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DEFUNDING POLICE AGENCIES

Rick Su^{*}
Anthony O'Rourke^{**}
Guyora Binder^{***}

ABSTRACT

This Article contextualizes the police defunding movement and the backlash it has generated. The defunding movement emerged from the work of Black-led activists to reassert democratic control over policing and shift resources to social service agencies and other institutions serving community needs. In reaction, states have enacted anti-defunding bills checking local government reduction of law enforcement budgets. These anti-defunding measures continue a long tradition of state and federal control over local police spending, subverting local democratic control over police agencies. These limits include direct legal constraints on local police spending and indirect constraints through grants and authorization to collect fines, fees, and forfeitures. These mechanisms form a ratchet, bribing local governments to increase police spending and then mandating them to maintain it, at the eventual cost of cutting social services. This leaves cities little choice but to try to police their way out of the problems of poverty and inequality. Thus, constraints on local police funding help explain the decades-long shift of resources from social welfare to law enforcement. The problem revealed by the defunding controversy is not just the size of police budgets but also the perverse process determining those budgets. Before police agencies can be right-sized or reformed, police budgeting must be put in the hands of the people policed.

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INTRODUCTION

While police reform has won widespread support,¹ proposals to “defund the police” have met with decidedly mixed reactions.² To reformers frustrated by

¹ See Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1328 (2021) (“Across the country, crowds braved the pandemic to demonstrate against racism and police violence, with the seeming support of every organization with a public relations department.”); Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes,’* GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> (noting people “support reducing police department budgets and shifting the money to social programs”).

² In July 2020, forty-seven percent of Americans supported shifting funds from police to social programs. By August, at least thirteen cities had adopted plans to do so. See Crabtree, *supra* note 1. In March 2021, support for redirecting funds still stood at forty-seven percent, but only eighteen percent of those polled supported “the

the difficulty of subjecting police to meaningful public oversight, defunding offers a Gordian solution, at once damning and disabling police. The formula's flexibility adds to its allure, as its meanings span the spectrum from complete abolition of law enforcement to a modest reallocation of some police responsibilities.

Despite these ambiguities, this pithy proposal, formulated by a Black-led abolitionist social movement, packs a profound critique of the “War on Crime.”³ Framing police violence as a fiscal problem locates it within the neoliberal reconfiguration of the social safety net from a welfare state to a carceral state.⁴ Redescribing law enforcement as a fiscal burden wryly substitutes the police for the poor as the underperforming assets to be shed in search of profit. “Defunding” also seeks to reverse police “mission creep,”⁵ whereby problems

movement to ‘Defund the Police.’” Sarah Elbeshbishi & Mabinty Quarshie, *Fewer Than One in Five Support ‘Defund the Police’ Movement, USA TODAY/Ipsos Poll Finds*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/03/07/usa-today-ipsos-poll-just-18-support-defund-police-movement/4599232001/> (Mar. 8, 2021, 6:10 PM). By August 2021, at least twenty-five bills had been introduced in ten states to prevent or punish defunding. See S. 1333, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.R. 2310, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.R. 1, 2021 Leg. Sess. (Fla. 2021); S. 484, 2021 Leg. Sess. (Fla. 2021); S. 171, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); H.R. 230, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S. 1203, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S. 42, 2021 Leg. Sess. (Ind. 2021); H.R. 67, 2020 Leg., 2d Ex. Sess. (La. 2020); S. 66, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); S. 100, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021); Gen. Assemb. 4990, 219th Leg., 1st Ann. Sess. (N.J. 2020); S. 23, 87th Leg., Gen. Sess. (Tex. 2021); Tex. H.R. 638; Tex. S. 913; Tex. H.R. 1900; Tex. H.R. 1950; Tex. H.R. 2362; Tex. H.R. 2438; Tex. H.R. 2695; Tex. H.R. 3151. In August 2021, all present Democratic senators voted for an amendment toothlessly threatening sanctions against localities defunding police. Mark Lungariello, *Senator Cory Booker Gives Satirical Speech Against ‘Defund the Police’ Movement*, N.Y. POST (Aug. 11, 2021, 1:01 AM), <https://nypost.com/2021/08/11/sen-cory-booker-gives-satirical-defund-the-police-speech-on-senate-floor/>.

³ Lyndon Johnson, Special Message to Congress on Law Enforcement and the Administration of Justice (Mar. 8, 1965) (transcript available at the American Presidency Project).

⁴ See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

⁵ The term “mission creep” was coined to describe the extension in time and escalation in scale of military intervention as a result of adding objectives beyond those originally invoked to justify the use of force. See, e.g., Jim Hoagl, *Beware ‘Mission Creep’ in Somalia*, WASH. POST (July 20, 1993), <https://www.washingtonpost.com/archive/opinions/1993/07/20/beware-mission-creep-in-somalia/fe98b9e2-9ceb-45c3-babf-844a8a2671e9/>. We apply this term to the allocation of social service functions to police either (1) to justify increased budgets, or (2) because entrenched police budgets make redeploying police the only affordable way to staff these services. Examples include the deployment of officers in schools as drug educators and school resource officers, pursuant to federal grant programs. *Drug Abuse Resistance Education (D.A.R.E.)*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS (Sept. 1995), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/drug-abuse-resistance-education-dare-fact-sheet>; *Supporting Safe Schools*, U.S. DEP’T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVS., <https://cops.usdoj.gov/supportingsafeschools> (last visited May 5, 2022).

once managed by social welfare professionals have been turned over to belligerent, panicky police. Finally, the focus on funding offers insight into the political economy of race. One robust predictor of high police budgets in U.S. cities is Black population.⁶ Residential segregation⁷ and high real estate prices are also associated with higher police budgets.⁸ Calls to defund the police call out a neoliberal politics of redistribution from poor to propertied, and from Black to white.

While much controversy over the slogan has debated its rhetorical merits, this Article assesses “defunding” as both a diagnosis of policing’s ills and a prescription for its cure. A focus on police funding shows *how* the war on crime has subverted local democracy, distorted urban policy, and further eroded the social safety net. Yet an anatomy of police funding also reveals daunting obstacles to defunding as a path to police reform. If state government lacks the will, local government lacks the way to substantially shrink the police.

Our previous research has shown that police agencies are intractably difficult to reform, in part because they are legally insulated from oversight not only by courts but also by local legislative and executive officials.⁹ This raises the question, to what extent *can* local democratic majorities use their spending power to check or change police behavior? While the defunding movement has succeeded in a few cities in reducing police budgets or subjecting them to regular legislative review, several state legislatures have moved quickly to preempt and even penalize such laws.¹⁰ Moreover, these recent anti-defunding measures continue a lengthy history of state and federal measures to dictate local spending on law enforcement, while reducing the ability of local governments to control police operations. States and the federal government have also influenced local police budgets indirectly by implementing grant programs and authorizing the collections of fines, fees, and forfeitures.¹¹

⁶ See Jason T. Carmichael & Stephanie L. Kent, *The Persistent Significance of Racial and Economic Inequality on the Size of Municipal Police Forces in the United States, 1980–2010*, 61 SOC. PROBLEMS 1, 5 (2014); Brian J. Stults & Eric P. Baumer, *Racial Context and Police Force Size: Evaluating the Empirical Validity of the Minority Threat Perspective*, 113 AM. J. SOCIO. 507, 510 (2007); Stephanie L. Kent & David Jacobs, *Minority Threat and Police Strength from 1980 to 2000: A Fixed-Effects Analysis of Nonlinear and Interactive Effects in Large U.S. Cities*, 43 CRIMINOLOGY 731, 734 (2005).

⁷ Stults & Baumer, *supra* note 6, at 510.

⁸ See Brandon Beck & Adam Goldstein, *Governing Through Police? Housing Market Reliance, Welfare Retrenchment and Police Budgeting in an Era of Declining Crime*, 96 SOC. FORCES 1183, 1184 (2018); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165, 165 (2010).

⁹ O’Rourke, Su & Binder, *supra* note 1, at 1328.

¹⁰ See *infra* Part I.C.

¹¹ See, e.g., Mike Crowley & Betsy Pearl, *Reimagining Federal Grants for Public Safety and Criminal*

Together, these mandates and incentives form a web of constraints that limit the ability of local government to redirect police funding. Local government can rarely wield the power of the purse to control police or confine their mission. But these constraints also determine policy, often in perverse ways. Inflexibly high police budgets force localities to slash other services during fiscal downturns, requiring police to take on problems for which they are unprepared. Grants are temporary, but the staff positions created may become permanent. The pursuit of fines, fees, and forfeitures draws policing priorities away from serious crime and falls most heavily on the poor. Funding government by exacerbating poverty is not only regressive but also self-defeating, generating new social problems without improving government's capacity to solve them. Thus, high police budgets contribute to inequality and reduce the capacity of government to redress it. Yet, the problem with police budgets is not only their size. The prevailing process of budgeting deprives local government of capacity to prioritize problems and fashion solutions. Redirecting resources from police to social services will require budgetary autonomy local governments now lack.

To be clear, we make no claim that urban electorates have sought smaller police forces. They may have rationally supported investment in more police, as data supports the plausible intuition that increasing enforcement capacity (including through federal grant funding) reduces crime.¹² Moreover, Black constituents have sometimes supported leaders seeking to increase police presence and enforcement in their communities.¹³ Yet other public investments

Justice Reform, CAP (Oct. 7, 2020), <https://www.americanprogress.org/article/reimagining-federal-grants-public-safety-criminal-justice-reform/> (noting “[f]ederal grants can be a crucial instrument to influence criminal justice . . . nationwide” and proposing reforms).

¹² Steven Mello, *More COPS, Less Crime*, 172 J. PUB. ECON. 174, 176 (2019) (finding slightly lower murder rates (by a fraction) in cities that received federal COPS hiring grants after the Great Recession than in those which did not); Emily K. Weisburst, *Safety in Police Numbers: Evidence of Police Effectiveness from Federal COPS Grant Applications*, 21 AM. L. & ECON. REV. 81, 83 (2018) (finding similar results with different controls and different city sizes); Aaron Chalfin & Justin McCrary, *Are U.S. Cities Underpoliced? Theory and Evidence*, 100 REV. ECON. & STAT. 167, 184 (2018) (finding statistically significant “police elasticities” of crimes reported in the Uniform Crime Reports). However, while there is evidence that increased police staffing slightly lowers crime rates, it is less clear that reductions in *arrest* rates lead to increases in crime (and evidence points against the proposition). See SUNGWOO CHO, FELIPE GONÇALVES & EMILY WEISBURST, INST. OF LAB. ECON., DISCUSSION PAPER SERIES: DO POLICE MAKE TOO MANY ARRESTS? THE EFFECT OF ENFORCEMENT PULLBACKS ON CRIME 2 (May 2021); see also Jeffery Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 COLUM. L. REV. 1235, 1293 (2017) (citing Steven Mello, *Police and Crime: Evidence from COPS 2.0*, at 27 (2016) (unpublished manuscript) (on file with Columbia Law Review) and Chalfin & McCrary, *supra*, for the proposition that “the most appropriate strategic response to homicide spikes, if not epidemics, may have less to do with the number of police than with how those police are deployed”).

¹³ See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 11 (2017) (documenting Black officials advocating for “tough-on-crime measures in race-conscious terms” and

may also reduce crime in the short or long run, with further social benefits or fewer social costs. Beyond police spending, interventions shown to reduce crime include welfare programs,¹⁴ early education,¹⁵ increased educational attainment,¹⁶ drug rehabilitation,¹⁷ and lead abatement.¹⁸ Local electorates should be free to choose among different conceptions of, and pathways to, public safety.¹⁹

Instead, legal constraints frame a political economy in which police are often the only policy tool available to local officials for tackling any problem. Thus, our claim is that fiscal and legal constraints restrict the agenda of local politics. The entrenchment of police budgets makes redirecting these resources seem futile as both a policy strategy and an electoral platform. This constricting effect of the police budgeting process on the agenda of ostensibly democratic politics is an example the “second face” or “second dimension” of political power.²⁰

“expand[ing] police forces and courts—state resources they had historically been denied”); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 62 (2015); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 787–91 (2020) (surveying scholarship documenting Black support for punitive crime policies).

¹⁴ Price V. Fishback, Ryan S. Johnson & Shawn Kantor, *Striking at the Roots of Crime: The Impact of Welfare Spending on Crime During the Great Depression*, 53 J.L. & ECON. 715, 717 (2010) (finding that during the Great Depression, spending on both “direct relief” (without work requirements) and, to an even greater degree, “work relief” were related to reductions in property crimes).

¹⁵ James J. Heckman, Seong Hyeok Moon, Rodrigo Pinto, Peter A. Savelyev & Adam Yavitz, *The Rate of Return to the HighScope Perry Preschool Program*, 94 J. PUB. ECON. 114, 115 (2010); Arthur J. Reynolds, Judy A. Temple, Dylan L. Robertson & Emily A. Mann, *Long-Term Effects of an Early Childhood Intervention on Educational Achievement and Juvenile Arrest*, 285 J.A.M.A. 2339, 2339 (2001).

¹⁶ Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 157 (2004) (demonstrating that a ten percent increase in high school graduation leads to nine percent decrease in crime and that racial disparity in educational attainment accounts for up to twenty-three percent of racial disparity in incarceration).

¹⁷ M.L. Prendergast, Deborah Podus, Eunice Chang & Darren Urada, *The Effectiveness of Drug Abuse Treatment: A Meta-Analysis of Comparison Group Studies*, 67 DRUG & ALCOHOL DEPENDENCY 53, 53 (2002); A.J. Lurigio, *Drug Treatment Availability and Effectiveness: Studies of the General and Criminal Justice Populations*, 27 CRIM. JUST. & BEHAV. 495, 496 (2000).

¹⁸ Hans Grönqvist, J. Peter Nilsson & Per-Olof Robling, *Understanding How Low Levels of Early Lead Exposure Affect Children’s Life Trajectories*, 128 J. POL. ECON. 3376, 3379 (2020); Anna Aizer & Janet Currie, *Lead and Juvenile Delinquency: New Evidence from Linked Birth, School and Juvenile Detention Records*, 101 REV. ECON. & STAT. 575, 575 (2019); Stephen B. Billings & Kevin T. Schnepel, *Life After Lead: Effects of Early Interventions for Children Exposed to Lead*, 10 AM. ECON. J. APPLIED ECON. 315, 315 (2018); James J. Feigenbaum & Christopher Muller, *Lead Exposure and Violent Crime in the Early Twentieth Century*, 62 EXPLORATIONS ECON. HIST. 51, 52 (2016); Rick Nevin, *Understanding International Crime Trends: The Legacy of Preschool Lead Exposure*, 104 ENV’T. RSCH. 315, 315 (2007); Jessica Wolpaw Reyes, *Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 13097, 2007).

¹⁹ See generally Barry Friedman, *What is Public Safety?* 6 (N.Y.U. Sch. of L., Working Paper No. 21-05, 2021) (examining many possible conceptions of the term “public safety”).

²⁰ See ELMER E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY*

Our argument proceeds in four parts. Part I explains the aims and strategies of the movement to “defund” police and describes recent efforts of states to preempt or punish local defunding measures. It identifies the movement to defund as an outgrowth of penal abolitionism, aimed at shifting investment from penal enforcement to developing the social infrastructure for peace and security by fostering education, employment, and health. It observes that the movement has focused its advocacy at the level of city governments and reviews recent successes in passing defunding measures in several cities. Part I then traces the recent reaction against municipal defunding at the state level, where dozens of anti-defunding bills have been introduced, preempting and punishing city defunding measures.

Part II reveals the more fundamental impediments to shifting fiscal and policy priorities by unraveling the web of direct legal constraints on local decisions to fund or defund law enforcement. Direct constraints include state legislation mandating local governments to fund police agencies at certain levels of spending, staffing, pay, benefits, or job security; requiring indemnification; or mandating that police perform certain functions. They also include state-permitted or state-mandated collective bargaining agreements that set pay, benefits and job security levels or require indemnification. These constraints continue longstanding efforts by states to control local enforcement, often reflecting mistrust of urban populations as dissolute and urban politics as corrupt. State control of local police budgeting sometimes originated as part of more comprehensive regimes of state control of law enforcement or of local finance.²¹ States mandated and regulated funding of sheriffs’ offices from the outset, often financing them indirectly through permissions to charge fees. State control of local expenditures was unaccompanied by any state responsibility to fund these expenditures. Police agencies came to see themselves as largely independent of local government, and learned to cultivate relationships with patrons in state government.

IN AMERICA 102–03 (1960) (arguing the agenda of American democracy includes only the interests of the few who are sufficiently mobilized); Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 952 (1962) (identifying a second face of power that consists of controlling the policy agenda, rather than winning competitions among policies on the agenda); *see also* PETER BACHRACH & MORTON S. BARATZ, POWER AND POVERTY: THEORY AND PRACTICE 50–51 (1970) (observing the “main concern” of an inquiry into the second face of power “is not whether the defenders of the status quo use their power consciously”); STEVEN LUKES, POWER: A RADICAL VIEW 27–29 (2d ed. 2005) (critiquing pluralist theorists for considering only the dimension of contestation over policy while ignoring the “second dimension” of agenda-setting and the “third dimension” of power to shape preferences).

²¹ *See infra* notes 166–69 and accompanying text.

Part III shows how state and federal revenue programs, rather than enabling localities to achieve their most pressing priorities, indirectly constrain them to either prioritize crime control or shift responsibility for other problems to police. These indirect constraints on funding allocation include state authorization for local law enforcement agencies to collect fines and fees; state and federal authorization to law enforcement to seize and forfeit property; and federal and state grants programs. In many localities, fines and fees have assumed an ever-larger share of local government expenditures, and have financed law enforcement even as social welfare expenditures have declined. Forfeiture programs have further freed law enforcement from having to seek local authorization.²² Federal grant programs like the community policing program, enacted during the Clinton administration, intentionally incentivized police expansion, which then became locked in by state mandates and collective bargaining agreements.²³ These programs replaced an earlier generation of general-purpose federal grants that enabled local governments to choose their own priorities. By contrast, the community policing grants incentivized only one priority: expanding the footprint of law enforcement. When the grants expired, local governments had to keep paying their newly expanded police forces and were constrained to cut other programs. This incentivized localities to shift social welfare functions over to untrained but contractually secure police. An account of the police takeover and abandonment of Baltimore's recreation programs will illustrate this phenomenon. By tracing *how* expanding police expenditures impoverish social services, Part III exposes one of the mechanisms through which the carceral state replaced the welfare state.

Part IV sums up the dynamic we have described, in which cities under financial pressure—as most cities were in the last third of the twentieth century—turned to law enforcement as a revenue source. In this way, the availability of funding dictated government function, inverting the expected relationship between public finance and public policy. A further effect of shifting policy choices to the budgeting process was to insulate these decisions from public scrutiny since budgeting is an opaque and technical process attracting little attention and is especially insulated from local democratic input.

Recounting how municipalities came to over-invest in law enforcement reveals that the defunding movement is taking on a deeper problem than excessive law enforcement: the impotence of local government to set its own

²² See *infra* Part III.B.

²³ See, e.g., CONG. RSCH. SERV., COMMUNITY ORIENTED POLICING SERVICES (COPS): IN BRIEF 1-2 (2017), <https://fas.org/sgp/crs/misc/RL33308.pdf>.

priorities democratically. We conclude by urging the abandonment of methods of financing law enforcement that distort budgetary priorities. We urge freeing local governments to require law enforcement to prove its worth in competition with other funding priorities. We also suggest a return to more flexible federal grant programs, funding government functions rather than particular agencies. Finally, fines, fees, and forfeitures should be drastically reduced as they create perverse incentives for law enforcement to harass the public, while freeing armed officials from democratic oversight.

I. DEFUNDING AND ANTI-DEFUNDING

This Part maps the arguments, strategies, and aims of the defunding movement.²⁴ It identifies the movement's political successes and describes the backlash it has elicited.

A. *The Rise of the Defunding Movement*

Although the defunding movement may strategically equivocate on the scope of its demands,²⁵ and adherents may diverge in their ultimate goals,²⁶ its focal aims are clear. The movement seeks to (1) reduce the budgets of local police agencies,²⁷ (2) shift those resources to such other social needs as health care, housing and education, and (3) thereby improve the public's capacity for prosocial behavior.²⁸

²⁴ For our own diagnosis of the pathologies of policing and why they may require dramatic institutional and structural reforms, see O'Rourke, Su & Binder, *supra* note 1, at 1337–59.

²⁵ See Melissa Mohr, *A Slogan Whose Ambiguity Serves a Purpose*, C.S. MONITOR (Aug. 13, 2020), <https://www.csmonitor.com/The-Culture/In-a-Word/2020/0813/A-slogan-whose-ambiguity-serves-a-purpose>; Austin McCoy, *Defund the Police: Protest Slogans and the Terms for Debate*, PERSPS. ON HIST. (June 12, 2020), <https://www.historians.org/publications-and-directories/perspectives-on-history/summer-2020/defund-the-police-protest-slogans-and-the-terms-for-debate>.

²⁶ See generally Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120 (2021) (providing a taxonomy of the political goals of those advocating to “defund the police”).

²⁷ See, e.g., INTERRUPTING CRIMINALIZATION INITIATIVE, #DEFUNDPOLICE TOOLKIT: CONCRETE STEPS TOWARD DIVESTMENT FROM POLICING & INVESTMENT IN COMMUNITY SAFETY 3 (2020) [hereinafter #DEFUNDPOLICE TOOLKIT], <https://www.interruptingcriminalization.com/defundpolice-toolkit> (“#DefundPolice is a demand to cut funding and resources from police departments and other law enforcement and invest in things that actually make our communities safer.”).

²⁸ See *id.* (calling for reinvestment in “quality, affordable, and accessible housing, universal quality health care, including community-based mental health services, income support to stay safe during the pandemic, safe living wage employment, education, and youth programming”); see also Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1830 (2020) (“Demands to divest from police and prisons are often accompanied by demands to invest in social provision and collective care: for example, housing, health care, and education. By demanding investments, these campaigns suggest alternate modes that the state can take to respond to all manner of currently criminalized social problems.”).

These demands emerged from the work of Black-led social movements to implement policies developed by abolitionist theorists.²⁹ Abolitionists conceived defunding as a strategy to empower Black communities and challenge the legitimacy of policing as a mode of governance.³⁰ There are three significant components of this argument. First, abolitionist theorists and activists often trace contemporary policing institutions to eighteenth- and nineteenth-century slave patrols of the American South.³¹ This connection, they argue, calls into question the political legitimacy of police agencies as institutions that govern Black and Brown people in the United States.³² Second, as Professor Angela Y. Davis has argued, Black incarceration occurs in part because the legacy of slavery continues to leave many Black people without access to material resources necessary to live “free lives.”³³ Third, in the late-twentieth century, changes in the labor market further deprived poor people, including many Black people, of economic opportunities.³⁴ Simultaneously, state and local governments defunded social services while expanding police budgets.³⁵ These changes ensured that, especially in localities with high concentrations of poor people of color, “the ‘social safety net has been replaced by a criminal dragnet.’”³⁶

Building on these premises, abolitionists turned their attention to the large share of many local budgets consumed by police funding.³⁷ This focus has motivated defunding initiatives in cities with well-organized activist communities.³⁸ In Chicago, for example, activists organized protests in response

²⁹ See Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/>.

³⁰ See #DEFUNDPOLICE TOOLKIT, *supra* note 27, at 3 (“#DefundPolice . . . is not just about decreasing police budgets, it is about reducing the power, scope, and size of police departments. It is about delegitimizing institutions of surveillance, policing and punishment, and these strategies, no matter who is deploying them, to produce safety.”).

³¹ See O’Rourke, Su & Binder, *supra* note 1, at 1342; Akbar, *supra* note 28, at 1817–18, 1830. This story of the origins of American policing has a particularly explanatory value in its description of Southern police agencies, with large urban police agencies in the North having a distinct evolution. See Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 263 (2021).

³² Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 42 (2019).

³³ See ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 96–97 (2005).

³⁴ GILMORE, *supra* note 4, at 70–76; see also JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990*, at 5 (1993) (arguing that the collapse of labor markets exacerbates incarceration).

³⁵ GILMORE, *supra* note 4 at 76–77, 94–95.

³⁶ *Id.* at 77 (citation omitted).

³⁷ Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 107–08 (2020).

³⁸ Sam Levin, *These U.S. Cities Defunded Police: ‘We’re Transferring Money to the Community,’* GUARDIAN (Mar. 11, 2021, 11:03 AM), <https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund->

to building plans for an expensive “cop academy.”³⁹ These protests ultimately failed, and the projected costs of the new police academy ended up being far higher than the ninety-five million dollar estimate that triggered the protests.⁴⁰ However, the organizing effort contributed to more ambitious calls to defund the Chicago Police Department.⁴¹

While abolitionist in origin, calls to defund the police have been well received by some activists and scholars who do not see policing institutions as inherently illegitimate.⁴² Such reformers may reject abolition but still see the cost of police diverting resources from other public goods that would better address significant social problems.⁴³ For example, Professor Barry Friedman has called for disaggregating the policing function by shifting many responsibilities to social workers, psychologists, and other professionals.⁴⁴ Reformers argue that this strategy could improve social services, which communities currently rely on police officers to provide.⁴⁵ At the same time, shifting responsibilities could strengthen public safety by freeing law enforcement to focus on addressing the violent crimes that are currently *underpoliced* in poor communities of color.⁴⁶

As Professor Friedman notes, even some police leaders have voiced support for this endeavor.⁴⁷ Such reforms resonate with the U.S. Department of Justice

police-transferring-money-community.

³⁹ See Heather Cherone, *Rahm Pushes Plan to Spend \$95 Million on New Police, Fire Training Academy Through Divided City Council*, BLOCK CLUB CHI. (Mar. 13, 2019, 5:13 PM), <https://blockclubchicago.org/2019/03/13/emanuel-pushes-plan-to-spend-95-million-on-new-police-fire-training-academy-through-divided-city-council/>.

⁴⁰ John Byrne, *Mayor Lori Lightfoot Says Cost of Chicago’s Proposed Controversial Police Academy Likely to Go Way Up: ‘I Want To Get It Right,’* CHI. TRIBUNE (June 25, 2019, 11:55 AM), <https://www.chicagotribune.com/politics/ct-lori-lightfoot-police-academy-cost-20190625-2utamxb4q5badl3q4qtlq6pste-story.html>.

⁴¹ Kiran Misra, *#NoCopAcademy and the Movement to Defund the Police*, BELT MAG. (July 31, 2020), <https://beltmag.com/no-cop-academy-movement-defund-police-chicago/>.

⁴² Akbar, *supra* note 37, at 112 (bemoaning this interest convergence).

⁴³ See, e.g., *Divest from the Police. Invest in Black and Brown Communities*, ACLU, <https://action.aclu.org/petition/divest-police-invest-black-and-brown-communities> (last visited May 5, 2022); Christy E. Lopez, *Defund the Police? Here’s What That Really Means*, WASH. POST. (June 7, 2020), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/>.

⁴⁴ See Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 965–66 (2021).

⁴⁵ *Id.* at 967.

⁴⁶ O’Rourke, Su & Binder, *supra* note 1, at 1342; see Friedman, *supra* note 44, at 973 (“Clearance rates for homicides alone are a disappointment (to say the least) in communities most afflicted with crime.”); Fagan & Richman, *supra* note 12, at 1278 (observing that neighborhoods with high homicide rates “experience policing as detached from serious crime and aimed at the wrong behaviors and the wrong people”); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1724–27 (2006) (analyzing the underenforcement of laws against serious crime in urban neighborhoods of color).

⁴⁷ Friedman, *supra* note 44, at 930–31.

“Justice Reinvestment Initiative,” which supports local government efforts to divert resources from corrections to evidence-based public safety strategies.⁴⁸ In practice, however, these strategies would likely require defunding in order to reallocate law enforcement resources.⁴⁹

B. The Aims and Strategy of the Defunding Movement

While advocates of defunding may diverge in their ultimate goals,⁵⁰ they share a common assessment of the need to target police budgets.⁵¹ They also share a localized strategy for achieving their aims, reflecting the localized nature of police funding and the concentration of political support for defunding in certain cities. This subpart maps these aims and strategies.

1. Movement Aims

In recent years, Black-led social movements have turned to structural reform not only out of principled opposition to punitive and carceral methods of governance, but also as a practical strategy for reducing police violence. As shown in our previous research, efforts to reform police behavior have been impeded by insular organizational culture, powerful unions, monitoring difficulties, intermittent political will as a result of high political costs,⁵² and legally entrenched organizational autonomy.⁵³ Accordingly, movement leaders have sought to mobilize urban communities to reduce police budgets with three aims: (1) improving allocation of resources, (2) improving democratic representation, and (3) tangibly reducing police violence.⁵⁴

⁴⁸ See *What Is Justice Reinvestment?*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jrionepager.pdf> (last visited May 5, 2022); Paul Butler, *Obama's 'Defund the Police' Comments Showcase a Radical Cynicism*, WASH. POST (Dec. 6, 2020), <https://www.washingtonpost.com/opinions/2020/12/06/obamas-defund-police-comments-showcase-radical-cynicism/>.

⁴⁹ See Yoana Tchoukleva, Amalee Beattie & Josh Cottle, *Defunding the Police: Brief Overview of History, Models and the Demands of the Movement*, EQUAL JUST. SOC'Y (June 18, 2020), <https://equaljusticesociety.org/defundthepolicememo/>.

⁵⁰ See *supra* note 42 and accompanying text.

⁵¹ In a previous essay, we presented an affirmative case for disbanding police agencies as a strategy of political dis-entrenchment. See O'Rourke, Su & Binder, *supra* note 1, at 1337. Many of these arguments apply with equal force to the case for police defunding. Here, rather than rehearse our previous arguments, we examine the origins of the defunding strategy in Black-led social movements. In both pieces, we take seriously the call for legal scholars to “think alongside” social movements and acknowledge that the arguments presented in this section have their roots in activist organizing. See Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826 (2021) (arguing that legal scholarship should study and “think alongside” the strategies of social movements).

⁵² O'Rourke, Su & Binder, *supra* note 1, at 1343–55.

⁵³ *Id.* at 1389–96.

⁵⁴ See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108

First, defunding would enable communities to reinvest in depleted social services.⁵⁵ To be sure, critics of the defunding movement claim that state and local governments together spend only four percent of their budgets on police and local law enforcement.⁵⁶ Yet this figure obscures the fact that law enforcement is primarily a local function and fiscal responsibility. The Urban Institute data on which these critics rely reports that cities, towns, and counties spend thirteen percent, ten percent, and eight percent of their respective budgets on policing when disaggregated from state government budgets.⁵⁷ And even these figures exclude the substantial costs of police retirement and health benefits.⁵⁸

Because different cities may have different fiscal responsibilities, it is difficult to compare how much different communities spend on policing relative to other priorities.⁵⁹ For example, cities that include schools in their municipal budgets (such as New York) will appear to spend a smaller portion of their budgets on police than cities that have independent school districts.⁶⁰ However, police budgets in many medium and large cities have ballooned in recent years, while spending on other services has stagnated.⁶¹ And, as noted above, police budgets tend to be particularly large in cities with larger and more concentrated Black populations.⁶² Thus, as movement activists have observed, law enforcement expenditures appear to choke out other pressing priorities in the budgets of many large and small cities.⁶³ For example, according to Black Lives

CALIF. L. REV. 679, 730 (2020) (noting the link between calls for police defunding and community control over policing).

⁵⁵ #DEFUNDPOLICE TOOLKIT, *supra* note 27, at 3; Akbar, *supra* note 37, at 104–05.

⁵⁶ See Girard Miller, *The Misunderstood Math of Defunding the Police*, GOVERNING (Oct. 21, 2020), <https://www.governing.com/finance/The-Misunderstood-Math-of-Defunding-the-Police.html>; see also Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 320–21 (2020) (arguing that underfunding of police departments likely contribute to police misconduct).

⁵⁷ *Criminal Justice Expenditures: Police, Corrections, and Courts*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> (last visited May 5, 2022).

⁵⁸ *Id.* at n.2.

⁵⁹ Erin Scharff, *Cities on Their Own: Local Revenue When Federalism Fails*, 48 FORDHAM URB. L.J. 919, 941 (2021).

⁶⁰ *Id.*

⁶¹ See, e.g., Geoff Kelly, *City Hall Spending on Police Has Skyrocketed*, INVESTIGATIVE POST (Dec. 3, 2020), <https://www.investigativepost.org/2020/12/03/city-hall-spending-on-police-has-skyrocketed/> (reporting that the City of Buffalo spends fifty-four percent more on police than it did fifteen years ago, and currently allocates more than twenty-five percent of its budget to its police department); Emily Badger & Quoc Trung Bui, *Cities Grew Safer. Police Budgets Kept Growing.*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/interactive/2020/06/12/upshot/cities-grew-safer-police-budgets-kept-growing.html> (discussing spending allocation in Boston, Los Angeles, and Milwaukee).

⁶² See *supra* note 6 and accompanying text.

⁶³ See KATE HAMAJI, KUMAR RAO, MARBRE STAHLY-BUTTS, JANAÉ BONSU, CHARLENE CARRUTHERS,

Matter Chicago, that city currently “spends nearly [forty percent] of its annual operating budget” on its police department, thus redirecting much-needed money away from schools, mental health centers, social services, and community institutions.⁶⁴ A Bloomberg study found that twenty-five of thirty-four major cities examined would spend more than twenty-five percent of their general budgets on police in 2021.⁶⁵ Similarly, a systematic review by activists of ten major city budgets found that all but New York City spend more than twenty-five percent of their general funds on their police departments, with the City of Oakland spending 41.2%.⁶⁶ In each of these cities, activists observed, spending on law enforcement dwarfed expenditures on community priorities such as infrastructure, job training and placement, affordable housing, drug rehabilitation, educational support, youth programs, and jobs.⁶⁷ The remedy for this disparity, activists argue, is greater community control over city spending priorities through a participatory budgeting process in which community members decide how to spend a portion of the public budget.⁶⁸

Second, defunding advocates contend that defunding could invest poor and minority communities with more democratic control over the institutions that govern them.⁶⁹ This claim is distinct from the question of where money spent on police should be reallocated. These activists argue that police overfunding is not

ROSELYN BERRY & DENZEL MCCAMPBELL, FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 3 (n.d.), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>.

⁶⁴ *BAN Defund CPD Demands*, BLACK LIVES MATTER CHI., <https://www.blacklivesmatterchicago.com/ban-defund-cpd-demands/> (last visited May 5, 2022). Vera, using Bureau of Labor statistics data from Fiscal Year 2020, puts this figure at thirty-seven percent—a figure which does little to undermine the substance of activists’ claims. See *What Policing Costs: A Look at Spending in America’s Biggest Cities*, VERA INST., <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities/chicago-il> (last visited May 5, 2022).

⁶⁵ Sarah Holder, Fola Akinnibi & Christopher Cannon, *‘We Have Not Defunded Anything’: Big Cities Boost Police Budgets*, BLOOMBERG CITYLAB (Sept. 22, 2020), <https://www.bloomberg.com/graphics/2020-city-budget-police-defunding/>. These estimates do not account for the significant municipal costs of litigating and paying for settlements and judgments in police misconduct cases—a set of costs that, for example, reached half a billion dollars for Chicago over a ten-year period. Scharff, *supra* note 59, at 941–42. Nor does it appear that these figures account for the indemnification insurance that many local governments rely on to pay judgments in police misconduct cases.

⁶⁶ HAMAJI ET AL., *supra* note 63, at 1–2 (examining budgets for 2017). The exception, New York City, still spent nearly \$5 billion on police and is unusual among cities in having fiscal responsibility for schools and county services. *Id.* at 2.

⁶⁷ *Id.* at 1–2. But note that schools are typically funded separately. See Scharff, *supra* note 59, at 941.

⁶⁸ HAMAJI ET AL., *supra* note 63, at 79–80 (describing participatory budgeting as a process consisting of four main phases: (1) brainstorming ideas, (2) developing proposals, (3) voting on proposals, and (4) funding winning projects).

⁶⁹ See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 801, 818 (2021); Rahman & Simonson, *supra* note 54, at 730.

simply a fiscal problem—it is also a community governance issue.⁷⁰ They observe that activists within poor communities of color often have a deeply informed understanding of the sources and dynamics of violence in their communities, and have well-developed plans for reducing violence and repairing injustice without relying on police institutions they deem illegitimate instruments of social control.⁷¹

For these activists, police defunding is a strategy to disempower institutions they regard as inherently racist and immune from reform.⁷² In this view, incremental reforms require expanded police budgets, which only serve to “increase resources and legitimacy to the institutions that maintain inequality and systematic suffering.”⁷³ The solution, they argue, is to defund these institutions in order to reduce their presence in the lives of those living in poor Black neighborhoods and materially support alternative social infrastructures.⁷⁴ Thus, some activists view the defunding movement as part of what Professor Jocelyn Simonson calls a power-shifting strategy for asserting community control over police governance.⁷⁵

Third, defunding has appeal as a practicable reform strategy that could affect the scale of police violence and also sustain mobilization by rewarding supporters with a tangible success. Relative to more ambitious structural reforms, such as disbanding police departments, advocates may view police defunding as *politically feasible*.⁷⁶ Given its potentially cross-ideological appeal,⁷⁷ police defunding can be a successful coordinating strategy for coalitional politics.⁷⁸ Consider, for example, the political coalition behind recent

⁷⁰ Simonson, *supra* note 69, at 803–04.

⁷¹ See O’Rourke, Su & Binder, *supra* note 1, at 1334. 1336.

⁷² #DEFUNDPOLICE TOOLKIT, *supra* note 27, at 3; Akbar, *supra* note 37, at 104.

⁷³ Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U L. REV. 405, 465 (2018).

⁷⁴ Akbar, *supra* note 37, at 108–10; Eaglin, *supra* note 26, at 127–28.

⁷⁵ See Simonson, *supra* note 69, at 803–04.

⁷⁶ O’Rourke, Su & Binder, *supra* note 1, at 1335–36 (outlining feasibility challenges with disbanding police departments).

⁷⁷ See *infra* note 86 and accompanying text.

⁷⁸ Indeed, advocates of police defunding have had victories in at least thirteen cities nationwide. See Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Aug. 13, 2020, 3:04 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/?sh=7d7fde5c29e3>. In March 2021, support for redirecting funds for social services still stood at forty-three percent, but only eighteen percent of those polled supported “the movement known as ‘Defund the Police.’” Elbeshbishi & Quarshi, *supra* note 2. Some of these successes, however, were reversed the following year. See, e.g., McEvoy, *supra* (reporting that the City of Baltimore cut \$22 million in police spending in its Fiscal Year 2021 budget); Emily Opilo, *Baltimore Officials Pass Budget with \$555 Million in Police Spending Without Amendments*, BALT. SUN (June 8, 2021), <https://www.baltimoresun.com/politics/bs-md-ci-baltimore-budget-approved-20210608-ib3k7vbnajadfovvoigxy7mvq-story.html> (reporting that the Fiscal Year 2022 budget

defunding successes in Los Angeles. Grassroots abolitionist organizations such as the People’s Budget LA first developed proposals for police defunding and abolition.⁷⁹ This laid the groundwork for a coalition of institutions and officials—many of them conventionally reformist in their aims—to organize a successful ballot initiative to amend the Los Angeles County Charter.⁸⁰ This initiative—which abolitionist organizers also supported⁸¹—requires that ten percent of the County budget be directed toward alternatives to incarceration and prohibits those earmarked funds from being spent on law enforcement agencies.⁸² During this same period, the Los Angeles City Council and Mayor Eric Garcetti authorized a \$150 million reduction in the Los Angeles Police Department.⁸³ Citing the city’s fiscal crisis, Mayor Garcetti vetoed the City Council’s plan to reallocate a portion of this money to other city services—showing that police defunding can win the support from those primarily interested in fiscal responsibility.⁸⁴ While these victories build on years of abolitionist criticism and organizing,⁸⁵ they reveal wider constituencies for police defunding in large cities than previously imagined.⁸⁶ Thus, for both radical reformers and liberal incrementalists, a focus on police funding provides an avenue for reform that they perceive to be more readily available and politically possible than disbanding police agencies or other significant structural reforms.⁸⁷ Any such success, even if relatively modest, can enhance the political credibility of a grassroots movement with both constituents and coalition partners.⁸⁸ However, as explained below, there has been political pushback, and even moderate defunding faces legal impediments.

“includes a \$28 million increase in spending on the Baltimore Police Department to cover employee health insurance and higher pension obligations”).

⁷⁹ *About People’s Budget LA*, PEOPLE’S BUDGET LA, <https://peoplesbudgetla.com/about> (last visited May 5, 2022); see also Simonson, *supra* note 69, at 791 n.38, 823 (describing People’s Budget LA organizing).

⁸⁰ See *The Coalition Behind Measure J*, REIMAGINE LA, <https://yesonj.reimagine.la/about/> (last visited May 5, 2021).

⁸¹ See, e.g., *About People’s Budget LA*, *supra* note 79 (listing coalition members).

⁸² Dakota Smith & Julia Wick, *How Wide a Left Turn for L.A. Politics?*, L.A. TIMES, Nov. 6, 2020, at A1, 14.

⁸³ Kevin Rector, *A Cool Response to LAPD Budget Request*, L.A. TIMES, Nov. 24, 2020, at B1. The City Council rejected subsequent pleas by the police department to partially refund the agency. *Id.*

⁸⁴ Dakota Smith, *Garcetti Vetoes Plan to Reallocate LAPD Money*, L.A. TIMES, Dec. 12, 2020, at B5.

⁸⁵ Akbar, *Abolitionist Horizon*, *supra* note 28, at 1830.

⁸⁶ There are other examples of cross-ideological coalitions coordinating around police defunding. See, e.g., *NYC Budget Justice*, CMTYS. UNITED FOR POLICE REFORM, <https://www.changethenypd.org/nycbudgetjustice> (last visited May 5, 2022) (calling for a one-billion-dollar reduction in the New York Police Department’s budget).

⁸⁷ See O’Rourke, Su & Binder, *supra* note 1, at 1359–88.

⁸⁸ USC DORNSIFE EQUITY RSCH. INST., A PRIMER ON COMMUNITY POWER, PLACE AND STRUCTURAL CHANGE 10 (2020) (noting the importance of tangible victories to sustain social movements).

2. Localist Movement Strategy

As the victories described above suggest, defunding activists have primarily sought to achieve their goals by mobilizing at the levels of city and county governments.⁸⁹ There are several straightforward explanations for this localist strategy. First, and most obviously, policing in the United States is and historically has been quintessentially local.⁹⁰ Accordingly, police agencies are primarily funded by local governments⁹¹ through local sales and property taxes.⁹² It therefore makes sense to assume that these local governments should be the principal target of any effort to reduce police funding.

Second, the political constituencies supporting police defunding are concentrated in cities. Indeed, in some cities, support for police defunding appears to be overwhelming.⁹³ The slogan “defund the police,” while unpopular nationwide, can nevertheless serve as a successful mobilizing tool in some localities.⁹⁴ This concentrated support for police defunding is particularly potent since local officials tend to be more receptive than state or federal officials to grassroots citizen mobilization around criminal justice issues.⁹⁵

Third, defunding advocates have identified city laws as necessary targets for reform. Consider, for example, defunding activists’ successful effort to amend the San Francisco City Charter to assert greater control over police budgets.⁹⁶ A 1994 amendment to the City Charter required that the San Francisco Police Department maintain a minimum staffing level of 1,971 full-time officers.⁹⁷ In

⁸⁹ For an exception, see *The Demilitarization of Law Enforcement*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/the-demilitarization-of-law-enforcement/> (last visited May 5, 2022) (urging activism at the federal budgetary level to address militarization).

⁹⁰ See Daniel Richman & Sarah A. Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. C.R. & C.L. (forthcoming 2021).

⁹¹ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 948 (2015).

⁹² See Rushin & Michalski, *supra* note 56, at 287.

⁹³ In San Francisco, for example, a seventy-one percent majority voted to amend the city charter in order to eliminate mandatory police staffing levels and thereby empower the Board of Supervisors to reduce the size of the city’s police department. See *San Francisco, California, Proposition E, Police Staffing Charter Amendment (November 2020)*, BALLOTPEDIA, [https://ballotpedia.org/San_Francisco,_California,_Proposition_E,_Police_Staffing_Charter_Amendment_\(November_2020\)](https://ballotpedia.org/San_Francisco,_California,_Proposition_E,_Police_Staffing_Charter_Amendment_(November_2020)) (last visited May 5, 2022).

⁹⁴ See *supra* notes 2, 5, 51, and accompanying text.

⁹⁵ See LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 128–41, 170–71 (2008).

⁹⁶ Fabiola Cineas, *San Francisco Hasn’t Defunded Its Police Force Yet—But Just Voted to Make It Smaller*, VOX (Nov. 4, 2020, 10:27 AM), <https://www.vox.com/2020/11/4/21537593/san-francisco-proposition-e-police-staffing-results>.

⁹⁷ Alan Greenblatt, *Defund Your Local Sheriff? Police Reform on Ballots Nationwide*, GOVERNING MAG. (Oct. 28, 2020), <https://www.governing.com/now/defund-your-local-sheriff-police-reform-on-ballots-nationwide>.

November 2020, San Francisco residents voted to amend the Charter to repeal this minimum staffing requirement.⁹⁸ The amendment further requires the Police Chief to submit a report and recommendation for police staffing to the Police Commission every two years that will be considered when determining the police department's budget.⁹⁹ The President of the San Francisco Board of Supervisors, who sponsored the Proposition,¹⁰⁰ explained that the reform would allow the city to “dispatch[] teams of social workers and substance use counselors to respond to calls seeking their skills and service when appropriate.”¹⁰¹

C. *The Backlash Against “Defunding”*

While widespread demonstrations against the killing of George Floyd prompted demands to “defund the police,” these protests also sparked a political backlash aimed at limiting local governments’ authority over law enforcement funding. Indeed, while the defunding movement has gained some traction at the local level, it is facing new challenges at the state level. A growing number of states are considering “anti-defunding” bills that would prohibit and punish localities that reduce law enforcement funding.

During the first eight months of 2021, at least twenty-five anti-defunding bills were introduced in ten states.¹⁰² While all seek to limit local efforts to restructure the role of local police agencies through the funding process, they set different limits on what structures of defunding would be impermissible. Some impose restrictions on any reductions, in either relative share of the municipal budget¹⁰³ or absolute dollar amounts.¹⁰⁴ Others prohibit reductions over a certain percentage in a given year¹⁰⁵ or over a number of years.¹⁰⁶ Moreover, most of

html.

⁹⁸ See Cineas, *supra* note 96.

⁹⁹ See Letter from Angela Calvillo, Clerk of the Bd. of Supervisors for City Hall, to John Arntz, Dir. of Elections (Jul. 23, 2020) (available at https://sfelections.sfgov.org/sites/default/files/Documents/candidates/2020Nov/20200724_PoliceDepartmentStaffingLevels_LT.pdf).

¹⁰⁰ Greenblatt, *supra* note 97.

¹⁰¹ See Cineas, *supra* note 96.

¹⁰² See *supra* note 2.

¹⁰³ See H.R. 230, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S. 1203, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.R. 38, 2020 Leg., 2d Ex. Sess. (La. 2020).

¹⁰⁴ See H.R. 638, 87th Leg., Reg. Sess. (Tex. 2021); H.R. 1, 123d Leg., Reg. Sess. (Fla. 2021).

¹⁰⁵ See S. 100, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

¹⁰⁶ See H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); see also S. 26, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (twelve percent over five years); H.R. 2310, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (ten percent from prior year); Gen. Assemb. 4990, 219th Leg., 1st Ann. Sess. (N.J. 2020) (twenty-five percent from prior year).

these proposed bills do not simply mandate a certain threshold of funding. Following the wave of “punitive preemption” laws in the past decade,¹⁰⁷ they impose significant penalties on localities violating their requirements. State funding is withheld,¹⁰⁸ or localities lose the ability to increase local taxes¹⁰⁹ or to keep sales tax receipts.¹¹⁰

Thus far, four bills have been signed into law. Florida House Bill 1 authorizes a state attorney or a member of a municipality’s governing board to appeal a police budget that reduces funding.¹¹¹ Once an appeal has been filed, a commission appointed by the governor can amend or modify the budget allocation as it sees fit. Georgia House Bill 286, signed a few weeks after Florida’s HB 1, bars budget reductions of more than five percent over a five-year period unless the reduction is due to a shortfall in revenues.¹¹² Any shortage-justified reduction must be proportional to the overall decrease in the municipal budget. HB 1900 in Texas prohibits any reductions to law enforcement budgets in cities with over 250,000 residents unless it is proportionate to the reduction of the municipal budget overall.¹¹³ Texas Senate Bill 23 requires all counties with over one million residents to receive voter approval for nearly all budget or personnel reductions affecting law enforcement agencies.¹¹⁴ The population cut-offs in Texas ensure that these anti-defunding restrictions are limited to metropolitan areas of the state where defunding efforts are garnering the most support. Moreover, these new laws include a number of punitive provisions targeting local fiscal capacity and territorial integrity. These include denial of state funds and prohibitions against raising local tax and utility rates.¹¹⁵ In addition, defunding municipalities are denied the authority to annex any new territory into their city, and areas annexed within the last thirty years may vote to secede from the city.¹¹⁶

¹⁰⁷ See generally Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018) (describing the rise of “punitive preemption” laws “that do not merely nullify inconsistent local rules—the traditional effect of preemption—but rather impose harsh penalties on local officials or governments simply for having such measures on their books”).

¹⁰⁸ See Iowa H.R. 230; Mo. S. 26; La. H.R. 38; Gen. Assemb. 4990, 219th Leg., 1st Ann. Sess. (N.J. 2020); S. 913, 87th Leg., Gen. Sess. (Tex. 2021).

¹⁰⁹ See S. 23, 87th Leg., Gen. Sess. (Tex. 2021).

¹¹⁰ See La. H.R. 38.

¹¹¹ See H.R. 1, 123d Leg., Reg. Sess. (Fla. 2021).

¹¹² See H.R. 286, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

¹¹³ See H.R. 1900, 87th Leg., Gen. Sess. (Tex. 2021). As of 2020, this includes approximately eleven cities in Texas. *Id.*

¹¹⁴ See Tex. S. 23.

¹¹⁵ See *id.* (prohibition against increasing county property taxes); Tex. H.R. 1900 (prohibition against cities raising tax and utility rates).

¹¹⁶ See Tex. H.R. 1900.

There is little doubt that the recent wave of anti-defunding measures is motivated more by the politics of police reform than by concerns about fiscal responsibility or public safety. All these anti-defunding measures were introduced in response to the growing movement for police reform. The anti-defunding measures in both Florida and Texas were enacted alongside measures aimed at suppressing political protests and making local governments liable for property damage if they instruct police officials to exercise restraint.¹¹⁷ Moreover, even though many of the anti-defunding bills provide exceptions if law enforcement reductions are due to budgetary shortfalls, none provide any state assistance to localities in those circumstances. From this perspective, the state's interest appears to be less about ensuring police agencies are adequately funded for public safety purposes and more about foreclosing defunding as a tool for police reform.

At the same time, these anti-defunding laws threaten to upend municipal budgeting. Indeed, even localities uninterested in police reform are affected by these constraints. During budgetary shortfalls, measures prohibiting cuts to law enforcement would force localities to cut other services and departments. In times of growing revenues, localities required to dedicate a fixed percentage of their budgets to law enforcement would need to proportionally increase law enforcement funding even if that increase is unnecessary. Moreover, all this affects the structure of municipal government, even on issues unrelated to the matter of policing. The city of Gainesville, Florida, for example, currently has youth and social service programs funded through their police budget.¹¹⁸ The city council would like to transfer those programs to a different municipal department. But Florida House Bill 1 precludes this reorganization, which would reduce the law enforcement budget.¹¹⁹

Taken together, these anti-defunding bills represent a startling effort by states to interfere with local budgeting authority. To be sure, state laws normally preempt local laws, but anti-defunding bills go much further than simply overturning a local ordinance or regulation. By stripping the power to set their own budgets, anti-defunding bills intrude upon the internal governance of cities

¹¹⁷ The anti-protest measures in Florida were included alongside the anti-defunding measures in HB 1. See H.R. 1, 123d Leg., Reg. Sess. (Fla. 2021). Texas House Bill 1900, the anti-defunding measure in Texas, was signed on the same day as HB 9 and HB 2366, both of which increased penalties for activities that took place during Black Lives Matter protests. See H.R. 9, 87th Leg., Gen. Sess. (Tex. 2021); Tex. H.R. 1900; Tex. H.R. 2366.

¹¹⁸ See Conner Evans, *Funding the Police: A Closer Look at Local Law Enforcement Budgets*, GAINESVILLE TIMES, <https://www.gainesvilletimes.com/news/badge-bar/funding-police-closer-look-local-law-enforcement-budgets/> (July 12, 2021, 9:39 AM).

¹¹⁹ Complaint at 41–42, *Gainesville v. Desantis*, No. 138574764 (2d Cir. Nov. 16, 2021) (E-Filed).

and other localities. In doing so, they clash with the traditional understanding of police departments as subdivisions of local governments, spending funds allocated to them by representatives of local residents.

But as will see in the next Part, these anti-defunding bills may simply be the latest example of longstanding state efforts to control the budgets of locally funded law enforcement agencies. To be sure, few state laws have mandated local funding as directly as these proposed bills, at least not in recent history. Yet state-local conflicts over law enforcement funding are hardly new, and today, local discretion over law enforcement funding is mandated, constrained, and circumvented in several ways. And as we will see, fiscal considerations only rarely have factored into these conflicts. In most cases, like today, states sought to determine the function of law enforcement agencies and insulate them from control by local residents.

II. DIRECT CONSTRAINTS ON LAW ENFORCEMENT DEFUNDING

Funding has come to the fore of the policing debate. Both radical and incremental reformers—even officials now shedding the “defunding” brand—hope to redirect law enforcement resources to other social services in an effort to reimagine public safety. Yet supporters of anti-defunding legislation seek to foreclose this avenue of reform by blocking police budget cuts. Both sides focus their efforts on local funding authority over police departments and sheriffs’ offices. But how much budgetary discretion do local governments actually have?

To be sure, American police agencies are primarily funded at the local level. But as this Part shows, even absent explicit anti-defunding legislation, the budgetary discretion of local officials is already constrained. Later, in Part III, we will consider the *indirect* constraints on reducing law enforcement expenditures—more specifically, the programs and policies that incentivize local officials to expand law enforcement budgets. Here, we focus on the *direct* constraints that strip local budgetary discretion altogether through targeted mandates. Moreover, we reveal the deep historical roots of these funding mandates in the context of local law enforcement agencies. From this perspective, the current battles over law enforcement funding are merely the latest escalation of a longstanding political struggle over policing. And the persistence of this battle reflects the contradictory desires of states to exercise control over policing and disclaim responsibility for funding it.

A. *Mandates and Restrictions on Law Enforcement Funding*

Anti-defunding legislation directly limits local governments' abilities to reduce funding for police agencies. But even absent explicit limitations, local budgetary discretion faces several legal and structural constraints. State and local laws set baselines compelling local governments to fund law enforcement at specific levels. Collective bargaining agreements constrain the ability of local officials to reduce law enforcement budgets without union buy-in. States increasingly impose duties on local police agencies, many of which require local funding without state assistance. In addition, many local police agencies operate independently of the local governments they serve or have dedicated funding streams outside of local control. The scope and extent of these constraints vary from state to state. But together, they form a system in which local budgetary authority is narrower than commonly assumed. These constraints restrict the potential of budgeting as a strategy for reforming law enforcement activities.

First, local budgeting discretion is constrained by laws mandating certain levels of law enforcement spending. This is most common when it comes to personnel expenses, which comprise the major part of law enforcement budgets.¹²⁰ Some of these mandates are locally imposed. For example, the Minneapolis municipal charter, which can only be amended through a cumbersome process, requires the city to maintain at least 1.7 police officers for every thousand residents.¹²¹ In most cases, however, the legal requirements are the result of state laws. And it is here that states impose some of the most specific mandates. Although many are now outdated, minimum salaries for police officers are statutorily set in at least fifteen states and often on the basis of rank or years of service.¹²² Almost all states guarantee a pension for police officers, many of which are funded in large part by local contributions.¹²³ Moreover,

¹²⁰ See BRIAN A. REAVES, DEP'T OF JUST., BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 7 (2015).

¹²¹ MINNEAPOLIS, MINN., CITY CHARTER art. VII, § 7.3(c) (2021).

¹²² See, e.g., MO. REV. STAT. § 84.510 (2016) (providing a salary schedule for Kansas City Police Department); MONT. CODE ANN. § 7-32-4116 (2021) (establishing the minimum wage for police at \$750 per month in "first and second class" cities, with an annual one percent increase); 53 PA. STAT. AND CONS. STAT. § 639(a) (West 2016) (setting a minimum salary for borough and township police of \$5,200 annually); TEX. LOC. GOV'T CODE ANN. § 143.041 (West 2022) (establishing criteria on police salaries in cities with populations under 1.5 million); WYO. STAT. ANN. § 15-5-106 (2007) (giving a civil service commission the power to set salaries no lower than the statutory minimum of \$425.00).

¹²³ See, e.g., NEB. REV. STAT. § 16-1004 (2012); 53 PA. STAT. AND CONS. STAT. § 767 (West 2016) (providing for "[e]stablishment of police pension funds or pension annuities; regulation and maintenance; rights of beneficiaries"); see also NAT'L CONF. OF STATE LEGISLATURES, STATE RETIREMENT PLANS FOR PUBLIC SAFETY WORKERS—TABLES (2012), <https://www.ncsl.org/research/fiscal-policy/state-retirement-plans-public-safety-tables.aspx> (describing state-administered retirement plans for public safety workers, including police

personnel policies for police departments are commonly dictated at the state level.¹²⁴ In Louisiana, shift schedule and overtime pay are mandated entirely by state law and, in many cases, on a city-by-city basis.¹²⁵ Wisconsin not only mandates an eight-hour workday for police officers,¹²⁶ but also requires police departments to dismiss officers on the basis of seniority when their cities face a budgetary shortfall.¹²⁷ Wisconsin also imposes a salary ratchet for police officers: city councils are authorized to increase salaries, but prohibited from reducing them without a written recommendation from an independent police board.¹²⁸

State laws are even more specific when it comes to sheriffs' offices.¹²⁹ This is due to the unique status of sheriffs as constitutional offices in most states and their independence from the county governments that fund them.¹³⁰ Thus, in states like Maryland, sheriff salaries are statutorily determined on a county-by-county basis: \$75,000 in Somerset County¹³¹ and \$132,734 in Prince George's County.¹³² In Alabama, sheriff salaries are either set at a dollar amount, as is the case for Coffee County, or as a percentage of other county officials' salaries, as in Mobile County.¹³³ Georgia authorizes counties to increase the sheriff's salary above the statutory minimum but prohibits the county from reducing that

agencies); *Legal Protections for State Pension and Retiree Health Benefits*, PEW CHARITABLE TRS. (May 30, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/legal-protections-for-state-pension-and-retiree-health-benefits> (describing pension protections for public employees).

¹²⁴ See, e.g., MONT. CODE ANN. §§ 7-32-4118 to -4119 (2021) (setting working hours and overtime pay); W. VA. CODE § 8-14-2 (2011) (same).

¹²⁵ See LA. REV. STAT. § 33:2213.

¹²⁶ WIS. STAT. § 62.13(7n) (2019-20) (limiting the workday to eight hours "except in cases of positive necessity by some sudden and serious emergency"); see also W. VA. CODE § 8-14-2 (same); MO. ANN. STAT. § 84.110 (same).

¹²⁷ WIS. STAT. § 62.13(5m) (2019-20); see also N.J. STAT. ANN. § 40A:14-115 (West 2019) (requiring seniority as basis for demotion when necessary for county police department); 53 PA. STAT. AND CONS. STAT. § 813 (West 2016) (same if no employees eligible for retirement); TEX. LOC. GOV'T CODE ANN. § 143.085 (West 2022) (requiring demotion or dismissal of least senior officers when positions eliminated). Seniority rules often have a disproportionate impact on minority police officers, many of whom lack the seniority of white officers. See MARTIN SHEFTER, *POLITICAL CRISIS/FISCAL CRISIS: THE COLLAPSE AND REVIVAL OF NEW YORK CITY 135* (Columbia Univ. Press 1992).

¹²⁸ WIS. STAT. § 62.13.7 (2019-20); see also *id.* § 62.50.10 (on the authority of the police board in first class cities).

¹²⁹ See, e.g., MONT. CODE ANN. § 7-32-2111 (2021) (limiting deputy sheriffs to forty hours of work per week "except in case of an emergency"); *Id.* § 7-32-2107 (limiting grounds for termination of deputy sheriffs).

¹³⁰ O'Rourke, Su & Binder, *supra* note 1, at 1371-73.

¹³¹ MD. CODE ANN., CTS. & JUD. PROC. §§ 2-333(a)-(b)(1) (West 2019).

¹³² *Id.* §§ 2-330 (a)-(b)(1)(i) (setting salary for 2013; thereafter salary to match that of circuit judge).

¹³³ See ALA. CODE § 45-16-230 (1975) (setting salary for the Sheriff of Coffee County at \$85,000 starting in 2021); *Id.* § 45-49-230 (setting salary for the Sheriff of Mobile County at ninety percent of the salary of the District Attorney or seventy-five percent of the salary of the highest paid circuit court judge in county).

supplemental allocation during any term of office.¹³⁴ In addition, Georgia law requires counties to “provide reasonably sufficient funds to allow the sheriff to discharge his legal duties,” and grants counties no power to “dictate to the sheriff how that budget will be spent in the exercise of his duties.”¹³⁵ In Florida, county authority over sheriff spending is also procedurally constrained. Florida sheriffs not only initiate budgetary requests to counties, but can also appeal any adverse county decision to a state commission appointed by the Governor.¹³⁶ The budget determined by the state commission then binds the county.¹³⁷

Legal constraints on personnel expenses and budgeting procedures have the most direct impact on the funding of police agencies. But other areas of state law also directly limit local discretion. States increasingly mandate that law enforcement agencies perform certain responsibilities, including many outside of their traditional role, like immigration enforcement.¹³⁸ Fulfilling these mandates necessitates local funding while limiting local officials’ ability to prioritize other law enforcement activities unless they add further funding.

State laws also regulate the liability of localities for law enforcement activities. Not only is sovereign immunity often waived for localities in ways that are not applicable to the state,¹³⁹ but states also frequently require local governments to indemnify law enforcement officials for all damage judgments

¹³⁴ GA. CODE ANN. § 15-16-20(3) (West 2015); *see also* MINN. STAT. § 387.20(2)(d) (2021) (forbidding reducing county sheriff’s salary).

¹³⁵ *Chaffin v. Calhoun*, 415 S.E.2d 906, 907–08 (Ga. 1992).

¹³⁶ FLA. STAT. ANN. §§ 30.49(5)–(6). It is worth noting that the budget for the sheriff’s office is usually “the largest single budget request” that the county will receive. Aubrey Jewett, *County Government Structure in Florida*, in FLORIDA COUNTY GOVERNMENT GUIDE 2014 UPDATE 5, at 13 (2014), https://factor.fl-counties.com/themes/bootstrap_subtheme/sitefinity/documents/structure-chapter.pdf. Florida’s HB1, the recently enacted anti-defunding measure regarding police budgets referenced earlier, is also modeled explicitly on this longstanding state law restriction on county budgets for sheriff’s offices. *See supra* note 117 and accompanying text.

¹³⁷ Jewett, *supra* note 136, at 13; *see also* MINN. STAT. § 387.20(7) (2021) (authorizing a district court, upon appeal by the sheriff, to overturn a budget allocation “[i]f the court shall find that the board acted in an arbitrary, capricious, oppressive or unreasonable manner or without sufficiently taking into account the extent of the responsibilities and duties of the office of the sheriff, the sheriff’s experience, qualifications, and performance”).

¹³⁸ *See* Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 848–49 (2019) (describing Iowa and Tennessee state laws mandating federal immigration enforcement).

¹³⁹ *See, e.g.*, *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006) (“[T]his Court has repeatedly refused to extend sovereign immunity to counties.”); *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (holding that “municipalities have no immunity from damages liability flowing from their constitutional violations”); *see also* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 413 (2016) (collecting cases).

and legal costs.¹⁴⁰ All of these financial obligations are further exacerbated by the variable fiscal capacity and limited fiscal authority of local governments. As Professors Rushin and Michalski point out, law enforcement funding differs substantially across counties in accordance with the local economic condition and tax base.¹⁴¹ Further, structural constraints limit the ability of local governments to incur debt,¹⁴² or to impose new taxes without state authorization.¹⁴³

In addition to funding mandates, union contracts impose further constraints on local law enforcement spending. All but four states allow collective bargaining for law enforcement unions.¹⁴⁴ Indeed, even in states that broadly prohibit collective bargaining for public sector employees, specific exceptions are provided for police and sheriffs.¹⁴⁵ Much attention has been paid to how union contracts shield law enforcement officers from political and personal accountability for misconduct.¹⁴⁶ But, at a more basic level, these contracts also limit local budgetary discretion by defining salary scales, benefits, and job security.¹⁴⁷ All of this hampers local efforts to use budgets to institute reforms, especially without buy-in from the police agencies subject to these reforms. Because approximately sixty-six percent of police officers work in departments covered by collective bargaining agreements,¹⁴⁸ this impact is widespread.

¹⁴⁰ See, e.g., 65 ILL. CODE 5 § 1-4-5 (requiring all municipalities over 500,000 residents to indemnify for injuries caused by police); see also Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 973 (2014) (finding that police officers are “virtually always indemnified” by local governments). A study of indemnification found that twenty-three states statutorily require local government to indemnify employees acting in the scope of their employment. See Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 268 (2020). Even this might be an undercount, however, as with respect to law enforcement officials. For example, the study lists Nebraska as a state that does not require indemnification. *Id.* at 270–71. Yet Nebraska law does require counties to indemnify sheriffs for legal costs and damage judgments arising from property seizures implicating the sheriff’s surety bond. See NEB. REV. STAT. ANN. § 23-1720.

¹⁴¹ Stephen Rushin & Roger Michalski, *supra* note 56, at 292–94.

¹⁴² Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/>.

¹⁴³ GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 75–87 (2013); Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 295–96 (2016); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the Get What You Pay For Model of Local Government*, 56 FLA. L. REV. 373, 392–93 (2004).

¹⁴⁴ Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1204 n.58 (2017).

¹⁴⁵ See William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115, 1140 n.98 (2011) (“[M]ost of the laws exempt some powerful public sector unions—police and firefighters—from the stripping away of collective bargaining rights.”).

¹⁴⁶ See, e.g., Rushin, *supra* note 144.

¹⁴⁷ See *id.* at 1205.

¹⁴⁸ BRIAN A. REAVES, U.S. DEP’T OF JUST., LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), <http://bjs.gov/content/pub/pdf/lpd07.pdf>.

State law also confers leverage on police unions in contract negotiations. State law mandates on compensation, pensions, terms of employment, and disciplinary procedures narrow the range of proposals that localities can raise in the bargaining process.¹⁴⁹ Police unions can safely negotiate for additional benefits without needing to concede on other terms below the baseline already guaranteed by state law. In addition, approximately thirty states require negotiation stalemates to be settled through binding arbitration.¹⁵⁰ Evidence suggests arbitration has generally favored police unions, resulting in increases in law enforcement funding that have historically outpaced inflation.¹⁵¹ Moreover, in many states, collective bargaining agreements supersede state laws.¹⁵² This allows law enforcement unions to not only bargain for benefits beyond those provided by state law, but also to free themselves from state law constraints through the collective bargaining process.

Last, it is important to recognize that many localities do not directly control the funding of their police agencies. In some cases, this is because the police agency that serves their jurisdiction is not a department of the local government. Many cities do not provide for policing on their own, but instead contract with the county sheriff for police services.¹⁵³ Some cities have contracted with a sheriff's office since incorporation, while others, like Camden, New Jersey, may choose to do so only after disbanding a municipal police department as a result of budgetary shortfalls.¹⁵⁴ The precise payments due under these contracts vary;

¹⁴⁹ See *supra* notes 122–24 and accompanying text.

¹⁵⁰ David B. Lipsky & Harry C. Katz, *Alternative Approaches to Interest Arbitration: Lessons from New York City*, 35 PUB. PERS. MGMT. 265, 265–66 (2006).

¹⁵¹ See, e.g., E.J. MCMAHON & MICHAEL WRIGHT, EMPIRE CTR. FOR N.Y. STATE POL'Y. POLICE AND FIRE PAY KEEP RISING, BENEFITS STICKY UNDER ARBITRATION 2 (2013) (showing that compulsory arbitration decision in New York increased police and fire budgets more than inflation from 2003 to 2012, and arguing that “rather than risk a more generous arbitration award, local officials” are now incentivized to “agree to contract terms they otherwise would have resisted”); LYNNE A. WEIKART, FOLLOW THE MONEY: WHO CONTROLS NEW YORK CITY MAYORS? 68 (2009) (“Binding arbitration often favors the [police and fire] unions since . . . costs are not part of any criteria that an arbitrator uses in negotiations.”). *But see* Thomas Kochan, David B. Lipsky, Mary Newhart & Alan Benson, *The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 569 (2010) (reviewing union contracts in the 1960s and 1970s and concluding that “[t]here were no significant effects” after the adoption of binding arbitration “in the rates of wage increases granted by arbitrators compared to those negotiated voluntarily by the parties”); *Patrolmen's Benevolent Ass'n of N.Y. Inc. v. City of New York*, 767 N.E.2d 116, 122 (N.Y. 2001) (describing the state interest in binding arbitration for contract negotiations involving police departments).

¹⁵² See, e.g., TEX. LOC. GOV'T CODE ANN. § 174.002(b) (West 2021); 5 ILL. COMP. STAT. ANN. 315/7 (West 2021); *Metro. Council No. 23 & Loc. 1227 v. City of Ctr. Line*, 327 N.W.2d 822, 831–32 (Mich. 1982).

¹⁵³ See Peter J. Nelligan & William Bourns, *Municipal Contracting with County Sheriffs for Police Services in California: Comparison of Cost and Effectiveness*, 14 POLICE Q. 70, 71 (2011) (noting the extensive use of municipal contracting for police services in states like Arizona, California, Florida, Illinois, Minnesota, Ohio, Oregon, Vermont, and Washington).

¹⁵⁴ See Joseph Goldstein & Kevin Armstrong, *Could This City Hold the Key to the Future of Policing in*

some set an absolute figure, while others assess based on actual costs or a rate schedule.¹⁵⁵ Short of establishing their own police departments, however, cities usually have few options but to pay the rate set by the sheriff's office. Moreover, because sheriff's deputies are not city employees, funding cannot easily be used as leverage to influence law enforcement priorities or conduct.¹⁵⁶ In addition, some states have created independent police departments with their own funding stream.¹⁵⁷ The Las Vegas Metropolitan Police Department has a hybrid jurisdiction, serving not only the City of Las Vegas but also the county, including the tourist area known as "The Strip" located on unincorporated territory. To tax casinos for the police services they wanted—but not for urban social services—the state imposed a county-wide property tax dedicated to this department.¹⁵⁸ Finally, many cities that face fiscal distress, or went through such periods in the past, have ceded control over their budgets to financial control boards imposed by the state.¹⁵⁹

In short, while policing in the United States is provided largely at the local level, the authority of any local government over a police agency's budget is also constrained by state law. None of this is to deny that cities and counties exercise some discretion over law enforcement funding. To that extent, police reform advocates rightly direct their defunding proposals to local government officials. But it does suggest that currently high funding levels are not entirely the result of local discretion. Moreover, restrictions on local discretion cast the emerging anti-defunding movement in new light: though unprecedented in scope, these state constraints are not entirely novel. Indeed, as we will see in the next section,

America?, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/2020/07/12/nyregion/camden-police.html> (on file with the Columbia Law Review); Nelligan & Bourns, *supra* note 153.

¹⁵⁵ See Municipal Law Enforcement Service Agreements By and Between the County of Los Angeles and the City of West Hollywood (2019) (on file with author) (fee schedule based on hours per officer rank); Agreement for Law Enforcement Services [between the Town of Bennett, CO and Arapahoe County] (2017) (on file with author) (lump sum); Agreement for Law Enforcement Services [between the City of Arden Hills, MN and Ramsey County] (2019) (on file with author) (actual cost).

¹⁵⁶ See, e.g., Caitie Switalski Muñoz, *Cities Air Complaints about Broward Sheriff's Office Service: "We Have Almost No Say Anymore of Control,"* WLRN MIAMI (July 15, 2021, 9:00 AM), <https://www.wlrn.org/news/2021-07-14/cities-air-complaints-about-broward-sheriffs-office-service-we-have-almost-no-say-anymore-of-control>.

¹⁵⁷ See, e.g., S.C. Code Ann. §§ 23-27-10, 23-27-100 (1976) (creating special police districts, each with its own independent tax assessment).

¹⁵⁸ See DENNIS N. GRIFFIN, *POLICING LAS VEGAS: A HISTORY OF LAW ENFORCEMENT IN SOUTHERN NEVADA* 23-27, 39-43 (2005).

¹⁵⁹ See PEW CHARITABLE TRS., *THE STATE ROLE IN LOCAL GOVERNMENT FINANCIAL DISTRESS* 11, 15, 17, 19 (2013), https://www.pewtrusts.org/-/media/assets/2016/04/pew_state_role_in_local_government_financial_distress.pdf; Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 654-55 (2008); JOSEPH F. ZIMMERMAN, *STATE-LOCAL GOVERNMENTAL INTERACTIONS* 73-74 (2012).

funding mandates were common historically and rooted in state-local battles over the control of law enforcement agencies like those we see today.

B. The Historic Origins of Funding Constraints

Local discretion over law enforcement funding is currently limited by a litany of legal mandates and structural constraints. These restrictions hamper efforts of defunding advocates to use budgeting to reform policing, yet also serve as models for even more expansive restrictions like those now being proposed in the recent wave of anti-defunding bills. It might be tempting to see these restrictions as the result of contemporary debates over policing, and the partisan divide that separates many cities from their states. Yet constraints on local funding discretion have deep historical roots, going back to the origins of police agencies. Indeed, state efforts to control local law enforcement funding were far more extensive at the turn of the twentieth century than they are today. From this perspective, the anti-defunding bills currently under consideration may have more in common with nineteenth century state controls than with recent ones.

The history of funding controls reflects two overriding interests: one political and the other fiscal. On the one hand, states have long sought to control the role, responsibilities, and operations of police departments and sheriffs' offices, notwithstanding their status as local agencies. On the other hand, states also had a financial incentive to ensure that police agencies are funded primarily at the local level. To reconcile these two interests, states imposed restrictions to foreclose localities from using their funding responsibility to challenge state control. As a result, as state efforts to control local law enforcement agencies increased, efforts to constrain local funding discretion expanded as well.

This dynamic is most clearly seen in the early history of municipal police departments. In the United States, municipal police departments were created in major cities across the country in the mid-nineteenth century.¹⁶⁰ But soon after cities created these departments, state leaders took steps to wrest control of them from local leaders.¹⁶¹ The reasons for these state take-overs are not entirely unfamiliar to us today. Partisan, religious, and ethnic divides between city and state leaders created tensions over the composition of police forces and the focus of local law enforcement activities.¹⁶² In the eyes of state leaders, police departments were auxiliaries of local political machines, staffed by catholic

¹⁶⁰ O'Rourke, Su & Binder, *supra* note 1, at 1366–67.

¹⁶¹ *See id.* at 1367.

¹⁶² ROBERT M. FOGELSON, *BIG CITY POLICE* 41–45 (1977).

immigrants who turned a blind eye to alcohol, vice, and labor unrest.¹⁶³ States responded by subjecting municipal police departments to police commissions, whose members were appointed by the state, or by replacing municipal police departments with “metropolitan police” forces under the direct control of the state.¹⁶⁴

But even as states assumed direct control of municipal police departments in the nineteenth century, localities remained responsible for their funding. States took care to ensure that local funding responsibility would not undermine state control. Thus, when the Illinois legislature granted the governor full control over the Chicago Police Department in 1861, it also passed laws mandating the number and type of officers to be hired.¹⁶⁵ In 1867 and 1869, the legislature increased those numbers and set the salaries that the city was obligated to pay.¹⁶⁶ Next door in Missouri, the state legislature assumed control of the St. Louis Police Department in 1861.¹⁶⁷ After the city unsuccessfully challenged the takeover and its obligation to continue funding the department,¹⁶⁸ the state took steps to ensure the city’s funding obligations would not undermine the state’s control. In 1898, a state law increased the number of officers the St. Louis Police Department was required to hire and mandated that the city set aside funds at the beginning of the fiscal year based on estimates presented by the state-controlled police board.¹⁶⁹ In Milwaukee, the size of the police department was kept low for decades through low appropriations, in part due to voter disapproval of the

¹⁶³ *Id.* at 41–44, 91; see also JAMES F. RICHARDSON, *THE N.Y. POLICE: COLONIAL TIMES TO 1901*, at 123 (1970) (“The cities tended to be more cosmopolitan and pluralistic, more tolerant of prostitution, gambling, and liquor, and of a different political persuasion from that of the state legislatures.”).

¹⁶⁴ O’Rourke, Su & Binder, *supra* note 1, at 1367.

¹⁶⁵ See JOHN JOSEPH FLINN, *HISTORY OF THE CHICAGO POLICE FROM THE SETTLEMENT OF THE COMMUNITY TO THE PRESENT TIME* 93–94 (1887).

¹⁶⁶ *Id.* at 114 (“This year the legislature amended the police law once more. It was required that the commissioners should devote their whole time to the public service, and each was to receive an annual salary not exceeding \$2,500 the exact amount to be fixed by the city council. The salaries of police officers were regulated as follows: General superintendent, not less than \$3,000; deputy superintendent, \$2,500; captain’s, \$1,500; sergeant’s, \$1,200; patrolmen not less than \$800 nor more than \$1,000. An act passed two years later (March, 1869) fixed the salary of each commissioner at \$3,000, captain’s at \$2,000 and sergeant at \$1,500. During 1867 the number of patrolmen was increased to 173.”).

¹⁶⁷ See ALLEN E. WAGNER, *GOOD ORDER AND SAFETY: A HISTORY OF THE ST. LOUIS METROPOLITAN POLICE DEPARTMENT, 1861-1906*, at 16–18 (2008).

¹⁶⁸ State *ex rel.* McNeal v. Roach, 520 S.W.2d 69 (Mo. 1975); State *ex rel.* Sanders v. Cervantes, 480 S.W.2d 888, 890 (Mo. 1972). Cases from other states have also justified state control over local police departments on two grounds: (1) the subservience of the locality to the state, and (2) construing policing as a state function, making police state agents. See, e.g., City of Newport v. Horton, 47 A. 312, 314 (R.I. 1900); Eaton v. Town Council of Warren, 161 A. 225, 226 (R.I. 1932); Burch v. Hardwicke, 71 Va. 24, 33–38 (1878).

¹⁶⁹ WAGNER, *supra* note 167 at 451–52 (noting that in 1907, the state further increased the number of police officers and changed the patrol shifts, which also required more funding to hire the necessary officers to staff the new shift schedules).

department's strike-breaking activities.¹⁷⁰ But after a series of labor conflicts, Wisconsin passed a law in 1885 removing the city's control over its police department, increasing the police force by fifty percent and restructuring its organization and operating procedure.¹⁷¹ The state legislature also granted lifetime tenure to Milwaukee's Police Chief.¹⁷²

State control of municipal police budgets, then, was initiated as a corollary to increased state control of municipal police departments. Yet funding mandates often persisted even when local control was restored. Take for example, the New York City Police Department. It was the first municipal police department established in the United States (1850), the first to be replaced by a state-controlled police force (1856), and the first to be returned to municipal control (1870).¹⁷³ During the period of state control, New York City's funding obligation was set by the legislature and increased dramatically.¹⁷⁴ Yet even after the restoration of local control, state regulation of salaries and benefits only increased.¹⁷⁵ This was partly because of the rise of police unions and their historical predecessors,¹⁷⁶ which established extensive political operations to lobby for salary increases at the state level.¹⁷⁷ Equally important were the political motivations of the state legislature. As James Richardson explained, "it was easy and politically profitable for the legislators . . . [who] received the political rewards, while municipal officials had to raise the money."¹⁷⁸ Later, a salary mandate was extended to nearly all municipal employees. When it was observed during the fiscal crisis of the 1930s that New York City only controlled a quarter of its budget because of state funding mandates,¹⁷⁹ the mayor was

¹⁷⁰ See SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915*, at 93-94, 99 (1983).

¹⁷¹ *Id.* at 89.

¹⁷² *Id.* at 90.

¹⁷³ RICHARDSON, *supra* note 163, at 163-64.

¹⁷⁴ *Id.* at 152-53 (stating, for example, that from 1963 to 1969, the funding obligation for New York City grew by sixty percent from 1.8 million to 2.8 million).

¹⁷⁵ *Id.* at 163-64; see also N.Y. Second Class Cities Law § 134 (McKinney 1909) (prohibiting second-class cities from lowering the number of police and fire officials to lower than it was at the time that this Act was adopted in 1906).

¹⁷⁶ See Aaron Bekemeyer, *The Labor of Law and Order: How Police Unions Transformed Policing and Politics in the United States, 1939-1985*, at 35-36 (2021) (Ph.D. dissertation Harvard University) (on file with authors) (documenting how groups like New York's Patrolmen's Benevolent Association, founded in 1892, achieved significant political victories but for pragmatic reasons were "careful not to identify as labor unions" until the mid-twentieth century).

¹⁷⁷ RICHARDSON, *supra* note 163, at 163-64.

¹⁷⁸ *Id.* at 163-64.

¹⁷⁹ See ESTER R. FUCHS, *MAYORS AND MONEY: FISCAL POLICY IN NEW YORK AND CHICAGO* 85-86 (1992).

granted authorization to reduce municipal salaries.¹⁸⁰ But that authorization was only temporary,¹⁸¹ and some argue that the restoration of the funding mandates went on to set the stage for the city's fiscal crisis in the 1970s.¹⁸²

While states codified the funding structure of police departments only after assuming greater control over their operations, they controlled the funding of sheriffs' offices from the start.¹⁸³ Although sheriffs' jurisdictions usually coincide with counties, sheriffs are constitutional officers of the state rather than departments of counties.¹⁸⁴ Moreover, sheriffs were originally funded on a fee-for-service basis, following the model of sheriffs in England.¹⁸⁵ Despite the structural dissimilarity between sheriffs' offices and police departments, states mandated that funding for sheriffs also come from local coffers.

For most of the nineteenth century, state control focused primarily on the fee scale that sheriffs could charge counties for their activities.¹⁸⁶ When sheriffs arrested and detained a suspect, claims would be filed with the county for payment.¹⁸⁷ Similar fees were charged for other activities, such as the seizing of property or transferring "lunatic paupers" to the asylum.¹⁸⁸ In nearly all cases, these fees were set by state law. Sheriffs were required to document that they had completed the task for which they were charging.¹⁸⁹ But once a bill was properly presented, localities were required by law to pay according to state statute.¹⁹⁰ The fee schedules also gave states influence over the actions of sheriffs. By raising or lowering the fees to be paid, the state could incentivize sheriffs to pursue certain activities over others.

¹⁸⁰ *Id.* at 64.

¹⁸¹ *Id.* at 68.

¹⁸² *Id.* at 72.

¹⁸³ See David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. & CRIMINOLOGY 761, 785 (2014) ("An important American innovation was that the sheriff either had a salary or could only charge fees (e.g., for executing a civil judgment) that were fixed by law."); James Tomberlin, *Don't Elect Me: Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 120–22 (2018) (describing how the fees and salaries for sheriffs were set by colonial and then later state law).

¹⁸⁴ O'Rourke, Su & Binder, *supra* note 1, at 1371–72.

¹⁸⁵ *Id.* at 1377–78.

¹⁸⁶ See, e.g., WILLIAM L. MURFREE, A TREATISE ON THE LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS 583–84 (1884) ("A sheriff . . . cannot demand remuneration for services and expenses not expressly provided for by statute or fairly to be inferred from its terms."); see also *id.* at 589–90 (noting that when fees are fixed by statute, no additional compensation can be requested or granted by courts).

¹⁸⁷ See *id.* at 593–94.

¹⁸⁸ *Id.* at 589.

¹⁸⁹ *Id.* at 593–94.

¹⁹⁰ *Id.*

Like the early battles over municipal police departments then, current laws governing the funding of sheriffs reflect a similar effort to combine local funding responsibility with state control. Because sheriffs operate independently of counties and municipalities, local officials have little influence over their activities.¹⁹¹ But because states largely fund sheriffs' offices locally, state law mandates the fees local officials must pay.¹⁹² As a result, localities were unable to use funding to influence the sheriffs' activities. This arrangement persisted even when many of the sheriffs' fees were converted to salaries,¹⁹³ which is likely why so many states set sheriff salaries by statute or regulate the process by which counties budget for the sheriff.¹⁹⁴

Sheriffs benefitted substantially from state control of their funding. When their revenues were through fees, entrepreneurial sheriffs were able to increase their earnings by cutting costs in the services they provided. An investigation in the nineteenth century, for example, found that a sheriff was able to reduce the cost of feeding a prisoner to eight cents a day, while receiving forty-five from the county.¹⁹⁵ In addition, by taking advantage of their authority to sell food and other amenities to prisoners, sheriffs could use cuts to the daily rations to induce prisoners or their family and friends to buy supplemental food.¹⁹⁶ This is why many have described the office of the sheriff in the nineteenth century as "the most lucrative in the county."¹⁹⁷ None of this was subject to oversight by the county government, which was obligated to provide funding at statutorily mandated levels.

¹⁹¹ See O'Rourke, Su & Binder, *supra* note 1, at 1372.

¹⁹² See *id.* at 1373–74.

¹⁹³ See, e.g., GA. CODE ANN. § 15-16-19 (West 2015) (abolishing fees for sheriffs). Some states still retain a fee schedule in addition to salaries. See e.g., MONT. CODE ANN. § 7-32-2141 (2019) (establishing a minimum fee schedule if one is not set by the county); NEV. REV. STAT. § 248.275 (2019); N.H. REV. STAT. ANN. § 104:31 (West 2013); WIS. STAT. § 59.32 (2021); WILLIAM A. JACKSON, THE OFFICE OF SHERIFF IN IOWA 19 (1924) (describing fee schedule for Sheriffs based on population).

¹⁹⁴ See, e.g., GA. CODE ANN. § 15-16-20 (West 2015) (setting minimum salary schedule for sheriffs based on population size); N.J. STAT. ANN. § 40A:14-110 (West 2016) (setting a minimum annual salary for county police of \$2,250.00).

¹⁹⁵ Raymond Moley, *The Sheriff and the Constable*, 146 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 31 (1929).

¹⁹⁶ *Id.*

¹⁹⁷ See LANE W. LANCASTER, GOVERNMENT IN RURAL AMERICA 165 n.11 (1952); see also Moley, *supra* note 195, at 29–31 (describing and critiquing the profit motives of sheriffs); JOHN A. FAIRLIE, LOCAL GOVERNMENT IN COUNTIES, TOWNS AND VILLAGES 108 (1906) ("At the common law there was no compensation allowed to sheriffs. But statutes now authorize the payment either of fees or a fixed salary to the sheriff and his deputies. Under either system the office is among the best paid of the county posts; and where the fee system is retained in counties with a large city the net compensation is often excessive.").

This history reveals that state funding controls for local police agencies were common from the start. More importantly, depriving local governments of influence over local police agencies was often their very purpose.

C. Direct Constraints and the Expansion of Police Functions

The direct constraints imposed on local law enforcement funding illustrate the challenges defunding advocates face in reforming policing through the local budgetary process. They limit the discretionary authority local governments have over police agencies they appear to supervise.¹⁹⁸ And the deep historic roots of these direct constraints reveal states' persistent fear of urban democracy. From this perspective, the current wave of anti-defunding measures at the state level is hardly surprising—these measures build on existing mandates and resemble expansive restrictions imposed in the past. More importantly, the legacy of funding constraints may have contributed to the “governing through”¹⁹⁹ police agencies that “defunding” challenges.

Indeed, state funding mandates were often imposed in order to define police functions. States imposed minimum salaries and hiring requirements to effectuate the takeover of municipal police departments by their preferred personnel.²⁰⁰ Fee schedules and salary mandates were provided for sheriffs to maintain their independence from the county governments that eventually became their primary funding source.²⁰¹ In both cases, the goal was not just to ensure adequate funding, but also to direct the functions of police agencies.²⁰² States assumed control of big city police departments to redirect their activities towards issues that they believed were not prioritized under local control: vice in New York City,²⁰³ temperance in Boston,²⁰⁴ and labor strikes in Milwaukee.²⁰⁵ Sheriff compensation was set statutorily not only to ensure that counties fund specific functions, but also to ensure that sheriffs would focus on specific responsibilities.

¹⁹⁸ See *supra* notes 120–48 and accompanying text.

¹⁹⁹ See SIMON, *supra* note 4, at 4–5, 96–101 (arguing that the United States “governs through crime” by using criminality and criminal justice institutions to legitimize governance across a number of different policy arenas).

²⁰⁰ See *supra* notes 120–28 and accompanying text.

²⁰¹ See *supra* notes 129–37 and accompanying text.

²⁰² See *supra* notes 160–72 and accompanying text.

²⁰³ See, e.g., DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS AND POLICY 44–45 (2d ed. 2020).

²⁰⁴ See ROGER LANE, POLICING THE CITY: BOSTON, 1822–1885, at 123, 132 (1967).

²⁰⁵ See HARRING, *supra* note 170, at 99.

Funding control may have also played an important role in how local governments defined the functions of police agencies even after local control was restored in the late-nineteenth and early-twentieth centuries.²⁰⁶ Because funding mandates persisted, cities were compelled to maintain a certain level of police spending and staffing. These requirements gave local officials strong incentives to shift duties and responsibilities onto police agencies, rather than investing in agencies they had no comparable legal duties to fund. Accordingly, as new urban problems arose, cities turned to the police. As early as the late nineteenth century, police departments were involved in social service functions like the housing of “tramps” and the recovery of missing children.²⁰⁷ By the early twentieth century, police assumed responsibility over not only traffic control and pedestrian safety but also other functions, such as building code and child labor inspections, truancy, anti-cigarette clinics, and censorship of movies.²⁰⁸ If progressive era cities wanted social work done, the agency with the personnel and resources to do it was the police. Police have long remained one of the most capable and well-resourced local departments²⁰⁹ because their budgets have been protected by law. Indeed, these budget mandates limited options to create or expand other departments.

This is not to say that the functions of police agencies expanded without scrutiny. But funding considerations also forestalled efforts to reallocate police functions once they were assigned. Even while seeking to insulate police agencies from local political influence, progressive reformers in the early twentieth century argued that police activities should be confined to a narrower set of core law enforcement functions.²¹⁰ Law enforcement officials themselves were often frustrated by the expanding scope of their responsibilities.²¹¹ Yet, funding considerations ultimately sidelined these efforts to narrow their mission. For example, police departments successfully resisted efforts to establish civilian traffic divisions in order to position themselves for funding increases as the number of automobiles increased.²¹² All of this, of course, created a self-

²⁰⁶ See RICHARDSON, *supra* note 163, at 40–42.

²⁰⁷ See ERIK H. MONKKONEN, POLICE IN URBAN AMERICA 1860–1920, at 86–88 (Robert Fogel & Stephan Thernstorm eds., 1981); Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 88 n.109 (2021).

²⁰⁸ See SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 83 (1977).

²⁰⁹ See, e.g., MONKKONEN, *supra* note 207, at 151–52.

²¹⁰ See, e.g., FOGELSON, *supra* note 162, at 84–85.

²¹¹ See *id.* at 84.

²¹² See *id.* at 85. See generally David J. Bordua & Edward W. Haurek, *Components of the Increase in Local Police Expenditures, 1902-1960*, 13 AM. BEHAV. SCI. 667 (1970) (arguing that traffic control was the costliest of police functions and explains much of the growth of police budgets in the twentieth century).

perpetuating cycle. Funding mandates ensured that police were assigned new responsibilities. These new responsibilities then created more need for police funding. Ever-expanding police personnel created a potent patronage army elected leaders could not afford to antagonize.²¹³

From this perspective, anti-defunding bills represent not just a new obstacle to defunding advocates seeking to reallocate police functions to other local services and departments; they are also the continuation of an old story. Similarly motivated precursors to these recent bills contributed to the very expansion of police functions that defunding advocates are trying to reverse. On the one hand, states imposed funding restrictions to redefine the role of local police agencies. On the other hand, local officials further expanded the function of police agencies to justify the funding mandates imposed by the state and to govern through the agents the state required them to fund.

III. INDIRECT CONSTRAINTS ON LAW ENFORCEMENT DEFUNDING

Beyond these direct legal constraints,²¹⁴ local governments operate under fiscal and political pressures that make it difficult to reduce law enforcement funding or invest in other services. Unable to print money and politically punished for raising taxes, local officials have powerful incentives to look for creative sources of revenue to balance the books.²¹⁵ These pressures and incentives form indirect constraints on local police funding that are almost as inexorable as the direct constraints officials face. This Part surveys some of these constraints and shows how they distort local political decisions about the optimal level of police funding. As we explain, grant programs incentivize local governments to increase their own contributions to police funding and to expand the police mission. Legal financial obligations—such as the fines, fees, and forfeitures that have generated a wealth of recent scholarship—become sources of revenue that local governments must rely on to avoid politically costly or legally foreclosed taxation.²¹⁶

A. *Federal (and State) Grants*

Federal grants impose two related constraints on local budgeting decisions. First, while federal grants comprise a modest percentage of law enforcement

²¹³ See O'Rourke, Su & Binder, *supra* note 1, at 1337–59.

²¹⁴ See *supra* Part II.

²¹⁵ See Shannon R. Graham & Michael D. Makowsky, *Local Government Dependence on Criminal Justice Revenue and Emerging Constraints*, 4 ANN. REV. CRIMINOLOGY 311, 312 (2021); Reynolds, *supra* note 143.

²¹⁶ See *infra* Part III.B and accompanying text.

funding in many jurisdictions,²¹⁷ they impose significant pressures on local authorities to maintain high levels of funding. Second, in both direct and indirect ways, these grants shape the functions of police agencies.

Scholars have documented some of the ways these grants influence the priorities and practices of local law enforcement.²¹⁸ Thus far, this work has emphasized the logic of “fiscal attention”—how the promise of federal money can lead police agencies to shift their policing priorities to conform to the express interests of the federal government.²¹⁹ As Professor Rachel Harmon has observed, these distortions channel law enforcement into more aggressive forms of policing by incentivizing, or even mandating, more stops, more arrests, and more militarized policing.²²⁰

Less examined, however, are the indirect ways in which federal grants can alter budgeting constraints by requiring local governments to commit to high levels of police funding. This, in turn, incentivizes police agencies and local authorities to expand the scope of a police agency’s mission to cover functions that were once the responsibility of decreasingly funded social service agencies.²²¹ Here, we consider how grants constrain not only *how much* localities spend on police but also their *use* of police in place of other agencies.

I. Overview of Federal and State Law Enforcement Grants

It is difficult to determine how much money the federal government transfers to local law enforcement through a patchwork of federal grants distributed through an array of agencies.²²² While small in comparison to local funding, the amount is significant. In 2020, for example, the Department of Justice (DOJ)

²¹⁷ See Roger Michalski & Stephen Rushin, *Federal (De)Funding of Local Police*, 110 GEO. L.J. ONLINE 54, 55, 59–62, 65 (2021).

²¹⁸ See Harmon, *supra* note 91, at 872; Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 385–88 (2006) (providing an overarching account); see, e.g., Emily K. Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes*, 38 J. POL’Y ANALYSIS & MGMT. 338, 341–42 (2019).

²¹⁹ See Peter J. Boettke, Liya Palagashvili & Ennio E. Piano, *Federalism and the Police: An Applied Theory of “Fiscal Attention,”* 49 ARIZ. ST. L.J. 907, 918 (2017).

²²⁰ See Harmon, *supra* note 91, at 912–29.

²²¹ See generally Friedman, *supra* note 44, at 948–78 (describing the scope of police functions); SIMON, *supra* note 4, at 6 (arguing that the “vast reorientating of fiscal and administrative resources toward the criminal justice system at both the federal and state level, has resulted in . . . a transformation from ‘welfare state’ to ‘penal state’”).

²²² Beck & Goldstein, *supra* note 8, at 1192 (“[I]t is impossible to quantify the precise amount of local agency spending that is funded through intergovernmental transfers: not even the Congressional Research Service could identify exactly how much money was flowing to particular local governments through the complex patchwork of federal programs.”); see Harmon, *supra* note 91, at 937–38.

alone gave more than \$3 billion in state and local grants and more than \$4.3 billion in overall transfers to state, local, and tribal law enforcement.²²³ The largest DOJ grant program has been the Edward R. Byrne Memorial Justice Assistance Grant (JAG) Program, which distributed an average of \$461 million per year between 2005 and 2013.²²⁴ The program was established for states in 1988 and expanded in 2005 to include local and tribal governments, with the mandate to distribute relatively flexible block grants to be used for law enforcement and related criminal justice priorities enumerated by statute.²²⁵ The vast majority of these grants are distributed for law enforcement spending rather than on related areas.²²⁶ The DOJ is required to distribute Byrne JAG funds according to a statutory formula.²²⁷ Each year, forty percent of the funds are disbursed directly to local governments eligible under a formula that considers population and crime rates.²²⁸ The remaining sixty percent is distributed to states, which then distribute the money to state police and small local government units that are ineligible for direct grants.²²⁹ Despite the DOJ's recent

²²³ U.S. DEP'T OF JUST., FY 2021 BUDGET REQUEST AT A GLANCE 5, at 7 (n.d.), <https://www.justice.gov/doj/page/file/1246841/download>.

²²⁴ NATHAN JAMES, CONG. RSCH. SERV., EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 5 (2013), https://www.everycrsreport.com/files/20130130_RS22416_118579d59fee188665272ea06b892481c6d6a864.pdf. The program distributed \$235 million in Fiscal Year 2020. *See* Press Release, U.S. Dep't of Just., Justice Department Awards More than \$458 Million to Fight Violent Crime (Oct. 30, 2020) (available at <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fightviolentcrimefactsheet.pdf>). It was predicted to disburse nearly double that amount in Fiscal Year 2021. U.S. DEP'T OF JUST., *supra* note 223, at 7 (requesting \$411.7 million for Byrne Justice Assistance Grants).

²²⁵ U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, EDWARD BYRNE JUSTICE ASSISTANCE GRANT (JAG) PROGRAM FREQUENTLY ASKED QUESTIONS (FAQS) 2–3 (2022) [hereinafter BYRNE JAG FAQ], <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag-faqs.pdf>; Harmon, *supra* note 91. The other purposes for which the grant may be used are prosecution and court programs; “[p]revention and education” programs; corrections programs; drug treatment and enforcement; emergency planning; crime victim and witness programs; and mental health programs related to law enforcement or corrections. 34 U.S.C. § 10152(a)(1).

²²⁶ In Fiscal Year 2019, the last year for which data is available, seventy-one percent of Byrne JAG funds were allocated to law enforcement spending. *See* U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, JUSTICE ASSISTANCE GRANT PROGRAM: ACTIVITY REPORT, FISCAL YEAR 2020, at 2 (2021), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/JAG-Activity-Report-FY-2020.pdf>.

²²⁷ *See* 34 U.S.C. §§ 10152(a)(1), 10156; *City of Providence v. Barr*, 954 F.3d 23, 27 (1st Cir. 2020).

²²⁸ *See* BYRNE JAG FAQ, *supra* note 225.

²²⁹ *See id.*

and abandoned effort to deny Byrne grants to “sanctuary cities,”²³⁰ there are few meaningful restrictions on how the funds are used.²³¹

The second most significant source of DOJ grants for local policing is the Community Oriented Policing Services (COPS) Program, which provides categorical grants for hiring police and for other defined purposes.²³² The COPS Office was established under the 1994 Crime Bill with a mandate to put 100,000 new officers on the street by 2000.²³³ Its oldest and largest program, the COPS Hiring Program, has disbursed more than \$14 billion since 1994 to hire new law enforcement officers.²³⁴ These hiring grants typically comprise over fifty percent of funds distributed through the COPS Program.²³⁵ But the COPS office also provides grants to support initiatives that include school policing, multijurisdictional drug task forces, and “community policing” development.²³⁶

²³⁰ In 2016, the DOJ ordered that these grants may not be disbursed to state or local governments that adopt “sanctuary” policies, which limit cooperation and information sharing with federal immigration authorities. *See City of Providence*, 954 F.3d at 29; RACHEL HARMON, *THE LAW OF POLICE* 566 (2021). Cities nationwide challenged the order in court, producing a circuit split. Most circuits held that the DOJ’s order exceeded its statutory authority. *See City of Providence*, 954 F.3d at 26–27; *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Philadelphia v. Att’y Gen. of U.S.*, 916 F.3d 276 (3d Cir. 2019); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019). The Second Circuit disagreed. *New York v. U.S. Dep’t of Just.*, 951 F.3d 84 (2d Cir. 2020). In April 2021, the DOJ rescinded the order. *See Legal Notices*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, <https://www.ojp.gov/funding/explore/legal-notices> (Apr. 22, 2021).

²³¹ *See City of Philadelphia*, 916 F.3d at 284–85 (holding that the statute authorizing the Byrne JAG Program gives “exceptionally limited” authority to the Attorney General with respect to setting grant conditions); *cf. New York*, 951 F.3d at 103 (concluding that the DOJ may withhold grants from “sanctuary” cities but “agree[ing] that the Attorney General’s authority to depart from that formula when awarding grants to qualified applicants is extremely limited” (emphasis omitted)); Harmon, *supra* note 91, at 899 (noting that Byrne JAG grants give more discretion to localities than COPS grants to determine how funds are spent).

²³² *See Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. § 3796dd (2012)); NATHAN JAMES, CONG. RSCH. SERV., *COMMUNITY ORIENTED POLICING SERVICES (COPS): BACKGROUND, LEGISLATION, AND FUNDING* 1–3 (2011), https://www.everycrsreport.com/files/20110104_RL33308_95bb2cfa6efb367e0c6e2eda49f335d4e5aa036a.pdf.

²³³ Harmon, *supra* note 91, at 883. The COPS Office was established under the Violent Crime Control and Law Enforcement Act of 1994. *See JAMES, supra* note 232, at 1–3.

²³⁴ *See HARMON, supra* note 230, at 524.

²³⁵ *See Weisburst, supra* note 12, at 85.

²³⁶ *See Community Oriented Policing Services (COPS) OFFICE*, U.S. DEP’T OF JUST., <https://cops.usdoj.gov/grants> (last visited May 5, 2022); CONG. RSCH. SERV., *COMMUNITY ORIENTED POLICING SERVICE (COPS) PROGRAM* (2021), <https://crsreports.congress.gov/product/pdf/IF/IF10922> (“Funding for COPS has increased in the last four fiscal years, from \$276 million for FY2018 to \$386 million for FY2021. Increased funding for the COPS account is the result of Congress increasing funding for hiring programs, and for anti-heroin task forces, active shooter training, and grants under the Matching Grant Program for School Security.”). The school policing initiative was formerly called the “COPS in Schools Program” and provided up to \$125,000 for hiring a “school resource officer”—a sworn police officer—for a period of three years. *See Weisburst, supra* note 218, at 342. The program was discontinued in 2005, but schools may continue to apply through other COPS programs for funding to hire school resource officers. *See Supporting Safe Schools*, U.S. DEP’T OF JUST., COPS, <https://cops.usdoj.gov/supportingsafeschools> (last visited May 5, 2022).

Funding for COPS has fluctuated over time but is likely to grow in the near future. As one of Clinton’s signature policies, the program has been amply funded throughout its tenure.²³⁷ Prior to 2000, nearly all grant applications were accepted.²³⁸ Citing concerns about its effectiveness, the second Bush administration sharply decreased funding and made the grant applications more competitive.²³⁹ The Obama administration increased funding for COPS and, for Fiscal Years 2009 through 2011, allowed the grants to cover 100% of police salaries to help cities with budget shortfalls from the Great Recession.²⁴⁰ The Trump administration maintained the general level of funding,²⁴¹ with an increase to \$400 million in June 2020.²⁴² In Fiscal Year 2021, the COPS Program’s overall budget was \$386 million, with a \$156.5 million budget for the hiring program.²⁴³ For Fiscal Year 2022, the Biden administration has requested that the COPS program increase to \$651 million,²⁴⁴ with hiring program’s budget skyrocketing to \$537 million.²⁴⁵

The Department of Justice’s grant programs for law enforcement are not limited to Byrne JAG and COPS. In 2020 for example, the DOJ’s Office of Justice Programs awarded \$223 million in federal and state funding for law enforcement in addition to the \$235 million it provided through the Byrne JAG program.²⁴⁶ Nor is DOJ the only federal agency that funds law enforcement. The Department of Homeland Security, for example, disbursed \$243 million to law enforcement agencies in Fiscal Year 2020 and since 2004 has disbursed billions for terrorism preparedness.²⁴⁷ The Department of Agriculture provides millions

²³⁷ See CONG. RSCH. SERV., COMMUNITY ORIENTED POLICING SERVICES (COPS): IN BRIEF 1–2 (2017), <https://fas.org/sgp/crs/misc/RL33308.pdf>.

²³⁸ See Weisburst, *supra* note 12, at 85.

²³⁹ See *id.* at 85–86.

²⁴⁰ Mello, *supra* note 12. The twenty-five percent co-pay requirement was restored in 2012. *Id.*

²⁴¹ See CONG. RESEARCH SERV., COMMUNITY ORIENTED POLICING SERVICES (COPS) PROGRAM (2019), <https://fas.org/sgp/crs/misc/IF10922.pdf> (providing data through FY 2019).

²⁴² Press Release, U.S. Dep’t of Just., Department of Justice Awards Nearly \$400 Million for Law Enforcement Hiring to Advance Community Policing (June 2, 2020) (available at <https://www.justice.gov/opa/pr/departement-justice-awards-nearly-400-million-law-enforcement-hiring-advance-community>). This increase occurred despite the Trump administration’s initial proposal to reduce COPS funding by \$204.5 million in FY 2020. NAT’L ASSOC. OF CNTYS., PRESIDENT TRUMP’S FY 2020 BUDGET REQUEST: HIGHLIGHTS FROM THE COUNTY PERSPECTIVE (2019), <https://www.naco.org/sites/default/files/attachments/NACo%20President%20Budget%20FY%202020%20FINAL.pdf>.

²⁴³ CONG. RSCH. SERV., *supra* note 236.

²⁴⁴ U.S. DEP’T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVS. (COPS), FY 2022 PRESIDENT’S BUDGET 4 (2021), <https://www.justice.gov/jmd/page/file/1398331/download>.

²⁴⁵ *Id.*

²⁴⁶ U.S. DEP’T OF JUST., *supra* note 223.

²⁴⁷ See HARMON, *supra* note 230, at 524 (“[T]he Department of Homeland Security has given away billions of dollars to local law enforcement agencies for terrorism preparedness since 2002. In 2020 . . . , it provided

of dollars annually in community facility grants that may be used to supplement the cost of building police stations in rural areas.²⁴⁸

Less transparent are the state-level grants for local law enforcement.²⁴⁹ Because states can regulate local police directly,²⁵⁰ they do not need grant programs to influence law enforcement. Nevertheless, at least two states, California and New York, have nontrivial law enforcement grant programs. In 2021, for example, California provided an unusually large \$76 million to cities and community organizations through its California Violence Intervention and Prevention Grant Program.²⁵¹ New York State provided approximately \$14.4 million in Fiscal Year 2021 to police departments and district attorneys in eligible counties to implement shooting and harm reduction strategies outside New York City.²⁵²

States can also control which small jurisdictions receive federal funds through the Byrne JAG Program. Under the program's terms, each state must pass a predetermined percentage of its JAG funds to local units of government for statutorily enumerated purposes.²⁵³ However, the program does not otherwise guide the state's discretion.²⁵⁴ Thus, states can use federal as well as state grants to direct local policing priorities.

2. *The Distortionary Power of Federal Grants*

As Rachel Harmon has argued, federal grants “attenuate[] police accountability” by freeing law enforcement agencies from having to rely on

more than \$90 million for law enforcement agency cooperation on the U.S. borders and more than \$153 million to law enforcement agencies for urban-area terrorism prevention, among other grants.”); Harmon, *supra* note 91, at 872; Michalski & Rushin, *supra* note 217 at 58.

²⁴⁸ Harmon, *supra* note 91, at 886; *Community Facilities Direct Loan & Grant Program*, U.S. DEP'T OF AGRIC., <https://www.rd.usda.gov/programs-services/community-facilities-direct-loan-grant-program> (last visited May 5, 2021) (providing grants for “[p]ublic safety services such as fire departments, police stations, prisons, police vehicles, fire trucks, public works vehicles, or equipment”); The Fiscal Year 2021 budget for these grants was \$40 million. U.S. DEP'T OF AGRIC., FY 2021 BUDGET SUMMARY 43 (2021), <https://www.usda.gov/sites/default/files/documents/usda-fy2021-budget-summary.pdf>.

²⁴⁹ Given the variation in state budgeting transparency, it is difficult to determine which states support law enforcement through state-funded grants.

²⁵⁰ *See supra* Part II.

²⁵¹ *See* California State Budget Act 2021-22, S. 129, Ch. 69, <http://www.bscc.ca.gov/wp-content/uploads/State-Budget-Act-2021-CalVIP.pdf>. The previous year's appropriation was only \$9 million.

²⁵² *See* GRANT PROGRAMS, N.Y. STATE DIV. OF CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/ofpa/fundingprograms.html> (last visited Aug. 12, 2021).

²⁵³ *See* BYRNE JAG FAQ, *supra* note 225.

²⁵⁴ 34 U.S.C. § 10152(a)(1); BYRNE JAG FAQ, *supra* note 225.

local governments to fund specific priorities.²⁵⁵ Yet local governments still provide the vast majority of police funding,²⁵⁶ while federal grants comprise a relatively small amount of many police budgets, including those of the largest cities.²⁵⁷ This has led Michalski and Rushin to argue that federal grants “may exert little influence on local law enforcement activity.”²⁵⁸ As explained below, however, that conclusion overlooks realities of municipal budgeting and other scholarship documenting effects of federal grants on policing. To the contrary, theory suggests and observed behavior confirms that (1) small federal grants have potential to influence police funding decisions in even large cities and (2) these influences drive police to adopt enforcement priorities and methods local communities might not choose for themselves. In this way, grants reshape the agenda of policy choices confronting local officials.

Even small amounts of federal money can influence local government funding priorities. Local governments operate under significant budgetary constraints, including fixed spending obligations (such as legacy costs), which leave them struggling to fund basic city services.²⁵⁹ Unlike the federal government, they cannot print their own money. Moreover, many states constitutionally prohibit local governments from running budget deficits.²⁶⁰ This leaves local governments under immediate pressure to raise revenue or slash spending. Yet some states also prohibit local governments from unilaterally raising taxes.²⁶¹ And even where the tax option is available, local officials are aware of the electoral consequences they will suffer from exercising it.²⁶² Thus, even small sources of revenue can generate powerful incentives. This is particularly the case for smaller municipalities—which, as Michalski and Rushin acknowledge, receive most federal grants and rely on them for a significant portion of their police budget.²⁶³

But large city and state authorities also act as if federal grant money matters. Even major cities organize their police funding strategies around the promise of

²⁵⁵ Harmon, *supra* note 91, at 948.

²⁵⁶ *Id.*

²⁵⁷ Michalski & Rushin, *supra* note 217, at 54–55.

²⁵⁸ *Id.* at 59.

²⁵⁹ See, e.g., Clayton P. Gillette, *How Cities Fail: Service Delivery Insolvency and Municipal Bankruptcy*, 2019 MICH. ST. L. REV. 1211, 1238 (2019) (“As municipal budgets are subject to constraints, high legacy costs leave less discretion for municipal officials to pay for additional goods and services that might stabilize or augment current delivery levels.”).

²⁶⁰ See Gordon, *supra* note 142.

²⁶¹ Scharff, *supra* note 143, at 296.

²⁶² See Graham & Makowsky, *supra* note 215, at 312.

²⁶³ Michalski & Rushin, *supra* note 217, at 61.

receiving grants. For example, most major police agencies have grant writers on staff, and more agencies hire outside grant writing consultants and writers.²⁶⁴ Given the financial pressures on cities, we must assume this expense is a rational investment.

Moreover, organizations representing major cities—those proportionately less supported by federal grants—routinely lobby the federal government in support of the DOJ’s grant programs.²⁶⁵ One recent letter urging Congress to increase appropriations to the Byrne JAG Program—signed by the Major Cities Chiefs Association and U.S. Conference of Mayors—hailed the grants as “one of the most important tools states and localities have for spurring innovation and for testing and replicating promising practices.”²⁶⁶ The Major Chiefs Association even deemed it important to publicly oppose a proposed internal DOJ reorganization shifting the COPS Program to the Office of Justice Programs.²⁶⁷ In doing so, the organization claimed that COPS “has guided the law enforcement field in policies and practices that help to establish trust with the communities we serve.”²⁶⁸ This lobbying effort suggests that large departments factor these grant programs into their planning and adjust at least their external messaging to federal funding priorities.

Indeed, both state and local authorities adjust their policing methods to conform to federal grant requirements.²⁶⁹ States, for example, adopted sex offender registry and notification laws after the Byrne JAG program was statutorily amended to withhold just ten percent of the grants for any state that

²⁶⁴ JEFFREY A. ROTH ET AL., U.S. DEP’T OF JUST., OFFICE OF JUSTICE PROGRAMS, NATIONAL EVALUATION OF THE COPS PROGRAM 64 (2000), <https://www.ojp.gov/pdffiles1/nij/183643.pdf> (“[S]ome 40 percent of [COPS] grantees reported using consultants in the application process. Among the largest 100 grantee agencies in our sample, only 11 used consultants, in part because large agencies tend to have their own grant writers on staff.”).

²⁶⁵ INIMAI CHETTIAR, LAUREN-BROOKE EISEN, NICOLE FORTIER & TIMOTHY ROSS, BRENNAN CTR. FOR JUST., REFORMING FUNDING TO REDUCE MASS INCARCERATION 20 (2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Reforming-Funding-Reduce-Mass-Incarceration.pdf.

²⁶⁶ Letter from Jessica Hulsey, President and CEO, Addiction Policy Forum, to Jeanne Shaheen, Chairman, Senate Appropriations Subcomm. on Com., Just., Sci. & Related Agencies (Apr. 21, 2021) (available at <https://majorcitieschiefs.com/wp-content/uploads/2021/05/2021.04.21-Stakeholder-Letter-Support-for-FY-22-Byrne-JAG-Funding.pdf>).

²⁶⁷ See Letter from J. Thomas Manger, President, Major Cities Chiefs Ass’n, to Jefferson B. Sessions, Att’y Gen. of the U.S., Dep’t of Just. (June 18, 2018) (available at <https://majorcitieschiefs.com/wp-content/uploads/2021/03/2018.06.18-Opposition-to-COPS-Office-Relocation-.pdf>).

²⁶⁸ *Id.*

²⁶⁹ See Alexander J. Kasner, *Local Government Design, Mayoral Leadership, and Law Enforcement Reform*, 69 STAN. L. REV. 549, 563 (2017) (“[T]he federal government has increasingly found subtle ways to commandeer local law enforcement, most of which are being used to further increase the number of arrests carried out.”).

failed to have such laws in place.²⁷⁰ And at the state and local levels, the federal government has successfully used federal grants to advance arrest-based approaches to an array of social problems.²⁷¹ In particular, COPS grants resulted in increased arrests for drug offenses and misdemeanor public order offenses.²⁷²

This is by design. COPS hiring grants are designed to make police more “productive” by increasing arrest rates for disorder-related and other nonviolent crimes.²⁷³ The Byrne JAG program’s relatively flexible block grants also incentivize aggressive policing by virtue of the reporting requirements they select.²⁷⁴ While Byrne grants do not produce similar increases in arrest rates similar to those of COPS grants,²⁷⁵ they require quarterly assessment reports using metrics that incentivize low-level arrests.²⁷⁶ For example, before widespread decriminalization, police departments were able to signal productivity by reporting a high volume of marijuana arrests in their Byrne JAG assessments.²⁷⁷ A Brennan Center study, relying on interviews with thirty state and local JAG recipients, reported that police agencies looked to these metrics in deciding how to spend JAG funds.²⁷⁸

²⁷⁰ See 34 U.S.C. § 20927(a); Wayne A. Logan, *What the Feds Can Do to Rein in Local Mercenary Criminal Justice*, 2018 U. ILL. L. REV. 1731, 1754 (2018).

²⁷¹ See Harmon, *supra* note 91, at 913–18.

²⁷² See Jihong Solomon Zhao, Yang Zhang & Quint Thurman, *Can Additional Resources Lead to Higher Levels of Productivity (Arrests) in Police Agencies?*, 36 CRIM. JUST. REV. 185 (2011) (finding that one dollar in COPS hiring grant money correlates to increases of 36 arrests for disorder-related offense, 4 arrests for drug offenses, 1.8 arrests for property offenses, and 0.58 arrests for violent crimes); David Lilley & Rachel Boba, *A Comparison of Outcomes Associated with Two Key Law-Enforcement Grant Programs*, 19 CRIM. JUST. POL’Y REV. 438, 453–54 (2008) (finding that COPS grants increased per capita arrests for drug and disorder offenses, but that now-defunct law enforcement block grants (distinct from Byrne JAG Program grants) produced no such effects).

²⁷³ See MATTHEW C. SCHEIDER, DEBORAH L. SPENCE & THOMAS C. HAMILTON, U.S. DEP’T OF JUST., CMTY. ORIENTED POLICING SERVS. (COPS) OFFICE, *ASSESSING THE COPS OFFICE 1–2* (rev. ed. 2021), <https://cops.usdoj.gov/RIC/Publications/cops-w0648-pub.pdf> (embracing the empirical link between COPS grants and increased rates for disorder-related offenses as evidence that the COPS program “has made a difference in American communities” by “result[ing] in higher police arrest productivity”); see Zhao et al., *supra* note 272.

²⁷⁴ CHETTIAR ET AL., *supra* note 265, at 4, 23–27.

²⁷⁵ Harmon, *supra* note 91, at 899–900; Lilley & Boba, *supra* note 272, at 457–58.

²⁷⁶ CHETTIAR ET AL., *supra* note 265, at 24–25; Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1407–08 (2018). The distorting metrics identified in the Brennan Center Report remain in place today. See CHETTIAR ET AL., *supra* note 265, at 23–28; DEP’T OF JUST., BUREAU OF JUST. ASSISTANCE, *PROGRAM PERFORMANCE MEASURES FOR JUSTICE ASSISTANCE GRANT (JAG) PROGRAMS* (n.d.), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/jag_questionnaire_pa1_law%20enforcement.pdf.

²⁷⁷ See Jain, *supra* note 276, at 1408.

²⁷⁸ CHETTIAR ET AL., *supra* note 265, at 26.

Rachel Harmon has argued that these pro-arrest policies fail to consider the true costs of aggressive policing, and thus distort police incentives.²⁷⁹ For example, the Violence Against Women Act (VAWA) includes a federal grant component requiring recipients to “certify that their laws or official departmental policies ‘encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed.’”²⁸⁰ For better or worse, this policy has been successful in driving up arrest rates for domestic violence calls,²⁸¹ but came with costs to survivors, including increased arrests of complainants,²⁸² decreased calls from survivors reluctant to precipitate arrest,²⁸³ and reduced autonomy to decide whether to involve oneself in the criminal legal system.²⁸⁴

Many federal grant programs are also designed to expand the responsibilities of law enforcement agencies to address pressing social problems. The COPS in Schools grant program, for example, rewarded local governments for installing police officers in largely poor and minority schools.²⁸⁵ Federal officials touted this program as a success, despite evidence that the program resulted in reduced graduation and college enrollment rates for Black and Latinx students.²⁸⁶ But, as we explain below, grant funding also creates *indirect* incentives for local governments to expand the use of their police agencies at the expense of using other social service providers to solve problem.

3. Grants and Law Enforcement Mission Creep

We have seen that federal grants provide a powerful incentive for local governments to expand the size and responsibilities of their police agencies.²⁸⁷

²⁷⁹ See Harmon, *supra* note 91, at 914–15.

²⁸⁰ *Id.* at 913 (quoting 42 U.S.C. § 3796hh(e)(1)(A)).

²⁸¹ See, e.g., David Eitle, *The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases*, 51 CRIME & DELINQUENCY 573, 591–92 (2005). But see Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 35 & nn.202–05 (2009) (surveying research finding that mandatory arrest rates do not result in increased prosecutions and do not necessarily lower rates of domestic violence).

²⁸² See, e.g., David Hirschel, Eve Buzawa, April Pattavina & Don Faggiani, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 260 (2007); Carol Bohmer, Jennifer Brandt, Denise Bronson & Helen Hartnett, *Domestic Violence Law Reforms: Reactions from the Trenches*, 29 J. SOCIO. & SOC. WELFARE 71, 78 (2002).

²⁸³ See Harmon, *supra* note 91, at 914; Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 85, 88 (2009).

²⁸⁴ Goodmark, *supra* note 281, at 36–37.

²⁸⁵ Weisburst, *supra* note 218.

²⁸⁶ See *id.* at 360–61.

²⁸⁷ See *supra* notes 210–13 and accompanying text.

This distortionary influence is by design—federal grants are *meant* to alter local funding decisions in ways that expand the scope of local policing. But mission creep may also be an unexpected consequence of federal grant funding.²⁸⁸ Because local governments often cannot raise taxes, they must pay for needed social services in some other way.²⁸⁹ The availability of grants for police drives a dynamic that expands police responsibilities and weakens local governments' capacity to provide social services.

a. The Framework

As we explain below, the current landscape of federal grants incentivizes local governments to solve social problems through policing. These grants create a cycle in which police agencies become the most fiscally viable institution to address problems outside their core law enforcement mission. Yet police lack competence for and commitment to these ancillary missions and may abandon them after displacing agencies more competent to address them.

This cycle of police mission creep and social service collapse can be explained in four steps. First, the political economy of local government makes it attractive to use grant-funded police to solve social problems. As scholars and activists have argued, police now perform several functions that other social institutions could perform with greater expertise and lower risk of harm to poor and minority populations.²⁹⁰ For years, however, local governments have faced increased pressure to pay for social welfare programs that were once supported by federal and state governments.²⁹¹ At the same time, these local governments have been unable to increase revenue because state law often forbids (and local political pressure generally discourages) them from increasing taxes.²⁹²

Given these pressures, federal grant programs can contribute to mission creep by simply providing funds for law enforcement agencies only. From 1966 through the Reagan era, the federal government worked through grant programs (among other financing mechanisms) to build city social services across a range of policy areas, including (but not limited to) law enforcement.²⁹³ But while

²⁸⁸ See *supra* note 5 (defining mission creep).

²⁸⁹ See Reynolds, *supra* note 143.

²⁹⁰ See *supra* notes 69–71 and accompanying text; Friedman, *supra* note 44.

²⁹¹ See Scharff, *supra* note 59; Yunji Kim & Mildred E. Warner, *Shrinking Local Autonomy: Corporate Coalitions and Subnational State*, 11 CAMBRIDGE J. REGIONS ECON. & SOC'Y 427, 428 (2018).

²⁹² See Scharff, *supra* note 143, at 295–96.

²⁹³ See JOHN H. MOLLENKOPF, *THE CONTESTED CITY* 33 (1983) (describing the growth in federal spending from 1955 to 1975 as the federal government became “a ‘banker of government’ for local governments and a wide variety of private, nonprofit social agencies”); CONG. RSCH. SERV., *FEDERAL GRANTS TO STATE AND*

federal support waned for most social service projects,²⁹⁴ it increased for law enforcement under Presidents Reagan (who established the original Byrne Justice Assistance Grants) and Clinton (who established COPS grants). Despite these police funding opportunities,²⁹⁵ federal grant spending on local governments has recently been near historic lows.²⁹⁶ Furthermore, since the 1980s, federal grants have shifted from supporting city services to focusing primarily on Medicaid.²⁹⁷ This shift in financial infrastructure leaves one potential social service provider—police departments—far better positioned than others to generate independent funding.

Given these constraints,²⁹⁸ local governments often do not have the option to use the agency best suited to address a particular social problem—such as mental health, homelessness, or juvenile welfare. Instead, local elected officials face a stark choice. They may try to use a resource-starved social service agency that cannot pursue federal grants—at the potentially career-ending political cost of raising taxes (if state law even affords that option). Or they may have an enterprising police agency step into the policy area and win funding for an “innovative” approach to the social problem.²⁹⁹ For most officials, expanding the police function will be the best or only option.

Second, this choice throws local governments into a spending cycle that further increases police funding at the expense of other social service agencies. To compete for federal grants, police agencies must be sufficiently well funded to craft a competitive application.³⁰⁰ This generally requires employing grant

LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 21 (2019), <https://fas.org/sgp/crs/misc/R40638.pdf> (“In concert with President Johnson’s Great Society initiatives, Congress nearly tripled the number of federal grants to state and local governments during the 1960s, from 132 in 1960 to 387 in 1968. . . . Outlays for federal grants to state and local governments also increased, from \$7 billion in FY1960 to \$20 billion in FY1969.”); Kenneth Finegold, Laura Wherry & Stephanie Schardin, *Block Grants: Historical Overview and Lessons Learned*, URBAN INST., Apr. 2004, at 1, 2, <http://webarchive.urban.org/publications/310991.html> (recounting the history of block grant programs); Harmon, *supra* note 91, at 882 (discussing law enforcement block grants provided through the 1968 Law Enforcement Assistance Act of 1965 and the Omnibus Crime Control and Safe Streets Act of 1968).

²⁹⁴ See Harmon, *supra* note 91, at 882.

²⁹⁵ See *supra* notes 224–36 and accompanying text.

²⁹⁶ *Policy Basics: Federal Aid to State and Local Governments*, CTR. ON BUDGET & POL’Y PRIORITIES (Apr. 19, 2018), <https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments>.

²⁹⁷ See CONG. RSCH. SERV., *supra* note 293, at 8.

²⁹⁸ See *supra* notes 292–97 and accompanying text.

²⁹⁹ See, e.g., *COPS Grant Funding in Fiscal Year 2021: What Can We Expect?*, POLICE1 BY LEXIPOL (Apr. 12, 2021), <https://www.police1.com/police-grants/articles/cops-grant-funding-in-fiscal-year-2021-what-can-we-expect-pwGMQCDiv8adbqU/> (suggesting that COPS hiring grant applicants are more likely to be successful if they signal a commitment using “policing services to more effectively address social problems that have never really been the primary purpose of policing”).

³⁰⁰ See Faye Elkins, *How to Write Winning Grant Proposals*, CMTY. POLICING DISPATCH (Feb. 2020),

writers or spending discretionary funds on outside assistance.³⁰¹ Beyond this initial investment, an agency may have to be sufficiently funded to demonstrate capacity to use the grant money effectively.³⁰² Moreover, both Byrne JAG Grants and COPS grants have non-supplanting requirements³⁰³ prohibiting local governments from using the grants as a substitute for other sources of police funding.³⁰⁴

All these pressures require local governments to spend money *on* their police to generate money *from* their police. Because local governments are constrained in raising revenue, these spending increases may come at the expense of social services deemed nonessential.³⁰⁵ The result is a public financing structure requiring local governments to defund the agencies designed to provide a social service so the police agency can win grant funding to provide that same service. To be sure, Byrne JAG grants permit criminal justice spending on agencies other than police departments.³⁰⁶ However, because most related grant programs are earmarked for police agencies, it is unsurprising that these are the institutions

https://cops.usdoj.gov/html/dispatch/02-2020/grant_writing.html.

³⁰¹ See Roth et al., *supra* note 264; Elkins, *supra* note 300 (“If you don’t have internal capabilities, hire a grant writer—or find one in the community who might provide services on a pro bono basis.”).

³⁰² See U.S. Dep’t of Just., Community Oriented Policing Servs. (COPS) Office, 2021 Community Policing Programs, Project Narrative Template (on file with authors) (grant application requiring applicants to “detail the capacity of your agency or organization to carry out the proposed plan in the proposed time frame of the project and explain your experience with other similar efforts”); Such requirements apply the principle of development economics that institutions receiving financial assistance must have a sufficient “absorption capacity . . . to use additional aid without pronounced inefficiency . . . and without induced adverse effects.” François Bourguignon & Mark Sundberg, *Absorptive Capacity and Achieving the MDGs*, in *ADVANCING DEVELOPMENT: CORE THEMES IN GLOBAL ECONOMICS* 640, 640 (George Mavrotas & Anthony Shorrocks eds., 2007).

³⁰³ See BYRNE JAG FAQ, *supra* note 225, at 17–18; U.S. DEP’T OF JUST., COMMUNITY ORIENTED POLICING SERVICES (COPS) OFFICE, GRANT MONITORING STANDARDS AND GUIDELINES FOR ALL COPS GRANTS AND COOPERATIVE AGREEMENTS 92 (2014), [https://cops.usdoj.gov/pdf/e081420661_Grant Monitoring_Final.pdf](https://cops.usdoj.gov/pdf/e081420661_Grant%20Monitoring_Final.pdf).

³⁰⁴ Early research showed that, in effect, COPS grants tended to partially supplant local funding. See William N. Evans & Emily G. Owens, *COPS and Crime*, 91 J. PUB. ECON. 181, 199–200 (2007); Jihong Solomon Zhao, Matthew C. Scheider & Quint Thurman, *Funding Community Policing to Reduce Crime: Have COPS Grants Made a Difference?*, 2 CRIMINOLOGY & PUB. POL’Y 7, 9 (2002). Since these studies were published, the COPS Office implemented new monitoring requirements designed to “ensure that grant monitors are consistently assessing supplanting and [ensuring] that CHP funding is supplementing and not replacing state and local funding.” U.S. GOV’T ACCOUNTABILITY OFF., COMMUNITY POLICING HIRING GRANTS: GRANT APPLICATION AND MONITORING PROCESSES COULD BE IMPROVED TO FURTHER ENSURE GRANTEE ADVANCE COMMUNITY POLICING 28 (2013), <https://www.gao.gov/products/gao-13-521>.

³⁰⁵ See *supra* note 215 and accompanying text.

³⁰⁶ See BERMAN, *supra* note 203; see, e.g., NAT’L CRIM. JUST. ASS’N, THE IMPACT OF THE BYRNE JAG ASSISTANCE GRANT PROGRAM (2013), https://370377fc-459c-47ec-b9a9-c25f410f7f94.filesusr.com/ugd/cda224_cfc494ef4544464ad979aad2588f564.pdf?index=true (describing examples of state initiatives to spend Byrne JAG money on criminal justice programs administered through agencies other than police departments).

with the capacity to make use of Byrne JAG money (as evidenced by the fact that the vast majority of Byrne JAG grants are spent on law enforcement).³⁰⁷

This dynamic is intensified for grant programs providing short-term funds but imposing long-term costs. For example, the COPS hiring grant requires local authorities to increase funding for law enforcement both during the grant and long after it expires.³⁰⁸ Any grant-funded hires must be “added to [an] agency’s law enforcement budget with state and/or local funds over and above the number of locally funded officer positions that would have existed in the absence of the award.”³⁰⁹ Because local governments must pay for twenty-five percent of the new hire’s salary,³¹⁰ this in effect requires them to increase their police budgets to be eligible for the grant. After the grant period is over, the local government must retain the grant-funded positions for at least twelve months.³¹¹ In the vast majority of states, however, collective bargaining agreements may require governments to cover these salaries for years.³¹² Even when local governments do not have such contractual constraints, police can exert powerful political pressure to retain grant-hired officers. Unsurprisingly, COPS grant awards tend to permanently increase the size of recipient agencies.³¹³

Given these long-term costs, local governments often make additional social service cuts to cover budget shortfalls after COPS grants expire. The city of Vancouver, Washington, had to slash disability programs, parks, and community services in 2002 to pay for salaries created by an expired COPS grant.³¹⁴ In 2000, East Palo Alto cut (and contemplated eliminating) its parks and recreation

³⁰⁷ See *supra* note 226; LANE, *supra* note 204.

³⁰⁸ Our discussion here focuses on COPS grants, but other types of federal transfers also force local governments to spend money on a continuing basis. For example, the Department of Defense’s 1033 Program provides military hardware to local police agencies free of charge. See Harmon, *supra* note 91, at 924–25. However, these gifts come with the condition that police agencies are required to use the equipment, thus imposing costs in terms of training time and maintenance. See *id.*

³⁰⁹ U.S. DEP’T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVS., FY 21 COPS OFFICE HIRING PROGRAM SOLICITATION 4 (2021), <https://cops.usdoj.gov/pdf/2021AwardDocs/chp/solicitation.pdf>.

³¹⁰ See *id.* Local governments may obtain a waiver of this local match requirement by demonstrating “severe financial distress.” *Id.* at 10.

³¹¹ *Id.* at 4.

³¹² See *supra* notes 144–48 and accompanying text.

³¹³ See CHRISTOPHER K. KOPER, GRETCHEN E. MOORE & JEFFREY A. ROTH, PUTTING 100,000 OFFICERS ON THE STREET: A SURVEY-BASED ASSESSMENT OF THE FEDERAL COPS PROGRAM 4–9 (2002), <https://www.ojp.gov/pdffiles1/nij/grants/200521.pdf>.

³¹⁴ Jeffrey Mize, *Vancouver Council Okes Tight New Budget*, COLUMBIAN (Dec. 3, 2002) (“The council voted 7-0 Monday to approve a 2003-04 general fund budget, a \$165.8 million spending plan that boosts police and fire at the expense of parks and community service.”); Columbian Ed. Writers, *Opinion—In Our View: Temptations That Tie*, COLUMBIAN (Mar. 10, 2004) (attributing the 2003–2004 city budget cuts to the need to cover shortfalls from an expired COPS grant).

department to cover fifteen officer salaries after its COPS grant expired.³¹⁵ West Orange, New Jersey, kept its school policing program in place by cutting funding for recreation, the public library, and public works after the expiration of its COPS grant.³¹⁶ After its school district's COPS grant expired in 2013, Anchorage, Alaska, had to spend \$3 million annually for its school police officers at a time when the district was cutting educational funding.³¹⁷

Federal grant programs thus resemble the aggressive structural adjustment programs imposed by the International Monetary Fund in the 1990s.³¹⁸ To compete for a grant, local authorities must *increase* their own spending on law enforcement. This forces difficult choices about how to pay for these police increases without raising taxes. The social safety net becomes an attractive target for these cuts. Indeed, when the COPS in Schools program ended in 2005, the COPS Office advised school districts to reallocate money from other budget line items—including technology, supplies, sports, and capital expenditures—to continue covering police salaries.³¹⁹

Third, once local governments receive law enforcement grants, they must rely on their police departments to step into the void created by the social spending cuts made to get the grant. Consistent with Jonathan Simon's theory of "governing through crime,"³²⁰ scholars have identified a link between increases in law enforcement spending and decreased spending on other social services.³²¹ The dynamics of grant chasing help explain this phenomenon. To position themselves for grant funding, police agencies are advised to tackle "social problems that have never really been the primary purpose of policing," including mental health crises and homelessness.³²² Once they obtain these grants, cities

³¹⁵ Thaa Walker, *Parks to Get a Second Chance in East P.A.: City Seeks a Way to Save Police Force but Not Kill Recreation Program*, MERCURY NEWS (Jan. 20, 2000); Carolyne Zinko, *East Palo Alto OKs Park Site Lease for YMCA*, S.F. CHRONICLE (June 6, 2000) (confirming plan to eliminate parks department was scaled back but cuts were made).

³¹⁶ MEGAN FRENCH-MARCELIN & SARAH HINGER, ACLU, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 12 (2017).

³¹⁷ See *id.*

³¹⁸ See JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 18 (2002).

³¹⁹ See FRENCH-MARCELIN & HINGER, *supra* note 316.

³²⁰ See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 6 (2007) (arguing that the war on crime displaced intrinsic priorities across a wide range of policy arenas); see also GILMORE, *supra* note 34 (examining the California prison system's growth and its displacement of other policy solutions to social problems)

³²¹ See Beck & Goldstein, *supra* note 8, at 1190.

³²² See, e.g., *COPS Grant Funding in Fiscal Year 2021*, *supra* note 299. The City of Oakland, for example, once received a \$10.7 million COPS grant based on its police chief's proposal to "hire officers to work on youth violence, human trafficking and juvenile delinquency around four middle schools." Matthai Kuruvila, *Federal Grant Will Pay for 25 Officers*, S.F. CHRONICLE (Sept. 29, 2011).

may find their grant-funded police agencies have extra labor capacity, while their social service agencies are understaffed. An expedient response is to double down on the police agency's commitment to "community policing" by having them address the social problems formerly handled by the defunded social program.

Fourth, this expansion of the police mission may lead to the decline or collapse of the social program transferred to police control. Police officers lack the skillset and motivation of trained social workers, mental health counselors, and other experts whose jobs they replace.³²³ They are unlikely to do these jobs well and may be disinclined to do them at all.³²⁴ Because these tasks fall outside the perceived core of their mission, police agencies may abandon them if resources tighten or public attention wanes.³²⁵ Residents may be left with a hollowed out social service agency and nobody to perform the services that agency once provided.

b. Application—The City of Baltimore

A story from Baltimore illustrates how relatively small grant awards may significantly influence the size and scope of a police agency. The city currently spends approximately twenty-six percent of its budget (and \$840 per capita) on its police department.³²⁶ Although Baltimore's police department is (for the time being) formally a state agency, the City Council has political control over its budget (which is funded by city taxpayers), and the mayor has the authority to hire and fire its police commissioner.³²⁷ City officials seemed receptive to calls

³²³ See Friedman, *supra* note 19, at 62.

³²⁴ See Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 40 (Herbert Jacob ed., 1974) ("Fearing the role of the nurse or, worse yet, the role of the social worker, the policeman combines resentment against what he has to do day-in-day-out with the necessity of doing it."); see also ROSA BROOKS, *TANGLED UP IN BLUE: POLICING THE AMERICAN CITY* 182 (2021) ("Many officers complain about having to serve as social workers, mediating family disputes and dealing with people who mostly need parenting classes, drug rehab, or psychiatric care, not police intervention.").

³²⁵ Cf. Michelle Wilde Anderson, *The New Minimal Cities*, 123 *YALE L.J.* 1118, 1163 (2014) (describing resource-constrained, "underpoliced" cities as engaging in a sort of "triage" by cutting "non-emergency response, crime prevention, and community policing strategies").

³²⁶ See *What Policing Costs*, *supra* note 64 (providing these figures for Fiscal Year 2020 based on Bureau of Justice statistics data). Significantly, the City of Baltimore includes schools in its city budget. See *CITY OF BALT., PRELIMINARY BUDGET PLAN: FISCAL 2022*, at 3–4 (2022), https://bmr.baltimorecity.gov/sites/default/files/fy22_prelim_FINAL_web.pdf.

³²⁷ Bryn Stole, *Baltimore Voters to Decide on Taking Back Full Local Control of the City Police Department*, *BALT. SUN* (Apr. 8, 2021), <https://www.baltimoresun.com/politics/bs-md-pol-baltimore-police-local-control-20210407-2kre4qjgvck5fjdhxdrsiha6i-story.html>. The Mayor of Baltimore has had authority over the Baltimore Police Department's commissioner since 1976, long before the story told here begins. A city

to defund the police during Summer 2020 but committed to *increasing* police spending in 2022.³²⁸ Meanwhile, public outcry continues over how much the city spends on its police department relative to its spending on “social programs such as affordable housing, after-school programs, crisis centers and substance abuse treatment.”³²⁹

The Baltimore police department is also adept at winning federal grants.³³⁰ Indeed, the city received some of the largest COPS hiring grants when the program was established in 1994.³³¹ A particular battle from that time—over the operation and control of the city’s youth centers—suggests an overlooked connection between this grant funding and the collapse of the city’s other social programs.

As late as the 1980s, the City of Baltimore’s recreation centers were held up “as an example for all aging cities in nurturing the young.”³³² Over decades, the city had invested in “an extensive network of centers operated by the public recreation department.”³³³ By the 1970s, the city had ninety-three recreation centers, amply funded by the city’s budget and supplemented by a mixture of federal, state, and private funding.³³⁴ By the 1980s, however, federal and state

referendum (authorized by state legislation) is currently scheduled that, if approved, that will revert the Baltimore Police Department to city control. *See id.*

³²⁸ Emily Opilo, *Baltimore Officials Pass Budget with \$555 Million in Police Spending Without Amendments*, BALT. SUN (June 8, 2021), <https://www.baltimoresun.com/politics/bs-md-ci-baltimore-budget-approved-20210608-ib3k7vbnajadfovvoigxy7mvq-story.html> (reporting that the Fiscal Year 2022 budget “includes a \$28 million increase in spending on the Baltimore Police Department to cover employee health insurance and higher pension obligations”).

³²⁹ Emily Opilo, *Baltimore Taxpayers Condemn Police Spending Plan in 2022 Budget, Urge City Council to Make Cuts*, BALT. SUN (May 27, 2021), <https://www.baltimoresun.com/politics/bs-md-ci-baltimore-council-taxpayers-night-20210527-hyvypv6hhbadlhjhirbb7omcyy-story.html>.

³³⁰ *See, e.g.*, Press Release, U.S. Dep’t of Just., Department of Justice Awards More Than \$6.3 Million to Maryland Law Enforcement for Hiring to Advance Community Policing (June 2, 2020), (available at <https://www.justice.gov/usao-md/pr/departement-justice-awards-more-63-million-maryland-law-enforcement-hiring-advance>) (reporting that the Baltimore Police Department received a \$2.8 million COPS hiring grant); Jessica Anderson, *Baltimore Police Receive \$2.8 Million to Fund 10 New Positions and Bolster Federal Violent Crime Task Force*, BALT. SUN (May 13, 2020), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-police-receive-federal-money-20200513-mzgvovf4ivdmddyv73idmorjzi-story.html> (reporting that the Baltimore Police Department also received an additional \$1.4 million DOJ grant to fund new technology to track violent offenders).

³³¹ *See infra* notes 339–41 and accompanying text.

³³² Robert Guy Mathews, *City Recreation Program Has Faded Fast; Once Hailed, Agency Loses Staff, Centers; More Cuts Looming*, BALT. SUN, May 27, 1997, at 1B.

³³³ Jacob J. Bustad & David L. Andrews, *Policing the Void: Recreation, Social Inclusion and the Baltimore Police Athletic League*, 5 SOC. INCLUSION 241, 241 (2017).

³³⁴ Jacob James Bustad, *Right to the Active City: Public Recreation and Urban Governance in Baltimore* (2014) (Ph.D. dissertation, University of Maryland) (available at https://drum.lib.umd.edu/bitstream/handle/1903/16189/Bustad_umd_0117E_15754.pdf;sequence=1).

grant funding for recreation programs had largely evaporated.³³⁵ For cities like Baltimore struggling with population loss and a deteriorating economy, funding for recreational programs became a burden.³³⁶ By the 1990s, the city had closed some recreation centers in predominately black neighborhoods of Baltimore and cut staff and programming in the remaining centers.³³⁷

As federal funds for recreation were drying up, grants for law enforcement were becoming ample. In 1994, the Department of Justice's COPS Office was established with \$8.8 billion in initial funding.³³⁸ Baltimore was an early beneficiary of this program, receiving one of the largest early grants (\$5.2 million).³³⁹ Over the next few years, Baltimore received a total of more than \$12 million in COPS grants to hire 250 new police officers.³⁴⁰ The city had to pay for seventy-five percent of these salaries through the grant period and commit to paying their full salaries for one year thereafter.³⁴¹

The year it hired the first wave of grant-funded officers, the Baltimore Police Department launched an ambitious effort to revive its Police Athletic League (PAL).³⁴² This program was funded through grants and donations—with the crucial exception that it was staffed by salaried police officers.³⁴³ That year, the City of Baltimore cut \$2.86 million from the Recreation and Parks Department's budget.³⁴⁴

By the following year (1996), thirty officers were assigned full-time to PAL,³⁴⁵ and the program had become “cash-rich because of state and federal

³³⁵ Bustad & Andrews, *supra* note 333, at 243.

³³⁶ *Id.*

³³⁷ *Id.* For descriptions of the constructive role and precarious circumstances of one such center in 1993, see DAVID SIMON, *THE CORNER: A YEAR IN THE LIFE OF AN INNER-CITY NEIGHBORHOOD* (1997). In 2015, this center was privatized. Luke Broadwater, *In West Baltimore, Private Funds Bring New Life to Rec Center*, BALT. SUN (June 15, 2015, 8:22 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-private-rec-center-20150615-story.html>.

³³⁸ ROTH ET AL., *supra* note 264, at 41.

³³⁹ See Peter Hermann, *Federal Grant to Help Police in Baltimore*, BALT. SUN, Dec. 20, 1994, at 19A (reporting that Baltimore received a \$5.2 million COPS hiring grant to hire seventy-six new officers).

³⁴⁰ Peter Hermann & Gerard Shields, *COPS Windfall Becoming a Burden; City Has to Cover Costs of Officers Coming off the Federal Payroll*, BALT. SUN, May 31, 1999, at 1A.

³⁴¹ See *id.*

³⁴² See Norris B. West, *Publicity Campaign Being Planned for City Police*, BALT. SUN (Mar. 1, 1995), <https://www.baltimoresun.com/news/bs-xpm-1995-03-01-1995060054-story.html>.

³⁴³ See Peter Hermann, *Police Recreation Program Blooms as the City's Fades; PAL's Success Leads to Criticism of Efforts of Parks Department*, BALT. SUN, July 1, 1996, at 1A.

³⁴⁴ See Robert Guy Matthews, *Recreation's Future in City Under Debate, Baltimore Budget Cuts Shift Burden to Leagues Police Run for Children; Some Play Specialists Object; 'They Are Cops. They Do Law Enforcement,' Counselor Complains*, BALT. SUN, Nov. 25, 1996, at 1B.

³⁴⁵ See Hermann, *supra* note 343, at 1A.

grants.”³⁴⁶ Meanwhile, the City of Baltimore cut the Recreation and Parks Department’s proposed budget by \$1 million “as the mayor and City Council scrambled to balance the city’s budget.”³⁴⁷ The city closed eleven of its recreation centers and transferred them to PAL.³⁴⁸ The remaining city recreation centers fell into disrepair, with holes in their ceilings and broken-down equipment.³⁴⁹

The Police Athletic League’s reach continued to expand. In 1997, after cutting its Recreation and Parks budget by an additional \$5.4 million, the City of Baltimore closed ten additional recreation centers and transferred their control to PAL.³⁵⁰ By 1998, PAL operated twenty-nine centers, at a cost to the City of \$5.7 million in police salaries,³⁵¹ while federal grants and private support provided an additional \$2.3 million for operations.³⁵² At its high point, the police department had up to eighty-eight full-time officers assigned to PAL.³⁵³ While experts, city staff, and volunteers criticized the city for shifting responsibilities from trained youth experts to police,³⁵⁴ parents and kids preferred the well-equipped PAL centers to the deteriorating city centers.³⁵⁵

In 1999, Baltimore’s first wave of COPS grants ended, leaving the city scrambling to cover the full cost of the new officers’ salaries.³⁵⁶ Baltimore’s budget director estimated that retaining the 250 officers hired through federal grants would cost \$11.2 million in the next year and grow to \$19 million in

³⁴⁶ Robert Guy Matthews, *Youth Program Woes Spur Study; Recreation Centers Face Budget Crunch*, BALT. SUN, Nov. 12, 1996, at 1B.

³⁴⁷ Hermann, *supra* note 343, at 1A.

³⁴⁸ *See id.*

³⁴⁹ *See* Robert Guy Matthews, *Recreation Centers Struggling to Serve Children in an Atmosphere of Disrepair; Roofs Leak, Equipment and Money Are Scarce*, BALT. SUN, Nov. 18, 1996, at 3B [hereinafter Matthews, *Recreation Centers Struggling*]; Matthews, *supra* note 346, at 1B.

³⁵⁰ *See* Robert Guy Matthews, *Schmoke to Give Police Athletic League Control of 10 More City Recreation Centers; Change in Baltimore Goes into Effect Oct. 1*, BALT. SUN, Aug. 7, 1997, at 4B.

³⁵¹ *See* Melissa Healy, *Making After School Special; Education: National Push to Fund Programs for Latchkey Kids Gains Steam*, L.A. TIMES, May 18, 1998, at 1.

³⁵² *See id.*

³⁵³ *See* Peter Hermann & Gerard Shields, *Report Calls for Police Changes; Past Strategies Condemned for Raising Violence, Suspicion; ‘Justification for Lost Faith,’* BALT. SUN, Apr. 4, 2000, at 1A.

³⁵⁴ *See* Matthews, *supra* note 332, at 1B (“[N]ational recreation experts say that Baltimore is putting its muscle behind the wrong team.”); Matthews, *supra* note 350, at 4B (quoting recreation volunteer describing the transfer of a West Baltimore recreation center to PAL as “one of the worst mistakes they can possibly make”); Matthews, *supra* note 344, at 1B.

³⁵⁵ *See* Matthews, *Recreation Centers Struggling*, *supra* note 349, at 3B (“‘What I’m hearing is that more community groups are asking for a PAL center,’ said 6th District Councilman Edward L. Reisinger, who heads the recreation and parks subcommittee.”).

³⁵⁶ *See* Hermann & Shields, *supra* note 340, at 1A.

2003.³⁵⁷ To cover this shortfall, the Baltimore Police Department laid off civilian workers and moved sworn officers into those desk jobs.³⁵⁸ To save overtime, the police department shut at least one of its stations to the public for part of the day.³⁵⁹ Meanwhile, the city continued to apply for—and receive—federal COPS grants to hire new officers whose salaries the city would have to fully cover in a few years' time.³⁶⁰

As the city was grappling with this grant-fueled budget crisis, the Baltimore Police Department substantially reduced its commitment to the Police Athletic League. In early 2000, the police handed over eight of its twenty-four PAL centers to a private community service organization (after initially proposing to close the centers).³⁶¹ In January 2001, the outgoing Clinton administration gave the Baltimore Police Department a \$28.8 million COPS grant to hire two hundred new police officers as well as eighteen civilian coordinators for its remaining PAL centers.³⁶² The police department nevertheless removed all its officers from PAL centers.³⁶³ By 2002, a city official described the Police Athletic League as “desperate for funds.”³⁶⁴ In 2003, the nonprofit corporation that had been running the PAL Centers ran out of money, and the city required the police department to fully assume control of the centers.³⁶⁵

By 2009, “[Baltimore’s] PAL Centers, once heralded as a national model by the White House, fell into disrepair.”³⁶⁶ The city closed two PAL centers and transferred two others to the school system.³⁶⁷ The remaining centers were transferred back to the Recreation and Parks Department, thus ending the police department’s involvement.³⁶⁸

³⁵⁷ See *id.*

³⁵⁸ See *id.* (reporting that the Baltimore Police Chief proposed civilian layoffs to cover officers hired by COPS grants); Peter Hermann, *Police Station Shut to Public Part of Day; City Staffing Shortage Leads Commander to Act in Northeastern District; ‘Save a Little Overtime’; Union Leader Questions Move, but Says Officers Needed More on Street*, BALT. SUN, Aug. 7, 1999, at 1B (confirming layoffs).

³⁵⁹ See Hermann, *supra* note 358, at 1B.

³⁶⁰ See Hermann & Shields, *supra* note 340, at 1A.

³⁶¹ See Mark Ribbing, *O’Malley Announces Plans to Pare Down Police*, BALT. SUN, Apr. 13, 2000, at 4B; Tim Craig, *Daniel Says 9 PAL Sites Will Be Shut*, BALT. SUN, Feb. 9, 2000, at 1B.

³⁶² See Peter Hermann, *\$28 Million in Grants OK’d*, BALT. SUN, Jan. 19, 2001, at 1A.

³⁶³ See Allison Klein, *Baltimore Residents Protest Elimination of Some Libraries, Neighborhood Centers; Shrinking Population, Budget Constraints Noted*, BALT. SUN, Mar. 11, 2001, at 5B.

³⁶⁴ Tom Pelton, *O’Malley Chides Norris for ‘Sloppy’ Accounting; Mayor Says He Is Proud of Official’s Police Work*, BALT. SUN, Aug. 14, 2002, at 8A.

³⁶⁵ See Del Quentin Wilber, *City Police Taking Over PAL Rec Center Operations; O’Malley Says Residents Will Notice No Changes*, BALT. SUN, May 1, 2003, at 2B.

³⁶⁶ Peter Hermann, *‘It’s Better Now,’ Kids Say of Old Rec Center*, BALT. SUN, Sept. 30, 2009, at 6A.

³⁶⁷ See *id.*

³⁶⁸ See *id.*

This cycle left Baltimore residents with fewer recreation options than they had before the police department's foray into youth recreation. Unlike the recreation centers they replaced, PAL centers did not provide services such as day care, senior programs, or "classes on health care and nutrition for adults."³⁶⁹ And even as the Recreation and Parks Department was taking back control of the PAL centers, its budget was being cut.³⁷⁰ One of the recreation department's own centers was shuttered,³⁷¹ and seven of its employees were laid off.³⁷²

Many factors could explain the rise and fall of Baltimore's Police Athletic League. At a macro level, two scholars recently argued that the program was "a particular form of neoliberal intervention within urban communities."³⁷³ At the level of institutional politics, a police commissioner founded Baltimore's Police Athletic League as one of his signature programs,³⁷⁴ and the program was likely overstaffed relative to the city's public safety needs.³⁷⁵ The program was then ended under a mayor who was openly skeptical about using police resources for youth recreation.³⁷⁶

These explanations, however, do not account for the financial dynamics that *catalyzed* the Baltimore Police Department's expansion into youth recreation—at the expense of the agency that had the primary mandate to provide youth recreation. Scholars have identified a statistically significant correlation between the share of a municipal budget that goes to parks and the share that goes to police services,³⁷⁷ while a strong predictor of how much money city agencies receive in a given year is the amount received the previous year.³⁷⁸ As such, it is worth considering how the status quo in Baltimore was disrupted so that within

³⁶⁹ See Matthews, *supra* note 332, at 1B.

³⁷⁰ See Annie Linskey, *Pitching for Recreation; Mayor Takes to Neighborhood to Explain What Survived Budget Cuts*, BALT. SUN, June 25, 2009, at 3A.

³⁷¹ See *id.*

³⁷² See Annie Linskey, *City Plans to Lay Off 27; Proposal for Furloughs, Job Cuts to Be Presented to Spending Panel Today*, BALT. SUN, Sept. 23, 2009, at 3A.

³⁷³ Bustad & Andrews, *supra* note 333, at 241.

³⁷⁴ See Del Quentin Wilber, *City Police Taking Over PAL Rec Center Operations; O'Malley Says Residents Will Notice No Changes*, BALT. SUN, May 1, 2003, at 2B.

³⁷⁵ See Hermann & Shields, *supra* note 353, at 1A.

³⁷⁶ See Mark Ribbing, *O'Malley Announces Plans to Pare Down Police Athletic League; 18 Centers to Keep Officers; Eight to Go Up for Bid*, BALT. SUN, Apr. 13, 2000, at 4B ("Recreation should not be the exclusive [domain] of the police," O'Malley said. "They have enough hard work to do.") (alteration in original).

³⁷⁷ See Jihong Zhao, Ling Ren & Nicholas P. Lovrich, *Budgetary Support for Police Services in U.S. Municipalities: Comparing Political Culture, Socioeconomic Characteristics and Incrementalism as Rival Explanations for Budget Share Allocation to Police*, 38 J. CRIM. JUST. 266, 272–73 (2010). This correlation is minor, however, in comparison to the share of budget going to fire expenditures. See *id.* at 273.

³⁷⁸ See *id.* at 269.

a few short years, Baltimore's police took resources and responsibilities from the city's recreation department and then shed the responsibilities.

The influx of federal grants to the Baltimore Police Department helps explain this disruption. To get a COPS grant, the city had to increase police spending to cover its twenty-five percent share of the new officers' salaries while complying with the grant's non-supplanting requirement. These cuts came at the expense of the Recreation and Parks Department. Then, the grants created an extra supply of police labor which allowed the department to step into the void created by the recreation department cuts. By assuming this responsibility, the police department was able to generate even more federal money to support its "community policing" strategy. However, youth recreation remained ancillary to the defining function of its police department. This left the Police Athletic League vulnerable to cuts when the city faced increased financial pressure—resulting in part from chasing more grant money for new police hires.

B. Legal Financial Obligations (LFOs)

The story that drew public and scholarly attention to the pathologies of fines and fees is now familiar. In 2015, the Department of Justice found that the City of Ferguson, Missouri used its police department to collect fines and fees as a source of revenue.³⁷⁹ City officials "budget[ed] for sizable increases in municipal fines and fees each year" and pressured the Ferguson Police Department "to deliver [on] those revenue increases."³⁸⁰ In response, the predominantly white police department aggressively enforced the city's municipal code through investigative stops and arrests of the city's predominantly Black population.³⁸¹ The result, concluded the Department of Justice, was "a pattern of stops without reasonable suspicion and arrests without probable cause in violation of the Fourth Amendment; infringement on free expression, as well as retaliation for protected expression, in violation of the First Amendment; and excessive force in violation of the Fourth Amendment."³⁸² As Jeffrey Fagan and Elliot Ash concluded, Ferguson thus

³⁷⁹ U.S. DEP'T OF JUST. CIVIL RIGHTS DIVISION, INVESTIGATION OF FERGUSON POLICE DEPARTMENT 2 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.* at 2–3. These practices, the report found, "severely damaged the relationship between African Americans and the Ferguson Police Department long before" the police killing of Michael Brown, which prompted the Department of Justice's investigation. *Id.* at 79.

“cloak[ed] its taxing power in the exercise of police power by functionally equating the power of taxation with the power to punish.”³⁸³

Ferguson is not unique.³⁸⁴ Criminal legal systems in the United States widely use legal financial obligations (LFOs)—including court fees, criminal fines, restitution orders, civil forfeitures, and other monetary extractions—as a source of revenue.³⁸⁵ This fee-for-service financing is a reversion to a premodern model of criminal justice. Through the nineteenth-century, public prosecutors and sheriffs in the United States relied on fees to cover their salaries and budgets.³⁸⁶ By the 1930s, however, virtually all public prosecutors at the federal, state, and local levels were compensated through taxpayer-funded salaries.³⁸⁷ A primary reason for this innovation was the recognition that the older system incentivized prosecutors to bring trivial charges for low-level offenses, while neglecting serious crimes.³⁸⁸ The movement toward taxpayer-funded salaries was thus part of a legitimating project to professionalize, and instill trust in the motives of, public prosecutors.³⁸⁹ In recent decades, however, this trend appears to have reversed, as LFOs have metastasized in number and monetary burdens.³⁹⁰ These burdens are disproportionately borne by poor and minority residents, who become targets for traffic stops and citations for low-level offenses.³⁹¹

³⁸³ Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO L.J. ONLINE 33, 75 (2017).

³⁸⁴ Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1792–93 (2020) (“As a growing body of research and scholarship increasingly demonstrates, Ferguson is an exemplar rather than an aberration in its targeting of poor people for fines and fees.”).

³⁸⁵ ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 9–10, 113–48 (2018); see Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1179–85 (2014) (providing a brief history of LFOs). For catalogues of the type of legal financial obligations that state and local criminal legal systems currently impose, see *id.* at 1185–96; Laura I. Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016). Of course, court fees and most other legal financial obligations are not imposed directly by police agencies, but they nevertheless rely on police cooperation to channel people into the criminal legal system. See, e.g., FERGUSON REPORT, *supra* note 379, at 2.

³⁸⁶ See NICHOLAS PARILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 258–59 (2013) (discussing public prosecutors); O’Rourke, Su & Binder, *supra* note 1, at 1376–78 (discussing sheriffs).

³⁸⁷ PARILLO, *supra* note 386, at 290.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 292.

³⁹⁰ See Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 6–7 (2018) (“In recent years, the use of economic sanctions—statutory fines, surcharges, administrative fees, and restitution—has exploded in courts across the country.”); Graham & Makowsky, *supra* note 215, at 317 (summarizing literature showing that “[t]he prevalence of fees and the dollar amounts charged have increased substantially in recent decades”).

³⁹¹ See Shaun Ossi-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 581 & n.308 (2021) (identifying recent empirical literature demonstrating the racialized effects of policing through the imposition of legal financial obligations); Fagan & Ash, *supra* note 383, at 119–22 (discussing the link between revenue driven

The pathologies inherent in such revenue-focused policing are well documented.³⁹² For example, asset forfeiture laws motivate police officers to patrol and stop *southbound* traffic, where traffickers are likely to be carrying cash that police can seize; stops conducted on *northbound* traffic, by contrast, will be more likely to yield only drugs, which must be destroyed.³⁹³ More seriously, the pursuit of fines and fees incentivizes police officers to aggressively stop and harass citizens to generate revenue.³⁹⁴ Empirical scholarship confirms that Black people are more likely to be targeted for this type of aggressive policing,³⁹⁵ while municipalities relying on fines and fees have lower clearance rates for violent and property crimes.³⁹⁶

These distortionary effects are not simply the result of a misguided policing strategy. They are also products of budgetary constraints and, to a degree, federal policy interventions. Just as poor towns use prisons to subsidize their economies, they use policing as a source of revenue.³⁹⁷ In many high-poverty jurisdictions,

policing and an “interest in managing minority populations” and reproducing racial segregation).

³⁹² See, e.g., Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY CRIM. JUST. L. & SOC’Y 21, 23–24 (2017); Fagan & Ash, *supra* note 383, at 119–20; Anna Harvey, *Fiscal Incentives in Law Enforcement*, 22 AM. L. & ECON. REV. 173, 174 (2020); Robert A. McBride, *Policing for Profit: How Urban Municipalities’ Focus on Revenue Has Undermined Law Enforcement Legitimacy*, 9 FAULKER L. REV. 329, 331–32 (2018); Jain, *supra* note 276, at 1405–06; Logan & Wright, *supra* note 385, at 1212–15; Ossei-Owusu, *supra* note 391, at 581–82. For a seminal and thoroughgoing examination of how federal civil forfeiture programs distort local policing priorities, see Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40 (1998).

³⁹³ Harmon, *supra* note 91, at 932–33.

³⁹⁴ David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES, <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html> (Nov. 30, 2021) (identifying over four hundred killings by police of unarmed, nonviolent civilians during traffic stops in a five-year period).

³⁹⁵ See FERGUSON REPORT, *supra* note 379, at 2; Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090 (2017) (finding that LFOs are more likely to be collected in cities that have high Black populations and low Black political representation); Kelsey Shoub, Leah Christiani, Frank R. Baumgartner, Derek A. Epp & Kevin Roach, *Fines, Fees, Forfeitures, and Disparities: A Link Between Municipal Reliance on Fines and Racial Disparities in Policing*, 49 POL’Y STUD. J. 835, 838 (2021) (finding that greater reliance on fines and fees increases racial disparities in traffic stops, with Black drivers subject to more searches that do not yield contraband); cf. Allison Harris, Elliott Ash & Jeffrey Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, 5 J. RACE, ETHNICITY, & POL. 450, 453 (2020) (finding increased budget stress leads police officers to issue more traffic citations to white drivers, and hypothesizing that this is because police officers must seek new revenue sources where Black drivers are already being stopped and cited as much as possible).

³⁹⁶ See Rebecca Goldstein, Michael W. Sances & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFFS. REV. 5, 15 (2020).

³⁹⁷ See Monica Bell, *Response: Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 12 (2018); PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, NINE FACTS ABOUT MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 6 (2019), https://www.brookings.edu/wp-content/uploads/2019/03/BailFacts_20190314.pdf; Mike Maciag, *Addicted to Fines*, GOVERNING (Aug. 19, 2019), <https://www.governing.com/archive/gov-addicted-to-fines.html>; see also Graham & Makowsky, *supra* note 215, at 313–14

payments of LFOs are a significant portion of the revenue collected by county and municipal governments.³⁹⁸ One analysis recently identified more than six hundred jurisdictions nationwide where fees and fines account for more than ten percent of general fund revenues.³⁹⁹ These jurisdictions are largely concentrated in rural, high-poverty areas lacking other significant sources of tax revenue.⁴⁰⁰ In extreme cases, these jurisdictions fund nearly their entire budget through fines.⁴⁰¹ Thus, LFOs are used not just to fund police departments but also to subsidize entire municipal governments.⁴⁰²

This is not to suggest however, that reliance on LFOs is exclusively a problem for rural jurisdictions. To be sure, most local governments do not rely on police-driven legal financial obligations as a significant funding source.⁴⁰³ But the use of LFOs appears to have serious and racialized distributional impacts even in these cities. As Ferguson illustrates, LFOs are more likely to be collected in cities that have high Black populations and low Black political representation.⁴⁰⁴

While budgetary shortfalls may be the principal driver of revenue-oriented policing, federal policies also incentivize it in at least two ways.

First, some federal grants incentivize police agencies to impose LFOs to signal their productivity. Specifically, the National Highway Safety Administration (NHSTA) awards states over \$600 million in grants that subsidize ticket writing.⁴⁰⁵ While the agency does not impose ticket quotas as a grant condition,⁴⁰⁶ it indirectly incentivizes aggressive ticketing as a matter of institutional design. The agency requires that at least forty percent of a grant

(identifying states for which fines constitute a substantial percentage of revenue and explaining that “[s]ome . . . local governments collect up to 80%–90% of their general revenues from fines and forfeitures”).

³⁹⁸ Maciag, *supra* note 397.

³⁹⁹ *See id.*

⁴⁰⁰ *See id.*; Graham & Makowsky, *supra* note 215, at 313–14.

⁴⁰¹ *See* Maciag, *supra* note 397. For example, several towns in Louisiana fund more than eighty percent of their budget through fines. *Id.*

⁴⁰² *See* Graham & Makowsky, *supra* note 215, at 326; Maciag, *supra* note 397.

⁴⁰³ *See* Maciag, *supra* note 397.

⁴⁰⁴ *See* Sances & You, *supra* note 395, at 1090.

⁴⁰⁵ Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES, <https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html> (Nov. 2, 2021); *see also* U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin., *NHTSA Provides Grants to States so States Can Conduct Effective Highway Safety Programs*, <https://www.nhtsa.gov/highway-safety-grants-program> (last visited May 5, 2021) (“NHTSA’s Office of Regional Operations and Program Delivery (ROPD) administers over \$500 million in grant programs annually to the 50 States, the District of Columbia, Puerto Rico, the U.S. Territories and the Bureau of Indian Affairs.”).

⁴⁰⁶ McIntire & Keller, *supra* note 405.

award be used by a state's local political subdivisions.⁴⁰⁷ The NHSTA further requires states to adopt and report “quantifiable” performance metrics as a grant condition.⁴⁰⁸

Ticket stops—brief, easily increased, and easily counted—are an attractive metric. It is therefore no surprise that at least twenty states evaluate police performance based on their number of traffic stops per hour.⁴⁰⁹ This creates downstream pressure on local police agencies to generate tickets in order to satisfy state reporting obligations. In Windsor, Virginia, for example, the Chief of Police advised officers that they were “required to write a minimum of two tickets per hour while on grant time” (i.e., grant-funded patrols) “and there [was] zero tolerance” for deviating from this minimum.⁴¹⁰ The result of these pressures was a “culture of quotas” in Windsor that resulted in the high-profile pepper-spraying of a Black and Latino Army lieutenant.⁴¹¹ Thus, federal grants contribute to the ticket-writing pressures that contribute to the troubling number of police killings during traffic stops.⁴¹²

Second, federal law incentivizes local police agencies to aggressively seize assets by permitting them to keep assets seized in connection with federal crimes.⁴¹³ Under the federal Equitable Sharing Program, local police departments can keep up to eighty percent of the assets seized in investigations of federal offenses in which they assist.⁴¹⁴ The Equitable Sharing Program has resulted in the distribution of billions of dollars to local police agencies.⁴¹⁵ This

⁴⁰⁷ 23 C.F.R. § 1300 App'x C(a).

⁴⁰⁸ *Id.* § 1300.11(c)(1).

⁴⁰⁹ McIntire & Keller, *supra* note 405.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² See Kirkpatrick et al., *supra* note 394.

⁴¹³ See 21 U.S.C. § 881(e)(1)(A); 18 U.S.C. § 981(e)(2); 19 U.S.C. § 1616(a); 31 U.S.C. §§ 9705(b)(4)(A)–(B); Harmon, *supra* note 91, at 929; LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, 6, 46–50 (3d ed. 2020).

⁴¹⁴ Harmon, *supra* note 91, at 929–30; see also U.S. DEP'T OF JUST. & U.S. DEP'T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 9 (2018) [hereinafter 2018 GUIDE TO EQUITABLE SHARING], <https://www.justice.gov/criminal-afmls/file/794696/download> (outlining methodology for calculating amount of equitable sharing for local law enforcement); KNEPPER ET AL., *supra* note 413, at 6, 46–50 (examining state equitable sharing data).

⁴¹⁵ As of 2015, “more than \$4.5 billion ha[d] been shared through the Equitable Sharing Program.” See Harmon, *supra* note 91, at 930. Professor Harmon reported this figure based on the U.S. Department of Justice's prior edition of its Guide to Equitable Sharing. See *id.* 930 n.241 (citing U.S. DEP'T OF JUST., ASSET FORFEITURE & MONEY LAUNDERING SECTION, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (2009)). Since the publication of Professor Harmon's article, the Department of Justice appears to have stopped reporting the amount shared through the equitable sharing program. See 2018 GUIDE TO EQUITABLE SHARING, *supra* note 414.

provides police departments with an additional source of revenue beyond the reach of local control—even in jurisdictions that limit the ability of police departments to retain assets seized in connection with state offenses.⁴¹⁶ Thus, the Equitable Sharing Program “enables law enforcement agencies to circumvent their own state’s forfeiture laws in favor of forfeiting property under federal forfeiture laws, which earn a D- for being some of the worst in the country.”⁴¹⁷

Enabling law enforcement to generate legal financial obligations exerts a distortive effect not only on policy but also on governance. Revenue-oriented policing can free law enforcement officials from local and state accountability in several ways.

First, LFOs reduce the financial leverage elected officials wield over police departments.⁴¹⁸ By enabling local police agencies to keep assets seized in connection with federal investigations, the federal forfeiture program frees agencies from local efforts to hold them accountable through budgetary control.⁴¹⁹ For example, Harmon suggests that if a local government were to lay off police officers as part of a defunding strategy, the police department could use assets obtained through equitable sharing to buy invasive technologies and pay overtime so that overall police impact in communities would remain stable.⁴²⁰ LFOs could thus frustrate activist-led defunding efforts. Most states also have civil forfeiture programs, permitting local police agencies to permanently retain the cash and property they seize.⁴²¹ These further circumscribe local governments’ ability to use the power of the purse to control police agencies.

⁴¹⁶ Harmon, *supra* note 91, at 929–30; *see also* KNEPPER ET AL., *supra* note 413, at 46 (highlighting the amount of revenue that state and local law enforcements have gained through equitable sharing in certain years).

⁴¹⁷ KNEPPER ET AL., *supra* note 413, at 46. In 2015, the Department of Justice prohibited most federal “adoptions” of state and local forfeitures that occurred without the cooperation of federal officials. *See id.*; Press Release, Dep’t of Just., Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015) (available at <https://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>). In 2017, however, Attorney General Jeff Sessions repealed this policy and allowed for such forfeitures. *See* OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUST., ORDER No. 3946-2017, FEDERAL FORFEITURE OF PROPERTY SEIZED BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2017); U.S. DEP’T OF JUST., MONEY LAUNDERING AND ASSET RECOVERY SECTION, ASSET FORFEITURE POLICY MANUAL 45 (2021), <https://www.justice.gov/criminal-afmls/file/839521/download>.

⁴¹⁸ Colgan, *supra* note 392, at 23.

⁴¹⁹ *See supra* notes 255–86 and accompanying text.

⁴²⁰ HARMON, *supra* note 230, at 537.

⁴²¹ KNEPPER, ET AL., *supra* note 414, at 34–36.

Second, and more troublingly, revenue-oriented policing may align the interests of local officials and police agencies at the expense of the public. Given their budgetary constraints,⁴²² local governments are powerfully incentivized to rely on extortionate policing to balance their budgets. And there is considerable evidence that local officials do in fact encourage this type of policing. Sometimes this dynamic is explicit, as the Department of Justice found to be the case in Ferguson, Missouri.⁴²³ Similarly, the mayor of Edmundson, Missouri, chided the police department for a disappointing downturn in traffic tickets and reminded the department that these tickets “add to the revenue on which the [P.D.] budget is established and will directly affect pay adjustments at budget time.”⁴²⁴ Empirical research bolsters these anecdotes, showing that local authorities and police departments coordinate when it comes to revenue generation.⁴²⁵ One study found that police departments issue more tickets in higher dollar amounts in municipalities with lower property tax revenue.⁴²⁶ Moreover, departments are more likely to issue tickets after voters reject a property tax increase.⁴²⁷ And at the county level, officials collaborate with sheriffs’ offices to finance the construction of jails through court fees and other legal financial obligations.⁴²⁸

Local officials often evade state efforts to regulate their reliance on LFOs as a source of revenue. For example, many states limit the amount of fine-generated revenue that localities may collect.⁴²⁹ However, these limits often go unenforced and localities regularly exceed them.⁴³⁰ Moreover, some revenue-dependent towns circumvent state caps on fines by shifting their enforcement toward ordinances not covered under the cap.⁴³¹ Similarly, some states have sought to limit the revenue localities can collect through asset forfeiture, only to have local police departments seize assets under a federal equitable sharing program.⁴³²

The political pathologies of LFO-oriented policing thus run in two directions. On one hand, police agencies can use revenue from civil forfeitures

⁴²² See *supra* notes 255–86 and accompanying text.

⁴²³ FERGUSON REPORT, *supra* note 379, at 2.

⁴²⁴ HARRIS ET AL., *supra* note 395, at 456 (quoting leaked memo).

⁴²⁵ See Shoub et. al., *supra* note 395, at 836 (surveying research).

⁴²⁶ Michael D. Makowsky & Thomas Stratmann, *Political Economy at Any Speed: What Determines Traffic Citations?*, 99 AM. ECON. REV. 509, 526 (2009) (examining data from North Carolina).

⁴²⁷ *Id.*

⁴²⁸ See Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 865 (2021).

⁴²⁹ See Graham & Makowsky, *supra* note 215, at 313.

⁴³⁰ See *id.*; Maciag, *supra* note 397.

⁴³¹ See Maciag, *supra* note 397.

⁴³² See Harmon, *supra* note 91, at 955–56.

to escape the democratic oversight that inheres in legislative budgeting.⁴³³ On the other, local officials can use their budgetary leverage to pressure police to generate LFO revenue without raising taxes. For police agencies and local officials, LFOs are win-win. The poor and powerless lose.⁴³⁴

C. Indirect Constraints and the Expansion of Police Functions

This Part has described a web of government programs and policies that shape funding and use of police through positive incentives. These indirect constraints complement the direct constraints exerted by mandates and prohibitions. As we have seen, indirect constraints have influence beyond pressuring local governments to fund law enforcement at a high level. They also create distortionary incentives that shape *how* local governments use their police departments. In two significant ways, these problems parallel those created by the legal constraints we previously identified.⁴³⁵

First, indirect constraints incentivize local governments to rely on police agencies to perform functions that could be better performed by social service agencies and community stakeholders, or not at all. Federal grant programs sometimes expressly seek to expand the police mission.⁴³⁶ But these grant programs also contribute to mission creep through the budgetary dynamics illustrated by the fate of Baltimore's recreation program. This account helps explain how and why local governments default to criminal solutions to address social problems.⁴³⁷ Authorization to generate LFOs further distorts policy by channeling police toward extortionate policing at the expense of addressing violent crime.⁴³⁸ There is mounting evidence that local government spending on police tends to increase as tax revenue shrinks.⁴³⁹ Crime rates do not explain this trend, since they appear to have little correlation to police spending patterns.⁴⁴⁰ Tellingly, however, increases in police spending tend to correlate with reduced spending on other social programs.⁴⁴¹ The pressures federal grants and other

⁴³³ See *id.* at 948–54; Erik Luna, *The Perils of Civil Asset Forfeiture*, 43 HARV. J.L. & PUB. POL'Y 23, 27–28 (2020).

⁴³⁴ Cf. Siân Mughan, Danyao Li & Sean Nicholson-Crotty, *When Law Enforcement Pays: Costs and Benefits for Elected Versus Appointed Administrators Engaged in Asset Forfeiture*, 50 AM. REV. PUB. ADMIN. 297, 307–08 (2019) (finding that elected sheriffs rely less on forfeiture revenue than municipal police and are less responsive to state-level policies that change the financial rewards for asset forfeiture).

⁴³⁵ See *infra* Part II.

⁴³⁶ See, e.g., *supra* note 285 and accompanying text (describing the federal COPS in Schools program).

⁴³⁷ See SIMON, *supra* note 4, at 3–4; Beck & Goldstein, *supra* note 8, at 1185.

⁴³⁸ See *supra* notes 392–402 and accompanying text.

⁴³⁹ Beck & Goldstein, *supra* note 8, at 1204.

⁴⁴⁰ *Id.* at 1184.

⁴⁴¹ *Id.* at 1204.

indirect constraints place on local authorities to fund law enforcement at the expense of social welfare programs help account for this relationship.

Second, grants and LFOs allow police agencies to circumvent oversight by local government funders. Because local governments operate under significant fiscal constraints, they are often happy to allow police agencies to operate as revenue-generating enterprises. This allows police to appeal for grants to fund priorities that local officials may not share. While local officials can reject many of these grants, budgetary pressures may prevent them from doing so. Police agencies may further circumvent state and local government oversight by relying on LFOs to independently generate revenue. In some cases, local governments may become so dependent on these funds that they will be unable to serve as a meaningful check on the agencies they are meant to control.

These two distortions may be compounded by indirect constraints imposed by private institutions. For example, to protect their coffers from budget-breaking legal judgments, local governments may need to cater to priorities of private companies and nonprofit municipal risk pools that provide indemnification insurance.⁴⁴² Indeed, there is anecdotal evidence that insurance companies are actively curbing efforts to reduce police budgets.⁴⁴³ Nonprofit foundations have also become such significant sources of police funding that they may exert influence similar to that exerted by federal grant programs.⁴⁴⁴ And still another possible source of private pressure is introduced by many cities' dependence on the bond market to cover the costs of ballooning police

⁴⁴² Cf. John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1573 (2017) (cataloguing the ways in which private insurance companies regulate the policies and conduct of the police agencies they indemnify).

⁴⁴³ Specifically elected officials in Culver City, California, recently faced political pressure to reduce funding for the City's police department. In response, the City Manager advised that the city's insurance broker warned that reduced police funding could "result in the City's inability to obtain insurance coverage." CULVER CITY, STAFF REPORT, FILE # 21-369 (2020) [hereinafter CULVER CITY REPORT], <https://culvercityaction.files.wordpress.com/2021/01/staffreport.pdf> (reporting the City Manager's findings with respect to a public safety review). The insurance broker also purportedly cautioned against reorganizing the city's public safety infrastructure so that non-sworn personnel could respond to some 911 calls. *Id.* Moreover, the insurance broker reportedly informed the city that "insurance carriers across the country are seriously concerned with steps being taken to realign public safety resources." *Id.* We are grateful to Noah Zatz for drawing our attention to this effort and the city's response.

⁴⁴⁴ See, e.g., Kari Paul, *How Target, Google, Bank of America and Microsoft Quietly Fund Police Through Private Donations*, GUARDIAN (June 18, 2020, 4:12 PM), <https://www.theguardian.com/us-news/2020/jun/18/police-foundations-nonprofits-amazon-target-microsoft> (reporting that "more than 25 large corporations in the past three years have contributed funding to private police foundations" and that such private foundations "receive millions of dollars a year from private and corporate donors . . . and are able to use the funds to purchase equipment and weapons with little public input").

budgets.⁴⁴⁵ The dynamics of these private, indirect constraints and their impact on the scale and role of police agencies are important problems for further research.

IV. BUDGETARY DISTORTIONS AND THE ROLE OF POLICE AGENCIES

In our examination of the funding of local police agencies, we have focused on the web of state constraints and federal and state incentives that distort the local budgeting process. This distortion is an important contributor to the “catchall” model of policing in the United States. Legal mandates to maintain or expand law enforcement funding and personnel led local leaders to allocate increasing responsibilities to police agencies. Revenue potential—through grants, fines, fees, and forfeitures—incentivized local officials to pursue new initiatives through police agencies rather than other departments or services. Taken together, these mandates and incentives impede the defunding movement’s hopes of using the budget process to shrink and reorient policing. Indeed, budgetary distortions contributed to the historic expansion of law enforcement functions in the first place.

This Part considers the consequences of this budgetary structure. We make three points. First, the structure of police budgeting reverses the relationship between function and funding required for policy rationality. Second, this reversal limits the democratic accountability of police agencies to residents by steering policy choices about police function into the budgetary forum. Third, reform advocates should direct their defunding efforts toward reducing budgetary distortion of policy and expanding the local accountability of police agencies.

A. Budget Distortions and the Relationship Between Funding and Function

The funding of police agencies is rife with budgetary distortions that channel the discretion of local officials. In turn, these budgetary distortions have helped expand the duties and responsibilities of police agencies. This channeling effect reverses the traditional presumption about the rational relationship between function and funding. While policy choices about the role of government agencies should determine their funding, funding mandates and incentives too often drive definitions of the police function and distort the functions of other local departments and services.

⁴⁴⁵ Brentin Mock, *How Cities Offload the Cost of Police Brutality*, BLOOMBERG CITYLAB (June 4, 2020, 2:41 PM), <https://www.bloomberg.com/news/articles/2020-06-04/the-financial-toll-of-police-brutality-to-cities>.

This is not to deny that police agencies have long occupied a unique role in local administration. Indeed, when the need arises, local officials and residents frequently look to police agencies to solve their problems. In the nineteenth century, police and sheriff's offices were useful tools for local political machines—not only for “monitoring” the polls but also as sources of political patronage.⁴⁴⁶ Local residents also looked to police agencies to provide all sorts of social services, from lodging “tramps” and recovering missing children in the late-nineteenth century to traffic enforcement and pedestrian safety in the early-twentieth.⁴⁴⁷ And if the social service functions of police agencies expanded during the wars on drugs and crime in the latter half of the twentieth century, that expansion was possible because of support at the local level. Local officials were among the first to embrace the “broken windows” theory that directed police agencies to pursue order-maintenances strategies and expand misdemeanor arrests,⁴⁴⁸ even before the Clinton administration promoted the strategy nationwide.⁴⁴⁹ And, by some accounts, this effort was initially supported by local residents, even in the minority communities that would bear the brunt of this enforcement strategy.⁴⁵⁰

Yet, to say that the steady expansion of police function was responsive to local demands does not entirely explain why local officials assigned these functions to police rather than other agencies. Here, the unique structure for budgeting police agencies informs a path-dependent account. During their formative era, large police departments were useful to local bosses in securing political power and directing financial rewards to favored constituencies. Political rivals at the state level responded by regulating police through funding and personnel mandates.⁴⁵¹ These ensured that police maintained a sizable institutional presence, even in eras when crimes rates were falling. Even in their early decades, reformers complained that much police activity was tangential to their core “crime fighting” function.⁴⁵² But given their institutional capacity, it was convenient and even fiscally necessary to task police agencies with additional responsibilities as new problems arose. In other words, by insulating

⁴⁴⁶ See, e.g., FOGELSON, *supra* note 162; LANE, *supra* note 204, at 160.

⁴⁴⁷ See *supra* notes 207–08 and accompanying text.

⁴⁴⁸ See, e.g., ALEX S. VITALE, CITY OF DISORDER: HOW THE QUALITY OF LIFE CAMPAIGN TRANSFORMED NEW YORK POLITICS 46–48 (2008).

⁴⁴⁹ See BUREAU OF JUST. ASSISTANCE, UNDERSTANDING COMMUNITY POLICING 4 (1994) (citing George Kelling's broken windows research).

⁴⁵⁰ See JAMES FORMAN JR, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015).

⁴⁵¹ See *supra* notes 160–72 and accompanying text.

⁴⁵² See, e.g., WALKER, *supra* note 208, at 83.

police agencies from the normal budgeting process, state laws also ensured their expansive role in local governance.

The emergence of funding incentives in the late-twentieth century exacerbated this dynamic. Police agencies became a valuable source of revenue. Deindustrialization and white flight eroded many city tax bases, while tax revolts limited property tax rates.⁴⁵³ Still, states protected police budgets. As federal aid for housing, infrastructure, and social services ebbed, federal law enforcement grants and forfeiture programs picked up some of this slack.⁴⁵⁴ Fines and fees collected by law enforcement became more vital.⁴⁵⁵ Police were diverted into social welfare programs and drug, public order, and warrant enforcement.⁴⁵⁶ The new police revenue sources account for much of the increase in local law enforcement spending during this era. And for localities struggling to balance the books, even small additions to revenue were worth pursuing. Revenue needs explain these shifts in function.

These effects of police funding on police function add a new layer to existing explanations of the expansion of both with respect to police agencies. Traditional explanations tend to focus first on why police functions expanded, often by looking at the demand by local residents, social conflicts based on class and race, or institutional inertia in the bureaucratic administration of local governments.⁴⁵⁷ In turn, explanations for the growth of police funding generally center on the developments that increased the burden of those functions, such as the increasing prevalence of automobiles in the early-twentieth century.⁴⁵⁸ But our account suggests that the opposite is true as well—policy choices about the role of police agencies are responses to funding mandates and incentives.

Thus, the steady expansion of police functions may be due in part to the unique funding structure surrounding police agencies. The fiscal environment may also explain why alternatives to policing are so rarely considered, even at the local level where the impact of policing is most apparent. Residents look to local officials to address problems in their community. Budgetary considerations then lead local officials to turn to police agencies. Even if alternatives to policing or police agencies are available, local officials are likely to follow the incentive

⁴⁵³ See, e.g., JASON HACKWORTH, *MANUFACTURING DECLINE: HOW RACISM AND THE CONSERVATIVE MOVEMENT CRUSH THE AMERICAN RUST BELT* 121–22 (2019).

⁴⁵⁴ See *supra* notes 288–93 and accompanying text.

⁴⁵⁵ See *supra* notes 397–402 and accompanying text.

⁴⁵⁶ See *supra* notes 437–41 and accompanying text.

⁴⁵⁷ See David McDowall & Colin Loftin, *Fiscal Politics and the Police: Detroit, 1928–76*, 65 *SOC. FORCES* 162, 162–65 (1986).

⁴⁵⁸ See Bordua & Haurek, *supra* note 212.

structure that exists. If so, the overarching role of police agencies and the consequences of relying on policing often go unexamined.

Of course, these choices are entirely rational. With limited ability to raise revenue or run deficits, local officials should be seeking ways to stretch taxpayer dollars. Given their limited discretion over law enforcement budgets,⁴⁵⁹ local officials wisely ensure that police agency functions justify their funding levels. Indeed, local officials may hope that the savings accrued from their reliance on police agencies could be redirected to other services. Yet, the rationality of these choices are themselves the result of a funding structure distorted by state mandates and federal and state incentives. And these distortionary effects are likely to be strong in the poorest communities, where social services are most needed and the negative impacts of policing are greatest.

B. Budget Distortions and Political Accountability

Budgetary distortions affect not only the funding of police agencies but also their functions, relative to those of other local departments. Both erode the political accountability of police agencies at the local level. Police agencies are insulated from the authority of local officials by funding protections and their ability to generate revenue. In turn, budgetary considerations take precedence over local political demands in determining the role and function of police agencies. Despite the power that usually accompanies the purse, local responsibility to fund police agencies does not directly translate into police accountability to local majorities. Indeed, the participation of local residents is more likely to be excluded precisely because policing policies are so often made through the budgetary process.

The United States is unusual in organizing and governing policing at the local level.⁴⁶⁰ Yet—as we have argued in a previous work⁴⁶¹—some strong considerations militate in favor of local governance over policing. Some of these are generic advantages of local control. Those concerned about policy efficacy reason that local control allows different communities to tailor their law enforcement response to their specific needs and contexts.⁴⁶² For those concerned about efficiency, responsibility to fund policing should incentivize

⁴⁵⁹ See *supra* Part II.A.

⁴⁶⁰ See, e.g., EDWARD R. MAGUIRE, ORGANIZATIONAL STRUCTURE IN AMERICAN POLICE AGENCIES: CONTEXT, COMPLEXITY, AND CONTROL 2–3 (Austin T. Turk ed., 2003).

⁴⁶¹ See O'Rourke, Su & Binder, *supra* note 1, at 1400–01.

⁴⁶² See Mark Harrison Moore, *Problem-Solving and Community Policing*, 15 CRIME & JUST. 99, 120 (1992).

localities to carefully assess the cost of addressing local problems through police agencies in comparison to other departments or services.⁴⁶³ But there are also considerations peculiar to policing. Given the deadly force that police agencies are authorized to wield, local control best ensures that they serve the communities they police.⁴⁶⁴ The continuing legacy of race discrimination in criminal justice intensifies this concern. Both crime and criminal justice most heavily impact Black Americans living in cities. Police are most numerous in cities with large Black populations. Since Black voting strength is also greatest in these cities, local control of policing would best distribute power over policing to those most affected by it.⁴⁶⁵

Yet, as scholars of local democracy have recognized, neither decentralization nor local control ensures political accountability. Much depends on the ability of residents to channel their interests through local officials, which in turn depends on the process by which policy choices are made.⁴⁶⁶ Do residents have the ability to set the local agenda? Is the forum in which policy choices are made open to their participation?⁴⁶⁷ Are the interests and voices of all residents weighed equally in the decision-making process?⁴⁶⁸ Meaningful democratic participation is often undermined by the structural organization of local governments.⁴⁶⁹ There are also many reasons why local police agencies in particular seem to be insulated from political accountability at the local level—from the political influence of law enforcement unions to the structural entrenchment of police agencies.⁴⁷⁰ In addition to all of this, we argue, budgetary distortions play a similar role.

First, budgetary distortions mean that choices of police functions and priorities are more likely to be made on the basis of budgetary considerations rather than local political demands. As a result, local community views about the role of policing may be excluded from the agenda. Local officials may conclude that needs to balance the books and comply with funding mandates force certain choices. Conversely, local officials who oppose reform efforts for

⁴⁶³ See, e.g., Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 194–95, 195 n.17 (2005).

⁴⁶⁴ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7–8 (2011).

⁴⁶⁵ See *id.* at 286–87.

⁴⁶⁶ See, e.g., MICHAEL MENSER, *WE DECIDE!: THEORIES AND CASES IN PARTICIPATORY DEMOCRACY* 11 (2018).

⁴⁶⁷ See, e.g., FRANK M. BRYAN, *REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS* 4 (2004).

⁴⁶⁸ See, e.g., David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1812–13 (2005).

⁴⁶⁹ See, e.g., Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 839–40, 866 (2020).

⁴⁷⁰ See, e.g., O'Rourke, Su & Binder, *supra* note 1, at 1343.

other reasons can more easily rebuff local demands by arguing, perhaps disingenuously, that these alternatives would be economically unfeasible. In either case, funding concerns allow local officials to foreclose consideration of the role of police altogether. From this perspective, the steady expansion of police functions may reflect not the interests of local residents but instead the fiscal constraints and incentives facing local governments.

Second, the budgetary process is a forum uniquely insulated from resident participation. Balancing a municipal or county budget is often considered to be a complicated and technical affair best left to professional judgement. Indeed, responsiveness to resident demands is often blamed for leading cities into fiscal distress or municipal bankruptcy.⁴⁷¹ As a result, it is often believed that budgeting is one of the few areas where local officials need to make tough choices in spite of constituent demands. But if budgeting is where policy choices about the functions of police agencies are made, citizens will have little input into, or even awareness of, these policy decisions.

Third, budgetary distortions incentivize local officials to favor certain constituents in making policies about the role of police agencies. Social theories of policing have long focused on the conflict between different interest groups within a locality. History shows that police policies tend to favor the interests of local elites—whites over Blacks, businesses over residents, middle- and upper-class neighborhoods over those disadvantaged by poverty.⁴⁷² But budgetary distortions reinforce these hierarchies of influence. Tackling homelessness, drug abuse, or mental health through social services may mean increasing taxes. Because of fiscal incentives, addressing those same problems through policing allows local officials to please the propertied by keeping taxes lower. And, there is recent evidence that real property owners see expenditures on policing as securing their investments.⁴⁷³

Indeed, the effect of budgetary distortion on local political accountability may be even more pernicious than earlier efforts to insulate police agencies from local political accountability because its influence is largely hidden from view. State takeovers of big city police departments in the nineteenth century stripped local control over police agencies.⁴⁷⁴ But those efforts also triggered a political

⁴⁷¹ See, e.g., KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 98 (2017).

⁴⁷² See, e.g., Bruce C. Johnson, *Taking Care of Labor: The Police in American Politics*, 3 *THEORY & SOC.* 89, 104–06 (1976); HARRING, *supra* note 170, at 15–17.

⁴⁷³ See Beck & Goldstein, *supra* note 8, at 1196–99; Simon, *supra* note 8, at 167–68, 186–204.

⁴⁷⁴ See *supra* notes 160–64 and accompanying text.

backlash that eventually led to the widespread adoption of “home rule” amendments intended to insulate localities from state control.⁴⁷⁵ Progressive efforts to “professionalize” police agencies in the early-twentieth century also sought to insulate policing from the local political process.⁴⁷⁶ But complaints that law enforcement officials were too detached from the communities they policed eventually inspired efforts to restore community-oriented policing. In contrast, budgetary decision-making occurs away from public notice, and the structural constraints on that process imposed by state law and federal programs are even less visible.

In short, budgetary distortions also distort the political relationship between local governments and their residents. Local residents continue to bear the primary burden of funding their police agencies. But funding mandates and fiscal incentives mean that funding decisions are insulated from local political accountability.

C. Addressing Budgetary Distortions

Given the degree to which funding distortions have defined the role of policing, it makes sense that reformers are now targeting police budgets and the budgeting process. Indeed, the relationship between funding and function is more intertwined than defunding advocates have acknowledged. States have long sought to constrain the local budgeting process to set the priorities for policing. The federal government has also used grants and forfeitures to incentivize the allocation of local law enforcement resources. Further, local governments have steered policing activity in pursuit of fines and fees when local finances are tight, and states impose limits on their revenue raising capacity. If reformers seek to reverse the misallocation of local resources to police agencies, then they also need to address the budgetary distortions that structure local funding decisions.

At the most basic level, reformers will need to address the funding mandates that constrain local budgeting discretion. This certainly includes the recent wave of anti-defunding bills, which prohibit localities from shifting law enforcement resources to other local departments and services. Indeed, our analysis here suggests that anti-defunding laws are even more problematic than they may first

⁴⁷⁵ See DAVID R BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 49–52 (2003); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 9 n.17 (1990).

⁴⁷⁶ See FOGELSON, *supra* note 162, at 42, 91–94; see also NAT’L COMM’N ON L. OBSERVANCE & ENF’T, REPORT ON POLICE 1–6 (1931) (“Wickersham Commission” Report).

appear. These laws not only foreclose contemporary reform efforts but also constrain local budgeting decisions. In addition, they also lock in the effects of budgetary distortions of the past. If, as we have argued, funding mandates and revenue incentives led to the expansion of police functions beyond core law enforcement responsibilities, then anti-defunding bills ensure that those choices cannot be reconsidered.

Aside from the recent wave of anti-defunding bills, reform advocates should also turn their attention to the web of existing constraints that limit when and where law enforcement budgets can be reduced. Local responsibility to fund police agencies does not directly translate into local control over their budgets. As a result, appealing to local officials may not be effective without also addressing constraints imposed by state law. This is not to say that progress cannot be made on the budgeting front. Even within existing constraints, localities have some discretion over the funding of police agencies. But the options available for reimagining public safety may be limited if existing state mandates remain or expand.

At the same time, reformers need to turn their attention to the budgetary incentives that have turned police agencies into revenue generators. Police are particularly appealing investments for local officials because, unlike other agencies, they can offset their costs through grants, fines, fees, and forfeiture. Until these incentives are removed, the cold calculus of fiscal politics will take precedence. Even local officials eager to reexamine the role of police agencies must cope with adverse budgetary consequences.

Addressing budgetary incentives, however, is not necessarily a matter of removing these revenue sources altogether. After all, local communities are swayed by these revenue sources because of need. Rather, a better approach may be to rethink how support might be provided to local government without distorting local decision on police functions. Federal grant programs, for example, might provide funding to local governments to address issues rather than funding particular agencies. This allows local governments to experiment with different ways of achieving those ends.

Fines and fees should be assessed not as revenue sources but as particularly regressive tools for incentivizing enforcement, internalizing costs, or deterring antisocial behavior. The downsides of the fee-for-service model of policing have long been recognized. Arguably taxes, supported by additional local taxing authority, should once again be favored.

The goal, then, should be to reduce or eliminate the budgetary distortions now shaping police funding. The aim should be to enhance local discretion over—and local accountability for—police functions. Likely only some localities will decide to reallocate existing police functions to other departments or agencies, as defunding advocates urge. But if such decisions are made without fiscal distortion, there is a better chance that alternatives to policing will be fully considered.

Addressing budgetary distortion is all the more important as the debate over police agencies has once again turned to their funding. Both sides should understand how the resolution of funding disputes in the past may have unduly influenced the function of police agencies. In doing so, they might better recognize how the resolution of today's debates may have unintended repercussions long after the political fights that prompted them have passed.

CONCLUSION

Recent proposals to “defund” police reflect the convergence of many concerns. One concern is the dim prospect of meaningful reform of police departments, as police violence and racial discrimination have persisted, despite several waves of protest. This persistence is partly attributable to police agencies' political strength and insulation from democratic control. Defunding is appealing as a Gordian solution, sanctioning police agencies by legislative fiat. Complete defunding offers a means to the visionary goal of abolishing violent enforcement of law altogether. Partial defunding serves the more modest aim of reasserting local control over police agencies that have long resisted and even scorned democratic oversight.

A second concern is the scale of policing. Police budgets increased throughout the war on crime (albeit not to the same degree as corrections budgets) even as crime rates declined. Greater police capacity is one reason for increases in stops and arrests, swollen inmate populations, and crippling fees and fines. Police capacity also appears to be an effect of racial discrimination, as levels of Black population and segregation are predictors of police budgets.

A third concern is the trade-off between police budgets and other priorities. Rising spending on police and corrections coincided with the contraction of welfare and public spending on education and social services. Thus, investment in law enforcement was part of a broader neoliberal shift from a welfare state to a carceral state, transferring “responsibility” for the social costs of inequality

onto the least advantaged. “Defunding” signifies a determination to recommit to social welfare.

This Article has revealed impediments to defunding police—but also imperatives to reform the mechanisms of police funding.

Barriers to defunding police are similar to those impeding both incremental and radical reform. Local governments have responsibility to fund police but in practice have little governing authority over them. Recent state laws threatening to sanction localities that defund police simply make explicit the underlying legal distribution of authority that already constrains localities from doing so. Localities are largely constrained to retain and pay police as determined by the state. Federal and state grants, fines, fees, and forfeitures interact with state spending mandates to operate as ratchets. Grants incentivize officials to add staffing, while state law and collective bargaining agreements restrict the ability of local government to later shed these fiscal liabilities when the money runs out. Grants, fines, fees, and forfeitures likewise require police staffing to pursue.

All these sources distort policy and subvert local democracy by determining how police will be used, often drawing them away from investigation and prevention of violent crime. The difficulty of decreasing police budgets further distorts policy by incentivizing local government to allocate other policy domains to police.

Thus, the problem with police budgets is not simply that they are too large, but why they are so large. They are determined not by social need, nor by local democratic choice, but by a dysfunctional budgetary process that distorts policy and precludes democratic accountability.

The growth in police staffing and funding during the war on crime was no accident: it is what enterprising politicians at every level of government sold and voters bought. But local electorates now wishing to unwind those decisions cannot easily do so. Rational decisions of different actors at different times combined to produce this paralysis. Long ago, state-level actors pursued partisan advantage by regulating *how* local police agencies are funded, while abjuring responsibility for funding them. Police unions sought and achieved collective bargaining agreements and state-level protections that further deprived local populations of meaningful control over police budgets. Federal officials used short-term grants to incentivize hiring union-protected police—often to perform nonpolice functions—leaving local governments to cover the long-term costs. When the bills came due, resource-starved local governments and police agencies helped themselves to legal financial obligations. Together, these

decisions have set an agenda before the public with no good options. Before society can hope to determine the scale and role of policing, it will need to fundamentally change how it funds police.