cases and Matters*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#police> (last visited Sept. 3, 2018).

Michael Brown killing),¹⁹⁷ their smaller budgets and range of tax revenue sources can limit their wherewithal to comply with demanded reforms.¹⁹⁸ Perversely, the very circumstances that can make localities more prone to get heavily involved in LFO-generation, can impair their capacity to make reforms when abuses come to light and reforms are demanded.¹⁹⁹

Finally, inevitably, political forces play a major role, as recent pronouncements of the Trump Administration expressing disinterest in SRL make clear.²⁰⁰ Yet, even in the decidedly more interventionist Obama Administration,²⁰¹ interest in LFO reform, standing alone, was less than enthusiastic. As much was clear in late December 2015, when Justice Department officials expressed reluctance to address local government LFO abuses, citing a lack of information regarding particular jurisdictions.²⁰² The DOJ stated that it would instead continue to highlight reform suggestions by think tanks and advocacy groups and offer incentives to local governments to lessen use of LFOs that result in incarceration.²⁰³

Local politics also can figure in the likelihood of SRL coming into play. Unlike in other contexts, for instance, Baltimore in the wake of the Freddie Gray shooting by police, allegations of police violence, and associated public unrest,²⁰⁴ it is unlikely that local government officials will ask the federal government to take action. For reasons discussed earlier, abusive LFO policies and practices do not develop in a vacuum but rather reflect local self-interest (as well as the interest of states and private-sector actors), which very likely translates into a lack of the local support necessary for reforms to be sought, take

197. Rushin, *supra* note 169, at 1416.

198. The Justice Department required of Ferguson twenty-six “broadly identified . . . changes that are necessary for meaningful and sustainable reform.” DOJ, FERGUSON REPORT, *supra* note 31, at 6, 90–102.

199. Again, Ferguson serves as a prime example: the government balked at reforms initially agreed to, necessitating litigation by the Justice Department. See Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), <https://www.nytimes.com/2016/02/11/us/politics/justice-department-sues-ferguson-over-police-deal.html>.

200. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2129 (2017); Steve Eder et al., *How Trump’s Hands-Off Approach to Policing Is Frustrating Some Chiefs*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/trump-justice-department-police.html> (discussing no more “collaborative reform initiative”). Similar reluctance was evident in the George W. Bush Administration. See Chavis, *supra* note 179, at 373–74 (“[The lack of a private cause of action under § 12601] leaves enforcement of the statute vulnerable to the priorities of the political administration in power. Administrations that do not view police reform as a high priority, or worse, view the idea of police reform as politically unpopular, may not vigorously enforce the legislation. Aggressive federal intervention efforts and oversight involving local issues (particularly policing) may be unwelcome in some local jurisdictions.”).

201. See Simone Weichselbaum, *Policing the Police*, THE MARSHALL PROJECT (May 26, 2015, 6:12 PM), <https://www.themarshallproject.org/2015/04/23/policing-the-police> (noting that under Attorney general Eric Holder, the Department opened more than twenty § 12601 investigations nationwide, more than any other attorney general).

202. Ryan J. Reilly, *As DOJ Zeros in on Profit-Driven Policing, Advocates Urge Crackdown*, HUFF. POST (Dec. 2, 2015, 11:20 AM), https://www.huffingtonpost.com/entry/as-doj-zeros-in-on-profit-driven-policing-advocates-urge-crackdown_us_565dd88ee4b072e9d1c36495.

203. *Id.*

204. See Alexander J. Kasner, Note, *Local Government Design, Mayoral Leadership, and Law Enforcement Reform*, 69 STAN. L. REV. 549, 571–72 (2017) (noting requests by mayors of Cleveland, Ohio and Baltimore, Maryland in the wake of public concern over police harassment and use of force).

root, and succeed.²⁰⁵ Meanwhile, community members, if similar to those in Ferguson, will lack the political will and wherewithal to speak up, rendering them subject to continued economic subjugation.

Professors Rachel Barkow and Mark Osler recently observed that § 12601 actions targeting police abuses more generally often face institutional hurdles, based on federal prosecutors' shared, repeat-player law enforcement interests with local police.²⁰⁶ They reason that the LFO abuses in Ferguson did not face such an obstacle: "Arguing against localities seeking to extract fines and fees from impoverished defendants posed no conflict with the Department's mission because unlike these municipalities, the Department has no need to use the criminal process to help keep its budget afloat."²⁰⁷ But even in the absence of this barrier, it is unlikely that the Department of Justice would have known about and acted to address the mercenary justice policies and practices in Ferguson if not for the Michael Brown shooting and the mass public demonstrations that followed.²⁰⁸ And even if it did, for reasons noted, it is unclear whether Justice would have dedicated its limited resources to correct the economic violence done to citizens of Ferguson standing alone.²⁰⁹

B. Congressional Spending Authority

Congress, on its own, or perhaps as a result of pressure from the Department of Justice,²¹⁰ could conceivably enact legislation designed to achieve LFO reform. Mindful of Tenth Amendment-based limits on commandeering states to carry out federal programs or laws,²¹¹ Congress has with some regularity invoked its authority under the Spending Clause to provide or withhold federal funds in the name of adopting criminal justice policies to its liking.²¹² Perhaps

205. See Rushin, *supra* note 169, at 1416 (noting, based on a nationwide survey of SRL participants, that "supportiveness of the police executives and local political leaders in the targeted departments was the single greatest predictor of the overall success of the reforms."); *id.* at 1417 ("SRL is not a silver bullet. SRL ultimately requires local cooperation and dedication to succeed. The DOJ cannot use SRL to instantly transform a police agency with defiant, obstinate leadership."). According to Stephen Rushin, whether DOJ can force "reform on a municipality that adamantly opposes it . . . represents the most important question facing SRL in the future. The answer will define the future usefulness of this regulatory mechanism. Thus far, the DOJ has not fully pursued SRL against municipalities that ardently oppose federal oversight." *Id.* at 1417–18.

206. See Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 392 (2017) (noting the Justice Department's "hard-wired institutional resistance to reforms that make things more difficult for prosecutors").

207. *Id.* at 455.

208. See *supra* note 33 and accompanying text.

209. See *supra* note 35 and accompanying text.

210. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 544–46 (2001) (discussing the influence of the Justice Department on Congress).

211. See, e.g., *Printz v. United States*, 521 U.S. 898, 919 (1997).

212. U.S. CONST. art. I, § 8 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."); see also *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding the power of Congress to affect state law and policy on the basis of its Spending Clause authority). For a discussion of the potential impact on congressional Spending Clause authority by the Court's recent decision in *National Federation of Independent*

the most notable example relates to sex offender registration and notification (a.k.a. “Megan’s”) laws.²¹³ Since 1994, Congress has successfully pressured states to adopt registration and notification laws that track federal policy preferences by threatening to withhold from states 10% of their allocated funds under the Byrne Justice Assistance Grant Program.²¹⁴ It turns out that federalism concerns, even among states-rights stalwarts, is something less than an unequivocal obstacle when criminal justice policy comes into play.²¹⁵

Convicted sex offenders, perhaps the most feared and disdained of populations,²¹⁶ provide a politically compelling target for members of Congress, as do any number of other subpopulations drawing congressional attention in recent years, such as violent felons.²¹⁷ For several reasons, however, it is unlikely that similar political zeal will drive congressional interest in reforming LFO policy and practice.

For starters, as with much else in politics, the framing of an issue is critically important.²¹⁸ Predictably, one frame would unsympathetically characterize those targeted as legal scofflaws who violate the law and then fail to pay what they owe.²¹⁹ And even if local LFO abuses were acknowledged, advocates for change within Congress would likely have difficulty persuading their colleagues, given that the targets of abuse are very often poor and minorities who lack political influence,²²⁰ especially compared to local governments. Although localities are nonsovereign entities that exist at the sufferance of states,²²¹ they

Business v. Sibelius, see Grace E. Leeper, Note, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U. L. REV. 2053, 2075–84 (2017).

213. On the laws and their history more generally, see WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 54–55 (2009).

214. See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 97 n.277 (2008).

215. See Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 995 (2010) [hereinafter Logan, *Failed Promise*]; Logan, *supra* note 214, at 103–08. Professor Kami Chavis urges pursuit of police reform by use of the Spending Clause, withholding 5% of money allocated under a major federal funding source for police training and employment. Chavis, *supra* note 1790, at 351–52 (advocating withholding of funds allocated states under the Community Oriented Policing Services (“COPS”) Program).

216. See LOGAN, *supra* note 213, at 236 n.45.

217. See, e.g., 34 U.S.C. § 12113 (“Aimee’s Law”) (2012); 34 U.S.C. § 12101 (2012).

218. See, e.g., Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 104 (2007); Thomas E. Nelson et al., *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221, 221 (1997).

219. See *supra* notes 118–24 and accompanying text. The public, for instance, generally favors recoupment to help pay the costs of imprisonment. Traci R. Burch, *Fixing the Broken System of Financial Sanctions*, 10 CRIMINOLOGY & PUB. POL’Y 539, 539 (2011).

220. Indeed, if the fatal shooting of an unarmed pedestrian evoked ambivalence in some quarters, as it in fact did, generating revenue from Michael Brown and others like him will predictably inspire something less than the political pressure on federal politicians needed for change to come about.

221. As noted by Professors Mazzone and Rushin:

When Congress regulates not states but localities dispersed around the country, objections grounded in federalism—a state-centered principle—have less punch. Localities, of course, exist as a function of state government, from which they derive their authority, so regulating localities does ultimately implicate state governmental interests. Nonetheless, in our constitutional scheme, states have special footing; the Constitution makes no mention at all of towns, cities, or counties, and it provides protection to states that are not available to their subunits.

Mazzone & Rushin, *supra* note 125, at 330.

wield substantial power in the halls of Congress,²²² and a quasi-federalism sentiment among some members might militate against federal meddling in what has always been thought a local prerogative (criminal justice system operations).²²³

It is also worth noting that even when Congress has taken the initiative to threaten loss of funds, federal wishes do not always work out as planned.²²⁴ Once again, experience with federal sex offender registration and notification policies offers a case in point. Although states initially succumbed to federal Spending Clause pressure—loss of 10% of Byrne Grant allocations—imposed in 1994 (to enact registration laws) and in 1996 (to enact notification laws), the most recent threat, in 2006 to adopt significant changes and expansion of state laws,²²⁵ has been less than successful. Although Congress imposed a 2009 deadline for compliance, most states have balked because, in significant part, they reason that complying and satisfying federal demands will cost more than the threatened loss of funds.²²⁶ Depending on the role played by LFOs in local budgets, and its offset effect in avoiding need for states to fund local criminal justice systems, a similar rational calculus might come into play. Indeed, the cost of reform in Ferguson was a main reason the city rejected the proposed Justice Department settlement, which required the Department to file suit.²²⁷

A quid pro quo, carrot-and-stick approach, however, is not the only way for Congress to exercise its spending authority. Rather than threatening to withhold a percentage of federal funds if state and local governments do not adopt laws and policies limiting LFOs, Congress could simply deny federal funds earmarked for particular purposes. For instance, Professor Rachel Harmon has suggested the possibility of using Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968, which prohibit law enforcement agencies receiving federal funds, training, or technical assistance from discriminating on the basis of race, color, national origin, sex,

222. See DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 31 (2003); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 257, 278, 330 (2000).

223. See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WISC. L. REV. 789, 826 (2000).

224. See Logan, *Failed Promise*, *supra* note 215, at 1003–04.

225. Logan, *supra* note 214, at 66–84.

226. See Logan, *Failed Promise*, *supra* note 215, at 1003–04.

227. Apuzzo, *supra* note 199. A month later, after the federal government voiced its willingness to help keep the costs in check, the city relented and approved the consent decree on March 15, 2016. Willis Ryder Arnold, *Ferguson City Council Accepts Department of Justice Consent Decree*, ST. LOUIS PUB. RADIO (Mar. 16, 2016), [http://news.stpublicradio.org/post/ferguson-city-council-accepts-department-justice-consent-decree#](http://news.stpublicradio.org/post/ferguson-city-council-accepts-department-justice-consent-decree#stream/0)

stream/0; John Eligon, *Ferguson Approves a Federal Plan to Overhaul Police and Courts*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/us/ferguson-approves-a-federal-plan-to-overhaul-police-and-courts.html>. Ultimately, after several ballot initiatives posing increased taxes, the city was able to secure the money needed to implement DOJ-mandated reforms in the face of funds curtailed as the result of removing LFO-based revenue. See *Voters in Ferguson, Missouri, Approve 2nd Tax Increase*, CBS ST. LOUIS (Aug. 6, 2016, 12:11 AM), <http://stlouis.cbslocal.com/2016/08/03/voters-in-ferguson-missouri-approve-2nd-tax-increase/>.

or religion.²²⁸ She writes: “Since police departments receive substantial federal assistance, these statutes could be used to induce remedial measures designed to prevent discrimination by police officers. One could also imagine new analogous statutes that condition federal funds for police departments on abstaining from forms of misconduct other than discrimination.”²²⁹

As Professor Harmon notes, however, any such effort would be hindered by the “same obstacles that presently limit the frequency of Section [12601] suits: discrimination in violation of federal law is expensive to investigate and difficult to prove.”²³⁰ Also, such an approach would suffer from the more general concerns noted earlier—a piecemeal, reactive approach that very much depends on the political will of federal actors, which again remains in question.²³¹

Finally, the Department of Justice or Congress, alone or together, could incentivize state and local cooperation regarding LFO reform. President Obama was an advocate of the federal government “promulgating guidelines and best practices” by means of “grant and other funding incentives” to foster positive change in state and local criminal justice policies.²³² Indeed, in the wake of its Ferguson Report, the Obama Justice Department in March 2016 initiated a program making available several “Price of Justice” grants.²³³ Ultimately, five recipients received grant awards of roughly half a million dollars.²³⁴ To date, however, similar interest in a carrot approach has not been evidenced by the Trump Administration.

C. Bully Pulpit

Finally, independent of formal initiative, the federal government might make more frequent and vigorous use of its bully pulpit to highlight the evils of mercenary criminal justice and spotlight for the nation the particularly troubling instances uncovered (such as in Ferguson). Doing so would be low-cost, in fis-

228. Harmon, *Limited Leverage*, *supra* note 181, at 52–54. The statutes served as the basis for the Justice Department’s Ferguson investigation. See Consent Decree, *supra* note 99, at 1–2.

229. Harmon, *Limited Leverage*, *supra* note 181, at 53–54.

230. *Id.* at 53.

231. See *supra* notes 219–21 and accompanying text.

232. Barak Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 838–39 (2017).

233. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE PROGRAMS, THE PRICE OF JUSTICE: RETHINKING THE CONSEQUENCES OF JUSTICE FINES AND FEES, FY 2016 COMPETITIVE GRANT ANNOUNCEMENT 4 (2016), <https://www.bja.gov/funding/JRlpriceofjustice.pdf> [hereinafter DOJ, THE PRICE OF JUSTICE]. The program was initiated as the result of research that showed poor individuals being jailed “for failing to pay fines and fees, despite their inability to do so; justice agencies focused less on public safety and rehabilitation than on maximizing revenue; and racial and ethnic disparity in the impacts of criminal justice debt.” *Id.*

234. *Office of Justice Programs Awards Nearly \$3 Million to Reduce Unnecessary Confinement, Save Corrections Costs*, PR NEWSWIRE (Sept. 14, 2016, 4:30 PM), <https://www.prnewswire.com/news-releases/office-of-justice-programs-awards-nearly-3-million-to-reduce-unnecessary-confinement-save-corrections-costs-30032>

8290.html (indicating that five recipients were awarded approximately \$500,000 each: the Judicial Council of California, the Missouri Office of State Courts Administration, the Washington Minority and Justice Commission of the Washington State Courts, the Texas Office of Court Administration, and the Judiciary Courts of the State of Louisiana).

cal and political terms, and would be consistent with the federal government's avowed desire to, "if not manage non-federal law enforcement agencies," provide "federal leadership."²³⁵ It also has the potential of having some positive benefit. The Obama Administration, after staging a White House summit on LFOs in December 2015²³⁶ and releasing an issue brief by the White House Council of Economic Advisers,²³⁷ in March 2016 sent a "Dear Colleague" letter to state supreme court chief justices and state court administrators. The letter urged the curtailment of mercenary justice practices, especially jailing individuals who are unable to pay, which made courts appear that they were not concerned with "addressing public safety, but rather . . . raising revenue."²³⁸ According to the U.S. Commission on Civil Rights, the letter had a positive impact in several jurisdictions, creating task forces and commissions dedicated to studying LFO abuses.²³⁹ Such an approach, however, is again of course subject to the same political vicissitudes as the strategies discussed above.²⁴⁰ Indeed, the guidance contained in the "Dear Colleague" letter issued by the Obama Administration was later retracted by the Trump Administration.²⁴¹

V. CONCLUSION

At last, as a result of the August 2014 killing by police of Michael Brown in Ferguson, Missouri and the ensuing often-violent public demonstrations occurring nationwide, LFOs have gotten the attention they deserve. As the Justice Department's report on Ferguson noted, the investigation "shined a national spotlight on the intersection of poverty, policing and injustice,"²⁴² and it is now accepted that the mercenary practices in Ferguson were not an anomaly but ra-

235. Memorandum from the Attorney General, Jefferson B. Sessions, to Heads of Department Components and United States Attorneys, Supporting Federal, State, Local and Tribal Law Enforcement (Mar. 31, 2017) (available at <https://www.justice.gov/opa/press-release/file/954916/download>).

236. Obama, *supra* note 232, at 845 n.186.

237. See DOJ, THE PRICE OF JUSTICE, *supra* note 233.

238. Letter from Vanita Gupta & Lisa Foster, U.S. Dept. of Justice, Civil Rights Div., to state supreme court chief justices (Mar. 14, 2016) (available at <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf>); see also Matt Zapotosky, *Justice Department Warns Local Courts About Unlawful Fines and Fees*, WASH. POST. (Mar. 14, 2016), https://www.washingtonpost.com/world/national-security/justice-department-warns-local-courts-about-unlawful-fines-and-fees/2016/03/13/c475df18-e939-11e5-a6f3-21ccdbc5f74e_story.html?utm_term=.3004068cd383.

239. BRIEFING REPORT, *supra* note 194, at 51–55.

240. See, e.g., *supra* notes 201–04 and accompanying text.

241. Matt Zapotosky, *Sessions Rescinds Justice Dept. Letter Asking Courts to Be Wary of Stiff Fines and Fees for Poor Defendants*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/world/national-security/sessions-rescinds-justice-dept-letter-asking-courts-to-be-wary-of-stiff-fines-and-fees-for-poor-defendants/2017/12/21/46e37316-e690-11e7-ab50-621fe0588340_story.html?utm_term=.97bc4b0eb110.

242. Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dept. of Justice, Remarks at the National Legal Aid and Defender Association Annual Conference (Nov. 10, 2016) (transcript available at <https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-national-legal-aid-defender>).

ther part of a much larger phenomenon.²⁴³ Despite proposed reforms coming from many quarters, however, change has not been forthcoming, and the nation's attention has shifted elsewhere. Those wishing comprehensive reform of local mercenary criminal justice practices therefore will likely have to await, in James Baldwin's words, "the fire next time."²⁴⁴

243. See, e.g., ACLU, JUSTICE DERAILED, *supra* note 127; LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 9–10 (2015), <https://updates-lccrights.pantheonsite.io/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf>; Ruth Marcus, *Policing by Fleecing*, in *Ferguson and Beyond*, WASH. POST (Mar. 6, 2015), https://www.washingtonpost.com/opinions/in-ferguson-and-other-cities-jailed-for-being-poor/2015/03/06/e8cb5896-c42a-11e4-9271-610273846239_story.html?utm_term=.e950f4b414e5; The Editorial Board, *The Problem Is Bigger Than Ferguson*, N.Y. TIMES (Mar. 12, 2015), <https://www.nytimes.com/2015/03/13/opinion/the-problem-is-bigger-than-ferguson.html>.

244. JAMES BALDWIN, COLLECTED ESSAYS: THE FIRE NEXT TIME I (1963) ("God gave Noah the rainbow sign, No more water, the fire next time!").