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Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations

By

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Introduction

Protests and political actions in the St. Louis, Missouri region following Michael Brown's 2014 death in Ferguson, Missouri from police gunshots² questioned whether the justice system in much of the United States continues to be racist nearly 150 years after the adoption of the Fourteenth Amendment to the U.S. Constitution.³ The Black Lives Matter⁴ national chapter organization, formed at the time of George Zimmerman's acquittal of the unlawful killing of Trayvon Martin,⁵ assumed an active role in the Ferguson related protests along with numerous other activist community organizations. Some protest activities in the City of St. Louis were met with police in riot gear, tear gas, and National Guard troops with armored vehicles.⁶ The protests focused scrutiny on local justice systems and policing.

¹ This project has been funded in part with a grant from the Presidential Research Fund of Saint Louis University. Thanks to Rachel Giordano, Xia Wang, Joseph Benoist, and Kerstine Kerner for research assistance.

² A St. Louis County grand jury did not indict the police officer who shot Michael Brown to death. See documents released following the Grand Jury conclusion at http://hosted.ap.org/specials/interactives/_documents/ferguson-shooting/.

³ U.S. Const., 14th Amendment (ratified 1868) (granting citizenship to former slaves and guaranteeing equal protection of the law).

⁴ The Black Lives Matter website at <http://blacklivesmatter.com/> details the organization and current activities of the movement.

⁵ Lizette Alvarez and Cara Buckley, Zimmerman is Acquitted in Trayvon Martin Killing, The New York Time (July 13, 2013) available at http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?ref=collection%2Ftimestopic%2FMartin%2C%20Trayvon&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=64&pgtype=collection

⁶ Images of riot police in St. Louis during 2014 protests available at https://www.google.com/search?q=riot+police+in+st+louis+2014&espv=2&biw=1366&bih=623&tbm=isch&imgil=bbK-UA6WtEdoMM%253A%253BW_yR8mfaiXQIoM%253Bhttp%25253A%25252F%25252Fwww.salon.com%25252F2014%25252F08%25252F14%25252Freports_gov_nixon_to_remove_st_louis_county_police_from_ferguson%25252F&source=iu&pf=m&fir=bbK-UA6WtEdoMM%253A%252CW_yR8mfaiXQIoM%252C_&usg=__CiAyf78qOpY8pGjdHgwmdb644w8%3D&ved=0ahUKEwiBm4yXv-PJAhWDez4KHZcpCncQyjcINw&ei=xPpyVoGpB4P3-QGX06i4Bw#imgrc=bbK-UA6WtEdoMM%3A&usg=__CiAyf78qOpY8pGjdHgwmdb644w8%3D

In March 2015, the Civil Rights Division of the United States Department of Justice released its critical study of policing practices in the city of Ferguson, Missouri.⁷ Among the study's findings are observations that law enforcement practice is consciously revenue driven in Ferguson⁸ and discriminates against African Americans.⁹

In addition to the Department of Justice, the governor of the state of Missouri established the Ferguson Commission and appointed its membership.¹⁰ Governor Nixon charged the Ferguson Commission to “study and recommend ways to make the St. Louis region a stronger, fairer place for everyone to live.” The Ferguson Commission released its report in the fall of 2015.¹¹ That report confirms the existence of continuing racial inequality on many levels in the St. Louis region and recommends changes.

The negotiated draft of a consent decree in *United States v. City of Ferguson* became available in late January of 2016.¹² The City rejected the consent decree purportedly because of the cost of the reforms it would have required and the Department of Justice has filed suit.¹³ Reversing its position, Ferguson subsequently adopted the consent decree somewhat altered from the original decree.¹⁴ The Federal District Court for the Eastern District of Missouri approved the decree in April, 2016.¹⁵ The decree¹⁶ limits police activities and alters aspects of the

⁷ Civil Rights Division, U.S. Department of Justice, Investigation of the Ferguson Police Department (March 4, 2015) available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (in the following referred to as “DOJ Ferguson Police Report”).

⁸ The DOJ Ferguson Police Report cites a March 2010 written communication from the Ferguson City Finance Director to the Ferguson Police Chief Jackson: ‘unless ticket writing ramps up significantly before the end of the year, it will be hard to raise collections next year ... Given that we are looking at a substantial sales tax shortfall, it’s not an insignificant issue.’ And further citing a March 2013 communication by the Finance Director to the City Manager: ‘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.’ *Id.* at 2.

⁹ *Id.* at 4.

¹⁰ Executive Order 14-15 (November 18, 2014) of Governor Jeremiah W. (Jay) Nixon, available at <https://governor.mo.gov/news/executive-orders/executive-order-14-15>.

¹¹ STL Positive Change The Ferguson Commission, Forward through Ferguson A Path to Racial Equality, (as of October 14, 2015) available at http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf. This article refers to the report as the “Ferguson Commission Report” in the following.

¹² U.S. v. Ferguson Consent Decree available at <https://www.documentcloud.org/documents/2699153-Negotiated-Ferguson-Draft-Consent-Decree.html>.

¹³ DOJ Lawsuit against Ferguson, St Louis Post-Dispatch (Feb. 10, 2016) available at http://www.stltoday.com/doj-lawsuit-against-ferguson/pdf_afa0e395-82c7-505e-a691-33e642e501bc.html.

¹⁴ Laura Wagner, Ferguson City Council Accepts Consent Decree Worked Out With Justice Department (NPR, 3/15/16) available at <http://www.npr.org/sections/thetwo-way/2016/03/15/470598733/ferguson-city-council-accepts-deal-with-justice-department>.

¹⁵ Ricardo A. Ramírez, Federal Judge Approves Ferguson Consent Decree Following Public Hearing (4-20-16) available at <http://www.advancementproject.org/news/entry/federal-judge-approves-ferguson-consent-decree-following-public-hearing>.

¹⁶ The decree in *The United States v. The City of Ferguson* is available at <http://www.moed.uscourts.gov/sites/default/files/mdl/16-0180/0012-02.pdf>.

municipal court system.¹⁷ The decree hopefully would diminish racism in law enforcement and limit use of policing and the municipal court to raise revenue. On the April, 2016 ballot, voters in Ferguson passed a sales tax increase but rejected a property tax increase.¹⁸ Voters approved a two percent utility tax increase on the August, 2016 ballot.¹⁹

While the DOJ Ferguson report²⁰ and the consent decree²¹ both address practices in Ferguson only, the Ferguson Commission report²² identifies racism in policing and use of the municipal justice system to raise revenue as regional issues.²³ Our research confirms that revenue driven and discriminatory law enforcement practices permeate municipal justice throughout St. Louis County, most prominently in non-affluent municipalities²⁴ with large black populations.²⁵ Through analysis of its survey results,²⁶ our research further discloses that individuals who appear in municipal courts perceive police and the municipal courts, especially in non-affluent communities, to be focused more on producing municipal revenue through the justice system than on meting out justice to protect public safety and regulate dangerous or disruptive activities.²⁷ The results also disclose that the surveyed group perceives the municipal justice system to discriminate against blacks.²⁸

¹⁷ Matt Apuzzo and John Eligon, Justice Department and Ferguson Reach Agreement on Police, *The New York Times* A13 (Jan. 28, 2016) (describing the settlement between the U.S. Department of Justice and leaders in Ferguson to end “unlawful arrests, ensur[e] that the courts are independent of prosecutors and preserv[e] people’s right to film police officers”).

¹⁸ Monica Davey, Ferguson Voters Give Split Result on Funding Police Overhaul, *The New York Times* (April 6, 2016) (available at <http://www.nytimes.com/2016/04/06/us/ferguson-voters-give-split-result-on-funding-police-overhaul.html>). The property tax increase proposal got a majority of the votes but required a two-third super majority to pass, while the sales tax increase proposal required only a majority and passed with 59 percent.

¹⁹ City of Ferguson, Ferguson residents approve Proposition U, available at <https://www.fergusoncity.com/CivicAlerts.aspx?AID=476>.

²⁰ *Supra* note 7.

²¹ *Supra* note 16.

²² *Supra* note 11.

²³ Thomas A. Garrett and Louis Gary A. Wagner, Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets, 52 *J. L. and Econ.* 71 (2009) (empirical testing of issuance of traffic tickets for revenue in North Carolina).

²⁴ This paper uses the terms “affluent” and “non-affluent,” rather than related terms, including “rich” and “poor,” “high-income,” “low-income,” etc. for consistency with the convention adopted for the survey conducted under the direction of Professors Warren and Sandoval outside various St. Louis County municipal courts during the months of October and November, 2015 (the “Municipal Courts Survey”). Survey Results of the Municipal Courts Survey are published in Kenneth F. Warren, Onésimo Sandoval, and Henry Ordower, Ferguson and A Dozen Others: Perceptions of Affluent v Non-Affluent Municipal Court Systems in Saint Louis County by Race and Community Affluence, (forthcoming), and the affluent/non-affluent identification of communities appears in Graph 1 at page ___ and as Appendix A to this article.

²⁵ *Id.*

²⁶ *Id.* at . Appendix B *infra*.

²⁷ *Id.* at . Appendix B *infra*.

²⁸ *Id.* at . Appendix C *infra*.

If the justice system is discriminatory and revenue driven, as the DOJ Ferguson Police Report concludes and our research broadly confirms for large swaths of St. Louis County, Missouri, the report and our research raise the fundamental question of whether we respect the “rule of law”²⁹ at local level in the 21st century United States. Discussions of elements of a rule of law vary, but most discussions agree that rule of law means that i) all members of society are subject to identical legal rules, ii) courts apply the law independently, iii) laws are transparent and understandable and iv) laws are enacted by legislatures that represent the people to whom the laws apply.³⁰

Even if most municipalities in the United States do not discriminate or use their municipal justice systems to raise revenue from their non-affluent populations, some do.³¹ The perception that rule of law is absent in municipal justice systems may be as significant as actual absence of the rule of law. That perception undermines the willingness of segments of the population – especially blacks -- to cooperate with and call upon law enforcement authorities when needed. Lack of confidence in that they will receive fair treatment from the police and courts consistent with rule of law principles also discourages participation in the political process so that the legislatures often do not represent the population to whom the legal rules they enact apply.³² The perception of unfairness, whether justified or not, also may cause community members not to accept any part of the justice system as fair. Perception of unfairness undercuts the effective administration of the rule of law because it evidences that the laws in their application are not transparent and understandable.³³

Much literature on discrimination examines issues of racial profiling.³⁴ People of color tend to eschew interaction with the police even when they need police assistance.³⁵ Evidence, both anecdotal³⁶ and statistical,³⁷ of racial profiling and disparate treatment of people of color is

²⁹ United Nations Rule of Law available at http://www.unrol.org/article.aspx?article_id=3, A.B.A. Rule of Law Definition available at <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>, World Justice Project Rule of Law definition, available at <http://worldjusticeproject.org/what-rule-law>.

³⁰ Id.

³¹ Supra notes 11 - 26 and accompanying text.

³² Item iv) in discussion in previous paragraph. Bill Chappell, Ferguson Voters Elect 2 Black Members to City Council, NPR (April 8, 2015) available at <http://www.npr.org/sections/thetwo-way/2015/04/08/398232781/ferguson-voters-elect-2-black-members-to-city-council> (reporting that the election made the numbers of black council members equal to the number of white council members for the first time with higher voter turnout than historically and noting that the city has a black majority population).

³³ Item iii) in discussion in the previous paragraph.

³⁴ For example, David A. Harris, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (New York 2002) (broad discussion and critique of racial profiling in policing).

³⁵ Item i) of the rule of law concept. The rules may be neutral on their face but enforcement is discriminatory so that in fact the same rules do not apply to everyone.

³⁶ Ronald Weitzer and Steven A. Tuch, Perceptions of Racial Profiling: Race, Class, and Personal Experience, 40 Criminology 437 (2002) (polling data on racial profiling measuring perceptions).

ubiquitous. The likelihood of a police stop and questioning increases when one is not white and suspicion directed at people of color manifests itself in all activities where people of color interact with whites – even if the police officer, security guard, or other person in a similar role also is non-white. While style of dress and appearance ameliorates that discriminatory effect somewhat, it never eliminates it.³⁸

Against the backdrop of the events in and examination of Ferguson and the long, continuous U.S. history of racial discrimination, this article focuses on the economic impact of discriminatory municipal law enforcement.³⁹ Part 1 of this paper considers police and municipal court practice in St. Louis County with emphasis on traffic offenses as a source of municipal revenue. Part 2 considers whether municipal justice systems are primarily operating under police powers and regulating activities to promote public safety or primarily serving as revenue agencies providing financial resources for themselves and their municipalities through fines and fees that are regressive tax substitutes.⁴⁰ Part 2 also briefly reviews the literature on implicit taxation and considers Missouri decisional law distinguishing the municipal power to regulate from the municipal power to tax. And part 2 argues that many municipalities are cloaking the use of taxing power in the exercise of police powers, as it compares the concept of tax (revenue production) functionally with fines and fees (public safety and punishment). Part 3 turns its attention to the Hancock Amendment to the Missouri Constitution limiting the power of the legislature or municipal authority to increase taxes without a vote of the people. Part 3 concludes that Missouri’s municipalities, as well as those in other states that have tax limitation provisions, violate those tax limitations whenever they alter the mix or increase the fines and fees associated with enforcement of municipal ordinances. Part 3 also places the use of fines and fees for revenue production in their political context in which the legislature does not address the constitutional tax limitation possibly because it otherwise might have to propose tax increases requiring a referenda votes. Part 4 views the municipal justice system in Missouri from the perspective of the U.S. Constitution. In considering decisional law from the federal courts, the article argues that because of conscious and systemic discrimination in distribution of those fines and fees, they may violate the U.S. Constitution as well.⁴¹ Part 5 briefly concludes that revenue-

³⁷ The Leadership Conference, *Restoring a National Consensus: The Need to End Racial Profiling in America* (2011) available at http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.pdf (quantitative data, analysis and recommendations on profiling).

³⁸ A former black colleague explained that he always was meticulous in his dress when he went out in public in order to avoid racial targeting.

³⁹ Other articles that are part of this municipal justice project report survey results and other research of perceptions of law enforcement and municipal court practices in St. Louis County, Missouri.

⁴⁰ Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 *VANDERBILT L. REV.* 1055, 1098 - 1102 (2015), makes this observation concerning regressive taxation in discussing the shift to the privatization of misdemeanor justice and fine only misdemeanors as one of the means to limit mass incarceration.

⁴¹ The DOJ Ferguson Police Report at 54-61 concludes that fees and penalties for failure to appear are excessive.

based policing and courts undermines administration of justice and threatens maintenance of a society purportedly based on rule of law principles.

Part 1. St. Louis County Police and Courts. St. Louis County, Missouri has some ninety municipalities.⁴² Most of the municipalities have their own police force and municipal court. The judge and the prosecutor serving in the municipal court frequently are associated with a law firm that regularly represents the municipality, and some judges and prosecutors serve as judges or prosecutors in more than one municipality or as judges in some municipalities and prosecutors in others.⁴³ The dual functions of prosecutor and judge, even if separated by municipality, may compromise the individual's ability to act independently in either role and undercuts the rule of law requirement of an independent judiciary.⁴⁴

The bulk of the workload of each municipal court is comprised of hearing misdemeanor offenses, and most of those offenses are traffic violations. Traffic violations include moving violations like speeding, traffic signals, improper turns, vehicle maintenance offenses like broken tail lights, and status offenses like expired license plates or driver licenses. The municipal court disposes of most traffic violations swiftly and without contest from the purported offender by imposing a fine and court costs. In some instances, the amount of the fine and costs is less than \$100 but our research shows fines and court costs for offenders lacking legal representation to be significantly in excess of \$100.⁴⁵ Rarely does the purported offender have assistance of counsel or insist on a trial even if he or she is not guilty of the offense with which charged.⁴⁶ The Ferguson Commission identified absence of counsel for offenders as a serious shortcoming and recommended requiring informed consent for waiver of the right to counsel, appointment of counsel for juvenile offenders, and public defenders for individuals who cannot afford counsel.⁴⁷

Purported traffic offenders often fail to appear for the hearing on their traffic offense. Those who do not appear are predominantly non-affluent individuals,⁴⁸ who fail to appear for a

⁴² St. Louis County Municipal League website at <http://www.stlmuni.org/>.

⁴³ Ferguson Commission Report, supra note 11, at 32.

⁴⁴ Characteristic ii) of the rule of law definition, supra note 29 and accompanying text.

⁴⁵ In the Municipal Courts Survey, we found that only about 16 percent of fines were under \$100 but, with the exception of seat belt violations, more than \$100 with the addition of court costs. The

⁴⁶ In most instances, the cost of engaging counsel and conducting a trial outweighs the cost of paying the fine and court costs. In addition, the time required to return for a trial setting is burdensome as well. As noted infra note 49 and accompanying text, individuals represented by counsel usually plea bargain for payment of a fine in exchange for conviction of a non-moving violation.

⁴⁷ Ferguson Commission Report, supra note 11, at 31. Compare item 358 of the U.S. v. Ferguson Consent Decree, supra note 12. While providing counsel is a worthy goal, the cost of so doing is prohibitive for most municipalities and state governments. Kenneth F. Warren, *Administrative Law in the Political System* (5th Ed.) 284-88 (Boulder 2011).

⁴⁸ ArchCity Defenders: Municipal Courts White Paper, available at <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>, reported that the inability to hire a lawyer, lack of general education about how the Missouri court system works, and shortage of economic resources to pay the traffic ticket and courts costs are factors contributing to the individual's likelihood of appearing in court.

variety of reasons: i) their own neglect, ii) work obligations (including risk of termination for missing work), iii) lack of childcare (most courts do not permit children in the courtroom), and iv) inability to pay the fine that will be imposed. Municipal court dockets tend to be crowded so wait times in the municipal court may be substantial. Wait times further exacerbate problems associated with time away from work and childcare. As a courtesy to counsel, judges prioritize cases in which the purported offender has legal representation so that defendants who can afford counsel have shorter wait times than those who cannot afford counsel. Non-affluent individuals rarely have representation.

In many instances, affluent individuals for whom appearance, even with a short wait time in court, might be inconvenient may avoid appearance. They engage counsel who negotiates with the prosecutor for the amount of the fine and quality of the offense without the purported offender having to appear in person. Individuals ticketed for moving violations who can afford and do engage counsel frequently enter a guilty plea to a plea bargained, non-moving violation because moving violations impact their state driving record⁴⁹ and their insurance risk rating.⁵⁰ The trade-off in the plea bargain may be fines greater than those imposed for a moving violation, but the additional insurance cost that would follow from a moving violation would be greater than the incremental fine. Rarely are such offenders incarcerated temporarily under a bench warrant or required to pay fees for issuance and service of the warrant.

When purported offenders fail to appear, courts issue warrants for arrest of the purported offender (“bench warrants”). Non-affluent individuals may have bench warrants outstanding in multiple county jurisdictions. To resolve a bench warrant, the purported offender may be incarcerated⁵¹ and must post bail to secure his or her temporary release. Not infrequently when an individual posts bail, instead of release, a municipality passes him or her on to another municipality in which a bench warrant also is outstanding. The individual must post bail there as well. Resolving the matter in any given municipality requires payment of the fine associated with the misdemeanor, court costs, and fees for issuance of the bench warrant and service of process. Even if the fine itself is manageable, the additional costs and fees may place payment

(p.7-8). Failure to appear in court often leads to warrants. Administrative data from 2014 showed that the black non-affluent communities were the only municipalities that had warrants of 1 or greater per capita. (e.g., Normandy, 3.28 and Pagedale 2.85 warrant per capita).

⁴⁹ Missouri assigns points to traffic offense convictions and when a driver has accumulated 8 points or more in 18 months, the state suspends the driver’s driving privilege for 30 days. If a driver has accumulated 12 points or more in 12 months, 18 points or more in 24 months, or 24 points or more in 36 months, the driver’s license will be revoked for 1 year. Missouri Department of Revenue, Tickets and Points FAQ available at <http://dor.mo.gov/faq/drivers/points.php>.

⁵⁰ Most auto liability insurers rate drivers based on their driving record so that individuals who have been convicted of traffic law violations are higher risk drivers who pay an increased insurance premium for their liability insurance or, in some instances, find the insurer unwilling to continue insuring the individual. See: <http://www.forbes.com/sites/moneywisewomen/2013/01/08/what-really-goes-into-determining-your-insurance-rates/>

⁵¹ RSMo section 479.360.1 (3) now prohibits incarceration to coerce payment, infra note 52 and accompanying text.

beyond the non-affluent individual's reach. Recent state law amendments have required municipalities to alter their procedures. The new state law places restrictions on temporary incarceration, requires prompt hearings, and prohibits incarceration to coerce payment of fines and fees.⁵²

The likelihood of arrest for any specific offense is not predictable, but that likelihood does vary from jurisdiction to jurisdiction. Arrest and citation issuance in a jurisdiction depends on a variety of factors, some of which are random, others deliberate, many subject to municipal policy decisions and the exercise of discretion by law enforcement authorities. In the case of moving violations, enforcement may be automated in some instances – red light cameras that the Missouri Supreme Court may have outlawed⁵³ and speed cameras, also of questionable validity following the Missouri Supreme Court ruling on red light cameras⁵⁴ – but most traffic arrests continue to result from police observation. Hence enforcement of traffic laws is somewhat random in that the offense must occur when a law enforcement officer is present to observe it. Vehicle maintenance offenses – broken tail lights, signal failure, burned out head lights, vehicle noise -- similarly are somewhat random but issuance of citations for vehicle maintenance offenses generally is deliberate and reflects a purposeful decision to enforce that the police supervisory authority communicates to the officers on the streets. Unlike observable moving and vehicle maintenance violations, status offenses like driving on an expired license are invisible without the detention of the suspected offender. Enforcement of nearly all traffic laws is committed to the discretion of the arresting officer. While supervisors may establish general arrest policies that pressure officers to increase arrests and citation issuance to achieve departmental arrest goals, the officer nevertheless may elect to arrest, warn, or ignore any given offense.⁵⁵

In the absence of special factors, uniform enforcement of traffic laws throughout the county should yield numbers of violations substantially proportional to traffic flow. Motorists crossing multiple jurisdictional borders seem unlikely to modify their behavior in order to comply with traffic laws in one municipality but not in another, unless a jurisdiction has a reputation for stricter traffic law enforcement than others. Some municipalities may be commonly known as a “speed traps,” for example, and motorists reduce their speed passing through specific areas. Motorists are unlikely to limit their travel to a single municipality

⁵² Under RSMo section 479.360.1 (as added by Senate Bill No. 5 (May 7, 2015, signed July 9, 2015)). The decision in *City of Normandy v. Nixon*, discussed *infra* note 71 and accompanying text, Case no. 15AC-CC00531 (Cole County, 2016), on appeal to Missouri Supreme Court (Docket number SC95624) (enjoining the enforcement of portions of SB 5), did not enjoin any portion of RSMo §479.360.

⁵³ In *Tupper v. City of St. Louis*, 468 S.W.3d 360 (Mo. 2015) (en banc), the Missouri Supreme Court held the City of St. Louis' red light camera ordinance unconstitutional because it shifted the burden of proof to defendants to establish that they were not the operators of the vehicle.

⁵⁴ *Id.* The holding in *Tupper* may apply to speed cameras as well.

⁵⁵ *Kenneth Culp Davis, Police Discretion* (1975).

especially in St. Louis County where there are many small municipalities. If, relative to traffic volume, municipality A has more traffic law violators than municipality B, the reasons for that disproportion are probably related to non-uniform traffic laws and non-uniform enforcement practices. Possible, for example, is that municipality A has a lower speed limit on a street passing through both A and B than B has⁵⁶ or, in the case of traffic signal violations, A has more signals or shorter yellow lights than does B.⁵⁷ With respect to enforcement, police in A might enforce traffic laws more strictly than police in B. On speed, for example, police in B may tolerate 7 miles per hour over the limit while police in A issue a citation at 3 miles per hour or more over the limit. Or police in A might issue a red light citation if a motorist enters an intersection as the light is changing from green to yellow while police in B only issue citations to motorists who enter an intersection as the light is changing from yellow to red. Similarly, A's police may be more vigilant than B's police in identifying motorists whose automobile license plates have expired.⁵⁸

It is possible, on the other hand, that motorists in non-affluent suburbs comply with traffic laws less frequently than motorists in affluent suburbs. The former motorists simply may have been raised to be scofflaws and statistics on overall criminal activity may confirm that non-compliance pattern.⁵⁹ In St. Louis County, traffic stops accompanied by issuance of citations are far more common in non-affluent municipalities than in affluent municipalities. Compare, for example, Creve Coeur, an affluent suburb, with Jennings, a non-affluent suburb, suburbs of roughly equal geographical area and population.⁶⁰ In both jurisdictions, black motorists are disproportionately represented among those whom police ticket. Moreover, a white motorist is disproportionately likely to be given a warning rather than a citation. Those disproportions inhere throughout most of the county, but evidence suggests that in the municipality of Pine Lawn, a predominantly black, non-affluent community, white motorists are stopped more frequently and

⁵⁶ Consider, *Tank Truck Rentals, Inc. v. C.I.R.*, 356 U.S. 30, 78 S. Ct. 507, 2 L. Ed. 2d 562 (1958) (holding fines imposed for speeding in Pennsylvania not deductible despite Pennsylvania's speed limit being lower than adjacent states').

⁵⁷ Ken Leiser, *Some Yellow Lights Will Yield More Time for Missouri Drivers*, *St. Louis Post-Dispatch* (June 24, 2011), http://www.stltoday.com/news/local/metro/some-yellow-lights-will-yeild-more-time-for-missouri-drivers/article_c645f166-068a-5b95-8b38-ac58742040cd.html. (A St. Louis County municipality shortened its yellow light durations where it had red light cameras but a challenge in court forced it to restore those times to a level consistent with neighboring municipalities).

⁵⁸ In Missouri, driving on expired plates may yield a citation and a fine, but the violation has no impact on the motorist's driving record. Form 899, Missouri Department of Revenue Missouri Driver Record Traffic Violation Descriptions and Points Assessed (available at <http://dor.mo.gov/forms/899.pdf>).

⁵⁹ In unincorporated St. Louis County, for example, crime statistics disclose a greater number of incidents in the non-affluent areas than in affluent county areas. St Louis County Crime Incident Map available at <http://maps.stlouisco.com/police/lib/sbar/stats.html>.

⁶⁰ See <http://quickfacts.census.gov/qfd/states/29/2917272.html> and <http://quickfacts.census.gov/qfd/states/29/2937178.html>

fined more heavily that are black motorists.⁶¹ Population patterns distribute proportionally more white motorists in affluent suburbs than in non-affluent suburbs.⁶²

Many policing practices fall within the discretion of individual officers. Whether of tolerance for “public safety” infractions such as driving in excess of a speed limit or of tolerance for status infractions such as expired license plates, individual officers may exercise their discretion differently depending on the appearance of the motorist. Sex, race, or other appearance factors may inform the exercise of discretion. And officers may exercise discretion unfavorably if their superiors give them citation or revenue targets they are expected to meet -- a common practice in St. Louis County.⁶³ Where police in jurisdiction A have revenue targets, police there may issue a citation routinely if a motorist has a malfunctioning turn signal, brake light, or other vehicle defect while police in B who have no or low revenue targets may ignore such infractions or may stop the motorist to inform or remind him or her to repair the defect. Similarly, police in A may stop motorists, more or less randomly, to determine if the motorist has a valid license to drive. In order to meet revenue targets, police may stop blacks more frequently than whites because racial profiling may have proven to be a relatively reliable means to identify unlicensed drivers⁶⁴ or, alternatively, blacks make easier and less challenging targets because they have learned to expect to be stopped.⁶⁵

Some St. Louis County municipalities derive a substantial, regular, and predictable portion of their municipal revenue from the fines, costs, and fees imposed by these municipal courts.⁶⁶ Missouri statutes limit the portion of municipalities’ general operating revenues from “fines and court costs for traffic violations” to thirty percent of their general operating revenue.⁶⁷

⁶¹ Data from the Missouri Attorney General, Koster, C. (2015). Vehicle Stops Reports - 2010-2014. Retrieved from Jefferson City, MO: <https://www.ago.mo.gov/home/vehicle-stops-report> showed that the fine disparity index for whites fined for a traffic violations in Pine Lawn was 17.2. For reference, a disparity index 1 equates no disparity. Among the municipalities we studied, none of them had a black disparity index that was equal to or greater than white disparity index in Pine Lawn.

⁶² Supra note 60.

⁶³ DOJ Ferguson Police Report, supra note 7.

⁶⁴ Compare the audit function for federal income tax returns. The I.R.S. is unable to audit all returns so it uses algorithms to choose which returns are most likely to be inaccurate and yield additional revenue – a less offensive or less obvious form of profiling. Nevertheless, the IRS no longer may use TCMP audits to develop its algorithms. Government Accounting Office, TAX ADMINISTRATION Information on IRS’ Taxpayer Compliance Measurement Program (1995) available at <http://www.gao.gov/assets/230/221808.pdf>.

⁶⁵ David A. Harris, Driving While Black: Racial Profiling on our Nation's Highways, (ACLU American Civil Liberties Union 1999) available at <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

⁶⁶ The state of Missouri has implemented a uniform traffic fine collection system with standard fines if the county elects to participate. Your Missouri Courts, Frequently Asked Questions (available at <https://www.courts.mo.gov/page.jsp?id=1917>). The fine schedule is available at <https://www.courts.mo.gov/file.jsp?id=2721>. In addition, some municipalities publish a schedule of fines on cards that police officers hand to purported offending motorists when the officers write citations.

⁶⁷ Until 2016, RSMo §302.341.2 (2014) required municipalities to pay revenue from fines and court costs exceeding thirty percent of the general operating revenue to the director of revenue for distribution to the county schools. SB

In municipalities that rely on the municipal court as a major source of revenue, members of racial or ethnic minorities tend to bear a disproportional share of the burden of the fines, costs, and fees relative to non-minority societal groups.⁶⁸

Revenue driven justice administration may be common but it always is troubling.⁶⁹ Property seizures in connection with the enforcement of controlled substance laws received considerable attention in the latter decades of the twentieth century.⁷⁰ In those instances, there often was no criminal prosecution but also no practical opportunity for the unprosecuted, purported offender to recover the seized property. In St. Louis County, as is common throughout the U.S., most traffic law violations resolve through guilty pleas, default judgments and no contest adjudications. The cost to the defendant of conducting a trial generally far outstrips the uncontested fine and cost amount. Defense often is futile in any event, since only the police officer and the defendant may have any knowledge of the purported offense and they disagree on the facts generally tilting the scale in the officer's direction. Moreover, the purported offender may be uncertain as to some offenses where the line between innocence and guilt is particularly fine or where enforcement is committed to arresting officer's discretion as it often is for vehicle maintenance offenses – driving with a broken tail light, for example.

The Missouri legislature recently addressed the issue of municipal courts and revenue based policing by enacting Senate Bill 5.⁷¹ Under that legislation, municipalities in Missouri may not retain fine and fee revenue exceeding twenty percent of their operating budgets and St. Louis County municipalities and the City of St. Louis will be limited to 12.5 percent of operating budget.⁷² Senate Bill 5 also restricts use of incarceration to coerce payment of fines for minor traffic violations.⁷³ Included in the revenue cap are violations amended from moving to non-moving status.⁷⁴ A municipality collecting more than the cap must pay any excess over to the

5, supra note 52, discussed infra note 71 and accompanying text, modified those limits and incorporated RSMo §302.341.2 into new RSMo §479.359, operation of which the Cole County Circuit Court recently enjoined in *City of Normandy v. Nixon*, supra note 52, discussed infra note 71 and accompanying text.

⁶⁸ With respect to Ferguson, the DOJ Ferguson Police Report, supra note 7, at 9 -14, finds that policing in Ferguson is revenue-based and racist. Compare Radley Balko, *How municipalities in St. Louis County, Mo., profit from poverty*, *The Washington Post* (Sept. 3, 2014), available at <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

⁶⁹ For a recent discussion of revenue-based policing, privatization, and civil forfeiture in the context of the U.S. Constitution, Due Process, Equal Protection and Excessive Fines Clauses, see *Development in the Law: Policing: Chapter One: Policing and Profit*, 128 *Harv. L. Rev.* 1723 (2015).

⁷⁰ Nyika Prendergast, *No Instructions Required: Due Process and Post-Deprivation Remedies for Property Seized in Criminal Investigations*, 90 *J. Crim. L. & Criminology* 1013 (1999-2000); Denise Lieberman, *Asset Forfeiture*, available at <http://www.deniselieberman.com/articles/assetforfeiture.htm>.

⁷¹ S.B. 5, supra note 52, (Truly agreed to and finally passed May 7, 2015, signed by the governor July 9, 2015)

⁷² Mo Rev. Stat. §302.341.2 (2014, repealed by S.B. 5 and new §302.341 substituted). Effective date August 28, 2015.

⁷³ *Id.* Driving no more than 19 miles over the limit is considered minor.

⁷⁴ See discussion supra in text accompanying note 49.

state director of revenue to be distributed to school districts. In computing the base for determining the cap, special purpose funds, as opposed to operating revenues, are excluded so that the base for measuring the cap remains close to the amount of the municipality's actual recurrent operating budget.⁷⁵ Historical reporting of misdemeanor violation revenue has been incomplete, and there is evidence that some municipalities raised more than thirty percent of their operating revenue from municipal court activity but did not pay the excess over to the state.⁷⁶

Implementation of Senate Bill 5's revenue limitations is uncertain. A court decision in Cole County, Missouri enjoined the implementation of several statutory provisions of Senate Bill 5 holding them to be a "special law ... in violation of Article III Section 40 of the Missouri Constitution"⁷⁷ because the law distinguishes among municipalities. The fate of the revenue limitations will depend on the outcome of the appeal of that decision.

If the Normandy decision⁷⁸ is overturned on appeal, the new revenue caps and additional enforcement of the caps undoubtedly will cause revenue shortfalls in municipalities that lack adequate alternative revenue sources.⁷⁹ Since many municipalities have low housing values, real property taxes are an unlikely source to make up the shortfall and voters in Missouri often reject tax increases.⁸⁰ Voters in the City of Ferguson recently rejected a property tax increase while approving a sales tax increase.⁸¹ Affluent suburbs have larger property tax bases from which to raise revenue for municipal operations than do non-affluent suburbs. In non-affluent suburbs, the real property tax base has tended to contract during recent years⁸² further constricting the property tax revenue stream. The non-affluent suburbs depend more on retail sales taxes.⁸³ Even retail sales taxes decline as retail outlets close and shopping centers become vacant or close

⁷⁵ Rev. Stat Mo §479.368 (2014, repealed and new §479.368 substituted).

⁷⁶ Under the 2015 legislation, a municipality that fails to pay over excess collections loses its share of general sales tax revenue until it pays and a mandatory disincorporation election is required under Mo Rev. Stat. §479.368 (2015). See SB 5 summary at http://www.senate.mo.gov/15info/BTS_Web/Bill.aspx?SessionType=R&BillID=160.

⁷⁷ City of Normandy v. Nixon, supra note 52. Although the decision is silent as to which paragraph of section 40 Senate Bill 5 as a special law violates, presumably it is paragraph (7) which prohibits enactment of special laws "remitting fines, penalties and forfeitures or refunding money legally paid into the treasury."

⁷⁸ Id.

⁷⁹ In a recent article, Monica Davey, Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue, The New York Times (11/4/15), addresses the use of misdemeanor fines for home maintenance defects as revenue raising devices.

⁸⁰ Under the Hancock amendment to the Missouri Constitution, a vote of the people is required for new and increased taxes. See the discussion of Hancock infra Part 3.

⁸¹ Supra note 18 and accompanying text.

⁸² Alexia F. Campbell, Reena Flores, and Stephanie Stamm, *St. Louis Is Growing More Diverse—Just Not in the Black Half of Town*, National Journal (Oct. 20, 2015), available at <http://www.nationaljournal.com/next-america/population-2043/st-louis-is-growing-more-diverse-just-not-black-half-town>

⁸³ Unlike property taxes that are based on value of property – a measure of wealth – sales taxes are regressive relative to income and wealth because poorer people have to consume, subject to sales tax, more of their income for life's necessities while wealthier and higher income individuals may invest their disposable funds.

in poorer, less desirable spaces,⁸⁴ so that the same municipalities with low property tax bases have low retail revenue receipts to produce sales tax revenue and will be unable to make up the shortfall with sales taxes unless the municipalities can attract substantial amounts of new retail business. Perhaps revenue shortfalls will encourage small municipalities to disincorporate and consolidate with St. Louis County thereby spreading governmental costs over a broader base as the county government will provide police and essential other governmental services.

Part 2. Fines, Fees, and Implicit Taxes. Separating fines, fees and penalties from taxes and user fees is not uncomplicated. Legislatures use taxes to raise revenue and also to regulate behavior. The tax on tobacco products produces revenue but the tax increasingly has become a regulatory tax. Tobacco taxes increase the cost of engaging in smoking and presumably discourage people from smoking.⁸⁵ Cigarette taxes tend to be regressive because they have a greater impact on the disposable income of low income individuals than they have on higher income individuals. Tax increases may not be as regressive, however, because low income individuals may be most sensitive to price increases and may limit their smoking following a price increase while higher income smokers may be indifferent to price changes. If low income individuals spend less on tobacco following a tax increase, they also may reap the health benefit that accompanies smoking less.⁸⁶ A successful tobacco tax would eliminate its own revenue stream as people reduce and eventually stop smoking. While the tobacco tax serves a revenue raising function, it also, and sometimes predominantly, regulates behavior.

User fees defray the cost of providing otherwise public services. Regulators frequently impose the cost of their regulatory activity on those they regulate. The cost of inspecting property to determine whether it complies with local building codes, charges for the issuance of licenses necessary to engage in a specific activity, and penalties for failing to obtain a license when required or have property inspected at the required time all raise revenue. The inspections and licensing payments may match the cost of issuing the license or making the inspection. If they do so, they are a proper exercise of the police power. If they raise revenue in excess of the actual cost of regulation, they may exceed the police power under which they are enacted. As early as 1871, the Missouri Supreme Court held that the City of St. Louis exceeded its policing powers when it imposed a license fee on insurance companies that was greater than the actual administrative cost of issuing the license.⁸⁷ With that policing power limitation, a penalty often matches no identifiable cost to the regulator caused by tardy compliance with the regulation.

⁸⁴ Stats on vacant store locations, abandoned shopping centers

⁸⁵ Frank J Chaloupka, Ayda Yurekli, and Geoffrey T Fong, Tobacco taxes as a tobacco control strategy, 21 Tobacco Control 172 (2012) available at <http://tobaccocontrol.bmj.com/content/21/2/172.full.pdf+html> (arguing that high cigarette taxes are an effective means to control tobacco use; and Kenneth F. Warren, Regulators Throughout American History Have Been Reluctant to Regulate Cigars and the FDA Still Is, But Why?, 8 PITTSBURGH J ENVIRONMENTAL AND HEALTH LAW 60 (2014).

⁸⁶ Chaloupka et al., supra note 85, at 176.

⁸⁷ City of St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo. 150 (1871).

Instead it punishes the regulated person and raises revenue for the regulator. If punishment predominates, the penalty seems a valid exercise of policing power. If revenue production is its predominant function, the penalty is, if permissible at all, an exercise of taxing, rather than policing, power.⁸⁸

Early decisions in the Missouri courts confirm the distinction between policing and taxing powers and limit exactions when the municipality exceeds its policing power. Following *City of St. Louis v. Boatman's*,⁸⁹ a license fee was held invalid because it exceeded the cost of issuance of the license.⁹⁰ Similarly, the Missouri Supreme Court held that an earnings tax was not an exercise of police power and was invalid without taxing authority.⁹¹ Authorization of the earnings tax under the City's taxing power followed. The taxing power enacted earnings tax reached the earnings of residents over whom the City had general, personal taxing authority, and, in the case of non-residents, only those earnings of non-residents derived from their earnings activity conducted in the city of St. Louis and subject to the City's taxing authority.⁹² And with respect to parking meter fees, the Missouri Supreme Court confirmed that a facts and circumstances determination was necessary to uphold the validity of parking meter fees and fines from parking violations as exercise of police power since parking meter fees are not an authorized taxing function. The court did not determine the validity of the fees under the police power since it invalidated the ordinance on other grounds.⁹³ On the other hand, raising revenue with fees is permissible under a municipality's taxing power if the fees are uniform.⁹⁴

While the line between exercise of taxing powers and police powers is sometimes indistinct, it remains important to the validity of impositions. Fines for punishment and fees for rendition of governmental services represent exercise of a municipality's police functions while exactions for production of revenue are exercises of taxing power. Although regulation and taxation are both exercise of governmental powers, their primary functions remain discrete. A regulation may generate revenue in excess of cost but revenue production should not become the primary function of regulation. Use of regulatory funds for general governmental purposes

⁸⁸ Compare the "shared responsibility payment" for failure to obtain health insurance under the Affordable Care Act that the Supreme Court held to be a tax. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (U.S. 2012), discussed *infra* note 102 and accompanying text.

⁸⁹ *Supra* note 87.

⁹⁰ *Knox City v. Thompson*, 19 Mo. App. 523, 527 (1885).

⁹¹ *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 203 S.W.2d 438 (1947).

⁹² *City of St. Louis*, Missouri Charter Art I, §4 (authorizing an earnings tax); Ord. 47063 § 2, 1954 (imposing the earnings tax).

⁹³ *Auto. Club of Mo. v. City of St. Louis*, 334 S.W.2d 355, 362 (Mo. 1960) (improper delegation of authority to an administrative body).

⁹⁴ *City of St. Louis v. Green*, 7 Mo. App. 468, 481 rev'd, 70 Mo. 562 (1879).

limited.⁹⁵ Although taxation may be designed to impact behavior as regulation does, the concepts of taxation and regulation do not merge.

In many instances, one may substitute regulation for taxation and conversely taxation for regulation.⁹⁶ Yet, taxing power and regulatory power remain distinct governmental functions. Whether it raises revenue through taxes or fines may be a matter of indifference to the operational budgeting of a municipal government as long as the revenue source is relatively stable and predictable,⁹⁷ but it is not similarly a matter of indifference to the legal rules for enacting and enforcing the laws establishing the imposition. The municipal government must take care to separate its exercise of taxing and policing functions.⁹⁸

The breadth of taxing functions lends further support to the argument that taxing is far less confined than the simple production of revenue. The individual mandate⁹⁹ under the Patient Protection and Affordable Care Act of 2010¹⁰⁰ serves to coerce individuals to purchase healthcare insurance. The mandate imposes on individuals who fail to maintain healthcare insurance a penalty referred to as a “shared responsibility payment.”¹⁰¹ The individual makes that payment with his or her federal income taxes to the Internal Revenue Service in the same manner as a tax penalty. Unlike tax penalties, the shared responsibility payment is not enforceable with criminal sanctions. Despite the narrow base of the individual mandate and its selective imposition only on individuals who do not buy health insurance, the Supreme Court in

⁹⁵ *Hawaii Insurers Council v. Lingle*, 201 P.3d 564 (Hawaii 2008) (holding administratively imposed insurance assessments in excess of cost of services provided permissible but transfer of excess funds to general revenue violates separation of powers and is unconstitutional).

⁹⁶ Alexander Wu, U.S. International Taxation in Comparison with other Regulatory Regimes, 33 Va Tax Rev. 169, 171 (2013) (policies underlying regulation should underlie taxation and conversely as well).

⁹⁷ Richard A. Posner, Taxation by Regulation, 2 Bell J. of Economic and Management Science 22, 47 (regulation as serving distributive functions like taxation).

⁹⁸ The courts in *Unverferth v. City of Florissant*, 419 S.W.3d 76, 103 (Mo. Ct. App. 2013), *Ballard v. City of Creve Coeur*, 419 S.W.3d 109, 122 (Mo. Ct. App. 2013), *Edwards v. City of Ellisville*, 426 S.W.3d 644, 660 (Mo. Ct. App. 2013), *Damon v. City of Kansas City*, 419 S.W.3d 162, 185 (Mo. Ct. App. 2013), and *Brunner v. City of Arnold*, 427 S.W.3d 201, 226 (Mo. Ct. App. 2013), determined that motorist plaintiffs all stated a claim for relief in arguing that municipalities installed red light cameras to produce revenue – a taxing function – rather than for traffic safety – a policing function but most or all the municipalities ceased to use the cameras following the decision in *Tupper*, supra note 53, 468 S.W.3d 360 (Mo. 2015), holding the cameras unconstitutional because they shifted the burden of proof to the vehicle owner in a criminal action. Similarly, in *Clean Water Coalition v. The M. Resort, LLC*, 255 P.3d 247 (Nevada, 2011), the Nevada Supreme Court held that a fund created to raise revenue for the state is a tax and must be uniform throughout the state. In Missouri, revenues from municipal courts in excess of percentage of revenue limitations must be paid over to the state and used for education so that a portion of the revenues support state functions. See supra notes 67 and 71 and accompanying text. Similarly, the 10th Circuit held in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir., 2007), held the fee for distribution of vanity license plates to be a tax rather than a regulatory function because it produces revenue from the sale of a commodity within the control of the state.

⁹⁹ 26 U.S.C. §5000A

¹⁰⁰ 124 Stat 119 (2010)

¹⁰¹ 26 U.S.C. §5000A

*Nat'l Fed'n of Indep. Bus. v. Sebelius*¹⁰² held the shared responsibility payment to be a tax imposed under Congress's taxing power.¹⁰³

Fines and related fees may provide a better source of revenue than do property, sales and income taxes since the amount of revenue from fines remains substantially within the municipality's control. The governmental unit may expand or contract the amount of revenue the fines and fees generate as needed through more or less aggressive policing. The regular and predictable share of the operating budget attributable to fine revenue suggests that the fines indeed serve the same basic function as taxes. Fines provide the revenue needed to support governmental operations and services. In the City of Ferguson and other parts of St. Louis County, that revenue function has supplanted the public safety function of the municipal justice system. Public safety has become secondary or even irrelevant to administration of the police and the municipal courts.¹⁰⁴ As so much of the caseload of the municipal courts in St. Louis County serves to produce revenue, those courts seem only minimally concerned with meting out justice in order to punish dangerous conduct or deter such conduct in the future. Where governmental revenue production rather than regulation is functionally primary, the means of production of that revenue would seem to be predominantly a tax and only secondarily a punishment.¹⁰⁵

Both behavior modification taxes and fines often are regressive.¹⁰⁶ As with behavior modification taxes like tobacco taxes,¹⁰⁷ the amount of the fines, fees and related costs do not increase with affluence. Indeed the overall expenditure in conjunction with a moving violation may well be greater for non-affluent than affluent individuals. Affluent individuals are more likely to negotiate change in the classification of the offense from a moving violation to a non-

¹⁰² *Supra* note 88, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (U.S. 2012).

¹⁰³ U.S. Const. Art. I, §8, cl. 1

¹⁰⁴ DOJ Ferguson Police Report, *supra* note 7, at 2.

¹⁰⁵ Richard A. Westin, WG&L Tax Dictionary 779 (Valhalla 2002-3) (“an enforced contribution ... for the purpose of raising revenue to be used for public or governmental purposes ... and not a charge primarily imposed for the purpose of regulation”). As a working definition of tax, this definition might classify a tobacco tax structured to modify behavior, *supra* note 85 and accompanying text as primarily for regulation and similarly the “shared responsibility payment” under the Affordable Care Act, *supra* note 102.

¹⁰⁶ Without delving into questions of the marginal utility of money, an individual who has \$100,000 income who pays a fine of \$100 but gets no points affecting his insurance rates because of a plea bargain to a non-moving violation is less likely to feel the sting of the fine than is the individual with a \$20,000 income who is short on rent because of the \$100 fine and looks to an increase in her insurance cost because the moving violation conviction affects her driving record. *Supra* notes 49-50 and accompanying text. Compare the overt correlation between income taxes and fines in Finland where speeding fines are a function of income and may be progressive. Suzanne Daley, “Speeding in Finland Can Cost a Fortune, if You Already Have One,” *NEW YORK TIMES* A-12 (Apr 26, 2015).

¹⁰⁷ Chaloupka, Yurekli, and Fong, Tobacco taxes as a tobacco control strategy, *supra* note 85 and accompanying text, at 176 on regressivity observing that tobacco taxes tend to be regressive but increases in those taxes are not necessarily regressive. See also, Warren, Regulators Throughout American History Have Been Reluctant to Regulate Cigars, *supra* note 85.

moving violation, and rarely do courts issue bench warrants for affluent individuals.¹⁰⁸ While the guilty plea for a non-moving violation may result in an increased fine as part of the plea bargain, and the offender pays a legal fee, the court imposes no fees for issuance and service of a bench warrant, the offender's insurance rates do not increase, and with expedited disposition of the case as courtesy to counsel or even the freedom from required appearance of the offender, the offender rarely needs to miss work or pay for childcare in order to appear. With fines and penalties, the offender's ability to pay rarely influences the amount of the imposition whether a tax or a fine.¹⁰⁹ Misdemeanor fines and accompanying fees and costs impact non-affluent individuals more acutely than they impact affluent individuals. The fine amount may vary with the offense but generally not the offender.

In the U.S., the current tension between taxes and penalties for regulation manifests itself in debate on legalization of marijuana and its by-products. Marijuana is ubiquitous but historically has been an illegal and untaxed product. It remains a controlled substance under federal law¹¹⁰ but some states now tax rather than prohibit marijuana.¹¹¹ Most others penalize the distribution and consumption of marijuana. In those that penalize, small quantity possession and use offenses draw a fine rather than incarceration.

Similarly, traffic law infractions draw fines, not incarceration, except to the extent municipalities might use incarceration to coerce payment of fines, costs and fees.¹¹² Like sin taxes, fines for traffic law infractions tend to be uniform by the specific offense and, as noted above, there often is a fine schedule publicly available.¹¹³

Over the past twenty years or more, many municipalities in St. Louis County, including the City of Ferguson, suffered from declining property tax values. At the same time, volume of retail sales activity in the same suburbs retreated as local strip shopping centers have yielded to large regional shopping malls and internet sales, so that neither real property taxes nor sales taxes produced sufficient revenue to support the municipal government. Rather than disincorporate and rely on the countywide government for services, many of those municipalities looked to their police and courts to generate needed revenue. Fines, court costs, and fees for summons and

¹⁰⁸ See discussion supra in text accompanying note 49.

¹⁰⁹ U.S. v. Ferguson Consent Decree, supra note 12, item 340 requires assessment of ability to pay in imposing fines but not a proportional or progressive schedule of fines.

¹¹⁰ 21 U.S.C.A. § 812 (West).

¹¹¹ Colorado, Washington, and others. The tax/prohibition split creates federal income tax problems for legal distributors who may not deduct their ordinary and necessary business expenses of production and distribution under IRC § 280E. See, Jack Healy, Legal Marijuana Faces Another Federal Hurdle, New York Times (May 9, 2015) available at http://www.nytimes.com/2015/05/10/us/politics/legal-marijuana-faces-another-federal-hurdle-taxes.html?_r=0.

¹¹² Use of incarceration to coerce payment is prohibited in Missouri beginning at the end of August, 2015. Supra, note 71.

¹¹³ Supra note 66.

warrants filled the revenue gap and further impoverished the economically stressed, low income, local community predominantly composed of people of color.¹¹⁴ The police forces in those suburbs were predominantly white. In other parts of the county, Creve Coeur and Ladue, Missouri, for examples, real property values increased at or above cost of living levels so that municipal governments could capture property tax increases that matched or exceeded the rate of increase in general price levels.¹¹⁵ Similarly, suburbs like Creve Coeur were able to annex retail sales locations along major thoroughfares and increase revenue from retail sales taxes. Those affluent suburbs did not need to increase revenue from fines to support the municipal government.¹¹⁶ In the non-affluent suburbs, increasing and replacing lost revenue with traffic fines and accompanying fees demonstrates both the relationship between fines and taxes and the mutability of revenue sources. Fines and related fees have become taxes as they assume the role of revenue producers for municipal governments. As the next part of this Article illustrates, the shift to fines for revenue also proved a useful way to avoid the tax increase vote requirement of the Missouri constitution since fines, if not taxes, are not subject to that public vote requirement.

Part 3. Fines as taxes: State Constitutional Tax Limitations. If, as this Article argues, the distinction between fines and taxes is sometimes vague but that fines in many municipalities serve a primary or even exclusive revenue raising function, so that Missouri decisional law would classify them as emanating from exercise of the taxing rather than the policing power of the municipality.¹¹⁷ Since 1980, however, the taxing power of the state and its underlying political subdivisions has been circumscribed by express Missouri constitutional restrictions on governmental tax and fee collection.¹¹⁸ Those constitutional provisions should limit or prohibit the fines and fees as municipalities currently impose them. Recent Missouri legislation restricting the portion of a municipality's operating budget that fines and related fees provide¹¹⁹ becomes secondary to the constitutional restrictions. The new statutory ceilings would apply to limit only fines and fees to amounts the government units permissibly may collect under the constitution. State legislation may not override constitutional limitation, but it does suggest the

¹¹⁴ Administrative data from the municipal courts (available at <https://www.courts.mo.gov/file.jsp?id=83247>) showed that the affluent municipalities had average revenue in fines and court costs, including warrant fees, of \$70 per resident but an average of \$172 in non-affluent municipalities. Among the non-affluent communities Pine Lawn reported the highest fine and fee revenue per capita of \$541. Pine Lawn generated \$1,648,267 in traffic fines and \$156,424 in court costs.

¹¹⁵ The Mo Constitution X, §22 required that the tax rate be reduced to prevent collection of more tax than a price level increase, see discussion *infra* in text following note 130.

¹¹⁶ Which is not to say that they did not increase fine revenue. Creve Coeur, for example, installed a red light camera at an entrance to a major expressway and is understood to have received a substantial amount of revenue from red light violations without a police presence necessary. The camera has been disabled following the decision in Tupper, *supra* note 53.

¹¹⁷ *Supra* part 2.

¹¹⁸ Mo Constitution X, 22 (1980).

¹¹⁹ *Supra* note 71.

importance of the revenue function of the fines and fees without connecting that revenue function to impermissible taxation under the constitutional limitations.

A successful initiative petition in 1980 amended the Missouri constitution to limit tax and fee increases.¹²⁰ This constitutional limitation, customarily known as the “Hancock amendment,”¹²¹ permits increases in existing taxes and imposition of new taxes only with direct voter approval.¹²² In the case of a tax imposed by the Missouri General Assembly, tax increases to the extent of general price level changes are permissible without voter approval.¹²³ Increases in excess of the general price level change require voter approval. Without voter approval, the state must rebate tax collections that exceed the constitutional limitation by more than one percent with a pro rata payment relative to each individual’s personal income tax. The state also must eliminate the impermissible increase prospectively.¹²⁴ While the tax increase limitation applies to county and municipal taxes as well as taxes imposed by the Missouri General Assembly,¹²⁵ the remedy for excess collections is less certain.¹²⁶ The operative language does not include express provision for rebate of the excess.¹²⁷ Despite the absence of an express remedy, taxpayers have the right to bring suit in the circuit courts of Missouri to enforce the limitations and may recover attorneys’ fees if they successfully do so.¹²⁸

Section 22 applicable to local governmental units provides in part:¹²⁹

(a) Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, ... when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law ... when this section is adopted without the approval of the required majority of the qualified voters of that county or other

¹²⁰ Mo Constitution X, §§ 16 – 23. (1980).

¹²¹ Mel Hancock was the public proponent of the initiative and later was elected to Congress. See, Melton Donald Hancock obituary, available at <http://www.legacy.com/obituaries/news-leader/obituary.aspx?pid=154522835>.

¹²² Mo Const. art. X, § 16.

¹²³ Mo Const. art. X, § 18.

¹²⁴ Mo. Const. art. X, § 18(b). See, however, Mo. Const. X, § 18(e)(5), as added in 1996, under which state officials and taxpayers may bring suit to enforce the limitations and the Missouri Supreme Court has original jurisdiction to hear the suit and fashion a remedy either by requiring a rebate or a prospective reduction in taxes, thereby undercutting the automatic rebate provision in Mo Const X, 18(b). The automatic rebate is somewhat problematic in that it rebates through the personal income tax rather than rebating the actual excess collection.

¹²⁵ Mo. Const. X, § 22 (1980).

¹²⁶ In *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 244-45 (Mo. 2013), the Mo Supreme Court held a fee increase imposed by the Metropolitan St. Louis Sewer District to be impermissible without a vote but did not order a rebate of the fee because Mo. Const. X, § 22 provided no express remedy.

¹²⁷ *Id.*

¹²⁸ Mo. Const. art. X, § 23 (1980). *Gilroy-Sims & Associates v. Downtown St. Louis Business Dist.*, 729 S.W.2d 504, 505 (Mo. Ct. App. 1987) (awarding attorneys’ fees for successful suit blocking a special business district levy approved by the City of St. Louis without voter approval). In *Gilroy Sims* apparently no tax was collected so the rebate question did not arise.

¹²⁹ Mo. Const. art. X, § 22.

political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

This constitutional provision applies prospectively from enactment to municipalities and protects taxes in place at the time of enactment so that no vote became necessary for existing taxes. Undoubtedly, municipalities at the time of enactment of the Hancock amendment imposed fines, court costs and fees on traffic violators. While there may be misdemeanors that describe offenses for which no fine existed at the time of enactment of the Hancock amendment, in all likelihood those are far fewer in number than misdemeanors for which municipalities already exacted a fine at enactment. As taxes, the standardized fines within a municipality arguably constitute the “levy” for purposes of the constitutional limitation or, alternatively, the group of fines, fees, and court costs an aggregate “base.” The municipality is prohibited from “increasing the current levy of an existing tax, license or fees, above that current levy authorized by law . . . when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.”¹³⁰ Or, if a “base,” the aggregate amount collected from misdemeanors in the base must be rolled back to its 1980 level. Thus, increases in standard fines, court costs, and fees since 1980 violate the Hancock amendment if they are taxes. They seem to be taxes because their predominant function is production of revenue and most municipalities budget for the fines, fees and court costs in the same manner as the municipalities budget for taxes.

However, also possible is that the fines and fees had to be reauthorized under the taxing power. As their use changed from deterrence and punishment that are policing functions to production of general revenue to support the municipality, the original authorization no longer supported the new function.¹³¹ If reauthorization under the taxing power were necessary, all the

¹³⁰ *Id.*

¹³¹ Compare *City of St. Louis v. Green*, supra note 94, 7 Mo. App. 468, 481 rev'd, 70 Mo. 562 (1879) (invalidating licensing fee); *Carter Carburetor Corp. v. City of St. Louis*, supra note 91, 356 Mo. 646, 203 S.W.2d 438 (1947) (earnings tax invalidated under police power).

finances and accompanying fees violate the Missouri constitutional limitation because no public vote authorized them.¹³²

Otherwise, misdemeanors describing offenses that were not defined or for which there were no fines in 1980 might be viewed as an expansion of an existing base of offenses on which fines as taxes are imposed. Article X, section 22 of the Missouri constitution requires the rollback of levies, i.e., decrease in fines as taxes, so that the amount of revenue from the base is no greater than it was at the time of enactment. Only real property taxes may increase to reflect the change in the cost of living. Section 22 does not permit the substitution of one tax for another so that a municipality suffering a decrease in the real property tax base may not replace the lost revenue with an increased sales tax, for example, without the public vote. Accordingly, an increase in fines as taxes may not substitute for loss in revenues from other municipal tax bases without the affirmative vote of the electorate.

The municipal trend to increase revenue from misdemeanor arrests is unsurprising. Left to secure the affirmative vote of the electorate for increases in tax rates of existing taxes and new taxes to fill the need for revenue lost to declining property and sales tax bases, municipalities were confronted with a revenue dilemma. In general, voters have been reluctant to consent to new or increased taxes except taxes that did not impact them substantially like hotel taxes.¹³³ Often a committed constituency opposing a tax increase on a municipal ballot could get its voters out to the polls when general voter turnout in the election was otherwise quite low. A relatively small percentage of the voters would defeat the tax increase or new tax in the presence of that low turnout. Even in high turnout elections, votes to increase one's taxes were difficult to obtain. More generally, support for tax increases had become poisonous to politicians. In the 1992 Presidential campaign, Clinton used Bush's statement at the Republican convention: "[r]ead my lips: no new taxes"¹³⁴ against Bush who had little choice but to support a tax increase during his presidency.

Thwarted at the ballot box, municipal governments sought revenue sources requiring no approval by the voters and, therefore, independent of the Hancock Amendment limitations. Increased fines generated by aggressive and racist policing, along with court costs, fees for bench warrant issuance and service of process for misdemeanors and other minor offenses replaced some or all of the loss in other tax revenue and provided funding for the municipal government.

¹³² In *Haw. Insurers Council v. Lingle*, 120 Haw. 51, 201 P.3d 564 (Haw. 2008), *supra* note 95, the Hawaii Supreme Court held that fees properly collected under regulatory (police) power could not be transferred to a general revenue fund as if they were taxes. But, see, *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008) (holding that the transfer of special funds to a general revenue fund did not transform the regulatory collection of the special funds amounts under the police power to the use of the taxing power contrary to the Colorado constitution).

¹³³ Stats on approvals of tax increases in local elections. Note low voter turnout, limited issues, constituencies opposing tax increases may have scuttled ballot votes for increases by getting their voters out to the polls.

¹³⁴ DID HE JUST SAY THAT? George H.W. Bush, Top 10 Unfortunate Political One-Liners, *Time* (available at http://content.time.com/time/specials/packages/article/0,28804,1859513_1859526_1859516,00.)

The state demanded its share of the revenue by limiting the amount of revenue from fines and fees a municipality could retain and requiring the excess to be paid over to the director of revenue for distribution to the schools.¹³⁵

Successful challenge to the fines as taxes lacks a retroactive remedy. Taxpayers may not compel a refund¹³⁶ but may claim their legal fees incurred in challenging the tax.¹³⁷ Rollback of the illegal tax to the permissible pre-increase level prospectively is the likely remedy.¹³⁸ Rolling back fines to 1980 levels would require a significant increase in citations to produce comparable amounts of revenue to what the fines currently produce. In many county jurisdictions, police already are aggressively issuing citations, so that issuance of increased numbers in order to maintain revenue levels is likely to be a formidable task. Even if it were possible to write more tickets, the gross revenue limitation in section 22¹³⁹ would thwart even that effort to match revenues to accompany a rollback of levies. Prohibiting the use of the fines to raise revenue by restricting them to their pre-1980 punishment function, without an affirmative vote of the people, would wipe out a significant portion of municipal budgets. Whether municipal governments would be able to replace the revenue remains doubtful. Correct application of the Hancock amendment to fines and related costs may lead to the disincorporation of municipal governments and consolidation of their territory with the county government. The 2015 Missouri legislation limiting fine revenue contemplates such consolidation as a possible remedy for failure of a municipality to comply with fine revenue limits.¹⁴⁰

Fines do not fit comfortably into the concept of user fees that might not be subject to constitutional tax limitations. Agencies and governmental units attach user fees to provision of specific governmental services provided to the fee payer. Fees for building inspections, for example, attach the fee to the provision of the inspection service even though users are required to use the service. Similarly, user fees imposed on industry participants often support specific agencies regulating the industry participants. User fees support specific governmental functions to which they relate or pay for specific services provided. In *Arbor Investment Co., LLC v. City of Hermann*,¹⁴¹ the Missouri Supreme Court held that utility charges based on use were not fees subject to Hancock limitations. Fines and related fees in St. Louis County are not imposed to support the regulatory function to which they relate. Rather they become part of the general revenue of the municipality supporting all governmental functions of the municipality. The randomness of their imposition makes them more like taxes imposed on a limited base in this instance the operation of a motor vehicle within city limits. Accordingly, the fines, fees, and court costs more closely resemble taxes than user fees.

¹³⁵ RSMo §302.341.2 (2014), discussed supra note 67 and accompanying text.

¹³⁶ *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013), supra note 126.

¹³⁷ Mo Const. art. X, § 23 expressly provides for legal fees for taxpayers successfully challenging a tax or fee increase under Mo Const X §22.

¹³⁸ See *Zweig v. Metro. St. Louis Sewer Dist.*, supra note 126.

¹³⁹ Mo Const. art. X, § 22.

¹⁴⁰ SB 5 and Mo Rev Stat §479.368, supra note 76

¹⁴¹ 341 SW 3d 673 (Mo, 2011).

Part 4. Municipal Justice and the U.S. Constitution. The system of municipal justice administration not only violates the Missouri constitution's taxing limitations but also may violate one or more provisions of the U.S. Constitution as applicable to the states. The Department of Justice correctly concluded that the City of Ferguson's policing and court administration violated the First and Fourth Amendments.¹⁴² Listing a series of violations such as arresting without probable cause and the use of excessive force both in violation of the Fourth Amendment¹⁴³ and arresting for speech critical of the police in violation of the First Amendment,¹⁴⁴ the Department of Justice also found that policing was discriminatory. The Ferguson police randomly stop and detain people of color disproportionately to stopping whites without probable cause, a violation of Equal Protection and Due Process under the Fourteenth Amendment.¹⁴⁵ As a result of the random stops, police find expired driver's license infractions and other non-observable violations for which they issue citations. Resulting fines similarly fall disproportionately on people of color. To the extent fines and related fees leave people without sufficient means to pay for necessities, the punishment may be cruel and unusual in violation of the Eighth Amendment.¹⁴⁶

As taxes,¹⁴⁷ the fines are discriminatory without any rational basis for that discrimination. Since they deprive low income individuals of funds necessary to meet basic needs, those taxes, in addition to violating the Missouri constitution, may resemble other taxes that the courts have determined to be irreconcilable with the U.S. Constitution because they violate the Equal Protection clause of the Fourteenth Amendment.¹⁴⁸

Part 5. Conclusion. Needless to say, this issue of revenue policing and courts is not unique to Missouri. Several states have constitutional limitations on tax increases and new taxes.¹⁴⁹ Whenever local governments transform what was historically a police and court law enforcement function into a revenue function, state constitutional taxing limitations should apply to prevent the use of police to raise revenue. As Missouri survey results demonstrate,¹⁵⁰ revenue-based policing undermines the legitimacy of and public respect for the police and the courts. Appropriate cynicism about the function of police stop, the issuance of citations, and the

¹⁴² The DOJ Ferguson Police Report at 15 – 41 concludes that a variety of Ferguson's policing practices violate the First and Fourth Amendments to the U.S. Constitution. Fines stemming from those unconstitutional practices also would violate the First and Fourth Amendments.

¹⁴³ U.S. Const. Amendment IV.

¹⁴⁴ U.S. Const. Amendment I.

¹⁴⁵ U.S. Const. Amendment XIV.

¹⁴⁶ U.S. Const. Amendment VIII.

¹⁴⁷ Part 3 *supra*.

¹⁴⁸ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (U.S. 1966) (poll tax as invidiously discriminatory under the Equal Protection Clause).

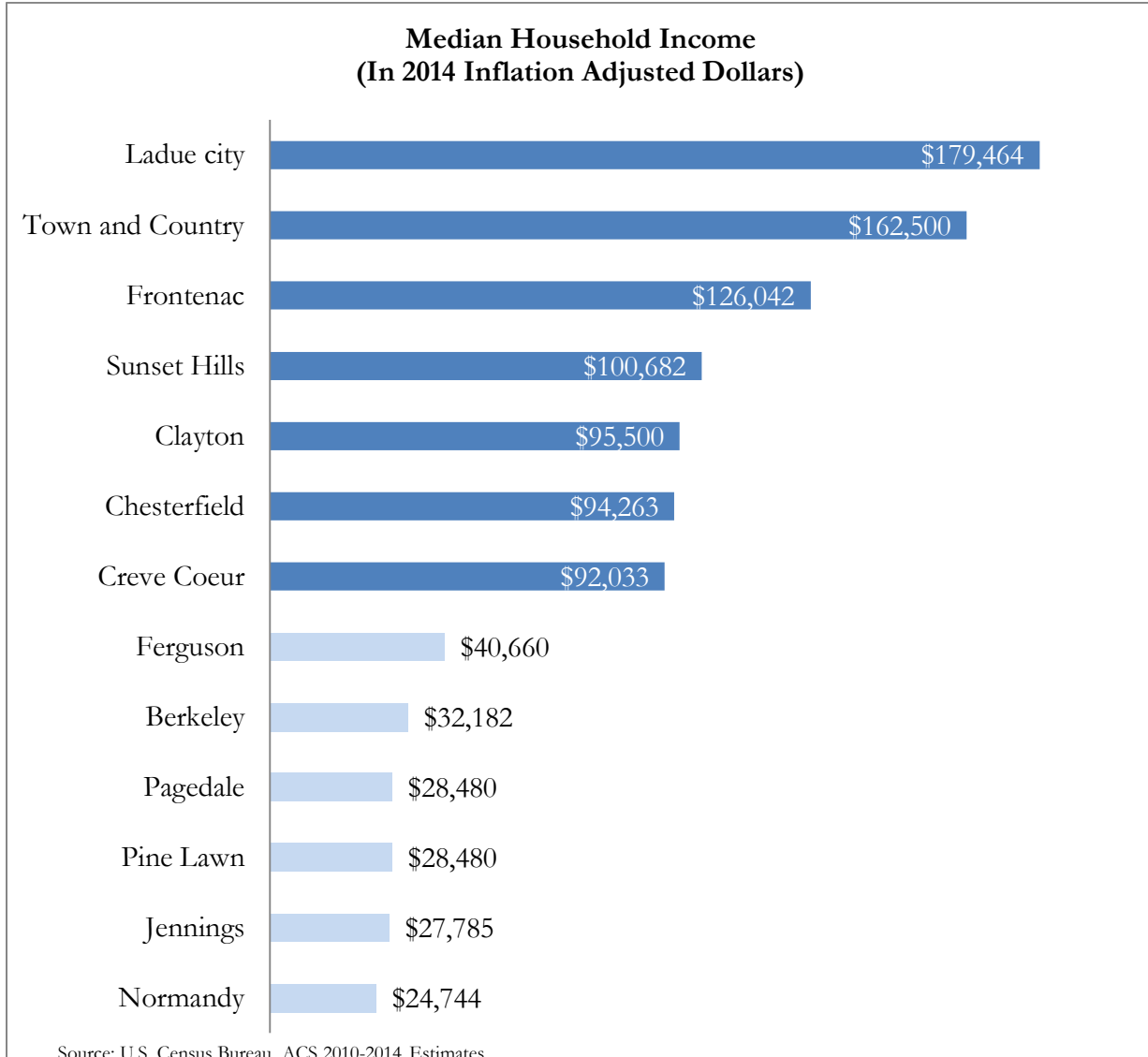
¹⁴⁹ National Conference of State Legislatures (NCSL), *State Tax and Expenditure Limits – 2010*, available at <http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx>.

¹⁵⁰ See the Municipal Courts Survey, *supra* 24 and accompanying text.

fairness of the courts distances the population from the police and the remainder of the law enforcement structure. If police and courts only or primarily are interested in money, they are not useful or reliable to protect the public by enforcing the law. Their objectivity concerning law enforcement becomes questionable so that people follow their instructions only because of force of arms. The underlying question becomes whether an offender is an offender at all or merely a target wearing a dollar sign. Whatever the answer to that question, revenue-based justice administration threatens the maintenance of and respect for the rule of law in the United States.

Appendix A

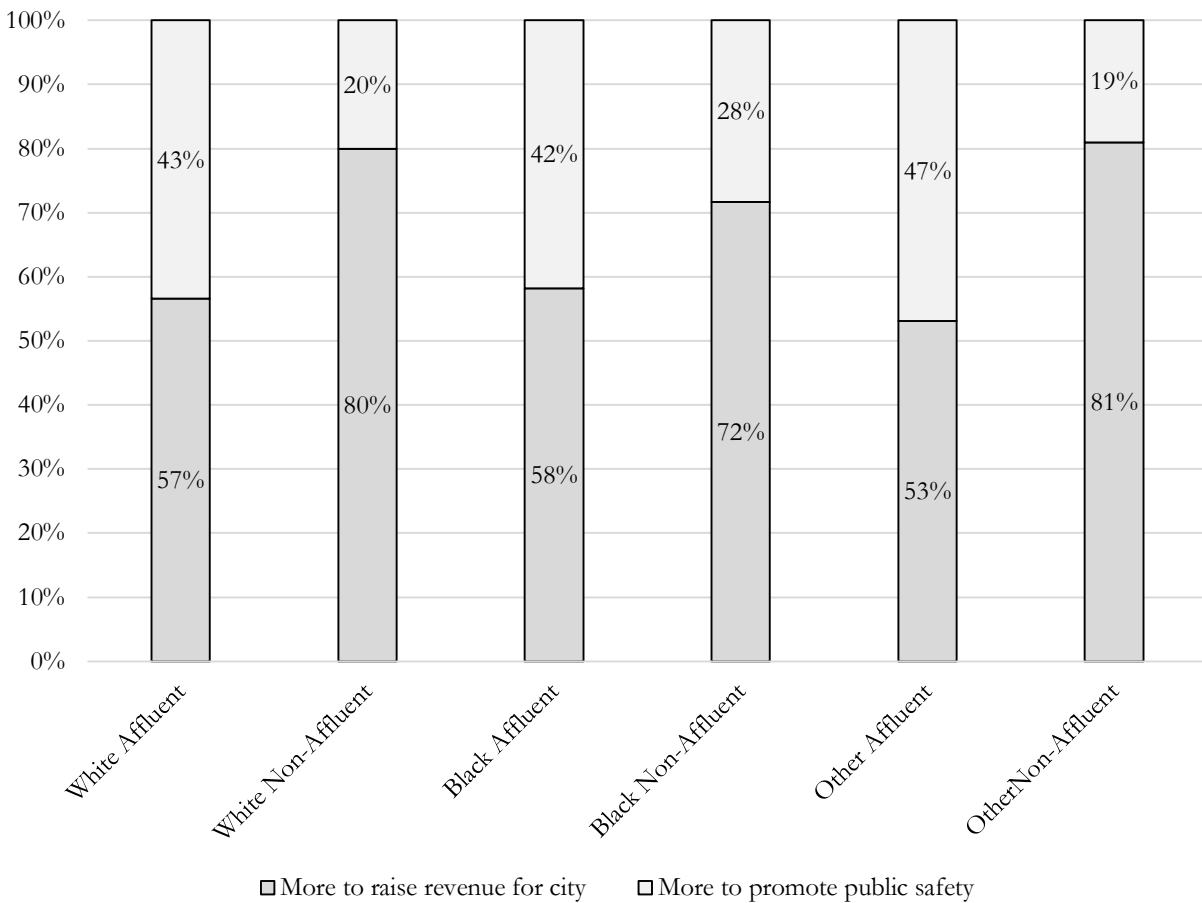
Graph. Medium Household Income of Communities Where Municipal Court Systems Were Studied In Saint Louis County¹⁵¹



¹⁵¹ From Warren, Sandoval, and Ordower, Ferguson and a Dozen More, supra note 24, Graph 1.

Appendix B. The following graph reveals that a majority of both whites and blacks expressed the opinion that they were stopped more to raise revenue than to promote public safety. In the affluent communities a similar percentage of whites (56.6%) and blacks (58.2%) felt that they were stopped “more to simply raise revenue for the city” than “to promote public safety.”

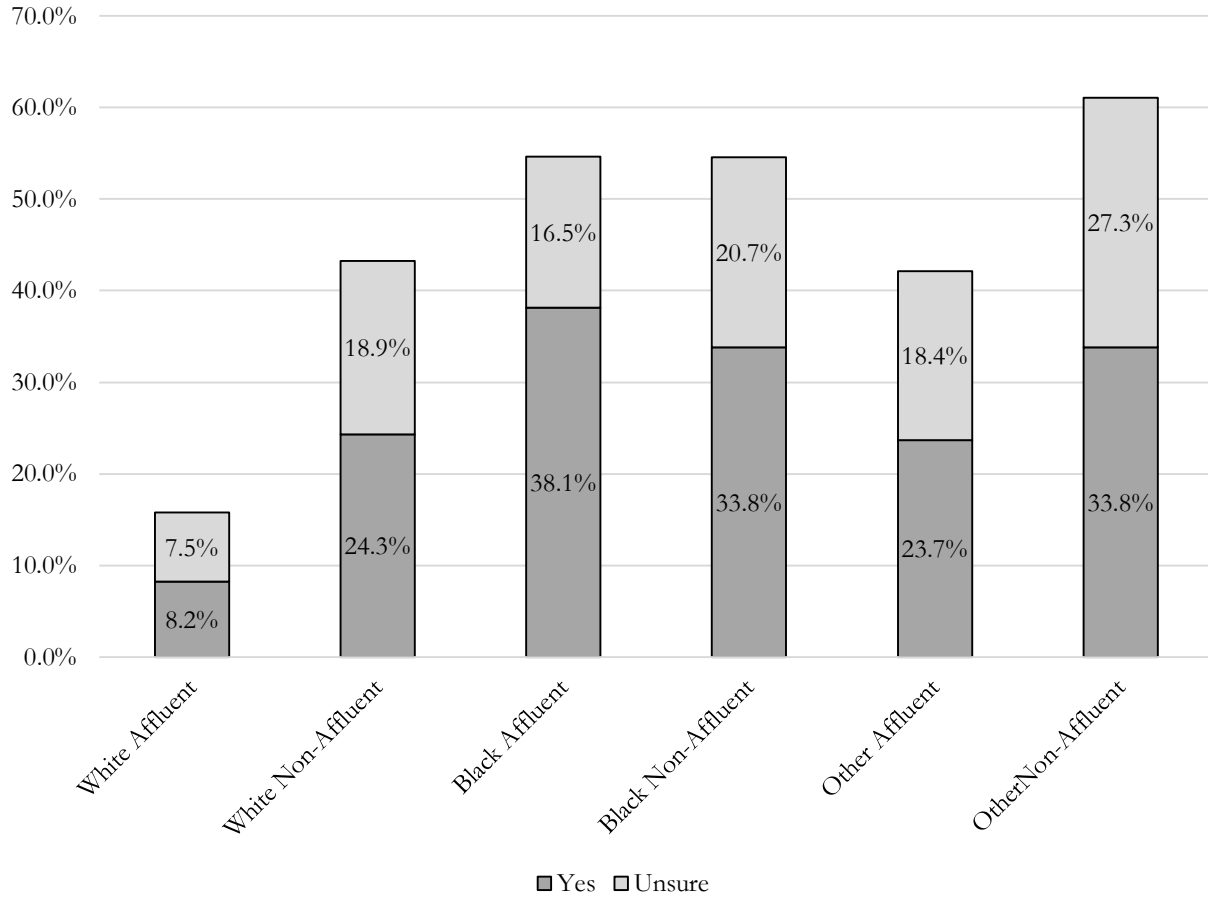
Graph. Ticketed to promote public safety or to raise revenue¹⁵²



¹⁵² Id. Graph 13

Appendix C.

Graph. Racial profiling played a role in the traffic stop¹⁵³



¹⁵³ Id. Graph 9.