

# Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform

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## Repository Citation

Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 Wm. & Mary L. Rev. 1171 (2017), <https://scholarship.law.wm.edu/wmlr/vol58/iss4/3>

LESSONS FROM FERGUSON ON INDIVIDUAL DEFENSE  
REPRESENTATION AS A TOOL OF SYSTEMIC REFORM

BETH A. COLGAN\*

ABSTRACT

*This Article investigates the relationship between the decisions by lawmakers to use municipal and criminal systems to generate revenue and the lack of access to individual defense representation by using the Ferguson, Missouri, municipal court as a case study. The Article chronicles the myriad constitutional rights that were violated on a systemic basis in Ferguson's municipal court and how those violations made the city's reliance on the court for revenue generation possible. The Article also documents how the introduction of individual defense representation, even on a piecemeal basis, played a role in altering Ferguson's system of governance. Using this case study, the Article examines the way litigating individual cases and seeking the enforcement of constitutional rights can alter the cost-benefit of using courts to generate funds by both increasing system expenses and decreasing revenues. Further, individual case litigation alters the cost-benefit of using courts as revenue generators by forcing officials to take a public position on municipal court practices, thereby informing and changing the public debate on crime policy. The Article posits that while individual defense representation will have the greatest systemic effects in systems like Ferguson's, where there*

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\* Assistant Professor of Law, UCLA School of Law. I wish to thank Barbara Babcock, W. David Ball, Stuart Banner, Rachel Barkow, Paul Butler, Devon Carbado, Sharon Dolovich, Ingrid V. Eagly, Lawrence M. Friedman, Bernard E. Harcourt, Christopher Kutz, Máximo Langer, Kaipo Matsumura, Tracey L. Meares, Erin E. Murphy, Richard M. Re, Daniel C. Richman, Andrea Roth, Joanna C. Schwartz, David Alan Sklansky, Carol S. Steiker, Robert Weisberg, Jordan Blair Woods, and Stephen C. Yeazell for their generous and insightful comments. This Article was also greatly improved through the UCLA Criminal Scholars Forum and the Stanford Law School Criminal Justice Roundtable. Finally, I wish to thank Alexandria Ruiz and Oscar Figueroa for excellent research assistance.

*is a significant dependence on the courts for revenue, a pattern of unconstitutional activity, or the targeting of economically vulnerable communities, individual defense representation should be broadly understood as a tool for systemic reform.*

*The Article also raises theoretical and normative implications from the Ferguson experience regarding whether constitutional criminal procedural rules or local government controls over procedure serve as a better check against systemic abuses, and regarding the repercussions of a politically and doctrinally myopic focus on access to counsel as a solely constitutional, as opposed to political, matter.*

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## INTRODUCTION

When tensions in Ferguson, Missouri, exploded in the late summer of 2014 following the shooting of Michael Brown by Ferguson police officer Darren Wilson, the ArchCity Defenders sought to provide some context to the anger and anguish exhibited by the city's residents.<sup>1</sup> The ArchCity Defenders, a nonprofit legal aid organization based in St. Louis, Missouri, which at the time focused on housing and homelessness issues, had been engaged in a court-watching project. The project arose out of concerns that many of its clients had arrest warrants—issued as a result of their inability to pay fines and fees ordered by municipal courts around St. Louis County—that prevented them from accessing housing, treatment, and employment services.<sup>2</sup>

Just five days after the shooting, the ArchCity Defenders released a White Paper detailing what it had witnessed in nearly thirty of the county's municipal courts.<sup>3</sup> The Paper described perfunctory hearings in which judges neither informed defendants that they may have a right to counsel nor provided it, assessed economic sanctions without considering a defendant's ability to pay, and issued warrants for and ultimately incarcerated—sometimes for weeks at a time—people who were too poor to pay the sanctions imposed.<sup>4</sup> The White Paper suggested what motivated these behaviors: the

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1. See Interview with Thomas B. Harvey, Dir., ArchCity Defs. (July 7, 2016) (on file with author) [hereinafter Harvey Interview]; Erica Smith, *Law Professionals Discuss Court Fines, Fees*, ST. LOUIS PUB. RADIO (Sept. 30, 2014), <http://news.stlpublicradio.org/post/law-professionals-discuss-court-fines-fees> [https://perma.cc/7JGD-MMGF].

2. See Smith, *supra* note 1; see also Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST: THE WATCH (Sept. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/> [https://perma.cc/H5TM-AU4N].

3. See THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 1, 3 (2014) [hereinafter ARCHCITY WHITE PAPER]; see also Stephen Deere, *North County Municipalities Talking About Merger of Courts Before Reforms Are Forced on Them*, ST. LOUIS POST-DISPATCH (Jan. 8, 2015), [http://www.stltoday.com/news/local/crime-and-courts/north-county-municipalities-talking-about-merger-of-courts-before-reforms/article\\_c0ba92ab-3d39-5cb0-a8a3-d55eda0269e2.html](http://www.stltoday.com/news/local/crime-and-courts/north-county-municipalities-talking-about-merger-of-courts-before-reforms/article_c0ba92ab-3d39-5cb0-a8a3-d55eda0269e2.html) [https://perma.cc/MN9W-2M3F] (describing the August 14 ArchCity White Paper as “skewering the area’s courts for mistreating poor people and blocking outsiders from seeing what goes on”).

4. See generally ARCHCITY WHITE PAPER, *supra* note 3.

municipalities were using economic sanctions as a revenue-generating mechanism, producing millions of dollars that were used to operate municipal governments on the backs of their poorest and most politically vulnerable citizens.<sup>5</sup> The municipalities appeared to be targeting low-income and black communities with these practices. For example, fines were collected at rates more than fifteen times higher in one low-income, majority-black community than in a more affluent neighboring municipality.<sup>6</sup> Ferguson was among the three worst offenders.<sup>7</sup>

In the weeks and months to come, Ferguson would, of course, become a household name.<sup>8</sup> The U.S. Department of Justice sent a team to investigate the Ferguson Police Department, gaining access to city and municipal court officials, internal emails, and documents that would shed more light on what the ArchCity Defenders had uncovered.<sup>9</sup> The Department released a Report that, in addition to addressing the issues of police misconduct that led to Brown's death, described in great detail a disturbing abuse of power by judges, court personnel, prosecutors, police, and municipal authorities regarding the use of fines and fees to fill municipal coffers.<sup>10</sup> The offenses detailed in the Report were often minor: having "High Grass and Weeds" in one's yard,<sup>11</sup> failing to wear a seatbelt while in a parked car,<sup>12</sup> or—as then-Attorney General Eric Holder highlighted in his remarks on the Department's investigation—the "highly-discretionary offense described as 'Manner of Walking Along Roadway.'"<sup>13</sup> Many offenses were enforced against the area's black

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5. *See id.* at 11-13.

6. *See id.* at 12 (quoting from Ray Downs, *ArchCity Defenders: Meet the Legal Superheroes Fighting for St. Louis' Downtrodden*, RIVERFRONT TIMES (Apr. 24, 2014), <http://www.riverfronttimes.com/stlouis/archcity-defenders-meet-the-legal-superheroes-fighting-for-st-louis-downtrodden/Content?oid=2505869> [<https://perma.cc/VFT9-6NQT>]).

7. *See id.* at 3.

8. *See* Scott Neuman, *Ferguson Timeline: Grief, Anger and Tension*, NPR (Nov. 24, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/24/364103735/ferguson-timeline-grief-anger-and-tension> [<https://perma.cc/2M2Q-ER9Q>].

9. *See, e.g.*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015) [hereinafter FERGUSON REPORT].

10. *See id.* at 2-4.

11. *Id.* at 7.

12. *See id.* at 3.

13. Eric Holder, Att'y Gen., U.S. Dep't of Justice, Remarks Providing Update on Investigations in Ferguson, Missouri (Mar. 4, 2015), <https://www.justice.gov/opa/speech/attorney->

residents almost exclusively.<sup>14</sup> Once embroiled in the municipal court system for these low-level offenses, the repercussions were anything but minor: intractable debt; the loss of drivers' licenses, employment, and housing; and even incarceration.<sup>15</sup>

The decision by Ferguson officials to use the municipal court system to generate revenue was a political one. There were other choices. While the municipality's ability to raise property taxes is constrained by state law, its officials could have sought the power to increase such taxes through a referendum.<sup>16</sup> Its officials could have pursued opportunities to consolidate the municipal court, or even its entire system, with neighboring municipalities so as to reach economies of scale on public service expenditures, thereby reducing the need for revenue.<sup>17</sup> They also could have curbed spending, which in the lead-up to the shooting included "buil[ding] an \$8 million fire station, issu[ing] bonds to fund the \$3.5 million-dollar renovation of the police station, and g[iving] all municipal employees (almost half of whom work for the Police Department) an 8 percent raise."<sup>18</sup> Ferguson officials instead chose to generate revenues through its municipal court.

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general-holder-delivers-update-investigations-ferguson-missouri [https://perma.cc/G3BQ-QJ2M].

14. See FERGUSON REPORT, *supra* note 9, at 62-69.

15. See *id.* at 4.

16. See Walter Johnson, *Ferguson's Fortune 500 Company*, ATLANTIC (Apr. 26, 2015), <http://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/> [https://perma.cc/SL2F-6G6B].

17. See, e.g., BETTER TOGETHER, THE WILL TO CHANGE 7-8 (2016), <http://www.bettertogetherstl.com/wp-content/uploads/2016/06/BT-Will-to-Change-Final.pdf> [https://perma.cc/LZB6-F24J] (reporting on a study of ninety independent municipalities in the St. Louis region, including their reliance on municipal court fees); cf. Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1422-23 (2012).

18. Johnson, *supra* note 16.

Ferguson officials, like municipal officials across the country,<sup>19</sup> also declined to provide counsel to people charged in its municipal court and subjected to the fines and fees upon which the municipality so heavily relied.<sup>20</sup> The question of whether Ferguson was constitutionally mandated to provide counsel is muddy.<sup>21</sup> The United States Supreme Court has declined to extend the right to counsel to fine-only cases.<sup>22</sup> But it has left open the question of whether the right to counsel at trial extends to circumstances under which a jurisdiction imposes economic sanctions at sentencing for which the failure to pay triggers incarceration,<sup>23</sup> or to collections hearings.<sup>24</sup> Both practices were at issue in Ferguson.<sup>25</sup> Regardless, even absent a constitutional mandate, Ferguson officials could have chosen to provide counsel in its courts but did not do so.

In this Article, I chronicle the links between Ferguson's reliance on fines and fees for revenue generation and its decision not to

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19. See, e.g., Rebecca McCray, *This Is What Justice Looks Like in Many Small Towns Across America*, TAKEPART (Aug. 14, 2015), <http://www.takepart.com/feature/2015/08/14/indigent-courts-right-attorney> [<https://perma.cc/U2FK-RPTJ>]. In some jurisdictions, counsel is provided in limited circumstances in municipal courts as a matter of state constitutional right. For example, in New Jersey, if a defendant has a pending indictable offense, she has a right to counsel to challenge the sufficiency of the charge even if the probable cause hearing occurs in municipal court. See *State v. Dennis*, 885 A.2d 429, 430 (N.J. 2005) (per curiam). A state constitutional right to counsel is also recognized in New Jersey when a defendant may be subject to a sentence with "consequence[s] of magnitude" such as the loss of a driver's license or fine of \$1800 or more. See *Rodriguez v. Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971); see also Act of June 11, 2016, ch. 366, 2016 Colo. Sess. Laws 1540 (a recently passed Colorado measure that created a statutory right to counsel in municipal court).

20. See FERGUSON REPORT, *supra* note 9, at 58, 100 (noting, with little discussion, that Ferguson did not provide counsel).

21. Compare *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979), with *Turner v. Rogers*, 564 U.S. 431, 449 (2011), and *Alabama v. Shelton*, 535 U.S. 654, 672-74 (2002).

22. See *Scott*, 440 U.S. at 373-74; see also *infra* notes 410-22 and accompanying text.

23. See *Shelton*, 535 U.S. at 672-74.

24. See *Turner*, 564 U.S. at 449.

25. The Missouri Supreme Court Rules also provide for a right to counsel if a conviction "would possibly result in confinement," MO. SUP. CT. R. 37.50, or if a person is arrested and placed in confinement due to the alleged commission of an ordinance violation, MO. SUP. CT. R. 37.13. The wording of the former rule, however, leaves unclear whether the right exists when the ordinance allows for confinement, as Ferguson's ordinances do, or instead is only available if the court is likely to impose incarceration as the initial sentence, see MO. SUP. CT. R. 37.50, which rarely happened in Ferguson, see FERGUSON REPORT, *supra* note 9, at 8-9. Likewise, the latter rule pertaining to the right while confined upon arrest is limited to circumstances in which the person arrested specifically requests counsel, but includes no requirement that the court inform the person that the right exists. See MO. SUP. CT. R. 37.13.



provide counsel to people charged in its municipal court. I argue that Ferguson's political system failed its poor and black citizens in significant part *because* they were unrepresented by counsel. Had people subjected to Ferguson's municipal court scheme been afforded indigent defense representation, they would have been better able to challenge violations of numerous procedural and substantive constitutional rights, making many of the abuses that occurred illegal and fiscally impossible. Further, individual defense counsel can create—and as detailed below, has ultimately created in Ferguson—space for a public conversation about crime policy. In other words, I contend that legal representation not only helps protect the rights of individual clients, but also has the potential to alter systems of governance and therefore should be understood as a mechanism of systemic reform. Ferguson serves as a case study<sup>26</sup> that shows the capacity for indigent defense counsel to change the cost-benefit of crime policy decisions and to shape public debate, and to do both through the zealous representation of individual clients that is central to their role.<sup>27</sup>

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26. The abuses in Ferguson's municipal court system are similar to practices in jurisdictions across the country. *See, e.g.*, AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 6-10 (2010); AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 3 (2014); ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13-18 (2010); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 52-54 (2016); LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 4, 12 (2015) [hereinafter NOT JUST A FERGUSON PROBLEM]; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 7-8 (2007); Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=312158516> [<https://perma.cc/BJ5X-R3PH>]; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), <http://www.npr.org/templates/transcript/transcript.php?storyId=313118629> [<https://perma.cc/MD2G-W7CS>]; Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> [<https://perma.cc/7AX3-HK7Q>].

27. In addition to contributing to a growing body of scholarship expressing concerns with the use of economic sanctions, this investigation of the role of counsel in Ferguson adds to literature that conceives of individual defense representation as generative of systemic reform. *See, e.g.*, Gabriel J. Chin, *Agenda Setting as a Tactic in Institutional Criminal Defense*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 29 (2015) (arguing that indigent defense counsel have the "ability to set the agenda for the legal system by coordinating the identification and pursuit of legal claims in appellate courts"); Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1212-13 (2005) (describing results of a

Although I argue that individual defense representation can create powerful political leverage, particularly in places like Ferguson, I recognize that counsel's power in this role is limited both by the breadth and severity of criminal law, which provides prosecutors with the power to force pleas even where defense representation exists,<sup>28</sup> as well as the chronic underfunding of indigent defense systems across the United States.<sup>29</sup> And while access to effective counsel has been shown to have a positive effect on case outcomes,<sup>30</sup>

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qualitative study of defense lawyers and noting that defense lawyers see themselves as criminal justice system reformers in ways similar to cause lawyers in other substantive arenas); Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1074-76 (2013) (describing holistic defense models employed by The Bronx Defenders, the San Francisco Public Defender Office, and the Minneapolis Legal Rights Center, which provide individual representation and advocacy targeted at changing social policies); Jonathan A. Rapping, *Returning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TEX. L. REV. 1225, 1226 (2014) (book review) ("[T]hat a strong public defender system is necessary to achieve systemic reform ... because of the role the public defender plays in interrupting a process that is increasingly designed to convict and punish poor people en masse and because of the potential of a strong community of public defenders to galvanize the movement needed to push for important policy reform"); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099-1100 (2013) (arguing that an increase in misdemeanor trials would result in costs that would have systemic effects on prosecutorial charging, policing, and legislative decision-making).

28. See, e.g., *infra* notes 353-54 and accompanying text.

29. There is an expansive literature on the effects of underfunding indigent defense counsel. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1039-40 (2006); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1341-42 (2012); Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1783-90 (2016).

30. Studies of the provision of counsel at bail hearings are particularly apt, given the similarities in arguments related to the defendant's financial circumstances both in bail determinations and in the setting and collection of economic sanctions. Compare Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1743-44 (2002) (describing the use of the defendant's financial circumstances in bail hearings), with *infra* Parts I.A.3-4 (regarding arguments related to a defendant's ability to pay economic sanctions available at sentencing pursuant to the Excessive Fines Clause and during collections). For example, in a randomized control experiment of bail hearings in Baltimore, researchers found that represented defendants were over two-and-a-half times more likely to be released on a personal recognizance bond than unrepresented defendants. See Colbert et al., *supra*, at 1752-53. Of those defendants upon whom the court imposed bail, represented defendants were over four times more likely to have bail reduced; where reductions occurred, the average reduction for represented defendants was nearly \$1000 as compared to \$166 for unrepresented defendants; and those who were represented were significantly more likely to have bail set at less than \$500. See *id.* at 1753-55; see also *id.* at 1747-48 (describing early studies—the Manhattan Bail Project in the 1960s and the Evaluation of Early Representation by Defense Counsel Field Test in the 1980s—which also showed that defendants had better outcomes when represented

where counsel fails to provide zealous representation, individual defendants may end up worse off in terms of the results of their individual cases.<sup>31</sup> The presence of ineffective counsel, therefore, risks creating a constitutional stamp of approval on what is actually a deficient system that merely entrenches the legal and political status quo.<sup>32</sup> Both scholars and advocates have provided compelling arguments regarding why such systems are unjust and how they should be reformed.<sup>33</sup> I agree that such reforms must take place and

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by counsel at bail hearings).

31. See, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 191-97 (2012) (examining random assignment of counsel and determining that, compared to appointed private counsel, public defenders had significantly better results as measured by both conviction rate and severity of sentencing in part because judges may assign counsel who file fewer pretrial motions and raise fewer factual claims, and because the flat-fee compensation system disincentivizes zealous advocacy); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1330-31 (1989) (finding that juveniles represented by counsel fared worse with regard to severity of disposition than those who were not represented and offering as one explanation a lack of competence of counsel). Recently, Erica Hashimoto engaged in an analysis of federal misdemeanor cases from 2000 through 2005 and determined that pro se defendants were more likely to have favorable sentencing outcomes for all case types other than driving under the influence. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489-94 (2007). While Hashimoto used the best available data, the study had serious limitations. The federal court administrators failed to code whether defendants were pro se or represented in one-third of the cases in the data set—over 19,000 cases—which may have had a significant effect on the study’s results. See *id.* at 489 n.128. Further, as Hashimoto notes, the data cannot convey whether the pro se defendants’ cases were significantly weaker. See *id.* at 495. The study also does not control for race, gender, criminal history, and the like, all of which have been tied to sentencing outcomes. See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311-12 (2001); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 90-95 (2015). Therefore, while Hashimoto’s study raises critical questions regarding why federal misdemeanants appear to be better off without representation, it cannot say whether the presence or absence of counsel is a causal factor driving those results. Cf. Roberts, *supra* note 27, at 1123-24 (discussing Hashimoto, *supra*).

32. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2179-81 (2013); see also Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1288 (2013) (describing underfunded defense systems as providing “Potemkin lawyering, a costly charade far removed from Gideon’s vision”); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 193 (2008) (noting that underfunding and structural issues result in attorneys seeing themselves as “a cog in the judge’s machinery that functions to move cases through court quickly”).

33. See, e.g., John Pfaff, Opinion, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <http://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html>

in fact call in this Article for indigent defense representation to be given more political and doctrinal attention.<sup>34</sup> But it is also important to recognize that even under current conditions, public defenders are capable of doing important work.<sup>35</sup> Even in an imperfect system—including in Ferguson, where change is occurring even though there is no indigent defense system and so only a fraction of defendants are represented—indigent defense representation has a key role to play in challenging systems of governance.

This Article proceeds in three parts. Part I is descriptive. In it, I document how Ferguson's municipal court system flouted constitutional rules through its design at adjudication, at sentencing, and in its post-sentencing collections practices.<sup>36</sup> By doing so, Ferguson maintained a system of governance in which the revenue-generating capacity of its court was prized over fair treatment of the most politically vulnerable members of its community. I also detail the role individual defense attorneys have played, in conjunction with social justice activists, civil rights litigators, and the Department of Justice, in achieving significant reforms in Ferguson.<sup>37</sup> These reforms have included the elimination of certain court fees and a particularly ubiquitous ordinance, relief for people burdened with ongoing debt related to economic sanctions, and the replacement of the officials in positions holding the most power over its court system, but have not yet included the creation of a public defender system.

In Part II, I consider what the events in Ferguson might teach us about the role indigent defense representation can play in criminal justice reform elsewhere. In particular, by litigating individual cases, counsel can alter the cost-benefit of crime policy decisions made by lawmakers, prosecutors, and police. Further, individual defense representation can inform the public debate by forcing the government to respond to allegations of improper governance and by identifying patterns of abuse. The power of counsel to create

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[<https://perma.cc/E3NZ-V8CT>] (calling for federal funding for indigent defense).

34. See *infra* Part III.B.

35. See David Alan Sklansky, Lecture, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580 (2008) (offering a “conservative estimate” of 300,000 dismissals of criminal charges each year based on Fourth Amendment challenges alone).

36. See *infra* Part I.A.

37. See *infra* Part I.B.

fiscal and political pressure will be greatest in jurisdictions that share certain characteristics with Ferguson: a dependence upon criminal systems to generate revenue, a pattern of unconstitutional activity, or the targeting of economically vulnerable communities. Still, because indigent defense litigation creates system costs and forces the government to explain its behavior in other settings, it serves as a check even where systemic abuses are less prevalent. I also consider how the unique circumstances in Ferguson—in particular, the public attention to the municipality created by the shooting of Michael Brown and advocacy efforts of civil rights litigators, the Department of Justice, and social justice advocates—support the need for indigent defense counsel. Yet, even setting aside these conditions, the work of pro bono attorneys engaged in traditional indigent defense representation in even a handful of cases has created both fiscal and political pressure on Ferguson officials. Because in most jurisdictions abuses go without the public scrutiny and various forms of advocacy seen in Ferguson, access to individual defense counsel becomes that much more significant.

In Part III, I examine theoretical and normative implications that may be drawn in two areas from the work of individual defense counsel in Ferguson. A full examination of these areas of inquiry is beyond the scope of this Article, but the experience in Ferguson provides useful insight nonetheless. First, I consider how Ferguson fits within an ongoing scholarly debate over whether constitutional criminal procedural rules or local government controls over procedure serve as a better check against criminal justice abuses. Ferguson provides an opportunity to test the terms of the debate in a system where low-level offenses are punished through economic sanctions. Placing control over procedure in the hands of local government creates risks too great: that revenue generation will take priority over fair process, that historical practices of targeting poor and particularly black communities for low-level offenses will continue, and that policing that violates constitutional procedural rules will aid in manufacturing convictions necessary to support court systems' revenue-generating capacity. I posit, therefore, that the experience in Ferguson supports keeping constitutional procedural rules within defense counsel's arsenal to serve as a check on governmental overreach.

Second, this investigation into Ferguson illustrates two problems that arise when access to counsel is thought of too narrowly, as purely an individual constitutional right. One, lawmakers can use the constitutional pedigree of the right to obscure the political choices they make to deny counsel. And two, although the ability of defense counsel to seek the enforcement of constitutional rights that protect against government abuse is critical to counsel's systemic effect, the right to counsel doctrine is myopically focused on the role counsel plays in securing negative liberties and ignores the ways in which defense representation functions as a component of participatory democracy. By overlooking how access to counsel supports that core democratic value, the right to counsel doctrine fails to recognize an independent and important reason for the recognition of a robust right. With these problems in mind, those seeking broad criminal justice reform should include access to indigent defense representation as a prominent part of both political and doctrinal efforts at systemic reform.

## I. FERGUSON

What follows is a comparison between the Ferguson municipal court system as it existed for decades before the shooting of Michael Brown in August of 2014, and after. The comparison begins with a description of a litany of constitutional rules violated in Ferguson,<sup>38</sup> and ends by providing a picture of how a group of pro bono attorneys providing indigent defense representation in a handful of cases—along with civil rights litigators, the Department of Justice, and social justice activists—were integral in creating meaningful change to the operation of criminal justice in Ferguson.<sup>39</sup>

### *A. Ferguson's Municipal Court System Before the Shooting of Michael Brown*

Before the shooting of Michael Brown turned public attention toward Ferguson, city officials there maintained a municipal court system in which charges were pursued overwhelmingly against

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38. *See infra* Part I.A.

39. *See infra* Part I.B.



members of the region's poor and black communities, in which convictions and economic sanctions were issued perfunctorily, and in which people who were too poor to pay those sanctions were routinely incarcerated.<sup>40</sup> As a result of these and other abuses, the municipal courts generated millions of dollars in revenue for the city of Ferguson each year.<sup>41</sup>

A key component of this system was that Ferguson officials took no steps to provide indigent defense counsel.<sup>42</sup> At the time, pro bono representation—primarily provided by legal aid attorneys from the ArchCity Defenders and students at university legal clinics—served as defense counsel for only a fraction of defendants, leaving the vast majority of defendants unrepresented.<sup>43</sup> Even that representation did not result in significant litigation, as—for reasons detailed further below—the municipal court quickly disposed of cases in which counsel appeared.<sup>44</sup> As a result, Ferguson was able to sidestep litigating numerous constitutional violations.<sup>45</sup>

To be clear, I do not claim that Ferguson officials intentionally denied counsel in order to entrench the ability to use the municipal court system to raise revenue, to criminalize particular conduct, or to support particular forms of policing; they may or may not have. Rather, I claim that, regardless of intent, for decades Ferguson officials were able to maintain a system of governance in which the police and municipal courts were used to generate revenue at the expense of the most politically vulnerable members of the community,<sup>46</sup> at least in part because defense counsel was not available

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40. See FERGUSON REPORT, *supra* note 9, at 2-5.

41. See *id.* at 9-10.

42. See *id.* at 58.

43. Pro bono representation was afforded by the ArchCity Defenders, St. Louis University Criminal Defense Clinic, Washington University School of Law Juvenile Law and Justice Clinic, and a few private practitioners, but only in an estimated 10 to 25 percent of cases. See Balko, *supra* note 2; see also Harvey Interview, *supra* note 1 (describing appearing at Ferguson's municipal court and witnessing hundreds of people without counsel).

44. See *infra* notes 74-78 and accompanying text.

45. See *infra* Parts I.A.1-4.

46. See T.E. Lauer, *Prolegomenon to Municipal Court Reform in Missouri*, 31 MO. L. REV. 69, 86-94 (1966) (describing Missouri's municipal court practices as including a focus on revenue generation, the unnecessary use of arrest warrants and incarceration, procedures that resulted in multiple hearings on even minor offenses, and practices that made court appearances difficult for many defendants); see also *id.* at 90 ("It is clear that many municipalities have at times conceived of their municipal courts in terms of their revenue-

to raise legal challenges to these practices. Thus, Ferguson is illustrative of how a system in which counsel is denied allows constitutional deficiencies to flourish in a manner that supports the use of court systems as tools for revenue generation.

### 1. *System Design*

Ferguson's municipal court system was designed to maximize its revenue-generating potential.<sup>47</sup> That design, however, left Ferguson in violation of long-standing due process limitations on pecuniary interests in economic sanctions. Beginning in the 1920s, the U.S. Supreme Court repeatedly struck down systems designed so that actors with adjudicative authority regarding economic sanctions were in a position where they may have been tempted to base decisions not on fairness, but on either a desire to generate revenue for the government or to satisfy their own pecuniary interests.<sup>48</sup> Evidence of governmental self-dealing exists where (1) the amount of revenue to be generated from fines is substantial enough that it is critical to the jurisdiction's financial stability<sup>49</sup> or offsets the need for increased taxation;<sup>50</sup> (2) the system's design places those with power over the outcome of an investigation or trial in the position of having partisan interests in governmental finances;<sup>51</sup> or (3) the volume of cases brought onto the court's docket appears to be driven by an interest in revenue generation.<sup>52</sup> Evidence of individual

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raising ability, and that local law enforcement and administration of justice have been run with disproportionate emphasis upon alleviating the burden upon the local taxpayers.”).

47. See FERGUSON REPORT, *supra* note 9, at 9.

48. See *Connally v. Georgia*, 429 U.S. 245, 249-51 (1977) (per curiam); *Ward v. Village of Monroeville*, 409 U.S. 57, 59-62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 520, 522-23, 535 (1927). These same principles existed in the common law prior to the Court's first pronouncement. See Lauer, *supra* note 46, at 90 (“At common law, ... it was settled as to municipal courts ‘that the municipal corporation could bring no action therein against a stranger where the effect would be to benefit the corporation or increase its funds, for that would be to make the corporation itself both judge and party.’” (quoting 2 DILLON, MUNICIPAL CORPORATIONS § 741 (5th ed. 1911))).

49. See *Ward*, 409 U.S. at 58.

50. See *Tumey*, 273 U.S. at 533.

51. See *Ward*, 409 U.S. at 58 n.1 (describing mayor's control over police chief's determination of filing charges); *Tumey*, 273 U.S. at 533-34 (describing mayor's dual role as judicial officer and county executive).

52. See *Ward*, 409 U.S. at 58 n.1 (citing police chief's testimony that the mayor ordered him to charge violations in the municipal, rather than county, court whenever possible so that



pecuniary interests exists where the actor stands to directly benefit from a decision of whether to impose a sanction, for example, by receiving even a small, direct payment of an administrative fee assessed.<sup>53</sup> Officials can avoid both improper governmental-interest and self-dealing problems by walling off actors with adjudicatory power from the jurisdiction's finances and executive functions, and ensuring that adjudicators receive no personal financial gain related to adjudicatory decision-making apart from a salary set independent of case outcome.<sup>54</sup> But where either governmental or personal pecuniary interests may taint decisions leading to the imposition of economic sanctions, the system "*necessarily* involves a lack of due process of law."<sup>55</sup>

Despite these long-standing constitutional rules, Ferguson is highly dependent upon economic sanctions for its financial stability. Its revenues from economic sanctions reached nearly 2.6 million dollars in 2013, constituting over 20 percent of total revenue in its general fund.<sup>56</sup> Before the Department of Justice began its investigation into Ferguson's use of economic sanctions, the city's 2015 revenues from fines and fees were projected to exceed 3 million dollars, jumping to nearly 25 percent of the city's general fund.<sup>57</sup> It is evident that Ferguson used economic sanctions to fund services unrelated to the crime of conviction, thereby avoiding the need to generate tax revenue for such services. For example, a conviction for having weeds in one's yard carries mandatory surcharges for a crime victim's compensation fund, an "Inmate Prisoner Detainee Security" fund, and a fund for the local domestic violence shelter.<sup>58</sup>

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the village could retain economic sanctions imposed); *Tumey*, 273 U.S. at 521 (describing mayor's statement that the town's "Liquor Court" would only operate when the town is short on funds).

53. See *Connally*, 429 U.S. at 246 (five dollars per warrant issued); *Tumey*, 273 U.S. at 523 (twelve dollars in costs per conviction).

54. See *Dugan v. Ohio*, 277 U.S. 61, 64-65 (1928) (finding no due process violation where mayor had exclusively judicial responsibilities and no opportunity to personally benefit from decisions rendered).

55. See *Tumey*, 273 U.S. at 534 (emphasis added).

56. CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET: FISCAL YEAR 2014-2015, at 50 (2014) [hereinafter 2014-15 BUDGET], <http://www.fergusoncity.com/documentcenter/view/1701> [<https://perma.cc/J57L-V5X2>].

57. *Id.*; see also FERGUSON REPORT, *supra* note 9, at 9-10.

58. See FERGUSON MUN. COURT, VIOLATIONS BUREAU SCHEDULE OF OFFENSES AND FINES (Apr. 1, 2015) [hereinafter FERGUSON VIOLATIONS SCHEDULE], <https://www.fergusoncity.com/>

Further, not only did Ferguson officials fail to wall off adjudicative actors, they maintained a system in which those responsible for the assessment and collection of economic sanctions had partisan interests in raising revenue for the city. The Department of Justice investigation revealed that, in order to capture the maximum amount of economic sanctions, Ferguson instituted a court system that not only matched the practices outlawed in prior Supreme Court cases, but exceeded them in the intricacy by which the actors in the system operated together to achieve that end.<sup>59</sup>

In Ferguson, the city manager is the chief executive officer, responsible for Ferguson's financial affairs.<sup>60</sup> The city manager supervises the chief of police, and the chief of police oversees the municipal court, which operates as a component of, and physically inside of, the police department.<sup>61</sup> For a judge to be appointed to the municipal court, she must first be selected by the city manager, followed by approval of the city council.<sup>62</sup> Appointment of the prosecutor is also subject to approval of the city manager.<sup>63</sup> Court staff report directly to the chief of police, including the court clerk, who is authorized under the city's municipal code to accept guilty pleas and dispose of charges without judicial oversight.<sup>64</sup> In other words, although the city manager did not himself have the ability to convict, acquit, or sentence, he selected and supervised those who did.

The various players with adjudicative power in Ferguson's municipal court system worked hand in hand with the city manager to ensure that revenue generation was prioritized. Take, for example, the court clerk, who, as noted above, had the power to dispose of charges.<sup>65</sup> Ferguson city officials consulted the court clerk with respect to how to improve revenue generation and to set goals regarding how much funding the court might generate in a given

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DocumentCenter/View/1829 [https://perma.cc/YS6X-VQGW].

59. See FERGUSON REPORT, *supra* note 9, at 9-15.

60. *Id.* at 7.

61. *Id.* at 7-8.

62. *Id.* at 8.

63. See ARCHCITY WHITE PAPER, *supra* note 3, at 36.

64. See FERGUSON REPORT, *supra* note 9, at 8.

65. See *id.* at 8, 47.

year.<sup>66</sup> In turn, the court clerk put pressure on other actors to work toward revenue generation. Emails located by the Department of Justice, for example, revealed that the court clerk prodded a prosecutor to seek higher economic sanctions with the warning, “We need to keep up our revenue.”<sup>67</sup>

Ferguson’s prosecutors also had adjudicative power in Ferguson’s system, as they were given authority to deny requests for extensions of time to pay debts stemming from economic sanctions.<sup>68</sup> This occurred with apparent regularity so that prosecutors could “aid in the court’s efficient collection of its fines.”<sup>69</sup> That prosecutors in St. Louis County’s municipalities felt intertwined with the court as a revenue-generating partner is also obvious from a comment made by a prosecutor who agreed to reduce a fine after a plea negotiation with a pro bono attorney from the ArchCity Defenders: “You’re taking money right out of my pocket, here.”<sup>70</sup>

Willingness to use economic sanctions to generate revenue was a key component of the judicial role in Ferguson as well. Court costs are set by the Missouri Supreme Court and legislature, but the state leaves open a gray area in which municipal courts appear free to impose additional fees.<sup>71</sup> When Ferguson municipal court Judge Ronald Brockmeyer was appointed to the bench in 2003, he took advantage of that gray area and created a list of new fees related to missed payments and court appearances that the Department of Justice described as “abusive” and possibly “unlawful.”<sup>72</sup> In a 2011 city finance director’s report, Judge Brockmeyer was quoted as saying that “none of these changes could have taken place without the cooperation of the Court Clerk, the Chief of Police, and the Prosecutor’s Office.”<sup>73</sup>

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66. *See id.*

67. *Id.* at 14-15.

68. *See id.* at 14.

69. *See id.* (quoting an acting Ferguson prosecutor).

70. Balko, *supra* note 2.

71. *See “St. Louis on the Air”: Law Professionals Discuss Court Fines and Fees*, ST. LOUIS PUB. RADIO (Sept. 30, 2014), <http://cpa.ds.npr.org/kwmu/audio/2014/09/093014aweb.mp3> [<https://perma.cc/P69P-NA74>] (discussing Missouri’s rules regarding costs and fees with Overland, Missouri, municipal court Judge Frank Vatterott).

72. FERGUSON REPORT, *supra* note 9, at 14.

73. *Id.* (quoting Ferguson finance director’s 2011 report).

Prosecutors and the municipal judges also cooperated to avoid expenditures of municipal resources by dismissing or reducing charges in many of the handful of cases in which the defendant was represented by counsel.<sup>74</sup> Obtaining a favorable outcome often took only a single phone call to the prosecutor.<sup>75</sup> It was important for the system's revenue-generating function to handle most represented cases in this manner.

Not only does access to counsel create a risk that the court will be faced with evidentiary and constitutional challenges of the kind described herein,<sup>76</sup> it also carries the threat of case removal. Under Missouri law, municipal court defendants have an opportunity to have a case removed to an associate circuit court for adjudication, a process that eliminates the "home court advantage" of an appearance before Ferguson's municipal court, increasing the likelihood of a favorable outcome,<sup>77</sup> while also enlarging prosecution costs. Unrepresented defendants were seemingly unaware of the possibility of removal and simply did not seek the opportunity to be heard outside of the Ferguson municipal court.<sup>78</sup> By quickly resolving cases of represented defendants, the municipality avoided potential removal costs.

The Department of Justice's review of court records also showed that, in addition to installing new fees and resolving those few cases

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74. See BETTER TOGETHER, PUBLIC SAFETY—MUNICIPAL COURTS 3 (2014) [hereinafter BETTER TOGETHER, MUNICIPAL COURTS], <http://www.bettertogetherstl.com/wp-content/uploads/2014/10/BT-Municipal-Courts-Report-Full-Report1.pdf> [<https://perma.cc/PB3T-CC6X>] ("Lawyers get 'no-points' deals and dismissals for their clients; the unrepresented defendants do not."); Harvey Interview, *supra* note 1 (describing the experience of routinely having cases dismissed or charges significantly reduced after appearing as counsel, but also noting that the vast majority of defendants appeared without counsel).

75. See Balko, *supra* note 2; Harvey Interview, *supra* note 1. In at least one case in which the defendant retained counsel, Ferguson prosecutors appeared to have been so disorganized that they contended at various points that the charges had been dismissed or pled down, when neither had actually occurred. See Tony Messenger, *Ferguson's Bumbling Court Costs Naval Vet His Security Clearance*, ST. LOUIS POST-DISPATCH (Aug. 13, 2016), [http://www.stltoday.com/news/local/columns/tony-messenger/messenger-ferguson-s-bumbling-court-costs-naval-vet-his-security/article\\_69279932-8959-5f04-9c68-d046fd18d925.html](http://www.stltoday.com/news/local/columns/tony-messenger/messenger-ferguson-s-bumbling-court-costs-naval-vet-his-security/article_69279932-8959-5f04-9c68-d046fd18d925.html) [<https://perma.cc/AY4W-NDLG>].

76. See *infra* Parts I.A.2-4.

77. See Harvey Interview, *supra* note 1.

78. This outcome is evident in the increase in prosecutor costs related to hearings in the associate circuit courts in recent months as greater numbers of defendants have gained legal representation. See *infra* notes 231-43 and accompanying text.

where counsel appeared, Judge Brockmeyer was not attending to other aspects of his job. The Department's Report noted that he "often times does not listen to the testimony, does not review the reports or the criminal history of defendants, and doesn't let all the pertinent witnesses testify before rendering a verdict."<sup>79</sup> In one of the few cases where a defendant was both represented and the representation did not result in a favorable resolution of the case without a hearing, Judge Brockmeyer interrupted counsel's attempts to cross-examine the officer and threatened to incarcerate the attorney for contempt if he continued to assert a defense for his client.<sup>80</sup> For those without counsel who chose to challenge the charges against them, Judge Brockmeyer would often add additional charges and fees, or even have those who asked questions or attempted to put on a defense arrested for contempt of court.<sup>81</sup>

Improprieties in the courtroom were swept aside, however, because Judge Brockmeyer was so effective at generating revenue.<sup>82</sup> When the city manager nominated him for reappointment, a city council member expressed concerns about judicial fairness.<sup>83</sup> The city manager responded by stating, "[i]t goes without saying the City cannot afford to lose any efficiency in our Courts, nor experience any decrease in our Fines and Forfeitures."<sup>84</sup>

Arguably, Judge Brockmeyer's refusal to actually adjudicate innocence or guilt meant that the adjudicative decision maker was, in effect, the police officer who initially chose to file a charge or issue a ticket. As Alexandra Natapoff has explained, in low-level offenses of the kind enforced in Ferguson, "evidence and law are displaced by the fact of selection itself: it becomes more accurate to say that they were convicted because they were arrested, and that they may have been arrested for any number of nonevidentiary reasons."<sup>85</sup> In Ferguson, stops equated to convictions, so officers were encouraged

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79. FERGUSON REPORT, *supra* note 9, at 43 n.22 (quoting a Ferguson city council member).

80. *See id.* at 44.

81. *See id.* at 48-49.

82. *Id.* at 15.

83. *See id.*

84. *Id.* (alteration in original).

85. Natapoff, *supra* note 29, at 1354; *see also id.* at 1318 ("[W]here protective procedures are weakest, enforcement selection processes—not evidence or substantive law—effectively determine who will be convicted.").

to write multiple tickets during every stop in order to generate the maximum amount of revenue;<sup>86</sup> in one case an officer issued fourteen separate tickets in a single stop.<sup>87</sup>

Finally, the volume of cases to reach Ferguson's municipal court also is indicative of a pecuniary interest in revenue generation. The chief of police made staffing and other policy decisions in order to increase the volume of cases, rather than improve public safety. For example, in March 2010, the city finance director alerted the chief of police that "unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year.... Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue."<sup>88</sup> The chief responded by stating that he could generate more revenue with shift changes, which were then put in place.<sup>89</sup> Similarly, the finance director and city manager worked with the chief of police to develop new initiatives designed to "fill the revenue pipeline," including a scheme to balance the use of highway traffic enforcement and red light cameras so as to achieve the highest possible revenues without exceeding a statutory cap on the amount of revenues municipalities were allowed to generate through fines.<sup>90</sup> Further, because the Ferguson municipal ordinance code largely overlaps with the Missouri state code, and therefore charges may be filed in either county or municipal courts,<sup>91</sup> the police filed charges in the municipal system whenever possible, thereby increasing the volume of cases and the amount of revenue generated.<sup>92</sup>

In addition to the overwhelming evidence that adjudicative actors in Ferguson's system were motivated to increase the city's revenue,

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86. *See* FERGUSON REPORT, *supra* note 9, at 11.

87. *Id.*

88. *Id.* at 10; *see also id.* at 13 (quoting an email from the city finance director: "Court fees are anticipated to rise about 7.5%. I did ask the Chief if he thought the PD could deliver 10% increase. He indicated they could try.").

89. *Id.* at 10.

90. *See id.* at 13-14.

91. *See id.* at 7.

92. *See id.*; *cf.* *Ward v. Village of Monroeville*, 409 U.S. 57, 58 n.1 (1972) (describing a mayor's order that a police chief file cross-listed charges in the mayor's court so the municipality could retain economic sanctions). Both the overlap of municipal and state codes and the role of law enforcement in directing code violations to municipal courts in order to retain fees is long-standing in Ferguson and elsewhere. *See* Lauer, *supra* note 46, at 77, 90.

it is also arguable that at least some of these actors had a personal pecuniary interest at stake. Emails reveal that police officers were informed that their salaries may be held stagnant or that they may be given worse assignments if they did not aggressively ticket, and that promotions may be in order for those who generated significant revenue.<sup>93</sup> And though salaries for other system actors were apparently set without a linkage to the amount of fines generated, the Department of Justice found that “City officials, including the Municipal Judge, the Court Clerk, and [Ferguson Police Department] supervisors [were] assisting friends, colleagues, acquaintances, and themselves in eliminating citations, fines, and fees.”<sup>94</sup> Because one person may serve as a prosecutor in one town and a judge in another, the practice of fixing tickets expanded across municipalities, making the personal pecuniary benefit of avoiding an economic sanction “routine.”<sup>95</sup>

In sum, far from providing a neutral arbiter, adjudicative actors in Ferguson’s system worked “primarily ... to compel the payment of fines and fees that advance[d] the City’s financial interests,”<sup>96</sup> and perhaps their own. Ferguson’s practices clearly violated long-standing constitutional restrictions on pecuniary interests in judicial systems.

## 2. Adjudication

The system of governance in Ferguson was also grounded on the municipal court’s ability to render faulty convictions based on

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93. See FERGUSON REPORT, *supra* note 9, at 11-12.

94. *Id.* at 74.

95. See *id.* at 75. In addition to the personal pecuniary benefit of avoiding the costs of tickets, at least one example has been covered of a possible use of the area’s municipal courts to procure favors with financial value: a prosecutor in Frontenac, a town neighboring Ferguson, purportedly dropped underage drinking charges against the daughter of a wealthy businessman in exchange for free golf at a prestigious local club. See Jeremy Kohler et al., *Municipal Courts Are Well-Oiled Money Machine*, ST. LOUIS POST-DISPATCH (Mar. 15, 2015), [http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article\\_2f45bafb-6e0d-5e9e-8fel-0ab9a794fcdc.html](http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article_2f45bafb-6e0d-5e9e-8fel-0ab9a794fcdc.html) [<https://perma.cc/B5KJ-QND7>] (quoting an email from an associate circuit court judge to the prosecutor as saying, “Her Dad is Wayne Baker (owner of Warrenton Oil and a ---load of other stuff)... Can we make this one go away??? By the way, we’re hooked up for golf at Porto Cima at the Conference!!! (is no cost okay???)!!!”).

96. FERGUSON REPORT, *supra* note 9, at 3.



evidence obtained in violation of the Fourth Amendment,<sup>97</sup> issued without sufficient evidence of the charged offense in violation of due process,<sup>98</sup> or based on ordinances that are likely unconstitutional as written or as applied.<sup>99</sup>

The Ferguson police department routinely violated the Fourth Amendment in relation to claims processed in its municipal courts. The Department of Justice's review of police records revealed "numerous incidents in which—based on the officer's own description of the detention—an officer detained an individual without articulable reasonable suspicion of criminal activity or arrested a person without probable cause."<sup>100</sup> This includes arrests based on so-called "wanted"—a statewide database in which Missouri law enforcement share a list of people who they want arrested, but for whom they have not sought an arrest warrant.<sup>101</sup> Though the database is intended to include only cases for which there is probable cause for arrest, the Ferguson police routinely issued "wanted" precisely because they did not have probable cause.<sup>102</sup> Ferguson police also practiced a technique they called "ped checks," which involved stopping pedestrians without any suspicion of criminal activity<sup>103</sup> in violation of even the low reasonable suspicion standard mandated by *Terry v. Ohio*.<sup>104</sup>

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97. See U.S. CONST. amend. IV.

98. See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The government must prove beyond a reasonable doubt every element of a charged offense.").

99. See *infra* notes 111-19.

100. FERGUSON REPORT, *supra* note 9, at 17.

101. *Id.* at 22.

102. See *id.* at 22-23.

103. See *id.* at 18.

104. See 392 U.S. 1, 21 (1968). In June 2016, the Supreme Court decided *Utah v. Strieff*, in which it held that evidence found in an unconstitutional stop is not subject to the exclusionary rule if, in the course of the stop, the police determine that the person was subject to an active warrant. 136 S. Ct. 2056, 2059 (2016). As Justice Sotomayor pointed out in a fierce dissent, in jurisdictions like Ferguson where the municipal court issues thousands of warrants related to inability to pay, see *infra* notes 144-50 and accompanying text, this renders an already lenient Fourth Amendment essentially moot, see *Strieff*, 136 S. Ct. at 2068-71 (Sotomayor, J., dissenting). The Court's articulation of its holding, however, emphasized both that the warrant must be valid, and that a pattern of stopping citizens without reasonable suspicion or probable cause may justify the application of the exclusionary rule. *Id.* at 2059, 2062-63 (majority opinion). As a result, indigent defense counsel retains an opportunity to seek the exclusion of evidence in Ferguson. Further, limited as it may be, the Fourth Amendment right is reinforced in a system in which counsel is afforded, because there would be both a reduction in the number of convictions and a limitation on economic sanctions to



Convictions in Ferguson were also obtained without evidence of all elements of the offense in violation of due process. Fourth Amendment violations played a key role in many such cases. Take, for instance, the ordinance prohibiting “Failure to Comply,” an element of which is that the police have issued a lawful order.<sup>105</sup> Convictions for failure to comply were a mainstay in Ferguson’s municipal court.<sup>106</sup> Ferguson police had a practice of ordering people to stop without having the requisite probable cause or reasonable suspicion needed to meet the element that the order to stop be lawful; when a person would not stop, the police would then arrest her for failure to comply.<sup>107</sup> Even setting aside Fourth Amendment violations, obviously deficient charges were pursued. For example, the Department of Justice described an incident in which five people were approached by an officer who claimed to smell marijuana.<sup>108</sup> The officer arrested all five for the crime of “gathering in a group for the purposes of committing illegal activity,” despite the fact that he found no marijuana, and therefore had no evidence of illegal activity, which was a necessary element of the offense.<sup>109</sup>

Not only were convictions obtained in Ferguson without satisfaction of the elements of the offense, the ordinances that formed the basis of many convictions were unconstitutional as written or as applied. For example, certain ordinances appear to be unconstitutional in that they prohibit legal activity, such as ordinances requiring occupancy permits that may be used to preclude people from hosting overnight guests.<sup>110</sup> Other ordinances, including the failure to comply statute used so ubiquitously in Ferguson, appear

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amounts that are feasible for defendants to pay. As a result, there would be a drastic reduction in the number of warrants issued by the court, meaning that the *Strieff* exception would be triggered less frequently.

105. See FERGUSON, MO., CODE OF ORDINANCES ch. 29, art. II, § 29-16(1) (2016).

106. See FERGUSON REPORT, *supra* note 9, at 19-22.

107. See *id.* at 19-20.

108. See *id.* at 18.

109. *Id.* For similar examples in Baltimore and New York City, see Natapoff, *supra* note 29, at 1359.

110. See FERGUSON, MO., CODE OF ORDINANCES ch. 7, art. VII, § 7-145.6 (2016). Compare Balko, *supra* note 2 (describing a hearing involving a woman ticketed for allowing her boyfriend to spend the night in her apartment in a neighboring municipality in which the prosecuting attorney argued “nothing good happens after 10pm”), with *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that there is a constitutionally protected liberty interest in intimate sexual contact between consenting adults).

to be unconstitutionally vague. That ordinance prohibits “disobeying a lawful order in a way that hinders an officer’s duties.”<sup>111</sup> As the Department of Justice noted, the meaning of “hinders an officer’s duties” provides too much discretion to the police and inadequate notice to the public as to what behaviors might be criminal,<sup>112</sup> so much so that it is used interchangeably with a separate charge for “Failure to Obey.”<sup>113</sup> This certainly suggests the ordinance is unconstitutionally vague.<sup>114</sup>

In addition to being deficient as written, the failure to comply statute also suffers from constitutional infirmity as applied. The ordinance requires that people identify themselves to the police when asked.<sup>115</sup> The Supreme Court has held that an arrest for the failure to provide identification is only constitutional where an officer has reasonable suspicion of criminal behavior and the request for identification is “reasonably related to the circumstances justifying the stop.”<sup>116</sup> But Ferguson police are trained to ask for identification of all passengers during a traffic stop—despite having no reasonable suspicion that the passengers are engaged in criminal activity—and to arrest anyone who refuses.<sup>117</sup> Other ordinances are also applied unconstitutionally, including the municipality’s contempt of court ordinance, which Judge Brockmeyer used against people who refused to answer questions related to guilt, in violation of the Fifth Amendment privilege against self-incrimination.<sup>118</sup>

To sum up, Ferguson regularly obtained convictions supported by evidence gathered in violation of the Fourth Amendment, without satisfying the elements of the charged ordinance, and through the use of statutes that were unconstitutional on their face or as

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111. FERGUSON REPORT, *supra* note 9, at 19.

112. *See id.* at 19-21.

113. *See id.* at 52. Vagueness challenges may be particularly useful given that the Roberts Court has shown an increased willingness to limit legislative authority over the reach of criminal law. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (striking down the residual clause of the Armed Career Criminal Act).

114. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (striking down gang loitering ordinance as unconstitutionally vague).

115. FERGUSON REPORT, *supra* note 9, at 19.

116. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 184-85, 188 (2004).

117. FERGUSON REPORT, *supra* note 9, at 21-22; *see also Messenger*, *supra* note 75 (discussing the filing of multiple bogus charges, including failure to comply, against a man who declined to give a Ferguson police officer his Social Security Number).

118. *See supra* note 81 and accompanying text.

applied. As a result, those convictions opened the door for the municipal court to assess economic sanctions.

### 3. Sentencing

Once Ferguson obtained a conviction—constitutionally or not—it amassed revenue by the imposition of fines and fees for low-level offenses without consideration of a defendant’s ability to pay.<sup>119</sup> In many—and perhaps most—cases in Ferguson, this practice triggers the Eighth Amendment’s Excessive Fines Clause.<sup>120</sup> Because excessiveness is measured by assessing whether economic sanctions are grossly disproportionate to the offense of conviction, such claims would have required consideration of both the seriousness of the offense (or lack thereof) and the severity of the punishment on

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119. See FERGUSON REPORT, *supra* note 9, at 44.

120. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). In Missouri, municipal court practices are considered civil, rather than criminal. See MO. REV. STAT. § 479.011(2) (2016) (granting authority for municipalities to establish “an administrative system for adjudicating housing, property maintenance, nuisance, parking, and other civil, nonmoving municipal code violations”). See generally Lauer, *supra* note 46, at 72-83. Despite the civil label, the Supreme Court has held that, for purposes of the Excessive Fines Clause, the civil setting is immaterial so long as the sanction imposed is at least partially punitive. See *Austin v. United States*, 509 U.S. 602, 609-10 (1993); cf. *United States v. Bajakajian*, 524 U.S. 321, 331 n.6, 343 n.18 (1998) (suggesting in dicta that civil *in rem* forfeitures historically would not have been understood as fines, but because forfeiture practices now blur the distinction between civil *in rem* and criminal *in personam* forfeitures, civil forfeitures qualify as fines because they are at least partially punitive). Though the Supreme Court has not had an opportunity to consider whether administrative fees of the type assessed in Ferguson constitute “fines,” several lower courts who have addressed the issue have determined that such fees are sufficiently punitive to fall within the Clause’s ambit. See, e.g., *Sloper v. City of Chicago*, 23 N.E.3d 1208, 1210, 1214-16 (Ill. App. Ct. 2014) (fees for towing and storage of impounded vehicle following arrest); *State v. Griffin*, 180 So. 3d 1262, 1269-70 (La. 2015) (prosecutor costs); *State v. Boyd*, 72 So. 3d 952, 953-55 (La. Ct. App. 2011) (court costs); *State v. Polley*, 2 S.W.3d 887, 894-95 (Mo. Ct. App. 1999) (investigation and prosecution costs).

In addition to the Excessive Fines Clause, another claim that may prove fruitful in Ferguson remains largely undeveloped. That claim stems from an equal protection challenge raised in *Fuller v. Oregon*, in which the Court upheld a fee recoupment statute because it provided protections for those unable to pay, including a hearing at sentencing to determine the defendant’s means and the effect of the sanction on the defendant, and further provided the court authority to waive fees. See 417 U.S. 40, 45, 47-48 (1974). Whether a statute that does not afford such protections violates the Equal Protection Clause remains an open question. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22 (1973) (noting that the Supreme Court has yet to address the question of whether economic sanctions “must be structured to reflect each person’s ability to pay in order to avoid disproportionate burdens”).

those without the financial capacity to pay,<sup>121</sup> both of which may have greatly favored defendants in Ferguson.

The seriousness of the offenses at issue in the Ferguson context are uniquely low for two reasons. First, the municipal court is restricted to addressing only the lowest-level offenses, including both traffic offenses and nonmoving violations, such as having high weeds and grass or excessive noise.<sup>122</sup> While the government certainly has an interest in traffic safety, eliminating blight, and keeping the public order,<sup>123</sup> in terms of balancing crime seriousness against punishment severity, as compared to higher-level offenses, the seriousness of these types of violation remains low.<sup>124</sup> Additionally, beyond the general categorization of the offenses as low-level, a defendant can attack offense seriousness on the basis of whether his particular acts are less serious than all activity that might be captured by a particular offense.<sup>125</sup> For example, Ferguson police ticketed a man for failure to wear a seatbelt when he was in fact not wearing his seatbelt and therefore could be found to have committed the offense and be subjected to a fine.<sup>126</sup> The circumstances surrounding his failure to wear a seatbelt, however, call into question the seriousness of the offense in relation to the fines imposed. At the time, he sat in a parked car next to a community park where he had just finished playing basketball; he was sitting in his car for the purpose of cooling down, not driving,<sup>127</sup> arguably reducing the

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121. See *Bajakajian*, 524 U.S. at 337.

122. See generally MO. REV. STAT. § 479.011.

123. See Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 115-16 (2015); Jason Hancock & Lynn Horsley, *KC Worries that State Legislation Restricting Municipal Courts Would Prolong Blight*, KAN. CITY STAR (Feb. 6, 2016, 7:05 PM), <http://www.kansascity.com/news/politics-government/article58919663.html> [<https://perma.cc/4NEF-B8PX>].

124. Cf. *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (noting that Wisconsin's decision to set the punishment for an offense as a monetary penalty rather than incarceration was a clear indication of the state's belief that the offense was comparatively less serious than other offenses).

125. See *Bajakajian*, 524 U.S. at 337-39 (determining that the defendant was not within the "class of persons" Congress intended to target with a law requiring reporting of currency being transported overseas because the money that defendant transported was legitimately owned, so he was not smuggling illicit funds).

126. See FERGUSON REPORT, *supra* note 9, at 3.

127. See *id.*

seriousness of the offense because the failure to wear his seatbelt did not implicate traffic safety.

Second, Ferguson's purposeful use of its ordinances to generate revenue may call into question the seriousness of the offense. In *Harmelin v. Michigan*, when speaking of the Excessive Fines Clause, Justice Scalia noted that "it makes sense to scrutinize governmental action more closely when the State stands to benefit."<sup>128</sup> Take, for example, the decision by city officials and police to increase traffic enforcement in order to make up a projected sales tax shortfall.<sup>129</sup> The decision required police to rearrange staffing and was carried out despite the fact that those staffing changes were detrimental to community policing efforts.<sup>130</sup> Such evidence that Ferguson was using economic sanctions generated from ordinance violations in part, and perhaps primarily, as revenue-generating mechanisms rather than—or even despite—public safety needs calls into question the seriousness of those violations of that ordinance.

The other side of the excessiveness scale—the severity of the punishment—also cuts in favor of the defense in most cases in Ferguson. Although the lower courts have split on whether a defendant's ability to pay an economic sanction is relevant to the excessiveness inquiry,<sup>131</sup> the Eighth Circuit, where Ferguson resides, considers the financial effect of the fine on the defendant a "critical factor,"<sup>132</sup> and the Supreme Court has also indicated that ability to pay is relevant to an economic sanction's constitutionality.<sup>133</sup>

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128. 501 U.S. 957, 978 n.9 (1991).

129. See *supra* notes 88-90 and accompanying text.

130. See FERGUSON REPORT, *supra* note 9, at 10.

131. Compare *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (holding that the effect of a fine on a defendant's "livelihood" is relevant to excessiveness), *petition for cert. filed*, No. 16-508 (U.S. Oct. 14, 2016), with *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (declining to consider financial effect).

132. See *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996).

133. See *United States v. Bajakajian*, 524 U.S. 321, 335-36 (1998) (discussing how the Excessive Fines Clause's roots are in a provision of Magna Carta that mandated consideration of the effect of an amercement—a predecessor of the fine—on the defendant's livelihood). For a historical accounting of consideration of defendants' ability to pay in colonial and early American law, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 330-35 (2014). Though defendants have access to evidence that would be used to establish ability to pay, that does not mean that they are well-equipped to do so without assistance. Cf. Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 PRISON J. 306, 323 (1994) (finding that inmates believed their chances of paying economic sanctions were significantly

The constitutional relevance of a fine's effect is no small matter, particularly in a place like Ferguson where the unemployment rate is 14 percent, 22 percent of the city's citizens live below the poverty line,<sup>134</sup> and policing and court practices predominantly affect the poor.<sup>135</sup> It may be true that there are some cases where people have sufficient income or assets to pay economic sanctions but choose not to do so. But it is hard to imagine that people with means are routinely risking incarceration<sup>136</sup> or the loss of housing, food, transportation, and other basic necessities<sup>137</sup> by refusing to make a payment. These penalties for being unable to pay can lead to a never-ending cycle of debt and further sanctioning.<sup>138</sup> If the Excessive Fines Clause precludes a court from imposing a fine on a person who cannot pay in the first instance, that cycle never starts. Of course, that also means that the revenue from such sanctions will never accrue to the municipality.

#### 4. Collections

The constitutional deficiencies in Ferguson did not stop with the structure of the system, adjudication of guilt, or sentencing; Ferguson's system for collecting economic sanctions was also blatantly unconstitutional because it violated the Supreme Court's long-standing prohibition on the automatic conversion of an economic sanction into incarceration where the failure to pay the sanction is due to the debtor's inability to do so. In addition to prohibiting the automatic conversion of economic sanctions to incarceration with the debt forgiven at a particular dollar amount per day in the early 1970s,<sup>139</sup> in the 1983 case *Bearden v. Georgia*, the Court also prohibited automatic conversion through probation revocation where

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higher than correctional staff believed inmates' chances were).

134. See ARCHCITY WHITE PAPER, *supra* note 3, at 34-35.

135. See, e.g., *supra* note 6 and accompanying text.

136. See *infra* Part I.A.4.

137. See ARCHCITY WHITE PAPER, *supra* note 3, at 4.

138. See Balko, *supra* note 2.

139. See *Tate v. Short*, 401 U.S. 395, 399 (1971) (striking down on equal protection grounds a statute that converted economic sanctions into incarceration at a rate of five dollars per day served); *Williams v. Illinois*, 399 U.S. 235, 236-37, 239 (1970) (same). Ferguson did not use a pay-or-stay system because it did not provide any discount on debt for incarceration imposed; rather, it imposed additional fees. See *infra* note 170 and accompanying text.

the terms of probation mandate payment.<sup>140</sup> Implicit in its automatic conversion to incarceration decisions and explicit in its probation revocation decision, the Court has required that a jurisdiction seeking to impose incarceration for the failure to pay an economic sanction must first afford the debtor a full hearing—now colloquially known as a *Bearden* hearing—to determine whether she has the means to pay but has declined to do so, or whether the failure to pay is due instead to indigency.<sup>141</sup> When the debtor lacks the means to pay, the court must consider alternate forms of punishment, such as a reduction of economic sanctions, a reasonable payment plan, or community service.<sup>142</sup> Absent some limited circumstance where those alternatives cannot satisfy the government's punitive and deterrent aims, incarceration for the failure to pay economic sanctions is unconstitutional.<sup>143</sup>

How, then, did it come to be that thousands of people in St. Louis County were incarcerated or the subject of arrest warrants tied directly to unpaid fines and fees without having an opportunity to be heard on their ability to pay and without access to alternative sanctions? The answer is simple: Ferguson officials did not adhere to the Court's long-standing prohibition.

The Ferguson municipal court's use of arrest warrants automatically converted economic sanctions into incarceration due to a person's inability to pay, albeit in a way slightly different than the mechanisms addressed by the Court to date.<sup>144</sup> The municipal court issued two types of warrants designed to squeeze as much as possible out of those living in poverty, and did so at a staggering rate.<sup>145</sup> In 2013 alone, the municipal court issued over 9000 war-

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140. 461 U.S. 660, 668-69 (1983).

141. *See id.* at 672.

142. *See id.*

143. *See id.* at 672-73; *Tate*, 401 U.S. at 400-01; *Williams*, 399 U.S. at 244.

144. *See Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1031-32 (E.D. Mo. 2015) (finding plaintiffs' claim that Ferguson's use of arrest warrants violated *Tate* was sufficient to survive a motion to dismiss).

145. *Cf.* Transcript of Oral Argument at 8, *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (No. 14-1373) (Justice Kagan: "I was staggered by the number of arrest warrants that are out on people.").



rants for minor violations,<sup>146</sup> a rate of nearly three warrants per household.<sup>147</sup>

The municipal court issued the first type of warrant for the failure to pay previously ordered economic sanctions.<sup>148</sup> In doing so, the court failed to engage in any effort to assess defendants' ability to pay prior to ordering their incarceration, instead summarily issuing arrest warrants for any "missed, partial, or untimely payment."<sup>149</sup> These warrants, therefore, are functionally equivalent to the probation revocation orders for failure to pay that the Court has struck down, because the failure to pay triggers the incarceration.<sup>150</sup>

The second type of warrant issued by the Ferguson courts was for violation of a "Failure to Appear" ordinance, an independent offense used in relation to hearings regarding previously assessed economic sanctions.<sup>151</sup> Courts certainly have the authority to enforce an order to appear in court. But the system in Ferguson appeared designed to force people to violate court orders in order to generate more sanctions and therefore was arguably even more perverse than the pay-or-stay statutes the Court has struck down.<sup>152</sup> In fact, a municipal judge in a neighboring town told the Department of Justice that adding a failure to appear charge was seen throughout St. Louis County not as a necessary tool for protecting the authority of the court in issuing orders, but as a "cushion for judges against the attack that the court is operating as a debtor's prison."<sup>153</sup>

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146. FERGUSON REPORT, *supra* note 9, at 3.

147. See ARCHCITY WHITE PAPER, *supra* note 3, at 35.

148. See FERGUSON REPORT, *supra* note 9, at 55.

149. See *id.* at 53.

150. See *id.* at 57-58 ("While the court does not *sentence* a defendant to jail in such a case, the result is often equivalent to what *Bearden* proscribes: the incarceration of a defendant solely because of an inability to pay a fine."); see also *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983).

151. See FERGUSON, MO., CODE OF ORDINANCES ch. 13, art. III, § 13-58 (repealed 2014); FERGUSON REPORT, *supra* note 9, at 55; see also Colin Reingold, Essay, *Pretextual Sanctions, Contempt, and the Practical Limitations of Bearden-Based Debtors' Prison Litigation*, 21 MICH. J. RACE & L. 361, 369-72 (2016) (describing use of failure to appear and contempt charges in debtors' prison systems). Failure to appear and contempt charges have gained favor in many jurisdictions in recent years. Erin Murphy has documented the increasing use of such charges as pretextual convictions where the state would otherwise be unable to obtain a conviction on a separate substantive charge. See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1458-63 (2009).

152. See *supra* notes 139-40 and accompanying text.

153. FERGUSON REPORT, *supra* note 9, at 56.



First, the information provided to those owing economic sanctions made it unlikely that they would appear for mandatory hearings. Ferguson police often failed to properly complete tickets, at times leaving out “critical information from the citation, which makes it impossible for a person to determine ... whether a court appearance is required.”<sup>154</sup> This deficiency was exacerbated by the fact that the municipal court ordered more in-person appearances than required under Missouri state law.<sup>155</sup> Further, through the municipal court’s website, mailings, and records, Ferguson’s court staff routinely provided misinformation regarding court hearings.<sup>156</sup> At times, court began prior to the announced session time, and then court personnel locked the doors five minutes after the session was to have begun, effectively blocking people attempting to attend court from actually doing so.<sup>157</sup>

Second, the behavior of the judge and court staff made it reasonable for those with outstanding debt to avoid court for fear of arrest. The court refused to accept partial payments,<sup>158</sup> at times arresting those who arrived without full payments on the spot.<sup>159</sup> Judge Brockmeyer also had a practice of holding in contempt—and incarcerating—those who attended court hearings but also attempted to participate by asking questions about, or seeking relief from, un-payable economic sanctions.<sup>160</sup>

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154. *Id.* at 45.

155. *See id.* at 44, 48.

156. *See id.* at 45-48; *see also* ARCHCITY WHITE PAPER, *supra* note 3, at 36. Once warrants were issued, Ferguson’s clerks did not bother even sending notice in an effort to “save the cost of warrant cards and postage.” FERGUSON REPORT, *supra* note 9, at 47 (quoting email from court clerk to chief of police).

157. ARCHCITY WHITE PAPER, *supra* note 3, at 36. The court clerks also at times closed the court’s payment window earlier than the posted hours, preventing people from paying on time. *See* FERGUSON REPORT, *supra* note 9, at 51.

158. *See* FERGUSON REPORT, *supra* note 9, at 4 (describing a woman who made two attempts to make partial payments toward a parking ticket but was refused both times by the court); *id.* at 42 (regarding court clerk’s refusal to take partial payment from a single mother). Another egregious example of an arrest stemming from an attempt to comply with a court rule was documented by the ArchCity Defenders: “Antonio Morgan reported being denied entry to the court with his children and then being jailed for child endangerment after leaving them in the court parking lot under the supervision of a friend.” ARCHCITY WHITE PAPER, *supra* note 3, at 14; *see also id.* at 21-22.

159. *See* ARCHCITY WHITE PAPER, *supra* note 3, at 21.

160. *See supra* note 81 and accompanying text.

At no point did the municipal court provide defendants a meaningful opportunity to be heard regarding their inability to pay economic sanctions prior to issuing an arrest warrant or during the course of incarceration. Even when defendants attempted to argue inability to pay, the municipal court declined to consider the evidence. In one example, a woman reported her attempt to explain to the judge that she was unable to pay the \$1758 in economic sanctions imposed for traffic violations, to which he responded that she would have to remain in jail for two weeks, and said further: “We’ll see how much money you can come up with.”<sup>161</sup> Additionally, prosecutors and court clerks were given the power to directly reject arguments of inability to pay<sup>162</sup>—far from the meaningful assessment at a judicial hearing contemplated by the Supreme Court. For example, one Ferguson assistant court clerk emailed a rejection to a defendant who had requested a reduced monthly payment plan, simply stating, “everyone says [they] can’t pay.”<sup>163</sup>

Even if Ferguson’s municipal courts had engaged in a meaningful analysis of defendants’ ability to pay, Ferguson still failed to fulfill the additional requirement that alternatives to incarceration be considered. Take, for example, the potential alternatives offered by the Supreme Court: reduction of fines, payment plans at rates low enough that defendants are able to make payments, and community service.<sup>164</sup> Ferguson routinely refused to employ the first two alternatives,<sup>165</sup> and made community service available only in limited circumstances to teenagers and to adults who could pay a program fee.<sup>166</sup> So not only did the municipal court refuse to assess

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161. Nicole Bolden, *Debtors Prisons Are Illegal in America. Missouri Locked Me Up in One Anyway*, GUARDIAN (Feb. 12, 2015, 11:15 AM), <https://www.theguardian.com/commentisfree/2015/feb/12/debtors-prisons-illegal-america-ferguson-missouri-incarcerated> [<https://perma.cc/8Y9U-ZEJU>].

162. See *supra* notes 64-70.

163. FERGUSON REPORT, *supra* note 9, at 53-54 (alteration in original) (quoting a Ferguson municipal court assistant court clerk).

164. *Bearden v. Georgia*, 461 U.S. 660, 671-72 (1983); see also *Tate v. Short*, 401 U.S. 395, 399-400 (1971); *Williams v. Illinois*, 399 U.S. 235, 244-45 (1970).

165. See *supra* notes 68-69, 163 and accompanying text.

166. See FERGUSON REPORT, *supra* note 9, at 3-4, 54; FERGUSON VIOLATIONS SCHEDULE, *supra* note 58, at 2. Though community service was an option given by the Court as an alternative to incarceration, it may not be a good policy choice. See, e.g., Noah Zatz, *Get to Work or Go to Jail: Free Labor in the Shadow of Mass Incarceration*, ACSBLOG (Nov. 16, 2015), <http://www.acslaw.org/acsblog/get-to-work-or-go-to-jail-free-labor-in-the-shadow-of-mass->

whether the person's failure to pay was due to indigency, Ferguson jailed people unable to pay without providing or even considering meaningful alternatives beyond incarceration.

It is not immediately apparent, given the interests in revenue generation, why Ferguson officials would use incarceration as a collection method, given the costs inherent to housing and feeding inmates,<sup>167</sup> and because, as the Court has previously noted, when a person has no money to pay, incarceration cannot magically make the debtor flush.<sup>168</sup> In Ferguson, however, the expense of running the jail was limited—in fiscal year 2013, Ferguson spent less than \$200,000 on its jail, including approximately \$175,000 on officer salaries and a paltry \$18,762 on other jail expenditures.<sup>169</sup> Further, Ferguson's warrant process created additional opportunities to impose economic sanctions, including a \$50 fee to cancel a warrant, \$120 to \$130 in fees for arriving late to court, and a fee of \$30 to \$60 per night spent in jail.<sup>170</sup> Additionally, Ferguson did not need to make the debtor herself suddenly flush; instead, it used incarceration as a mechanism for generating revenue not from the debtor, but from the families and friends of those arrested who wished to save their loved ones from languishing in jail.<sup>171</sup> In *Fant v. City of Ferguson*, a lawsuit filed in February 2015 regarding Ferguson's

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incarceration [<https://perma.cc/5RDP-N9JT>].

167. See ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 7 (2009) ("[T]axpayers expend on average \$80 per inmate per day to lock up misdemeanants." (footnote omitted)).

168. See *Tate*, 401 U.S. at 399.

169. In fiscal year 2013, Ferguson staffed its jail with three correctional officers. See 2014-15 BUDGET, *supra* note 56, at 70. Its budget, however, did not separate out those salaries from other police department personnel. See *id.* at 71. In documents released in May 2016, Ferguson estimated that it would save \$200,000 in salaries by subcontracting out 3.5 correctional officer positions. See CITY OF FERGUSON, MO., ANNUAL OPERATING BUDGET: FISCAL YEAR 2016-2017, at 5 (2016) [hereinafter 2016-17 BUDGET], <https://www.fergusoncity.com/documentcenter/view/1983> [<https://perma.cc/255L-CPCM>]. Based on those figures, I have estimated the expenditures per full-time correctional officer in fiscal year 2013 at \$58,000. Further, in fiscal year 2013, Ferguson expended an additional \$18,762 on the jail. See 2014-15 BUDGET, *supra* note 56, at 71.

170. See Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, MOTHER JONES (Sept. 12, 2014, 6:30 AM), <http://www.motherjones.com/politics/2014/09/ferguson-might-have-break-its-habit-hitting-poor-people-big-fines> [<https://perma.cc/K6V7-EYER>].

171. See Class Action Complaint at 1, 5, *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. 2015) (No. 4:15-cv-00253).

municipal court, plaintiffs detailed jailers' practice of informing those arrested on warrants that they would be released immediately if they could convince family and friends to pay a given amount, with the negotiated amount decreasing as days wore on (and the increasing cost of incarceration made holding the individual less financially lucrative).<sup>172</sup> The use of incarceration, in other words, cost little, created an additional means of generating revenue for the city, and provided an opportunity to obtain payments from an even wider base of people. As a result, the warrants practices remained a lucrative component of Ferguson's system.

*B. The Role of Individual Defense Counsel in System Reform in the Aftermath of the Shooting of Michael Brown*

As detailed above, prior to the shooting of Michael Brown, Ferguson maintained a system rife with constitutional deficiencies, focused on generating revenue for the municipality, and in which the vast majority of defendants were unrepresented. While a limited number of defendants had retained or pro bono counsel, the municipal court judge or prosecutor routinely dismissed such cases, thereby keeping the hourly rates of the private attorneys who served as prosecutors low.<sup>173</sup> Without counsel to litigate in the remaining cases, Ferguson also was able to limit court time to three court sessions per month,<sup>174</sup> despite processing between 13,000 and 25,000 cases per year.<sup>175</sup> Of course, Ferguson experienced a loss of revenue in the small fraction of cases dismissed after counsel

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172. See *id.* at 5, 8-9. The allegations against Ferguson also suggest that the city expended less than might be expected on jailing people. See, e.g., *id.* at 2. The Complaint describes people incarcerated for the inability to pay being held under conditions in which, among other things, they were denied access to personal hygiene items such as menstrual pads, forced to drink water out of the tap attached to the toilet, and denied access to necessary medication. See *id.*

173. See *supra* notes 74-78 and accompanying text; see also Stephen Deere, *Legal Bills Mount as Ferguson Stands by 'Failure-to-Comply' Cases*, ST. LOUIS POST-DISPATCH (May 2, 2016), [http://www.stltoday.com/news/local/crime-and-courts/legal-bills-mount-as-ferguson-stands-by-failure-to-comply/article\\_2070be9f-99f1-5218-9e3a-cdfaf4dfed5e.html](http://www.stltoday.com/news/local/crime-and-courts/legal-bills-mount-as-ferguson-stands-by-failure-to-comply/article_2070be9f-99f1-5218-9e3a-cdfaf4dfed5e.html) [<https://perma.cc/54M8-K7AA>] [hereinafter Deere, *Legal Bills*].

174. See *Ferguson Municipal Court*, CITY OF FERGUSON, <https://www.fergusoncity.com/60/The-City-Of-Ferguson-Municipal-Courts> [<https://perma.cc/9RSJ-LHTF>].

175. See 2014-15 BUDGET, *supra* note 56, at 116 (showing statistics for fiscal years 2007-2013).

appeared, but in the vast majority of cases prosecutors were able to obtain convictions perfunctorily, with economic sanctions in tow.

As a result, municipal expenditures ran low and revenues ran high. In fiscal year 2013, for example, Ferguson expended \$313,192 on its courts,<sup>176</sup> and approximately \$193,000 on its jail.<sup>177</sup> On the revenue side of the ledger, however, the court raised nearly 2.5 million dollars.<sup>178</sup> The bottom line for the municipal court system was just under 2 million dollars in net benefit.

At that time, the ArchCity Defenders' work focused on legal representation of people struggling with homelessness and housing insecurity,<sup>179</sup> through which its attorneys had begun to provide limited defense representation post-conviction in the context of seeking to void warrants for its housing clients.<sup>180</sup> It was not long, however, before their attorneys understood that large scale abuses were occurring. As Executive Director Thomas Harvey explained:

I'll be frank. There was no way we started believing we were getting involved in some political fight, we were merely responding to a gap in services. But as you start talking to the people you're representing and then you see the way the courts are treating them, and then the visual of 300 African-American men lined up with a white judge, white prosecutor, and white police and you realize that this is more than a legal issue. It's impossible to think about this any other way when you're actually out there.<sup>181</sup>

Disturbed by what they were witnessing, the ArchCity Defenders reached out to the Southern Poverty Law Center, which provided advice and a template on how to engage in a court-watching program.<sup>182</sup> The ArchCity Defenders then began court-watching in Ferguson and neighboring cities, confirmed their suspicions, and

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176. *Id.* at 69.

177. *See supra* note 169 and accompanying text.

178. *See* 2014-15 BUDGET, *supra* note 56, at 52 (including both municipal court revenues and the mandatory police training fee imposed for each nonmoving traffic violation).

179. *See "St. Louis on the Air," supra* note 71, at 4:35 (interviewing ArchCity Defenders' Executive Director Thomas Harvey shortly after the shooting of Michael Brown: "I've worked with the homeless population primarily. That's who ArchCity Defenders works with.").

180. *See* Harvey Interview, *supra* note 1.

181. *Id.*

182. *See "St. Louis on the Air," supra* note 71.

publicly released their findings in a White Paper within days of Michael Brown's death.<sup>183</sup> Harvey stated:

Our white paper was an attempt to take seriously what our clients have been telling us since 2009.... Since the first day I ever met a client who had a case in municipal court, they told me two things, and that's this isn't about public safety, it's about the money; and I was pulled over because I was a member of a community of color.<sup>184</sup>

After releasing the White Paper, the ArchCity Defenders then joined with professors from St. Louis University School of Law to request that the Supreme Court of Missouri amend its rules to clarify that Missouri municipal courts were mandated under state law to "proportion fines to the resources of offenders and ... to respond in a constitutional manner to non-payment by indigent defendants."<sup>185</sup>

Coming in a period of relative calm in Ferguson,<sup>186</sup> the public reaction to the revelations in the White Paper and the call for specific reforms was swift. On September 5, 2014, social justice activists held the first of many protests calling for municipal court reform, this one outside of Ferguson's city hall.<sup>187</sup> Three days later, in advance of a scheduled city council meeting, Ferguson officials announced they would respond to the activists' demands by providing a one-month window for those with outstanding warrants to have the warrants quashed, voting on a cap on the percentage of city revenue that could be generated from economic sanctions, and

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183. See *supra* notes 2-3 and accompanying text.

184. Smith, *supra* note 1 (quoting Thomas Harvey, ArchCity Defenders' Executive Director).

185. Letter from Brendan Roediger et al., Clinical Law Offices, St. Louis Univ. Sch. of Law, to Bill Thompson, Clerk, Supreme Court of Mo. (Sept. 3, 2014), <https://assets.documentcloud.org/documents/1506908/slu-law-letter-asking-for-scom-change.pdf> [<https://perma.cc/7FHW-XV2Y>].

186. See Sabrina Siddiqui & Simon McCormack, *Here's a Timeline of the Events in Ferguson Since Michael Brown's Death*, HUFFINGTON POST (Nov. 25, 2014, 3:30 PM), [http://www.huffingtonpost.com/2014/11/25/ferguson-timeline\\_n\\_6220166.html](http://www.huffingtonpost.com/2014/11/25/ferguson-timeline_n_6220166.html) [<https://perma.cc/C7BN-AH5S>].

187. See Jennifer S. Mann, *Cries for Reform in Traffic Courts Grow Louder in Wake of Ferguson*, ST. LOUIS POST-DISPATCH (Sept. 5, 2014), [http://www.stltoday.com/news/local/crime-and-courts/cries-for-reform-in-traffic-courts-grow-louder-in-wake/article\\_0295f598-7421-515a-8c52-337a36b7cc71.html](http://www.stltoday.com/news/local/crime-and-courts/cries-for-reform-in-traffic-courts-grow-louder-in-wake/article_0295f598-7421-515a-8c52-337a36b7cc71.html) [<https://perma.cc/C328-QGDE>].

considering the repeal of the city's 50 dollar warrant revocation fee as well as a failure to appear ordinance that was a source of significant funding for the municipality.<sup>188</sup> City council member Mark Byrne explained the early announcement by stating that the city council wanted "to demonstrate to residents that we take their concerns extremely seriously."<sup>189</sup> Later that month, the city council took action, voting to eliminate several fees related to its warrants practice and the failure to appear ordinance.<sup>190</sup>

Public pressure also led municipal judges in the region to form the St. Louis County Municipal Court Improvement Committee made up of municipal judges, prosecutors, and court staff.<sup>191</sup> As committee member Frank Vatterott, a municipal court judge in the region for over thirty-five years, remarked, "If there's any good out of this tragedy, it's that it gives us the impetus to fix our own abuses."<sup>192</sup> In addition to considering proposing an amnesty program for outstanding economic sanctions and alternatives to such sanctions moving forward, the committee also announced that it was interested in developing a program in which volunteer attorneys would provide municipal court representation pro bono.<sup>193</sup> That proposal met with resistance from the ArchCity Defenders and Better Together, an organization favoring consolidation of municipalities in the region, both of whom preferred a full public defender system funded by the region's municipalities.<sup>194</sup> In a report released in October 2014, Better Together called the plan to provide pro bono attorneys "unsustainable and impractical," and argued that requiring

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188. Jennifer S. Mann, *Judges Propose Wide Reform of St. Louis County's Municipal Courts*, ST. LOUIS POST-DISPATCH (Sept. 17, 2014), [http://www.stltoday.com/news/local/crime-and-courts/judges-propose-wide-reform-of-st-louis-county-s-municipal/article\\_02b3b9e9-7666-54dd-ad90-37441af32176.html](http://www.stltoday.com/news/local/crime-and-courts/judges-propose-wide-reform-of-st-louis-county-s-municipal/article_02b3b9e9-7666-54dd-ad90-37441af32176.html) [<https://perma.cc/WR94-Q2CA>]; Frances Robles, *Ferguson Sets Broad Change for City Courts*, N.Y. TIMES (Sept. 8, 2014), <http://www.nytimes.com/2014/09/09/us/ferguson-council-looks-to-improve-community-relations-with-police.html> [<https://perma.cc/A9CJ-3T9T>].

189. Robles, *supra* note 188.

190. See FERGUSON VIOLATIONS SCHEDULE, *supra* note 58, at 1.

191. See Mann, *supra* note 188.

192. *Id.* (quoting Frank Vatterott, a private attorney and municipal judge).

193. See *id.*; see also Smith, *supra* note 1.

194. See BETTER TOGETHER, MUNICIPAL COURTS, *supra* note 74, at 4, 15-16; William Freivogel, *Two Visions of Municipal Court Reform*, ST. LOUIS PUB. RADIO (Nov. 12, 2014), <http://news.stlpublicradio.org/post/two-visions-municipal-court-reform> [<https://perma.cc/3GTJ-P7RV>].



municipalities to pay for public defense was justified in light of the revenue generated by municipal courts, would better ensure that individual rights were protected, and would “demonstrate[] to citizens that their rights are important and that the court does not exist simply to bring in revenue.”<sup>195</sup> When Judge Vatterott renewed his call for a pro bono system of representation at a November 2014 public debate, ArchCity Defenders’ Harvey argued, “I believe these courts should bear the costs of running the courts and part of those costs are legal defense of indigents before them.”<sup>196</sup> In the following months, the Municipal Court Improvement Committee would simultaneously renew its proposal for the installation of a pro bono representation system and suggest the imposition of additional fees in the municipal court in relation to the program.<sup>197</sup>

At the November 2014 debate, Harvey also questioned the ability of a committee made up of municipal court officials to oversee reforms after Judge Vatterott questioned whether the municipal courts should or even could hold ability to pay hearings.<sup>198</sup> To avoid what he called the “fox guarding the henhouse,” Harvey suggested that the Municipal Court Improvement Committee be expanded to include members of Missourians Organizing for Reform and Empowerment (MORE), a grassroots organization whose members had demonstrated in favor of municipal court reforms.<sup>199</sup> Judge Vatterott rejected the idea,<sup>200</sup> later explaining in an interview his belief that “[o]ur judges and our court personnel are the road warriors. We know best how to improve our courts.”<sup>201</sup>

Unsatisfied, the ArchCity Defenders joined with the St. Louis University Criminal Defense Clinic and an additional nonprofit, Equal Justice Under the Law, to file class action lawsuits in Fer-

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195. BETTER TOGETHER, MUNICIPAL COURTS, *supra* note 74, at 15-16.

196. Freivogel, *supra* note 194.

197. See Jeremy Kohler & Jennifer S. Mann, *Municipal Court Reforms Gaining Momentum, but How Far Will They Go?*, ST. LOUIS POST-DISPATCH (Feb. 2, 2015), [http://www.stltoday.com/news/local/crime-and-courts/municipal-court-reforms-gaining-momentum-but-how-far-will-they/article\\_1b7ba83d-4363-5fd1-a119-99a293f91407.html](http://www.stltoday.com/news/local/crime-and-courts/municipal-court-reforms-gaining-momentum-but-how-far-will-they/article_1b7ba83d-4363-5fd1-a119-99a293f91407.html) [<https://perma.cc/NRW4-9BGL>].

198. See Freivogel, *supra* note 194.

199. See *id.*; see also “St. Louis on the Air,” *supra* note 71, at 26:36 (Harvey: “There’s got to be some members of the community on that committee though. You’ve got to have some directly impacted people if you want to get to real solutions that are [going] to help them.”).

200. See Freivogel, *supra* note 194.

201. Kohler & Mann, *supra* note 197.



guson and other Missouri municipalities that challenged municipal court practices.<sup>202</sup> They also began to see some success from earlier advocacy efforts, as the Missouri Supreme Court amended its rules to clarify that municipal courts must accept payments in installments.<sup>203</sup> MORE and other social justice advocates also continued to demonstrate and publicly call for municipal court reforms. In February, for example, MORE released a list of demands for reform—including the consolidation of the region’s municipal courts, elimination of the use of incarceration as a punishment for inability to pay, and abolishment of failure to appear ordinances.<sup>204</sup> MORE also called for a system in which economic sanctions would be proportioned to income and alternative sanctions made available, and in which public defenders would be provided to all indigent defendants.<sup>205</sup>

Then, on March 4, the Department of Justice released a report documenting its investigation in Ferguson.<sup>206</sup> When the Department announced shortly after the death of Michael Brown that it would investigate Ferguson’s police department, its focus was on the task of determining if there was a pattern and practice of constitutional violations related to use of force, stops, searches, and arrests, or in Ferguson’s jail.<sup>207</sup> In the months that would follow, the Department reviewed the ArchCity Defenders White Paper and the Better

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202. See Jeremy Kohler, *Lawyers Sue 7 St. Louis County Municipalities Over Court Fees*, ST. LOUIS POST-DISPATCH (Dec. 10, 2014), [http://www.stltoday.com/news/local/crime-and-courts/lawyers-sue-st-louis-county-municipalities-over-court-fees/article\\_dd6025d9-fcbd-536b-8d8c-97d0acf144ef.html](http://www.stltoday.com/news/local/crime-and-courts/lawyers-sue-st-louis-county-municipalities-over-court-fees/article_dd6025d9-fcbd-536b-8d8c-97d0acf144ef.html) [<https://perma.cc/66TH-7ASC>]; see also Class Action Complaint, *supra* note 171. Subsequent to the initial filing, the nonprofit Civil Rights Corp. and the law firm of White & Case, LLP, joined as co-counsel. See E-mail from Thomas B. Harvey, Dir., Arch-City Defenders, to Beth A. Colgan (Nov. 30, 2016) (on file with author).

203. See Jeremy Kohler, *Missouri Supreme Court Sets Rules for Muni Court Fines*, ST. LOUIS POST-DISPATCH (Jan. 7, 2015), [http://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-sets-rules-for-muni-court-fines/article\\_5de25408-196b-5698-90cf-c716326344e6.html](http://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-sets-rules-for-muni-court-fines/article_5de25408-196b-5698-90cf-c716326344e6.html) [<https://perma.cc/6F5Q-CGXU>].

204. See MISSOURIANS ORGANIZING FOR REFORM AND EMPOWERMENT, *TRANSFORMING ST. LOUIS COUNTY’S RACIST MUNICIPAL COURTS 2-4* (2015) [hereinafter MORE REPORT].

205. See *id.*

206. See generally FERGUSON REPORT, *supra* note 9.

207. See Kimberly Kindy & Sari Horwitz, *Holder Announces Ferguson Probe, Review of St. Louis County Police Practices*, WASH. POST (Sept. 4, 2014), [https://www.washingtonpost.com/politics/holder-announces-ferguson-probe-review-of-st-louis-county-police-practices/2014/09/04/1cae963c-3452-11e4-8f02-03c644b2d7d0\\_story.html](https://www.washingtonpost.com/politics/holder-announces-ferguson-probe-review-of-st-louis-county-police-practices/2014/09/04/1cae963c-3452-11e4-8f02-03c644b2d7d0_story.html) [<https://perma.cc/5YF7-2TFB>] (including a video of then-Attorney General Eric Holder’s announcement of the investigation).

Together Report, observed the municipal court at work, and interviewed Ferguson residents subjected to the municipal court system.<sup>208</sup> Ultimately, the Department's Report addressed both Ferguson's policing and its municipal court practices and confirmed what advocates in Missouri had claimed: Ferguson's municipal court system operated as a revenue-generating mechanism for the city to the detriment of the region's poor and primarily black residents.<sup>209</sup>

The Department's Report detailed how black people were subjected to 85 percent of all vehicle stops in Ferguson despite its population being only 67 percent black.<sup>210</sup> Though the failure of police to track the unconstitutional practice of "ped checks," described above,<sup>211</sup> means statistics on such stops are not available, anecdotal evidence suggests that police used ped checks almost exclusively against black youth.<sup>212</sup> Once stopped, police were more likely to search black people—despite the fact that white people were 26 percent more likely to have contraband when searched—as well as to cite and arrest black people.<sup>213</sup> Ferguson police also charged certain ordinance violations almost exclusively against black people, including manner of walking in roadway (95 percent of all charges), peace disturbances (92 percent of all charges), and failure to comply (94 percent of all charges).<sup>214</sup>

The harm caused by the municipal court's practices was also racially disproportionate. Of arrest warrants issued by the court, 92 percent were against black people, leading to circumstances where, of arrests based only on an outstanding municipal warrant, 96 percent of arrestees were black.<sup>215</sup> The municipal court was also nearly 70 percent less likely to dismiss charges against black people,<sup>216</sup> required black defendants to attend more hearings than white defendants,<sup>217</sup> and assessed higher fines against black people than

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208. See FERGUSON REPORT, *supra* note 9, at 1 (describing its investigation as including review of "third-party studies regarding municipal court practices").

209. See *id.* at 2; see also, e.g., ARCHCITY WHITE PAPER, *supra* note 3, at 2, 34-36; BETTER TOGETHER, MUNICIPAL COURTS, *supra* note 74, at 2; MORE REPORT, *supra* note 204, at 1.

210. FERGUSON REPORT, *supra* note 9, at 62.

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

212. See FERGUSON REPORT, *supra* note 9, at 67.

213. See *id.* at 62.

214. *Id.*

215. See *id.* at 62-63.

216. See *id.* at 62.

217. See *id.* at 68.

white people for the same offenses.<sup>218</sup> Because policing, the use of arrest warrants, extending hearings to make failure to appear fines more likely, and assessment of economic sanctions were essential to Ferguson's system of generating revenue, these racial disparities meant that Ferguson's black community members overwhelmingly shouldered the burden of that system.

The Department's investigation also makes clear that these disparities were "driven, at least in part, by intentional discrimination."<sup>219</sup> The Department gathered testimony from community members regarding police misconduct against black people involving use or threats of force.<sup>220</sup> Other community members reported police use of racial epithets during interactions with the community.<sup>221</sup> The Department also uncovered emails among law enforcement, court staff, and their supervisors exhibiting racial and ethnic bias.<sup>222</sup>

Though initially favoring voluntary changes to municipal court practices,<sup>223</sup> following the release of the Department of Justice's Report, the Missouri Supreme Court quickly stepped in and installed a Missouri Court of Appeals judge to oversee Ferguson's municipal court.<sup>224</sup> Immune from the pressure of Ferguson officials to generate revenue, he began by significantly reducing traffic fines, some by over half.<sup>225</sup> Under pressure due to the Department of Justice's Report and the pending class action lawsuit, at the instigation of the Municipal Court Improvement Committee, Ferguson officials also agreed to establish uniform fines along with numerous other municipalities at lower rates than previously imposed.<sup>226</sup>

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218. *See id.* at 69.

219. *Id.* at 63.

220. *See id.* at 39.

221. *Id.* at 73.

222. *Id.* at 71-73.

223. *Cf.* Kohler & Mann, *supra* note 197.

224. *See* Stephen Deere & Walker Moskop, *New Judge Takes Over in Ferguson*, ST. LOUIS POST-DISPATCH (Mar. 20, 2015), [http://www.stltoday.com/news/local/govt-and-politics/new-judge-takes-over-in-ferguson/article\\_9a67b853-3b24-548f-8f5d-dfad6aa00d56.html](http://www.stltoday.com/news/local/govt-and-politics/new-judge-takes-over-in-ferguson/article_9a67b853-3b24-548f-8f5d-dfad6aa00d56.html) [<https://perma.cc/U5YV-YH29>].

225. *See id.*

226. *See* Rachel Lippmann, *80 Municipal Courts in St. Louis County Agree to Uniform Fines for Ordinance Violations*, ST. LOUIS PUB. RADIO (Apr. 9, 2015), <http://news.stlpublicradio.org/post/80-municipal-courts-st-louis-county-agree-uniform-fines-ordinance-violations> [<https://perma.cc/5JLU-9QGC>]; *see also* FERGUSON VIOLATIONS SCHEDULE, *supra* note 58, at 1 (detailing Ferguson's adoption of a uniform fine schedule).

Upon releasing its Report, the Department of Justice began engaging in negotiations with Ferguson's city council under threat of a federal lawsuit.<sup>227</sup> After coming to an agreement, the city council balked and the Department called its bluff by filing suit.<sup>228</sup> In response, Ferguson's city council quickly shifted course again, unanimously approving a consent decree in March 2016.<sup>229</sup> In doing so, the council agreed to extensive changes to the city's policing practices and additional requirements for reforming its municipal court system, including an amnesty program for past fines and fees, the elimination of hurdles to payment of court debts, and limitations on the use of arrest warrants.<sup>230</sup>

At the same time the Department was negotiating with Ferguson's city council, the ArchCity Defenders and the St. Louis University Criminal Defense Clinic were also upping the ante by actively litigating several individual cases charged in Ferguson.<sup>231</sup> For example, Ferguson's prosecutor, Stephanie Karr, chose to prosecute a set of failure to comply cases charged against Ferguson protestors.<sup>232</sup> In addition to pursuing a civil challenge raising a constitutional claim that Ferguson's failure to comply ordinance is impermissibly vague given that it captured activities protected by the First Amendment,<sup>233</sup> the attorneys also tackled serious evi-

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227. See Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/justice-department-sues-ferguson-over-police-deal.html> [https://perma.cc/MA5H-QNGP].

228. See *id.*

229. See John Eligon, *Ferguson Approves a Federal Plan to Overhaul Police and Courts*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/us/ferguson-approves-a-federal-plan-to-overhaul-police-and-courts.html> [https://perma.cc/FP9Q-EMAZ]. For a detailed assessment of how structural reform litigation pursued by the Department of Justice can force political change, see generally Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015).

230. See Consent Decree at 1, 11-12, 78-89, *United States v. City of Ferguson*, No. 4:16-cv-000180 (E.D. Mo. Apr. 19, 2016).

231. See Stephen Deere, *Judge Hands Down Two More Not-Guilty Verdicts in Cases Stemming from Ferguson Protests*, ST. LOUIS POST-DISPATCH (May 17, 2016), [http://www.stltoday.com/news/local/crime-and-courts/judge-hands-down-two-more-not-guilty-verdicts-in-cases/article\\_4b0813a7-3d16-50b5-b789-398f004dd370.html](http://www.stltoday.com/news/local/crime-and-courts/judge-hands-down-two-more-not-guilty-verdicts-in-cases/article_4b0813a7-3d16-50b5-b789-398f004dd370.html) [https://perma.cc/T4GX-VBXC] [hereinafter Deere, *Two More*]; Deere, *Legal Bills*, *supra* note 173.

232. See Deere, *Two More*, *supra* note 231; Deere, *Legal Bills*, *supra* note 173.

233. See Jeremy Kohler, *Lawsuit Challenges St. Louis County's Go-To Charge for Protesters*, ST. LOUIS POST-DISPATCH (June 29, 2016), [http://www.stltoday.com/news/local/crime-and-courts/lawsuit-challenges-st-louis-county-s-go-to-charge-for/article\\_0b3dfd3c-68b0-5f17-b172-8870c604887e.html](http://www.stltoday.com/news/local/crime-and-courts/lawsuit-challenges-st-louis-county-s-go-to-charge-for/article_0b3dfd3c-68b0-5f17-b172-8870c604887e.html) [https://perma.cc/56KQ-Z32Z].

dentiary problems in several pending cases.<sup>234</sup> In one case, the defendant had questioned an officer's authority to demand his identification, handed his identification over after he was threatened with arrest, and then was arrested for failure to comply.<sup>235</sup> Other cases had significant evidentiary problems, including, in one case, that the prosecution had been unable even to identify the key witness to the charge: the arresting officer.<sup>236</sup>

While for years such crucial deficiencies resulted in convictions for people left without representation in Ferguson's municipal courts, in these cases the defendants were provided individual defense representation by the ArchCity Defenders, students in the St. Louis University Criminal Defense Clinic, and other pro bono attorneys.<sup>237</sup> Defense counsel sought removal of the cases to the associate circuit court, where they litigated various evidentiary and constitutional claims.<sup>238</sup>

The increase in litigation in Ferguson caused the costs of prosecution to tick steadily upward, from \$30,260 billed in 2014 to \$61,705 in 2015, with prosecutors on pace to bill \$120,000 in 2016.<sup>239</sup> This is well beyond what the municipality budgeted for such expenses.<sup>240</sup> And, in general, those expenses were for naught. In light of the prosecution's inability to prove the elements of the crime charged, the associate circuit court judge dismissed five of the cases.<sup>241</sup> The prosecution finally dropped a sixth case less than an hour before it was to go to trial.<sup>242</sup> In fact, Ferguson prosecutors have lost 40 percent of trials in the associate circuit court,<sup>243</sup> meaning that as its bills have skyrocketed, the city is simultaneously gaining less and less revenue.

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234. See Deere, *Legal Bills*, *supra* note 173.

235. See *id.*

236. See *id.*

237. See *id.*; see also Deere, *Two More*, *supra* note 231.

238. See Deere, *Legal Bills*, *supra* note 173.

239. *Id.*

240. See 2016-17 BUDGET, *supra* note 169, at 98.

241. See Deere, *Two More*, *supra* note 231.

242. See Stephen Deere, *Ferguson Prosecutor Dismisses Case Minutes Before Trial, Maintains that the Defendant Still Violated the Law*, ST. LOUIS POST-DISPATCH (May 18, 2016), [http://www.stltoday.com/news/local/ferguson-prosecutor-dismisses-case-minutes-before-trial-maintains-that-the/article\\_65946f32-62e3-5251-b22b-31bd6b0a8f58.html](http://www.stltoday.com/news/local/ferguson-prosecutor-dismisses-case-minutes-before-trial-maintains-that-the/article_65946f32-62e3-5251-b22b-31bd6b0a8f58.html) [https://perma.cc/Y9MH-HPX9] [hereinafter Deere, *Ferguson Prosecutor*].

243. See Deere, *Legal Bills*, *supra* note 173.

That loss in revenue combined with losses stemming from the changes in the ordinance code and fee schedule noted above had a significant effect on Ferguson's bottom line. The failure to appear charge alone had previously accounted for 24 percent of municipal court revenues.<sup>244</sup> Overall, Ferguson's gross municipal court revenues dropped from 2.5 million dollars in 2013,<sup>245</sup> to approximately 1.05 million dollars in 2015,<sup>246</sup> and continued to drop to just under \$579,000 in 2016.<sup>247</sup>

In addition to fiscal pressure, the act of litigating the failure to comply and several other cases also forced the city of Ferguson to stake out a position regarding its manner of policing and system of justice. For example, in at least one case the prosecution argued that, in Ferguson, guilt can and should be inferred from the mere fact of arrest.<sup>248</sup> In addition to being legally unsound, public reporting of these statements was fuel on the fire for social justice activists who called for the removal of the prosecutor.<sup>249</sup>

The combined public pressure from individual defense counsel, social justice activists, and the Department of Justice ultimately changed the makeup of those with power in Ferguson. Recall that the use of the municipal court as a revenue-generating mechanism was overseen by Ferguson's municipal judge, city manager, police chief, and city prosecutor.<sup>250</sup> When the Missouri Supreme Court

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244. See FERGUSON REPORT, *supra* note 9, at 43; *see also id.* at 3, 42.

245. See 2014-15 BUDGET, *supra* note 56, at 50; *see also supra* notes 176-78 and accompanying text.

246. See 2016-17 BUDGET, *supra* note 169, at 16.

247. Jeremy Kohler, *Municipal Court Business Is Way Down After Ferguson Unrest*, ST. LOUIS POST-DISPATCH (Feb. 5, 2017), [http://www.stltoday.com/news/local/crime-and-courts/municipal-court-business-is-way-down-after-ferguson-unrest/article\\_6c541acb-a28d-524b-ba83-c0238af72ce7.html](http://www.stltoday.com/news/local/crime-and-courts/municipal-court-business-is-way-down-after-ferguson-unrest/article_6c541acb-a28d-524b-ba83-c0238af72ce7.html) [<https://perma.cc/DJE7-KF97>].

248. See Deere, *Legal Bills*, *supra* note 173.

249. See, e.g., Stephen Deere & Christine Byers, *Ferguson City Attorney, Target of Protestors in Recent Months, Resigns Position*, ST. LOUIS POST-DISPATCH (May 24, 2016), [http://www.stltoday.com/news/local/crime-and-courts/ferguson-city-attorney-target-of-protestors-in-recent-months-resigns/article\\_1ec4967a-58ec-5956-be60-8931a1a9c6b9.html](http://www.stltoday.com/news/local/crime-and-courts/ferguson-city-attorney-target-of-protestors-in-recent-months-resigns/article_1ec4967a-58ec-5956-be60-8931a1a9c6b9.html) [<https://perma.cc/34NX-5KN5>] (describing protestors carrying signs reading "Stop the Karr-uption"); Stephen Deere, *Ferguson Loses Three More Cases Against Protestors*, ST. LOUIS POST-DISPATCH (May 12, 2016), [http://www.stltoday.com/news/local/crime-and-courts/ferguson-loses-three-more-cases-against-protestors/article\\_3393e5d9-1857-5358-991f-e0c67123f220.html](http://www.stltoday.com/news/local/crime-and-courts/ferguson-loses-three-more-cases-against-protestors/article_3393e5d9-1857-5358-991f-e0c67123f220.html) [<https://perma.cc/9BUN-22FV>] [hereinafter Deere, *Ferguson Loses*] (describing a protest beginning in front of the municipal court and ending at Karr's home).

250. See *supra* Part I.A.1.



installed a circuit court judge to oversee Ferguson's municipal court, Judge Brockmeyer resigned.<sup>251</sup> A few days later both the city manager<sup>252</sup> and the police chief<sup>253</sup> stepped down. The following month, after unusually high voter turnout driven by a desire for policing and court reform, three new city council members were elected<sup>254</sup> with reform at the top of the agenda and a commitment to bring in a new police chief who would support such efforts.<sup>255</sup> The city council ultimately selected as chief of police Delrish Moss, a veteran African-American officer from Florida who had become a police officer after being racially harassed by the police as a youth.<sup>256</sup> Chief Moss promised to "clean house" by firing or seeking the prosecution of errant officers,<sup>257</sup> and to put resources toward community policing.<sup>258</sup>

The last holdout was Stephanie Karr, Ferguson's prosecutor.<sup>259</sup> Karr doubled down on the old system, attempting to block the city council's approval of the consent decree negotiated with the

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251. See Jeremy Kohler, *Brockmeyer Resigns as Prosecuting Attorney in Florissant and Vinita Park*, ST. LOUIS POST-DISPATCH (Mar. 12, 2015), [http://www.stltoday.com/news/local/crime-and-courts/brockmeyer-resigns-as-prosecuting-attorney-in-florissant-and-vinita-park/article\\_5272300e-022a-5970-aaff-d71758c23c56.html](http://www.stltoday.com/news/local/crime-and-courts/brockmeyer-resigns-as-prosecuting-attorney-in-florissant-and-vinita-park/article_5272300e-022a-5970-aaff-d71758c23c56.html) [<https://perma.cc/W34P-A84X>]. A few days later, Brockmeyer also resigned as the prosecuting attorney in three other neighboring communities. See *id.*

252. See Dana Ford, *Ferguson City Manager Resigns After Critical DOJ Report*, CNN (Mar. 11, 2015, 1:24 PM), <http://www.cnn.com/2015/03/10/us/ferguson-city-manager/> [<https://perma.cc/YQ87-YJBA>].

253. See Matt Pearce, *Ferguson Police Chief Steps Down; Official Calls It 'Long Overdue'*, L.A. TIMES (Mar. 11, 2015, 6:57 PM), <http://www.latimes.com/nation/la-na-ferguson-police-chief-20150311-story.html> [<https://perma.cc/D9UY-D6BS>].

254. See Moni Basu, *Ferguson Election Makes History, Adds More Blacks to City Council*, CNN (Apr. 8, 2015, 4:15 PM), <http://www.cnn.com/2015/04/08/us/ferguson-election/> [<https://perma.cc/HCM5-BGRH>].

255. See Dan Greenwald, *New Ferguson City Council Members Sworn In; Reform Promised*, KMOV (Apr. 21, 2015, 11:01 PM), <http://www.kmov.com/story/28864514/new-ferguson-city-council-members-sworn-in-reform-promised> [<https://perma.cc/NRX4-NLX2>].

256. See Lauren Victoria Burke, *Delrish Moss Becomes First Black Police Chief in Ferguson*, NBC NEWS (May 10, 2016, 7:32 AM), <http://www.nbcnews.com/news/nbcblk/delrish-moss-becomes-first-black-police-chief-ferguson-n570756> [<https://perma.cc/3WW8-X65Y>]; Jeff Pegues, *New Ferguson Police Chief: "I Expect to Clean House."*, CBS NEWS (May 11, 2016, 6:49 PM), <http://www.cbsnews.com/news/new-ferguson-police-chief-delrish-moss-i-expect-to-clean-house/> [<https://perma.cc/45HS-HQS8>].

257. See Pegues, *supra* note 256.

258. See Burke, *supra* note 256.

259. See Deere & Byers, *supra* note 249.



Department of Justice,<sup>260</sup> and, as detailed above, continued aggressive prosecution of cases despite significant legal problems.<sup>261</sup> The city council announced that, while it would leave Karr as the city attorney, it would seek new counsel to serve the prosecutorial function because of the potential conflict created by having a single individual serving both roles.<sup>262</sup> After the losses in trying to shape the city council and in court, and with social justice activists demonstrating against her continued presence in Ferguson's system, Karr resigned on May 24, 2016.<sup>263</sup> Thus the quartet of city officials in place when the ArchCity Defenders released their White Paper documenting the pattern of abuses they saw when representing individual clients no longer hold power in Ferguson.

While there is still significant room for reform in Ferguson and activists there continue to work for change,<sup>264</sup> it is also beyond dispute that reform efforts there have had positive effects at both the individual and systemic level. As Keith Rose, one of the protestors prosecuted for failure to comply, remarked, "Without pro bono representation, I would have been forced to plead guilty to a crime I didn't commit."<sup>265</sup> Systemically, there also is significant evidence of change. Though racial disparities in traffic stops persist, both traffic and nontraffic offenses have dropped precipitously, by 85 and 88 percent respectively.<sup>266</sup> Further, with prosecutor bills

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260. See *id.*; Editorial Board, *Ferguson's Stubborn Stephanie Karr Faces Reality*, ST. LOUIS POST-DISPATCH (May 24, 2016), [http://www.stltoday.com/news/opinion/columns/the-platform/editorial-ferguson-s-stubborn-stephanie-karr-faces-reality/article\\_c351a9e1-9170-5a79-8156-bb93a26a8356.html](http://www.stltoday.com/news/opinion/columns/the-platform/editorial-ferguson-s-stubborn-stephanie-karr-faces-reality/article_c351a9e1-9170-5a79-8156-bb93a26a8356.html) [<https://perma.cc/PYQ9-FZA6>] (describing Karr's issuance of a legal opinion to attempt to block the swearing in of a new council member who promised to approve the consent decree).

261. See *supra* notes 232-36 and accompanying text.

262. See Deere, *Two More*, *supra* note 231.

263. See *Ferguson City Attorney to Resign, Commends Leaders' 'Grace' After Michael Brown's Death*, L.A. TIMES (May 24, 2016, 3:52 PM), <http://www.latimes.com/nation/nation-now/la-na-ferguson-city-attorney-20160524-snap-story.html> [<https://perma.cc/A5RM-92VM>].

264. See, e.g., Jennifer S. Mann & Jeremy Kohler, *Activists Urge Consolidation of Area Municipal Courts at St. Louis Hearing*, ST. LOUIS POST-DISPATCH (Nov. 12, 2015), [http://www.stltoday.com/news/local/crime-and-courts/activists-urge-consolidation-of-area-municipal-courts-at-st-louis/article\\_498c0c55-1fa9-5e8e-ace2-c0cae41b68c9.html](http://www.stltoday.com/news/local/crime-and-courts/activists-urge-consolidation-of-area-municipal-courts-at-st-louis/article_498c0c55-1fa9-5e8e-ace2-c0cae41b68c9.html) [<https://perma.cc/YHU7-EJCC>]; Messenger, *supra* note 75 (describing man still fighting charges four years after his arrest).

265. Deere, *Ferguson Loses*, *supra* note 249.

266. See Kohler, *supra* note 247; see also Durrie Bouscaren, *Revisiting Ferguson: 2 Years After the Shooting of Michael Brown*, NPR (Aug. 9, 2016, 5:00 AM), <http://www.npr.org/2016/08/09/489158667/revisiting-ferguson-2-years-after-the-shooting-of-michael-brown>

skyrocketing, losses in court piling up, and fewer convictions bringing in revenue,<sup>267</sup> and in light of the costs of implementing the Department of Justice consent decree and the potential of paying millions in damages to resolve the pending civil rights litigation,<sup>268</sup> the political conversation in Ferguson shifted. One city council member has suggested that the council should consider restricting prosecutor fees,<sup>269</sup> and the city council is beginning to discuss refocusing revenue generation on taxes,<sup>270</sup> ultimately putting the issue to a city-wide vote.<sup>271</sup> Although voters declined to increase property taxes, they approved increases to city sales, utility, and business taxes, which are anticipated to generate nearly two million dollars in revenue per year.<sup>272</sup> Political pressure has also created an interest among Ferguson's newly elected officials to ensure that its municipal court operates independent of the city's financial interests. In addition to the decision to separate out the city attorney and city prosecutor functions, the new city manager has expressed a belief that he should have no control over cases brought in the municipal court system.<sup>273</sup> The losses have also led the city manager to question the types of cases prosecuted in its court,<sup>274</sup> and

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[<https://perma.cc/MEZ6-XPAK>].

267. See *supra* notes 239-47 and accompanying text.

268. The ArchCity Defenders, St. Louis University Criminal Defense Clinic, and Equal Justice Under the Law filed a nearly identical suit to the one filed in Ferguson against the neighboring municipality of Jennings. See *generally* Class Action Complaint, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015). To avoid litigation, Jennings officials agreed to a multimillion dollar settlement of the claims. See Spencer S. Hsu, *Town Near Ferguson, Mo., Agrees to Pay \$4.7 Million to Settle 'Debtors Prison' Case*, WASH. POST (July 14, 2016), [https://www.washingtonpost.com/local/public-safety/town-near-ferguson-mo-agrees-to-pay-47-million-to-settle-debtors-prison-case/2016/07/14/37b42078-49db-11e6-acbc-4d4870a079da\\_story.html](https://www.washingtonpost.com/local/public-safety/town-near-ferguson-mo-agrees-to-pay-47-million-to-settle-debtors-prison-case/2016/07/14/37b42078-49db-11e6-acbc-4d4870a079da_story.html) [<https://perma.cc/4TD8-Y4K6>].

269. See Deere, *Two More*, *supra* note 231.

270. See Deere, *Legal Bills*, *supra* note 173.

271. See Tim Bryant, *Ferguson Proposes Tax Hike to Cover Costs of Revamping Police and Court*, ST. LOUIS POST-DISPATCH (May 22, 2016), [http://www.stltoday.com/news/local/govt-and-politics/ferguson-proposes-tax-hike-to-cover-costs-of-revamping-police/article\\_8113340e-b340-5567-975e-599a8536334f.html](http://www.stltoday.com/news/local/govt-and-politics/ferguson-proposes-tax-hike-to-cover-costs-of-revamping-police/article_8113340e-b340-5567-975e-599a8536334f.html) [<https://perma.cc/NA3Q-W8ST>].

272. See *Voters in Ferguson, Missouri, Approve 2nd Tax Increase*, WASH. POST (Aug. 3, 2016), <https://perma.cc/F9YT-D8M2>; Joe Harris, *Failure of Ferguson Tax Hike Won't Affect Deal*, COURTHOUSE NEWS SERV. (Apr. 6, 2016, 2:39 PM), <http://www.courthousenews.com/2016/04/06/failure-of-ferguson-tax-hike-wont-affect-deal.htm> [<https://perma.cc/WVP5-QRSJ>].

273. See Deere, *Ferguson Prosecutor*, *supra* note 242.

274. See *id.* (quoting City Manager De'Carlson Seewood as saying, "It makes you ask the question: 'What's going on?'").

caused the city council to eliminate the independent offense of failure to appear as well as certain administrative fees.<sup>275</sup> These are all signals that further reform of the breadth and severity of Ferguson’s municipal code is possible.<sup>276</sup>

While those changes are not solely due to individual defense counsel, but rather are the result of the combined efforts of counsel, civil rights litigators, the Department of Justice, and social justice activists, it is noteworthy that traditional indigent defense representation in even a small number of cases charged in Ferguson contributed to systemic reform. Further, it was individual defense counsel spotting and making public the pattern of abuses in Ferguson’s municipal court that played a key role in bringing the need for change to the fore.

Yet despite the role even limited access to individual defense counsel played in the reform effort, one key reform that has remained out of reach is system-wide access to individual defense representation in Ferguson’s municipal courts. Despite requiring other meaningful changes, the Department of Justice’s consent decree included only a general statement that Ferguson’s trial procedures must comply “with all applicable constitutional and other legal requirements,”<sup>277</sup> and a mandate that Ferguson include information on its website “regarding cost-free legal assistance that may be available to individuals with pending municipal charges.”<sup>278</sup> Other calls for the creation of a public defender system—by the ArchCity Defenders,<sup>279</sup> MORE,<sup>280</sup> and Better Together<sup>281</sup>—have been ignored. So too has the recommendation to establish such a system by the Ferguson Commission, which was established by Missouri Governor Jay Nixon two months after Michael Brown’s shooting with the direction to investigate practices in Missouri’s municipal

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275. See *supra* notes 188-90 and accompanying text.

276. See Roberts, *supra* note 27, at 1099-100 (arguing that litigating misdemeanor offenses would increase system costs and “give legislators a concrete reason (and perhaps some political coverage) to decriminalize and to refrain from creating more minor criminal offenses”).

277. Consent Decree, *supra* note 230, at 87.

278. *Id.* at 80.

279. See *supra* note 196 and accompanying text.

280. See MORE REPORT, *supra* note 204, at 3.

281. See BETTER TOGETHER, MUNICIPAL COURTS, *supra* note 74, at 4, 15-16.

courts.<sup>282</sup> After nearly a year of investigation and community meetings, the Ferguson Commission released a report in which it described access to individual defense representation as a “signature priority.”<sup>283</sup> And while Ferguson’s website now states that individuals in its municipal court have a right “[t]o be represented by an attorney,”<sup>284</sup> as of the date of publication of this Article there is no system in place for providing access to counsel.

## II. THE ROLE OF INDIVIDUAL DEFENSE REPRESENTATION IN CRIMINAL JUSTICE REFORM

As detailed above, Ferguson is illustrative of how a system grounded on constitutional deficiencies can be used as a tool for revenue generation, and how individual defense counsel can help to reform such systems of governance. I turn now to what the experience in Ferguson may teach regarding the role of individual defense counsel for criminal justice reform efforts beyond that city’s borders. Ferguson supports the conclusion that defense counsel can help instigate criminal justice reform by shifting the cost-benefit of crime policies, by helping to create a public reckoning regarding such policies,<sup>285</sup> and by achieving both through traditional indigent defense

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282. See Jason Rosenbaum, *Nixon Forms ‘Ferguson Commission’ to Examine Divisions Throughout the Region*, ST. LOUIS PUB. RADIO (Oct. 21, 2014), <http://news.stlpublicradio.org/post/nixon-forms-ferguson-commission-examine-divisions-throughout-region> [<https://perma.cc/W6PW-HZ7E>].

283. See FERGUSON COMM’N, *FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY* 33 (2015).

284. *Rights and Responsibilities*, CITY OF FERGUSON, <https://www.fergusoncity.com/542/Rights-and-Responsibilities> [<https://perma.cc/MRU3-N4E3>].

285. Outside of the criminal arena, public law litigation scholars have long recognized the ability of counsel, particularly those litigating class actions, to effect systemic change. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302, 1310 (1976); see also Ben Depoorter, Essay, *The Upside of Losing*, 113 COLUM. L. REV. 817, 828 (2013); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 25 (1979); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 546 (2004); Carol M. Rose, *Coming to Terms with Terminology: Evaluating Law Reform*, 31 STAN. L. REV. 977, 977-78 (1979) (reviewing JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978)). In public law litigation scholarship, however, the work of defense counsel is often cast as uniquely individualized and, with the possible exception of appellate representation, uniquely apolitical. See, e.g., STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 83 (2004) (noting that, with the possible exception of appellate litigation, “public defender work is strictly about law” and “is much less political and largely cut off from social movements with

representation as well as through collaboration with federal and pro bono civil rights litigators and social justice activists. I conclude this Part by discussing the limitations of using Ferguson to understand the role of indigent defense representation as a means of systemic change—the inability to precisely compute fiscal or public pressure, and distinctions stemming from the attention of a wide range of advocates in Ferguson instigated by Michael Brown’s shooting—and argue that because indigent defense representation can create fiscal and public pressure for reform, access to counsel is especially needed in places where injustices are occurring outside of Ferguson’s spotlight.

*A. How Individual Representation Can Aid in Changing the Cost-Benefit of Crime Policy*

The experience in Ferguson supports the conclusion that advocacy by individual defense counsel can create political pressure by shifting the cost-benefit of crime policy decisions. This contention relates to an ongoing debate in the literature regarding the extent to which damage awards in constitutional tort litigation can create political pressure and force changes in governance.<sup>286</sup> Some commentators posit that civil damages serve as a deterrent to continued malfeasance, thereby pushing officials to engage in reforms to reduce the likelihood of future litigation.<sup>287</sup> Other commentators argue that even if damages are deterrent, because officials weigh those fiscal risks against other and perhaps competing interests, the actual effect on governance is too complicated to predict.<sup>288</sup> This case study of Ferguson does not resolve that debate, but it provides key evidence of the deterrent effect of changing the cost-benefit of crime

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political agendas”); Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL PROF. 209, 232 (1998) (describing criminal appellate representation as “impact litigation” in contrast to trial representation). The effects of work performed by individual defense attorneys in Ferguson, however, show that even trial-level defense representation has the capacity to create systemic change just like other forms of public law litigation.

286. See Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151-56 (2016) (describing positions taken by various commentators regarding the effect of civil suits seeking damages in deterring improper governmental conduct).

287. See *id.* at 1151-52.

288. See *id.* at 1152-53.

policy decisions even in situations in which revenue generation is not the sole motivating factor. In Ferguson, access to even limited defense representation shifted the cost-benefit balance of Ferguson's practices in two ways: through work by counsel in providing traditional indigent defense representation,<sup>289</sup> and by counsel's advocacy outside of that traditional role.<sup>290</sup> Both forms of advocacy can be tied directly to changes in Ferguson's budget and to reforms to its municipal court system.

First, once counsel began providing traditional indigent defense representation by litigating individual cases—even in just a handful of the cases charged in Ferguson—the costs of maintaining its municipal court system began to rise.<sup>291</sup> If defense representation was available system-wide, those expenditures would skyrocket even further. Litigation of issues ripe in Ferguson's system would necessitate an expansion of hearings at each stage: adjudicatory, sentencing, and collections.<sup>292</sup> At the adjudicatory stage, counsel could bring claims seeking the exclusion of evidence stemming from Fourth Amendment violations related to police practices of stopping people without probable cause or reasonable suspicion and seek hearings related to the failure of the police and prosecution to establish all elements of the offense.<sup>293</sup> In addition, challenges resulting in striking down a statute for criminalizing constitutionally protected behavior or being unconstitutionally vague<sup>294</sup> require hearings in order to force a stop to the use of such ordinances. Likewise, as-applied constitutional challenges—such as those that would stem from the police practice of issuing unlawful orders to stop and then arresting those who do not comply<sup>295</sup>—would result in additional hearings and related expenditures. Of course, Ferguson prosecutors and the municipal court could continue to simply dismiss or reduce charges to avoid these costs, as they have routinely

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289. *See supra* notes 237-38 and accompanying text.

290. *See supra* notes 3-7 and accompanying text.

291. *See supra* notes 239-47 and accompanying text.

292. Even if defense counsel were to routinely shift cases to the associate circuit court docket, prosecutorial costs would still increase. *See supra* notes 232-43 and accompanying text.

293. *See supra* notes 100-09 and accompanying text.

294. *See supra* notes 110-14 and accompanying text.

295. *See supra* notes 115-17 and accompanying text.



done when defendants were represented by counsel in the past,<sup>296</sup> but given how pervasive the constitutional and evidentiary problems have been in Ferguson,<sup>297</sup> that would leave very few cases—and therefore little revenue—on the table if defense counsel were available system-wide.

For those cases that survive through conviction, additional hearings would be likely. In Ferguson, nearly a quarter of the community lives below the poverty line,<sup>298</sup> and the Department of Justice's investigation found that law enforcement activities were targeted at low-income residents.<sup>299</sup> The imposition of the hundreds of dollars of fines and fees for often very minor offenses may trigger a successful Excessive Fines Clause challenge if, for example, that amount is beyond the defendant's means.<sup>300</sup> Even if all other practices leading to the conviction were constitutional, given the economic vulnerability of those haled into Ferguson's municipal court, hearings to ensure that economic sanctions do not violate the Excessive Fines Clause should be routine. Further, rather than automatically issuing an arrest warrant and using incarceration to both impose more fees and pry funds from the families and friends of indigent defendants, Ferguson would be required to provide *Bearden* hearings to assess the defendant's ability to pay prior to an arrest, as well as to provide alternative nonincarcerative methods such as a reduction in the sanction imposed, a reasonable payment plan (which would thwart Ferguson's practice of imposing additional fees for failure to pay), or community service.<sup>301</sup> The combination of additional hearings and these alternatives adds, again, to the city's expenditures and further decimates the revenue-generating value of economic sanctions.<sup>302</sup> That was not lost on municipal court Judge

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296. See *supra* notes 74-75 and accompanying text.

297. See Deere, *Two More*, *supra* note 231.

298. See, e.g., ARCHCITY WHITE PAPER, *supra* note 3, at 35.

299. See FERGUSON REPORT, *supra* note 9, at 58.

300. See *id.* at 58 n.33; *supra* Part I.A.3.

301. See *supra* Part I.A.4.

302. See *supra* Part I.A.3. The Excessive Fines Clause and the requirement to conduct *Bearden* hearings to assess whether a failure to pay is willful or due to poverty have a symbiotic relationship that may ultimately result in a reduced need to conduct *Bearden* hearings. A successful excessive fines claim would lead to economic sanctions imposed at an amount the defendant has a meaningful ability to pay. Absent an unexpected exigency limiting the defendant's financial resources during the period of collections, the need to conduct a *Bearden* hearing should drop significantly as the ability of defendants to pay the



Vatterott, who explained that court officials making up the Municipal Court Improvement Committee were “not theoretically opposed” to holding the hearings required under *Bearden*, but that doing so was “not practical” because it would require courts to increase court time and expend resources.<sup>303</sup>

Second, advocacy engaged in by counsel beyond traditional indigent defense representation separately aided in increasing costs and decreasing municipal court revenue. By revealing municipal court abuses, the ArchCity Defenders White Paper, and advocacy by their attorneys and those at the St. Louis University Criminal Defense Clinic, helped create a public uproar, contributing to social justice activists’ push for municipal court reform<sup>304</sup> and helping to instigate the Department of Justice investigation into municipal court abuses.<sup>305</sup> The combined effect of those advocacy efforts led to policy changes, including the elimination of the failure to appear ordinance and the associated fees that, along with work litigating individual cases, dramatically undercut the revenue-generating capacity of the court.<sup>306</sup>

Both traditional and nontraditional individual representation have had the capacity to create such effects in Ferguson because officials there are highly dependent upon the municipal court system to generate revenue, because widespread constitutional violations in its system gives counsel an opportunity to engage in extensive litigation, and because the community members subjected to the system were largely poor, raising the possibility that Excessive Fines Clause hearings would be relevant in nearly every case.<sup>307</sup> The experience in Ferguson suggests, then, that traditional representation is most likely to have similar effects in jurisdictions with one or more of the same characteristics. Because systems without counsel, or where counsel is effectively denied through chronic underfund-

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amount assessed rises.

303. See Freivogel, *supra* note 194.

304. See BETTER TOGETHER, MUNICIPAL COURTS, *supra* note 74, at 3, 13 (citing the work of the ArchCity Defenders and St. Louis University Criminal Defense Clinic); MORE REPORT, *supra* note 204, at 1 (same).

305. See *supra* notes 208-09 and accompanying text.

306. See *supra* notes 244-47 and accompanying text.

307. See *supra* Part I.A.3.

ing,<sup>308</sup> allow constitutional deficiencies to fester, the addition of counsel could be particularly valuable in such systems.<sup>309</sup>

This is not to say that there is no cost-benefit effect of individual defense representation in systems where revenue generation is less urgent, constitutional abuses are less prevalent, or where defendants are more likely to have economic stability; regardless of the setting, litigation in individual cases creates system costs, and such costs may help hold the potential for abuse in check. But for those systems most in need of reform, by expanding system costs and contracting revenues, individual defense representation can serve as a particularly powerful tool.

The fact that an interest in revenue generation can lead to shifting the cost-benefit analysis of a court system also does not mean that revenue must be the sole motivating factor. Ferguson shows, for example, that reforms are possible even in systems where at least some actors have other, even irrational motivations, including racial animus.<sup>310</sup> Other motivations need not be eliminated for reforms to occur; rather, fiscal motivations must align with or outweigh other concerns. If, for example, each case in which

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308. See *infra* notes 393-96 and accompanying text.

309. While the total absence of counsel is most likely to exist in courts handling low-level offenses, the Supreme Court's decision to limit the right to cases in which incarceration is on the line, see *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979), means that there is no right to counsel even in the felony arena in the context of civil asset forfeitures. Such forfeitures occur through a process that allows the government to seek money and property without securing a criminal conviction based upon suspicion that the owner is involved in illegal activity. See, e.g., 21 U.S.C. § 881(b) (2012). Representation in such cases is rare because there is no right to counsel per *Scott* and those subject to civil asset forfeiture rarely retain counsel because the expense of doing so may surpass the value of money or property at issue. See, e.g., Robert O'Harrow, Jr. et al., *They Fought the Law. Who Won?*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/> [<https://perma.cc/8Z4J-WHVX>]. The ability of local, state, and federal governments to generate billions of dollars in forfeiture revenue has been linked to questionable policing practices. See, e.g., Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40-41, 66-76 (1998) (documenting policing practices motivated by profit motivation); Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/> [<https://perma.cc/YJ8V-B8LC>] (reporting on an investigation of government records showing that between September 2001 and September 2014, local, state, and federal law enforcement seized more than 2.5 billion dollars, much of which was then used to fund programs such as drug task forces around the country). Therefore, the addition of counsel to litigate claims in this context may dramatically shift the cost-benefit of civil asset forfeiture policy.

310. See *supra* notes 210-22 and accompanying text.

police subject a black youth to an unconstitutional “ped check” results in a dismissal, thereby creating costs with no economic gain, actors in the system motivated by a desire to generate revenue rather than racial bias will pressure those whose motivations are reversed to stop the use of “ped checks.” While fiscal concerns may not be sufficiently substantial to force reform in every system, and undoubtedly will not prevent all misbehavior,<sup>311</sup> that does not mean that defense representation has no political effect.<sup>312</sup>

In addition to the ways in which defense counsel created fiscal pressure to force reforms, both traditional and nontraditional individual representation had the capacity to effect change in Ferguson because that work created fiscal pressure on the very city officials who had control over the functioning of the municipal court system.<sup>313</sup> Governments are bureaucracies that often have multiple decision makers attending to any particular area of governance.<sup>314</sup> Crime policy decisions, for example, may be made by those expending resources, receiving revenues from economic sanctions, or both.<sup>315</sup> Therefore, the ability to replicate the effects of representation

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311. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 386 (2000) (arguing that, because police officers have discretion to stop and arrest, improper behavior may occur even where officials “are motivated to direct the agency to engage in socially optimal behavior”); cf. Schwartz, *supra* note 286, at 1201-02 (noting that fiscal pressures may encourage officials to attend to liability risks created by improper policing, but that “[r]equiring law enforcement agencies to bear the costs of lawsuits does not eliminate misconduct by those agencies”).

312. See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 847-48 (2001) (arguing that constitutional litigation can create “a deterrent effect on the behavior of ... governmental actors and entities”).

313. See Deere, *Legal Bills*, *supra* note 173.

314. See Levinson, *supra* note 311, at 380 (“Government is not a monolithic decisionmaker, but a multilayered collection of politicians and bureaucrats with different, and often conflicting, goals and agendas.”).

315. This misalignment between expenditures and revenues creates interesting power dynamics across governmental entities. See Marsh & Gerrick, *supra* note 123, at 111 (noting that financial incentives may be misaligned, for example, when “the entity that is seeking to collect the economic sanction is not the same entity that pays the cost of incarceration”). This is not, however, unique to the issue of access to counsel but is part of a larger phenomenon in the criminal arena. See, e.g., LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 8-11 (2008) (investigating how the participation of interest groups favoring tough-on-crime policies at the local level affected crime policy at the state and national level); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 253-57 (2011) (arguing that the funding of prisons at the state and federal level and policing at the local level results in both over-punishment and under-policing); W. David Ball, *Defund-*

seen in Ferguson will vary from jurisdiction to jurisdiction due to different formulas for moving monies into and out of criminal systems.<sup>316</sup> But despite that complication, the growing use of economic sanctions by government officials to generate revenue nationally means that the potential for individual defense representation to create pressure on key decision makers and therefore to shift the cost-benefit of crime policies has broad applicability.<sup>317</sup>

### *B. How Individual Representation Can Aid in Creating a Public Reckoning*

In addition to creating fiscal pressure, individual defense counsel in Ferguson created and even mandated a public conversation about crime policy in ways that contributed to and amplified reform efforts both within and beyond the tribunal. Ferguson shows how this may occur in two key ways. First, defense counsel can force the government to take a public position on its manner of governance through both traditional indigent defense representation and civil rights litigation. Second, by serving on the ground day-to-day within a criminal system, defense attorneys are in a unique position to spot, and make public, patterns of abuse.

#### *1. Forcing the Government to Take a Public Stance*

Just as in other forms of public law litigation, individual defense representation has the capacity to compel the government to take a position—to acknowledge its behavior in a specific, articulated way.<sup>318</sup> That public stance reveals details regarding the government's

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*ing State Prisons*, 50 CRIM. L. BULL. 1060, 1084-86 (2014) (arguing that centralization of prisons at state budgetary level allows jurisdictions to hide racial inequalities and disparate treatment in policing and prosecution by averaging those practices across localities).

316. Cf. Schwartz, *supra* note 286, at 1194-95 (describing varying budgetary arrangements related to policing in different jurisdictions). Compare, e.g., FERGUSON VIOLATIONS SCHEDULE, *supra* note 58, at 1, with NOT JUST A FERGUSON PROBLEM, *supra* note 26, at 10.

317. See *supra* note 26.

318. See Depoorter, *supra* note 285, at 834 (“Litigation is an adversarial process that frames issues and draws individuals into taking sides.”); see also, e.g., Orleans Public Defenders (@OrleansDefender), TWITTER (July 9, 2016, 12:18 PM), <https://twitter.com/OrleansDefender/status/751858033664274432/photo/1> [<https://perma.cc/K2VN-QHZ5>] (“It’s our job as public defenders to demand our clients’ voices matter, our communities matter & fight for change.... Through litigation, narration, and investigation, we tell judges, prosecutors, jurors

behavior, as well as the purported justification for it, and does so in a public forum. This public statement regarding governmental policies and practices, necessitated by litigation, provides an opportunity for constituents to evaluate the crime policy decisions of their elected officials, and creates pressure on officials when their behavior violates the public's expectations.<sup>319</sup> This may occur even when officials had not blessed or even been aware of the misbehavior at issue. As Myriam Gilles has explained: "Good' municipal managers may respond to previously unknown information concerning the departments over which they have jurisdiction; 'bad' managers may be responding only to the publicity that attends the exposure of this information."<sup>320</sup> In either case, the public revelation of malfeasance can push officials toward reform.<sup>321</sup>

We saw traditional indigent defense representation create this effect in Ferguson, for example, when defense counsel's litigation of several issues in a series of failure to comply cases led the prosecution to take the position that arrest should equate to guilt.<sup>322</sup> Protestors seized on news reports of the government's position in calling for the prosecutor's ouster.<sup>323</sup> Just as with the fiscal effect of individual defense representation, an expansion of defense services system-wide would have created even more opportunities to force officials to defend or repudiate the municipal court system. For example, if an individual defendant were to have challenged the system's focus on revenue generation as violating due process,<sup>324</sup> municipal officials would have been forced to publicly recognize the

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that our clients' lives matter, our clients' families' lives matter, our clients' communities' lives matter.").

319. See Emily Chiang, *Institutional Reform Shaming*, 120 PENN. ST. L. REV. 53, 81 (2015) (positing that litigation can be used to shame public actors by serving "as a call to community members to take action by joining in the condemnation").

320. Gilles, *supra* note 312, at 861; see also Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844-45 (2012) (explaining how officials may learn about policing practices through civil rights litigation).

321. See Gilles, *supra* note 312, at 860 (noting that the exposure of unconstitutional behavior can create a "desire to avoid adverse publicity, the cost and burden of litigation, and the sting of a determination of liability"). See generally Chiang, *supra* note 319, at 54-55 (regarding the shaming effect of litigation).

322. See *supra* note 248 and accompanying text.

323. See *supra* note 249 and accompanying text.

324. Each of the due process cases establishing these rules arose through advocacy on behalf of individual defendants. See *supra* note 48.

myriad facts later uncovered in the various investigations of the city's practices detailed in Part I. Likewise, issues raised at adjudication, such as a Fourth Amendment challenge to police use of "wanted," "ped checks," or other stops without probable cause or reasonable suspicion,<sup>325</sup> would require the officer involved to testify publicly regarding the invalidity of the stop, revealing to the public the failure of the police chief to control police forces. A challenge to an ordinance—such as failure to comply—as unconstitutionally vague would require police to explain publicly the ways they use the statute to entrap and harass citizens in order to write more and more tickets.<sup>326</sup> While any one of these challenges raised in just a few cases may allow officials to claim the officers involved were merely "bad apples" rather than symptoms of larger problems within the system of government, in jurisdictions like Ferguson where constitutional violations are rampant, the sheer volume of constitutional claims that might be raised if access to counsel were afforded broadly would be nearly impossible to disclaim.<sup>327</sup>

The same effect would be had in claims raised post-conviction. If a defendant were to raise an Excessive Fines Clause challenge at sentencing, the choice to defend the severity of an offense would require the municipality to explain, for example, why officials believed that ordinances including "Manner of Walking in Roadway" and "High Grass and Weeds" were so serious that they justified subjecting their constituents to insurmountable debt and the perpetual risk of incarceration.<sup>328</sup> Likewise, because *Bearden* requires the court to consider alternatives to incarceration for those unable to pay, legal claims would require officials to explain why they flatly rejected the alternatives offered by the *Bearden* Court: reductions in debt, reasonable payment plans, and community service.<sup>329</sup>

Further, Ferguson provides an example of how individual defense counsel can collaborate or inspire other forms of civil rights litigation, which also can force the government to acknowledge its behavior. After investigating systemic abuses in Ferguson, the class

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325. See *supra* notes 100-04.

326. See *supra* notes 105-07, 111-14.

327. See Gilles, *supra* note 312, at 861-63 (regarding the "fault-fixing" function of constitutional litigation as "localizing culpability in the municipality itself").

328. See *supra* Part I.A.3.

329. See *supra* Part I.A.4.

action initiated by the ArchCity Defenders, St. Louis University Criminal Defense Clinic, and Equal Justice Under the Law included a claim that Ferguson's denial of defense representation in collection hearings was unconstitutional.<sup>330</sup> Ferguson's collections practices so obviously miss that mark that in response to the class action complaint, Ferguson did not dispute that its failure to provide defense counsel violated due process.<sup>331</sup>

In both traditional individual representation and in class litigation efforts, attorneys in Ferguson were effective at creating public pressure because, by speaking to the press and collaborating with social justice advocates, they kept public attention on the positions Ferguson took in litigation. A key lesson from Ferguson, then, is that individual defense counsel can be most effective at creating public pressure for reform if attorneys both raise claims in litigation that force the government to stake out a position and work to ensure those positions are made public so as to foster collaboration with other reformers and public debate.

## 2. *Identifying Patterns of Abuse*

Individual defense counsel can also use its vantage point to spot patterns of abuse and make them public. Particularly when counsel exposes behaviors that implicate "the cultural and political forces that give rise to or countenance police misconduct"<sup>332</sup> or other systemic deficiencies within criminal systems, their work can create significant pressure for reform.

In Ferguson, this occurred most notably through the issuance of the ArchCity Defenders White Paper in which its attorneys documented the results of a court-watching project.<sup>333</sup> The White Paper had tremendous consequences for Ferguson. It quickly caught national press attention,<sup>334</sup> contributed to other investigations into

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330. See Class Action Complaint, *supra* note 171, at 40.

331. See *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1034 (E.D. Mo. 2015) ("[T]he City does not dispute that appointment of counsel, or waivers thereof, were required.")

332. See Gilles, *supra* note 312, at 859.

333. See *supra* notes 181-84 and accompanying text.

334. See, e.g., Koran Addo, *ArchCity Defenders Saw Problems with Municipal Courts Before Ferguson Turmoil*, ST. LOUIS POST-DISPATCH (Apr. 15, 2015), [http://www.stltoday.com/news/local/metro/archcity-defenders-saw-problems-with-municipal-courts-before-ferguson-turmoil/article\\_f1493907-7c8c-55af-a68b-6e36df0c2cae.html](http://www.stltoday.com/news/local/metro/archcity-defenders-saw-problems-with-municipal-courts-before-ferguson-turmoil/article_f1493907-7c8c-55af-a68b-6e36df0c2cae.html) [<https://perma.cc/GZG6-EWJD>].



municipal court practices by social justice advocates and the Department of Justice,<sup>335</sup> and also led the ArchCity Defenders to collaborate with the St. Louis University Criminal Defense Clinic and Equal Justice Under the Law to initiate a civil rights class action.<sup>336</sup>

The White Paper also aided reform efforts by identifying limitations in the law—places where the constitutional and statutory rules fail to protect social norms<sup>337</sup>—thereby helping to identify the need for social justice activism outside of the court. For example, by identifying how the use of failure to appear ordinances in St. Louis County’s municipal courts led to the incarceration of people unable to pay economic sanctions,<sup>338</sup> the ArchCity Defenders made concrete and public a way in which existing laws violated community expectations. Ultimately, with pressure from those attorneys and social justice advocates, Ferguson officials acquiesced in eliminating the charge.<sup>339</sup>

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335. See BETTER TOGETHER, MUNICIPAL COURTS, *supra* note 74, at 11-14; MORE REPORT, *supra* note 204, at 2; see also *supra* note 208 and accompanying text.

336. See *supra* note 202 and accompanying text.

337. See Depoorter, *supra* note 285, at 821, 836.

338. See ARCHCITY WHITE PAPER, *supra* note 3, at 9.

339. See *supra* note 190 and accompanying text. A willingness to reach out to other advocates can also be critical for addressing limitations on the defense function. For example, indigent defense counsel’s ability to directly attack certain aspects of conscious or unconscious bias in policing and court practices are hampered by the nature of the claims counsel have at their disposal. As Devon Carbado has detailed in depth, the Fourth Amendment not only allows for, but legalizes, racial profiling by constitutionalizing pretextual stops, see *Whren v. United States*, 517 U.S. 806, 813 (1996), and by allowing police to consider ethnicity, see *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975), appearance, see *United States v. Sokolow*, 490 U.S. 1, 4-5, 10 (1989), and the nature of the neighborhood where the stop occurs, see *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), when assessing suspicion. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. (forthcoming 2017) (describing how race is a structural feature of Fourth Amendment jurisprudence); see also *Utah v. Streiff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) (describing Fourth Amendment jurisprudence regarding police stops). Yet, indigent defense counsel must necessarily rely on that Fourth Amendment doctrine to raise challenges related to the existence of probable cause and reasonable suspicion. Likewise, as Gabriel Chin has written, courts often assess risk and the sufficiency of punishment—in the context of bail determinations, assessing plea bargains, and at sentencing—by relying on facially race-neutral factors such as home ownership, employment history, and residential neighborhood. Gabriel J. Chin, Essay, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2255-58 (2013). By zealously advocating for clients who fare better on such assessments—clients who are more likely to be white and economically stable—indigent defense counsel risk further entrenching racial and class disparities

The court-watching program that set the stage for these various forms of advocacy is akin to the day-to-day representation that occurs when counsel is systemically provided, even though in this case it was done to supplement the limited representation pro bono counsel could provide.<sup>340</sup> What the work of counsel in Ferguson suggests, then, is that where indigent defense counsel documents patterns of abuse and makes those patterns public, it has the potential to significantly affect public debate on crime policy.

*C. How the Limitations of Using Ferguson as a Model Support Systemic Access to Counsel*

In considering what we might learn from the experience in Ferguson about the role of indigent defense counsel in creating systemic reform, it is also important to consider limitations of using Ferguson as a model.

First, it is impossible to measure the exact percentage of fiscal or public pressure created by individual defense representation as opposed to other actors in the arena, just as it is impossible to say whether the Department of Justice would have been alerted to the need for municipal court reform through its investigation into policing in Ferguson without having first considered the ArchCity Defenders White Paper. Likewise, this study of Ferguson does not strictly measure the comparative weight of these pressures against other fiscal or political considerations Ferguson officials might have had. So while Ferguson is an example of how individual defense representation can create such pressures, it cannot do so with mathematical precision. Although this certainly means that optimal

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in criminal systems. *See id.*; *see also* Marsh & Gerrick, *supra* note 123, at 117-19 (noting that *Bearden's* distinction between willful nonpayment and an inability to pay economic sanctions, though protective, invokes “the rhetoric of personal responsibility [that] rings of barely disguised, and at times undisguised, racism” (footnotes omitted)). Indigent defense counsel has an important role to play in alerting other reformers of the limitations of established legal claims so that efforts can be directed at forcing change through other forms of advocacy.

340. *See* ARCHCITY WHITE PAPER, *supra* note 3, at 1.

levels of deterrence cannot be identified,<sup>341</sup> it does not mean that individual defense representation has no political value.<sup>342</sup>

Second, a separate, though related, problem is the way in which circumstances in Ferguson have been distinct from what is happening in other jurisdictions. It is becoming increasingly clear that, in terms of using criminal systems for revenue generation and ignoring constitutional restrictions, Ferguson is far from alone,<sup>343</sup> but there are ways in which it is unique. The shooting of Michael Brown, which occurred on the heels of the controversial use of deadly force by police against Eric Garner in New York City,<sup>344</sup> brought national attention to Ferguson. With that national attention came the Department of Justice investigation and an exceptional level of scrutiny on Ferguson's municipal court system resulting in litigation by both civil rights litigators and the Department. Work to reform the use of economic sanctions is happening elsewhere, but the reach is necessarily limited. Civil rights litigators including those involved in class litigation in St. Louis County, as well as the Southern Poverty Law Center, the Southern Center for Human Rights, and the ACLU, have been doing yeoman's work on reforming the use of economic sanctions through class litigation in various jurisdictions across the country.<sup>345</sup> Likewise, there are other

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341. See Levinson, *supra* note 311, at 347-48 (arguing that "exchanging economic costs and benefits into political currency" is too complex to ensure that cost increases will result in socially desirable outcomes).

342. See Gilles, *supra* note 312, at 847-48 (critiquing the notion that because fiscal pressure created through litigation may not result in optimal deterrence of government misbehavior, it has no deterrent effect).

343. See, e.g., *supra* note 26.

344. See John Lewis, *Michael Brown, Eric Garner, and the 'Other America,'* ATLANTIC (Dec. 15, 2014), <http://www.theatlantic.com/politics/archive/2014/12/michael-brown-eric-garner-other-america-john-lewis/383750> [<https://perma.cc/4UJQ-DQM7>].

345. See, e.g., Order Granting Preliminary Approval of Class Action Settlement, Directing the Dissemination of Notice, and Scheduling a Final Settlement Hearing at 4, *Jenkins v. City of Jennings*, No. 4:15-CV-00252-CEJ (E.D. Mo. filed July 13, 2016); *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at \*8 (N.D. Ga. Jan. 28, 2016); *Mitchell v. City of Montgomery*, No. 2:14cv186-MHT, 2014 WL 11099432, at \*2-3, \*16 (M.D. Ala. Nov. 17, 2014); Class Action Complaint at 50-51, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015); Class Action Complaint at 26, *Bell v. City of Jackson*, No. 3:15-cv-732-TSL-RHW (S.D. Miss. Oct. 9, 2015); Complaint at 12-13, *Foster v. City of Alexander City*, No. 3:15-cv-647-WKW (M.D. Ala. filed Sept. 8, 2015); Complaint at 16, *Edwards v. Red Hills Cmty. Prob., LLC*, No. 1:15-cv-67 (M.D. Ga. Apr. 10, 2015); Complaint at 1-2, *Thompson v. DeKalb County*, No. 1:15-cv-00280-TWT (N.D. Ga. Jan. 29, 2015); Complaint at 45, *Thomas v. City of Gulfport*, No. 1:05-cv-349-LG-RHW (S.D. Miss. July 21, 2005); Complaint for

examples of public defender organizations engaging in systemic advocacy of the sort undertaken by the ArchCity Defenders and the St. Louis University Criminal Defense Clinic,<sup>346</sup> and working to ensure that defense work garners public attention.<sup>347</sup> But it would be infeasible for these civil rights organizations to engage in the kinds of advocacy happening in Ferguson nationwide, and in some jurisdictions public defenders are limited to engaging in only traditional defense services. And while under the Obama Administration the Department of Justice issued a letter to state and local courts making clear it intended to continue its advocacy in jurisdictions that abuse criminal systems for the purpose of revenue generation,<sup>348</sup> there is no guarantee that such efforts will continue under

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Declaratory and Injunctive Relief ¶ 70, *Fuentes v. Benton County*, No. 15-2-002976-1 (Super. Ct. Yakima Co., Wash. Oct. 6, 2015).

346. For example, the attorneys who founded the ArchCity Defenders modeled their organization after The Bronx Defenders, *see* Harvey Interview, *supra* note 1, a public defender organization that combines representation in individual criminal cases with community outreach and education, impact litigation, and legislative advocacy, *see Our Mission and Story*, BRONX DEF., <http://www.bronxdefenders.org/who-we-are/> [<https://perma.cc/APW7-7GL5>]. The Bronx Defenders engage in holistic representation, *see id.*, and have been praised for the innovative ways in which they have shifted criminal practices in New York. *See* Nick Pinto, *Making Bail Better*, VILLAGE VOICE (Oct. 10, 2012, 4:00 AM), <http://www.villagevoice.com/news/making-bail-better-6436447> [<https://perma.cc/XQ8U-K4RM>] (describing The Bronx Defenders' creation of a community bail fund to ensure the release of clients from pretrial detention as "one of the most remarkable experiments in criminal justice in recent years, a pilot program for a growing movement that might be on the verge of changing the face of criminal justice in New York"); *see also* Natapoff, *supra* note 27, at 1075-76 (describing the work of The Bronx Defenders and similar public defender organizations); Roberts, *supra* note 27, at 102-03 (describing how, following individual challenges by students in a legal clinic and the filing of a federal lawsuit in which The Bronx Defenders served as co-counsel, the Bronx District Attorney changed its practice of filing misdemeanor trespass charges based solely on police reports, opting instead to first "interview the arresting officer to determine whether the arrest was lawful," which was followed by a decline in trespass arrests of 38.2 percent).

347. For example, to draw attention to the chronic underfunding of indigent defense in Missouri, Michael Barrett, Director of the Missouri State Public Defender, wrote and published a letter in which he described the funding crisis and then used a state law allowing him to conscript members of the bar to serve as defense counsel to appoint Jay Nixon to a case. *See* Letter from Michael Barrett, Dir., Mo. State Pub. Def., to Jay Nixon, Governor of Mo. (Aug. 2, 2016), [http://www.publicdefender.mo.gov/Newsfeed/Delegation\\_of\\_Representation.pdf](http://www.publicdefender.mo.gov/Newsfeed/Delegation_of_Representation.pdf) [<https://perma.cc/W4UZ-K7LZ>].

348. *See* Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, and Lisa Foster, Dir., Office for Access to Justice, U.S. Dep't of Justice, to Colleagues (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download> [<https://perma.cc/3UDZ-CRGY>].

the Trump Administration.<sup>349</sup> Even if it did, a nationwide effort by the Department of the kind seen in Ferguson is also infeasible. Therefore, in many jurisdictions it is unlikely that the extent of the combined pressure of indigent defense counsel and other litigation threats will be readily duplicated.

Likewise, Michael Brown's death sparked protests regarding police brutality that quickly came to include calls for municipal court reform. To be sure, it is possible to look at Ferguson and see the role the ArchCity Defenders and St. Louis University Criminal Defense Clinic played in bringing municipal court issues to the fore. In addition to the ArchCity Defenders White Paper, those serving as individual defense counsel participated in public debates, called attention to the plight of their clients in the press, and supported grass-roots reformers by publicly questioning why social justice advocates were not afforded an opportunity to participate in municipal court officials' reform efforts.<sup>350</sup> What is not clear is whether the level of social justice activism seen in Ferguson would have been so intense or so sustained if it had not first been prompted by the shooting of Michael Brown.

In other words, Ferguson had a confluence of circumstances and players that is unprecedented. In many jurisdictions where indigent defense counsel could have the most fiscal and political effect because of dependence on revenue generation or patterns of unconstitutional behavior, abuses are, put simply, so ordinary that they go without notice.

In many ways, however, this supports the need for access to indigent defense counsel all the more. Even setting aside pressures created by the Department of Justice, class litigation, and social justice advocates, the work of attorneys engaged in traditional indigent

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349. See Matt Zapotosky et al., *President Trump's Justice Dept. Could See Less Scrutiny of Police, More Surveillance of Muslims*, WASH. POST (Nov. 10, 2016), [https://www.washingtonpost.com/world/national-security/donald-trump-preached-law-and-order-now-likely-comes-less-police-scrutiny-more-surveillance-of-muslims/2016/11/10/c430a234-a696-11e6-ba59-a7d93165c6d4\\_story.html](https://www.washingtonpost.com/world/national-security/donald-trump-preached-law-and-order-now-likely-comes-less-police-scrutiny-more-surveillance-of-muslims/2016/11/10/c430a234-a696-11e6-ba59-a7d93165c6d4_story.html) [https://perma.cc/S7ZF-RXBZ] (contrasting aggressive civil rights enforcement by the Obama Administration's Department of Justice with the law and order rhetoric espoused by Donald Trump during his presidential campaign); Eli Hager et al., *8 Ways Jeff Sessions Could Change Criminal Justice*, MARSHALL PROJECT (Nov. 18, 2016, 4:53 PM), <https://www.themarshallproject.org/2016/11/18/8-ways-jeff-sessions-could-change-criminal-justice> [https://perma.cc/TG44-WXNV] (same).

350. See *supra* notes 196-205 and accompanying text.

defense representation created both fiscal and public pressure on key decision makers in Ferguson.<sup>351</sup> And that occurred even though counsel was available in only a handful of cases. System-wide defense representation in Ferguson would necessarily expand the costs of maintaining the municipal court and would force the government to take public positions on its behavior in an even greater number of cases, even without the involvement of other actors. Given that indigent defense counsel may be the only avenue to create such pressures in most jurisdictions, access to counsel becomes that much more critical.

### III. THEORETICAL AND NORMATIVE IMPLICATIONS

In this Part, I turn to the theoretical and normative implications that can be drawn from the work of individual criminal defense counsel in Ferguson. Though full examination of these implications are beyond the scope of this Article, I conclude here by suggesting that analysis of individual representation in Ferguson is relevant to two areas worthy of continued inquiry. First, I consider what this study of Ferguson can contribute to the long-standing debate over whether government overreach in establishing the breadth and severity of criminal law is best checked through application of constitutional rights writ large, or whether constitutional procedural rules should be abandoned in favor of local control over policing. Second, I suggest that this study of Ferguson illustrates how discussions concerning access to counsel are often too constrained. On the one hand, viewing access to counsel as a purely constitutional issue obscures the role of political choice in denying representation. On the other, the constitutional right to counsel has been hampered by a failure of the Supreme Court to adequately account for defense counsel's importance as a check against systemic abuses.

#### *A. Implications Regarding the Role of Constitutional Procedural Rights and Local Governance in Criminal Justice Reform*

The experience in Ferguson has implications for a broader theoretical debate about how best to understand and check the

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351. See *supra* notes 231-49 and accompanying text.



breadth and severity of criminal law, and particularly the role of constitutional procedural rules. Criminal procedure scholars generally agree that the Supreme Court has placed few restrictions on lawmakers' ability to criminalize conduct and set punishment and has failed to meaningfully restrict prosecutorial power to charge and bargain. As a result, prosecutors can threaten to increase the quantity or severity of charges to force defendants to plead guilty.<sup>352</sup> Many scholars have argued that the breadth and severity of criminal law in the United States also may result in the selective enforcement of criminal laws against poor and minority communities.<sup>353</sup> Despite common ground regarding the consequences of highly punitive criminal laws, there has been a long-standing debate regarding how best to correct this situation.

The debate is largely shaped by the work of William J. Stuntz, who argued that constitutional procedural rules caused a punitive backlash.<sup>354</sup> According to Stuntz, stringent rules aimed at protecting defendants prompted lawmakers to expand the breadth of what constitutes criminal activity and the severity of punishments, leading to too much prosecutorial power as well as selective enforcement against poor, and particularly black, communities.<sup>355</sup> He also believed that the backlash contributed to the ineffectiveness of indigent defense counsel by prompting lawmakers to underfund defense systems and by inducing indigent defenders to focus on the wrong thing—procedural rules—instead of guilt or innocence.<sup>356</sup> To counteract these problems, Stuntz would deconstitutionalize procedural regulation<sup>357</sup>—including the type of Fourth Amendment protections

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352. See, e.g., Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S. CAL. L. REV. 459, 460 (2014); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535-38 (2001) [hereinafter Stuntz, *Pathological Politics*]; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791, 832-34 (2006) [hereinafter Stuntz, *Political Constitution*]; see also Rachel E. Barkow, *Law Versus Politics*, 63 U. TORONTO L.J. 138, 142, 144, 146, 148 (2013) (reviewing STUNTZ, *supra* note 315).

353. See, e.g., Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 167 (2016); Stuntz, *Political Constitution*, *supra* note 352, at 815-16.

354. See Stuntz, *Political Constitution*, *supra* note 352, at 789-91, 798, 816.

355. See *id.*

356. See *id.* at 836; see also STUNTZ, *supra* note 315, at 299-300.

357. See, e.g., STUNTZ, *supra* note 315, at 218-20. In addition to preserving the right to counsel, see Stuntz, *Political Constitution*, *supra* note 352, at 836, Stuntz would continue to



detailed in Part I—in exchange for local control over procedure and policing under the theory that, if left unregulated, lawmakers would develop procedures and practices that are fair and evenly employed across all segments of society.<sup>358</sup>

On the other side of the debate are scholars including David Sklansky and Robert Weisberg, who have argued that the punitive turn is better explained by variances in political power and that constitutional challenges writ large have the capacity to cabin lawmakers' ability to expand criminal law and punishment.<sup>359</sup> They envision a system in which the Supreme Court and criminal justice

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regulate, to some degree, excessive force, discrimination, corruption, and interrogation practices, *see id.* at 833-34.

358. *See* STUNTZ, *supra* note 315, at 39 (“Make criminal justice more locally democratic, and justice will be more moderate, more egalitarian, and more effective at controlling crime.”); *see also id.* at 283, 287. Stuntz also suggested that trial judges should have the power to dismiss charges for any reason and reduce sentences in order to serve as a check on prosecutorial power in plea bargaining. *See* Stuntz, *Political Constitution*, *supra* note 352, at 836, 838, 842. While this may be a useful reform, the experience in Ferguson suggests it should come with a good deal of oversight so that such powers are not merely used to protect individuals with political power. *See supra* notes 94-95 and accompanying text. Other remedies proposed by Stuntz fit comfortably within the thesis of this project. For example, he proposed remedies designed to improve system transparency and to ensure equal application of the law, including extensive data collection regarding charging, conviction, and sentencing practices, and requirements that the prosecution prove systemic enforcement by comparison to the handling of factually similar cases. *See* Stuntz, *Political Constitution*, *supra* note 352, at 834, 836-38, 840-42. He also tied the ability to use data to “identify and punish *worst* practices,” particularly with respect to racial discrimination, to the Department of Justice’s power to bring suit to seek reform. *See id.* at 834-35. Perhaps most importantly, Stuntz supported the full funding of indigent defense. *See supra* note 356 and accompanying text.

359. *See* David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 63-64 (2006) (replying to Stuntz, *Political Constitution*, *supra* note 352); Robert Weisberg, *First Causes and the Dynamics of Criminal Justice*, 119 HARV. L. REV. F. 131, 134-35, 137-39 (2006) (same). In addition to Sklansky and Weisberg, Donald Dripps has disputed the claim that the Warren Court’s procedural revolution caused a punitive backlash. *See* Dripps, *supra* note 352, at 478-79. Dripps conducted an empirical evaluation showing that jurisdictions that both did and did not require significant shifts in practice as a result of the new procedural rules became more punitive over time, at largely consistent rates, and decades after the Warren Court’s procedural revolution. *See id.* at 478-92; *see also id.* at 473-74 (noting that Congress’s response to the procedural revolution, the Omnibus Crime Control & Safe Streets Act of 1968, was not substantive, but procedural, and the federal punitive turn did not occur until the mid-1980s). Stephen Schulhofer has examined crime rates, demographic data, and the rollback of procedural protections by the Burger and Rehnquist Courts and similarly concluded that it is not possible to prove a causal link between the Warren Court’s procedural decisions and the punitive turn. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1065-79 (2013) (reviewing STUNTZ, *supra* note 315).

actors are in a dialogue: when the Court speaks, those actors conform or change laws and practices in response, and the Court then has an opportunity to bless or strike down those changes and address any violations of its rules.<sup>360</sup> Sklansky and Weisberg, therefore, favor the continued use of both substantive and procedural constitutional rules as a check on political overreach.<sup>361</sup>

Ferguson provides an opportunity to test these theories in a system where lower-level offenses are punished primarily through economic sanctions. The experience in Ferguson suggests that Stuntz's exchange of procedural rules for local control is ill conceived. Instead, Ferguson supports Sklansky and Weisberg's argument that both substantive and constitutional procedural rules provide an important check on governmental action—presuming, of course, that indigent defense counsel is available to litigate such claims.

First, Ferguson shows that prizing local governance over constitutional procedural regulation opens the door for the design and maintenance of systems that value revenue generation over fairness. While scholars such as Rachel Harmon have argued that it is critical to consider both economic outputs and inputs to criminal systems,<sup>362</sup> the procedural debate has largely focused on how procedural rules create system costs.<sup>363</sup> Yet, in Ferguson and an increasing

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360. See Sklansky, *supra* note 359, at 59-61 (describing “a story of constitutional law and statutory innovation sharing a regulatory space, to their mutual benefit”); Weisberg, *supra* note 359, at 137-39.

361. See Sklansky, *supra* note 359, at 63-64 (emphasizing the value of Court-made constitutional rules); Weisberg, *supra* note 359, at 134-35 (questioning the motivations of a political response to loosened Fourth Amendment protections).

362. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 889-91 (2015).

363. Stuntz's work, for example, was notable for his attention to the potential effects of how resource limitations could pervert policing and prosecution, see, e.g., Stuntz, *Political Constitution*, *supra* note 352, at 784, 815-16 (arguing that costs imposed by constitutional law skew aggressive policing toward poor and minority communities), and even noted budgeting pressures at the local level, see *id.* at 808. Yet, fines, fees, surcharges, and other forms of economic sanction simply were not part of Stuntz's equation, meriting only passing mention in his later work and even then without reference to the perverse incentives economic sanctions may create for local officials. See, e.g., STUNTZ, *supra* note 315, at 3 (noting that state troopers have power to selectively enforce traffic laws, “handing out fines for driving at speeds no higher than most cars on the road”); *id.* at 67, 76 (noting the Excessive Fines Clause as among the “mild constraints of the Eighth Amendment”); *id.* at 117 (describing fines, costs, and restitution as part of a statutory punishment for the violation of an 1875 civil rights statute later struck down in the Civil Rights Cases in 1883); *id.* at 125 (describing *O'Neil v.*

number of jurisdictions around the country,<sup>364</sup> the interest in generating revenue also has implications for the breadth and severity of criminal law and attendant problems of prosecutorial power and selective enforcement. Without a meaningful check, local governments can and do use criminal systems to generate revenue at the expense of their constituents, saddling people with unmanageable debt, and even going to such lengths as incarcerating those who have no meaningful ability to pay.<sup>365</sup> Counsel's use of both substantive *and procedural* rules can be the basis of a powerful check on such behavior.

Second, while understanding fiscal motivation is critical, it is unlikely to be the sole motivating factor at the local level. In particular, shifting power to local governance without a meaningful check underestimates the long record of local governments focusing the enforcement of low-level public order and vice offenses against the politically vulnerable—particularly poor and black communities—just as Ferguson has done.<sup>366</sup> Historians have shown that long before the Warren Court's procedural revolution, policing practices

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*Vermont*, an 1892 case in which incarceration in lieu of paying a fine was challenged under the Due Process and Cruel and Unusual Punishments Clauses); *see also* William J. Stuntz, *Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns—Understanding the Unraveling of American Criminal Justice*, 119 HARV. L. REV. F. 148 (2006) (replying to Sklansky, *supra* note 359, and Weisberg, *supra* note 359) (no mention of economic sanctions); Stuntz, *Pathological Politics*, *supra* note 352 (same); Stuntz, *Political Constitution*, *supra* note 352 (same); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (same).

364. *See supra* note 26.

365. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1602-03 (2015); Colgan, *supra* note 133, at 285-95.

366. *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 106-07 (2005) ("From the close of Reconstruction to the modern civil rights revolution, law enforcement played a central role in maintaining the exclusion of African-Americans and other minorities from the Nation's political life. When suspected, however remotely, of wrongdoing, these citizens became the targets of sweeping and invasive tactics of investigation."). In addition to the historical use of selective enforcement, Stuntz's causal thesis is undermined by the long history of legislative support for prosecutorial power to force pleas, which existed long before the Warren Court. As George Fisher documented in his groundbreaking historical work on early criminal practices, legislative manipulation of substantive criminal law and sentencing severity for the purposes of increasing prosecutorial power to plea bargain has dated back to the early nineteenth century. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 864 (2000). For an additional critique of Stuntz's historical account, *see* Schulhofer, *supra* note 359, at 1049-58.

have targeted racial minorities for low-level offenses.<sup>367</sup> In the reconstruction-era South, newly freed slaves were subjected to a series of vaguely written minor offenses related to black people's public lives, particularly with regard to movement and employment,<sup>368</sup> that came to be known as the Black Codes.<sup>369</sup> A key example of the Black Codes was the crime of vagrancy, "the offense of a person not being able to prove at a given moment that he or she is employed."<sup>370</sup> Following arrest, local officials disincentivized trial by charging fees for each portion of the trial process.<sup>371</sup> Courts summarily sentenced black men, women, and children to pay fines they could not manage and then leased the "convicts" to plantations, mines, and mills to serve out the debt.<sup>372</sup> In the North and West, police also targeted black people for arrest on charges of being "suspicious characters,"<sup>373</sup> vagrancy,<sup>374</sup> or other public order<sup>375</sup> and vice<sup>376</sup> offenses. Selective

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367. Two of the most notable historical contributions in this regard have been Douglas A. Blackmon's work regarding policing and court practices in the Jim Crow South and Khalil Gibran Muhammad's exploration of how empirical studies and statistical data were used to create the perception of criminality among black people in the age of the Great Migration in the northern and western United States. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010).

368. See BLACKMON, *supra* note 367, at 53-54, 99-100.

369. See, e.g., Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2258-59 (1998). Stuntz spoke about the Black Codes and the practice of debt peonage, but chiefly to contrast the size of police forces in the North and South. See STUNTZ, *supra* note 315, at 102-03, 144-45.

370. See BLACKMON, *supra* note 367, at 1; see also *id.* at 53, 124.

371. See *id.* at 66, 100, 108-09.

372. See, e.g., *id.* at 65; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 31 (rev. ed. 2012) (comparing the relationship between penal labor and slavery); Donna Murch, *Paying for Punishment: The New Debtors' Prison*, BOS. REV. (Aug. 1, 2016), <https://bostonreview.net/editors-picks-us/donna-murch-paying-punishment> [<https://perma.cc/U9W8-V274>] (comparing historical practices with modern charges imposed on criminal defendants and prisoners).

373. MUHAMMAD, *supra* note 367, at 247; see also *id.* at 248 (describing a 1929 National Urban League study of Denver arrests on charges of "[i]nvestigation"); *id.* at 240 (describing a study in which a Chicago municipal court judge accounted the frequent arrest of black people "without a bit of evidence").

374. See, e.g., *id.* at 244 (describing a police raid of all black-operated pool halls in a northern city in which 160 people were arrested for vagrancy—a charge directly tied to unemployment—even though 60 of those arrested were able to produce proof of employment); *id.* at 248 (regarding vagrancy arrests in Denver).

375. See, e.g., *id.* at 248 (describing a National Urban League study of public order offense arrests in Troy, New York, in which 78 percent of arrests of black people were ultimately

enforcement of these types of charges, in other words, predated the Warren Court by generations and remains a key part of local government practices in places like Ferguson.<sup>377</sup> One need only fast-forward to the way in which Ferguson police used offenses aimed at public behaviors of black people—including movement, through the use of vehicle stops and “ped checks” and offenses such as “Manner of Walking in Roadway”—to see the historical parallels.<sup>378</sup> The absence of counsel to seek enforcement of constitutional rules—including substantive rules that restrict the use of vague statutes *and* procedural rules that check policing within politically vulnerable communities—helped sustain a system in Ferguson rife with selective enforcement.

Third, policing practices in Ferguson undermine the notion put forth by Stuntz that constitutional procedural claims distract defense counsel from litigating guilt and innocence. Rather, Ferguson’s practices show the close relationship between the violation of procedural rules and the government’s ability to use broad substantive laws to obtain convictions for low-level offenses in which police testimony is particularly critical to establishing guilt, given that officers are often the primary witnesses. By design, Ferguson’s police department engaged in rampant Fourth Amendment violations targeted at black people in the community, such as the use of “wanteds” and “ped checks.”<sup>379</sup> That form of policing provided a platform for charging defendants with substantive crimes such as failure to comply.<sup>380</sup> Without Fourth Amendment challenges to those practices, evidentiary problems related to guilt or innocence were effectively concealed.<sup>381</sup> Therefore, deconstitutionalizing criminal procedural rules would actually remove a key tool from defense

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“suspended, discharged, or adjourned” (quoting the National Urban League’s director of research and publicity, Ira De A. Reid)).

376. See, e.g., *id.* at 260 (describing Walter Reckless’s 1933 study, *Vice in Chicago*, showing that policing of vice targeting black people expanded significantly during the first two decades of the Great Migration).

377. See Birkhead, *supra* note 365, at 1623-24 (detailing the state of southern policing at the start of the twentieth century).

378. See *supra* notes 210-14 and accompanying text.

379. See *supra* notes 102-05 and accompanying text.

380. See *supra* notes 106-08 and accompanying text.

381. See *supra* notes 106-10 and accompanying text. *But see* STUNTZ, *supra* note 315, at 220 (“[M]ore attention paid to enforcing Fourth Amendment doctrine means less attention paid to other, more important issues, including the defendant’s conduct and intent.”).

counsel's ability to litigate guilt or innocence and also eliminate a means of checking abusive policing practices.

In systems like Ferguson's, where low-level offenses are punished primarily through economic sanctions, constitutional procedural rules are an important tool to ward off the types of abuses seen there. Substantive rules play a part—they allow defense counsel to seek the elimination of unconstitutionally vague statutes or reductions of punishments based on the Excessive Fines Clause—but they are not enough. Procedural rules ward off the type of policing that not only allows for easy convictions on low-level offenses in which guilt or innocence may be obscured by police behavior, but also helps sustain systems designed for revenue generation. Of course, if there is hope for either substantive or procedural rules to be used in the type of constitutional dialogue between the Court and criminal justice actors envisioned by Sklansky and Weisberg, there must be an investment in indigent defense representation.

Though what has occurred in Ferguson favors the ability of counsel to use both substantive and procedural rules to challenge government action, it does not, of course, resolve the debate, though it does have implications for the role of criminal procedural rules in other arenas. First and foremost, it suggests that there should be expanded consideration of the role of revenue generation in criminal systems. While this may be most critical when considering systems, like Ferguson's, that primarily address low-level offenses through the imposition of economic sanctions and that are highly dependent upon such sanctions as revenue-generation tools, the use of economic sanctions to generate revenue extends into the felony context and therefore is broadly relevant to criminal justice practices.<sup>382</sup> The experience in Ferguson also suggests the importance of considering the historical use of selective enforcement for various kinds of offenses, as well as examination of how procedural rules become intertwined with determinations of guilt and innocence.

In short, this investigation into how indigent defense counsel may use criminal procedural rules to ward off the types of abuses seen in Ferguson provides an opportunity to test and confirm the value of those rules. It also corroborates the importance of considering

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382. See Murch, *supra* note 372 (highlighting voting disenfranchisement due to criminal justice debt from felony convictions); *supra* notes 307-09 and accompanying text.



revenue generation, historical policing practices, and the use of such practices in establishing guilt when assessing the role procedural rules play in checking governmental abuses. But it also confirms the important work that scholars such as Stuntz, Sklansky, and Weisberg have undertaken. They have been right to insist that we look to interactions between constitutional rules and how criminal law plays out in the real world when searching for the cause of, and solutions to, seemingly intractable problems including overcriminalization, excessively harsh punishments, and selective enforcement for which the most politically disenfranchised communities bear the most significant burden.

*B. Implications for Understanding Access to Counsel as Both Political and Constitutional*

There is an old adage that “prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers—one at a time.”<sup>383</sup> That view of the role of indigent defense is correct. Individual defense representation is the primary means by which all other rights are afforded a defendant,<sup>384</sup> and guards against a defendant being “put on trial without a proper charge, and convicted upon incompetent evidence.”<sup>385</sup> That is the very role indigent defense counsel has played for those lucky few in Ferguson who have had representation.<sup>386</sup> Though correct, however, that view of indigent defense representation is also incomplete. By shifting the cost-benefit of crime policies, by forcing the government to take a position on its policies and practices, and by spotting and making patterns of abuse public, indigent defense counsel can and are contributing in meaningful ways to political reform of criminal systems.

Understanding the role of defense counsel in this way is useful for those thinking about how to advocate for reform, whether through policy advocacy or constitutional reinterpretation. Paul Butler has written persuasively about how the individualized focus on the right to counsel may create a distraction from broader

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383. *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting).

384. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) (describing the right to counsel as guaranteeing that “all other rights of the accused are protected”).

385. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

386. *See, e.g., supra* note 265 and accompanying text.



machinations of criminal systems that create systemic class- and race-based harm.<sup>387</sup> While he has acknowledged that aggressive litigation of constitutional issues may increase system costs in ways that create systemic effects,<sup>388</sup> he has also posited that advocates would be better served by “abandon[ing] rights discourse and rather focus[ing] on reducing the number of poor people overall, and African Americans specifically, who are incarcerated.”<sup>389</sup> What I raise here are two concerns in the same vein. First, focusing on counsel as a constitutional right alone obscures the fact that access to counsel is also a political choice that is part of the broader political machination of our criminal systems that allows abuses to occur. Second, while counsel’s ability to enforce constitutional rights that protect against government overreach is a key component of its capacity to effect systemic change, the right to counsel doctrine’s myopic focus on the rights-enforcing role of counsel has failed to account for the way in which individual defense representation functions as a form of political participation by effecting that very change. These problems are intertwined and together they risk creating space for the types of abuses seen in Ferguson.

### *1. Understanding Access to Counsel as Political*

There is evidence that officials in Ferguson see access to counsel too narrowly, as solely a constitutional right. Despite progress on other municipal court reforms, at the time this Article went to press, Ferguson had yet to create a public defender system. The civil rights class action filed against Ferguson includes a constitutional right to counsel claim to which Ferguson officials raised no defense,<sup>390</sup> but those officials have behaved as if they are under no obligation to provide counsel absent a court determination that they are constitutionally mandated to do so. This suggests that Ferguson officials see the matter as dictated solely by the Constitution in a way that

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387. See Butler, *supra* note 32, at 2195-97; see also Depoorter, *supra* note 285, at 820 (describing literature that critiques litigation as a form of “legal cooptation of a social movement”).

388. See Butler, *supra* note 32, at 2202 (theorizing that increased prosecution costs will decrease mass incarceration).

389. *Id.* at 2203.

390. See *supra* notes 330-31 and accompanying text.

obscures the role they play in deciding, as a political matter, whether to provide or deny access to counsel.

Doctrinal limitations on the constitutional right to counsel, of course, do not prohibit the government from providing counsel.<sup>391</sup> It is lawmakers who choose not to do so. Lawmakers also choose to grossly underfund counsel, expending only approximately 1 percent of all criminal justice spending nationally on defense services, with funding declining even as the number of prosecutions rise.<sup>392</sup> Some lawmakers choose to cut costs on indigent defense by retaining counsel through low-bid contracts.<sup>393</sup> Other lawmakers choose to fund defense services by charging defendants—who only qualify for representation if they are indigent—through preservice application fees or post-conviction assessment of costs.<sup>394</sup> Lawmakers even choose to fund indigent defense through the use of economic sanctions, thereby creating a system in which defense counsel's financial viability is dependent upon the court punishing their clients.<sup>395</sup>

Reimagining the role of counsel not just as a right in and of itself guarded only by the Constitution, but as an important check upon government abuses that is also dependent upon the political will of

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391. See *supra* notes 21-25 and accompanying text.

392. See Pfaff, *supra* note 33.

393. See Stephen B. Bright & Sia M. Sanneh, Essay, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2165-67 (2013); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 287 (2010).

394. See Beth A. Colgan, Essay, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1931-32 (2014); see also BORUCHOWITZ ET AL., *supra* note 167, at 16; Pfaff, *supra* note 33. In some jurisdictions, application fees for public defense services are waivable. See, e.g., E. Tammy Kim, *Poor Clients Pay Just to Apply for a Public Defender*, AL JAZEERA AM. (Jan. 9, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/1/9/poor-defendants-payfeesjusttoapplyforapublicdefender.html> [<https://perma.cc/2CG3-SKVX>] (describing the application fee increase in New Jersey from fifty dollars to two hundred dollars, though noting the amount is waivable). Defendants may not be informed that fees are waivable, however, causing them to forego counsel. See Bright & Sanneh, *supra* note 393, at 2163-64. In other jurisdictions, application fees are required. See, e.g., Ryan Grenoble, *Florida Judge Scraps Policy of Arresting People Who Fail to Pay Court Fines*, HUFFINGTON POST (Sept. 18, 2015, 1:29 PM), [http://www.huffingtonpost.com/entry/orange-county-florida-court-fee-arrest\\_us\\_55faee45e4b00310edf616d1](http://www.huffingtonpost.com/entry/orange-county-florida-court-fee-arrest_us_55faee45e4b00310edf616d1) [<https://perma.cc/B4L7-HWK8>] (describing a Florida case in which a man waited in jail for nearly two months without representation because he could not pay a fifty dollar application fee).

395. See, e.g., Colgan, *supra* note 394, at 1932; Dylan Walsh, *On the Defensive*, ATLANTIC (June 2, 2016), <http://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> [<https://perma.cc/6SCZ-VEWD>].

lawmakers places access to counsel well within the political arena. The value of work performed by individual defense attorneys in Ferguson, both for their individual clients and in achieving systemic reform, shows why it is important to understand the political nature of access to counsel. If lawmakers are allowed to use the constitutional pedigree of counsel as a shield to deflect responsibility for denying access to counsel, access will remain limited. If instead, lawmakers feel political pressure to provide counsel regardless of whether they are constitutionally mandated to do so, the pattern of depriving counsel in full, or effectively through deficiency in funding, could be interrupted. That will not be easy. As several scholars have noted, political opposition to defense representation, and in particular to providing sufficient funding to ensure counsel has the capacity to provide effective representation, is deeply entrenched in American politics and will be difficult to overcome.<sup>396</sup> This may be particularly true in jurisdictions like Ferguson where access to counsel undermines one of the key reasons the municipal court system is valued: its capacity to generate revenue.<sup>397</sup> Yet there are reasons to believe that access to defense counsel may be gaining political traction. In a handful of states, the movement to increase indigent defense funding has been successful,<sup>398</sup> and there is

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396. See, e.g., Bibas, *supra* note 32, at 1291 (describing full indigent defense funding as a “dream” that is “politically and financially unattainable” and calling for a contraction of the right to counsel to felony cases); see also Carol S. Steiker, Keynote Address, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013) (explaining that “any thoroughgoing solution to our Sixth Amendment quandary is less a matter of law than one of political will” but that “[w]ith clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone’s list”). But see Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 255-68 (2004) (arguing that the odds of legislative support for parity between prosecution and indigent defenders are high). Constitutional litigation can aid in forcing legislatures to provide funding for indigent defense. For example, after years of litigating a class action lawsuit seeking prospective injunctive relief in which plaintiffs argued that the State of New York’s failure to fund indigent defense violated the Sixth Amendment right to counsel, the State entered into a settlement in which it agreed, for the first time, to provide funding to five of its counties. See *Stipulation and Order of Settlement at 3, Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014).

397. See *supra* note 5 and accompanying text.

398. See, e.g., David Carroll, *Utah Reforms Indigent Defense with First-Ever State Dollars for Trial Representation*, SIXTH AMENDMENT CTR. (Mar. 16, 2016), <http://sixthamendment.org/utah-reforms-indigent-defense-with-first-ever-state-dollars-for-trial-representation/> [<https://perma.cc/BSW3-5R5D>].

increasing support for indigent defense reform across the political spectrum.<sup>399</sup> Further, though securing legal representation may be difficult, the same could be said for other seemingly intractable issues that have seen movement of late, including the push to make mandatory minimum sentencing part of the reform agenda<sup>400</sup> or to unseat prosecuting attorneys who are seen as too aggressively punitive.<sup>401</sup> The depth with which the indigent defense crisis is embedded in American criminal justice is exactly why the lessons of Ferguson, which give fodder to a reimagining of indigent defense as a fuller check against politics as usual, are so important to heed.<sup>402</sup>

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399. See, e.g., Andrew Cohen, *A New Conservative Approach to Justice: Serve the Poor*, MARSHALL PROJECT (May 12, 2015, 2:13 PM), <https://www.themarshallproject.org/2015/05/12/a-new-conservative-approach-to-justice-serve-the-poor> [https://perma.cc/M8Y8-LQ9K]; Orin Kerr, *Koch Industries Gives Grant to NACDL “to Address the Nation’s Profound Indigent Defense Crisis,”* WASH. POST: VOLOKH CONSPIRACY (Oct. 21, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/21/koch-industries-gives-grant-to-nacdl-to-address-the-nations-profound-indigent-defense-crisis> [https://perma.cc/2X9Q-AK4F]. But see Mark Joseph Stern, *Donald Trump Thinks that the Fundamentally American Right to Counsel Is Hurting America*, SLATE (Sept. 19, 2016, 5:51 PM), [http://www.slate.com/blogs/the\\_slatest/2016/09/19/donald\\_trump\\_on\\_the\\_right\\_to\\_counsel\\_for\\_ahmad\\_khan\\_rahami.html](http://www.slate.com/blogs/the_slatest/2016/09/19/donald_trump_on_the_right_to_counsel_for_ahmad_khan_rahami.html) [https://perma.cc/L97X-NXCD] (relating statements by then-presidential candidate Donald Trump regarding the right to counsel for a bombing suspect).

400. See, e.g., Danyelle Solomon, *In a Nutshell: Criminal Justice Bills Pending Before Congress*, BRENNAN CTR. FOR JUST. (Aug. 3, 2015), <https://www.brennancenter.org/blog/nutshell-criminal-justice-bills-pending-congress> [https://perma.cc/43LG-C6MN].

401. See, e.g., David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. (forthcoming 2017); Deborah L. Shelton, *Organizers Celebrate the Defeat of Anita Alvarez by Planning Their Next Steps*, NATION (Mar. 16, 2016), <https://www.thenation.com/article/organizers-celebrate-the-defeat-of-anita-alvarez-by-planning-their-next-steps/> [https://perma.cc/7AHV-GC3N]; see also President Barack Obama, Remarks at the Democratic National Convention, 2016 DAILY COMP. PRES. DOC. 6 (July 27, 2016) (“If you want more justice in the justice system, then we’ve all got to vote—not just for a president, but for mayors, and sheriffs, and state’s attorneys, and state legislatures. That’s where the criminal law is made.”).

402. Cf. Gerald P. López, *Keynote Address—Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2053-54 (2005) (“But how do we know what we can individually and collectively accomplish unless, against the reigning approach to how to live and work, we act as if our dreams can come true? ... Reject absolutely the ‘common sense’ and ‘mature’ notion that what we’re now living marks the limits of what’s possible.”).

*2. Accounting for the Political Effect of Individual Defense  
Representation Within the Right to Counsel Doctrine*

Under both classic and contemporary liberal theory, individual rights serve to protect against deprivations of personal liberty through the creation of negative liberties that restrict government action,<sup>403</sup> such as the Fourth Amendment's limitations on the ability of police to engage in searches or seizures.<sup>404</sup> Though the right to counsel creates an affirmative obligation on the state rather than a restriction on its behavior, because the right to counsel is inherently intertwined with securing protections afforded by negative liberties,<sup>405</sup> it fits comfortably within liberal theory.<sup>406</sup> Although individual defense representation certainly fulfills that role, this study of Ferguson shows it also operates on a separate though related axis in which the right also functions as a form of civic participation.<sup>407</sup> Because individual defense representation can change political dynamics through the restructuring of the cost-benefit of particular crime policies and by forcing a public accounting of governmental behavior, the right to counsel also protects the core democratic value of participatory government that is traditionally understood as a tenet of the theory of republican constitutionalism.<sup>408</sup> This marriage of the two theories, in which a right might be understood as both protective of negative liberties and of the larger democratic project of participatory government—what Cass Sunstein has dubbed “[l]iberal republicanism”<sup>409</sup>—provides an accurate understanding of the right to counsel.

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403. See, e.g., John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 124-25, 124 n.37 (2002).

404. See, e.g., Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1465-66 (2002).

405. See *supra* notes 383-86 and accompanying text.

406. Cf. Michaels, *supra* note 404, at 1466-67.

407. See Hill, *supra* note 403, at 166-67 (“[R]ights have two general functions and should be understood to operate along both of these axes .... They protect the individual in the pursuit of a range of personal interests and activities from various forms of social and political invasion ... [and serve] as empowering devices that permit the individual to invoke various protections in the name of preserving a counterbalance of social power.”).

408. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495-96, 1525-26 (1988).

409. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

The right to counsel doctrine, however, is narrowly focused on the degree to which counsel is needed to protect negative liberties.<sup>410</sup> Take, for example, the Supreme Court's decision in *Scott v. Illinois*, in which the Court declined to recognize the right to counsel in courts, like Ferguson's, where people are punished through economic sanctions.<sup>411</sup> Framed as a question of the severity of the deprivation of liberty at stake in the criminal proceeding—where actual imprisonment is sufficiently severe to warrant the protection of counsel and economic sanctions are not—the Court could justify the deprivation of counsel.<sup>412</sup> Drawing the line between incarceration and economic sanctions has proven unworkable and therefore open to challenge,<sup>413</sup> given that jurisdictions like Ferguson are using incarceration as a collections tool,<sup>414</sup> and given that the proliferation of evidence of the severity of economic sanctions, which can result in significant and even lifelong consequences for those too poor to pay.<sup>415</sup> But more fundamentally, the *Scott* decision, like the right to counsel doctrine as a whole,<sup>416</sup> did not grapple with the way in which counsel serves a means of challenging systems of governance, and

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410. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (“In a long line of cases ... this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.”); *United States v. Cronin*, 466 U.S. 648, 653-54 (1984) (“[Counsel’s] presence is essential because they are the means through which the other rights of the person on trial are secured.”).

411. See 440 U.S. 367, 373-74 (1979).

412. See *id.* at 371-73.

413. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1994))). For a discussion of how the Supreme Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), requiring defense counsel to provide advice on the immigration consequences of a conviction also may require a reevaluation of *Scott*, see Ingrid V. Eagly, Essay, *Gideon’s Migration*, 122 YALE L.J. 2282, 2301 (2013).

414. See *supra* Part I.A.4.

415. See, e.g., Colgan, *supra* note 133, at 279-81; John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 16 (2013) (arguing that the “actual incarceration” line no longer comports with the realities of misdemeanor punishment, particularly due to the impact of collateral consequences).

416. See, e.g., *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting) (“In my view, the Court’s opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching.”). For a discussion of how the Sixth Amendment’s ineffectiveness test, set out in *Strickland v. Washington*, 466 U.S. 668 (1984), precludes consideration of systemic issues such as funding, see, for example, Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 925 (2010); and Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1204-16 (2013).



therefore as a form of participatory republicanism that may provide independent reasons for extending the right.<sup>417</sup> While the *Scott* Court considered the expense to the state of providing counsel when holding that fine-only offenses were outside of the scope of the right, it did not consider how denial of counsel would restrict the ability of those subjected to criminal systems to engage in political participation regarding those very systems.<sup>418</sup> Counsel provide clients with the opportunity to engage in civic participation by “function[ing] as the instrument and defender of the client’s autonomy and dignity in all phases of the criminal process.”<sup>419</sup> By cutting short that opportunity, the right to counsel doctrine denies membership in civic participation to those who need it most<sup>420</sup>: criminal defendants who have “no lobby.”<sup>421</sup> The costs of ignoring the political effect of representation—borne out so starkly in Ferguson—include allowing systems of governance that favor revenues over fairness and allow constitutional violations to flourish.<sup>422</sup> Individual defense representation serves as a check against such systemic abuses; that role should be relevant to constitutional interpretation regarding how far the constitutional right to counsel should reach.

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In short, what the continuing lack of a public defense system in Ferguson’s municipal court suggests is that lawmakers do not yet feel an obligation to ensure access to effective counsel, regardless of whether they are mandated to do so by the Constitution. At the same time, the existing constitutional doctrine has not sufficiently

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417. See *Scott v. Illinois*, 440 U.S. 367, 371-74 (1979).

418. See *id.* at 372-73.

419. *Jones v. Barnes*, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting).

420. See AMY GUTMANN, *LIBERAL EQUALITY* 181 (1980) (“To deny *effective* equal participatory rights or *fair* equality of participatory opportunities is to deny the equal dignity of individual citizens.”); Michelman, *supra* note 408, at 1496 (describing the focus on negative liberties in the liberal tradition as “abet[ting] the community’s self-betrayal through lapse of commitment to extension of membership to persons who, at many historical moments, could not count themselves heirs to traditions whose meanings did at those times involve the exclusion or subordination of just those persons”).

421. *Criminal Justice Act: Hearing on H.R. 4816 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 88th Cong. 32 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States) (“The poor man charged with crime has no lobby.”).

422. See *supra* Part I.A.



accounted for the role indigent defense counsel can play in a participatory government by guarding against systemic abuse. Studying the way in which indigent defense counsel serve as the primary enforcement mechanism for constitutional rights, and how enforcement of those rights has the potential to create other criminal justice reforms, allows a greater understanding of the link between the two problems. To overcome these problems, those seeking criminal justice reform should pressure lawmakers to feel an obligation to support full access to counsel, without a constitutional mandate *and* push forward on efforts to create the constitutional mandate that will force their hand. Both efforts support the same end: ensuring that indigent defense representation is available to serve as an important tool of systemic reform.

#### CONCLUSION

Studying Ferguson shows how affording access to counsel can increase the enforcement of constitutional rights, and, in doing so, both raise the operating costs of criminal systems and reduce the imposition of economic sanctions, depleting the system of its revenue-generating power. The work of pro bono defense counsel in Ferguson also shows the power of indigent defense representation to change crime policy debates by forcing the government to stake out positions in litigation, by spotting patterns of abuse, and by working to ensure that both are made public. While the confluence of events in Ferguson and the extent of public scrutiny there were unique, and while the work of individual defense counsel can be most effective when undertaken in combination with advocacy by the Department of Justice, civil rights litigators, and social justice advocates, the experience in Ferguson shows that traditional indigent defense representation can play a key role in systemic criminal justice reform.