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Dismantling Policing for Profit: How to Build on Missouri's Post-Ferguson Court Reforms

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DISMANTLING POLICING FOR PROFIT: HOW TO BUILD ON MISSOURI'S POST-FERGUSON COURT REFORMS

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ABSTRACT

This Note argues that legal reforms enacted after the 2014 Ferguson, Missouri uprising are insufficient to address the problem of using courts as revenue generators and the related problem of predatory policing. Reforms to date have merely capped how much money towns can raise from their courts; they have not fixed the perverse incentive problem, which allows towns like Ferguson to extract wealth from vulnerable, low-income residents through the court system. This Note argues that towns should be required to remit the money their courts raise to a state education fund, which puts legal separation between the entity collecting the money and the beneficiary of those funds. This Note considers two provisions of the Missouri Constitution, one which could be read as requiring such a reform, and another which could be read as prohibiting such a reform. This Note compares Missouri's constitutional provisions to a similar North Carolina constitutional provision and concludes that the Missouri Constitution provides ample support for reformers to advocate for this Note's proposed reform. Finally, this Note offers a roadmap for the steps needed to build political and legal support for the reform.

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INTRODUCTION

In 2014, the killing of Michael Brown, a Black teenager, by a white police officer in Ferguson, Missouri sparked an uprising that garnered international attention.[1] Mr. Brown's death was the catalyst, but historic segregation and racial inequality in Ferguson and the surrounding region fueled the movement.[2] The unrest caught the attention of the U.S. Department of Justice, which declined to bring charges against the officer who killed Michael Brown, but, in an exhaustive and highly consequential investigation, found that "the combination of Ferguson's focus on generating revenue over public safety, along with racial bias, has a profound effect on the [Ferguson Police Department]'s police and court practices, resulting in conduct that routinely violates the Constitution and federal law."[3] The events in Ferguson gave rise to the Black Lives

1. *See, e.g.*, Larry Buchanan, Ford Fessenden, K. K. Rebecca Lai, Haeyoun Park, Alicia Parlapiano, Archie Tse, Tim Wallace, Derek Watkins & Karen Yourish, *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [https://perma.cc/5NEK-CN2E]; Adam Taylor & Rick Noack, *How the Rest of the World Sees Ferguson*, WASH. POST (Aug. 18, 2014, 12:47 PM), https://www.washingtonpost.com/news/worldviews/wp/2014/08/18/how-the-rest-of-the-world-sees-ferguson/ [https://perma.cc/QA3Q-5LH8].

2. RICHARD ROTHSTEIN, ECON. POL'Y INST., THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES (2014), https://www.epi.org/publication/making-ferguson/ [https://perma.cc/U2AA-RXPR].

3. Press Release, U.S. Dep't of Justice, Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri (Mar. 4, 2015), https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri [https://perma.cc/QKZ2-ULQR].

Matter movement, and a new generation of civil rights activists focused on ending police brutality around the nation.[4]

Police brutality is not the only problem plaguing the region. The large number of towns each trying to raise money through fees and fines has cultivated a practice known as the "muni shuffle" in which people who make bond in one town after being jailed for failure to pay tickets are shuffled to the next town where they owe money.[5] That is how Keilee Fant, 37, ended up in the custody of five different towns after being arrested while dropping off her kids at school, and how Edward Brown, 62, was jailed for not paying fines on offenses such as failing to cut his grass.[6]

Although litigation, legislation, rulemaking, and other efforts have targeted these issues, using police and courts to generate municipal revenues through exploitative fees and fines, collectively referred to as "policing for profit," remains a serious problem in the St. Louis area and throughout the country. In the wake of the Ferguson uprising, Missouri enacted legislative and judicial reforms that lowered the cap on the percentage of revenue that towns may derive from their courts, instated mandatory ability-to-pay hearings, made it easier for the public to sanction towns that violate the rules, and attempted to curtail debtors prisons.[7] However, these reforms have not fundamentally altered the perverse incentive structure that encourages towns to treat their police and courts as revenue generators.

In this Note, I argue that the most effective way to fix the problem is to require towns to give the proceeds from fines that their courts collect to a different public interest entity: a state education fund. Such a change would create legal and economic separation between the entity doing the revenue collection and the entity benefiting from the funds. The Missouri Constitution speaks to that issue in seemingly contradictory ways. This Note examines whether such a remittance is in fact already required by the constitution, or at least permitted by it, and offers a blueprint for how advocates can argue for and defend such a reform in the courts and the legislature. This Note also explores ways for advocates to leverage existing reforms to achieve this long-term goal, including running ballot-petition campaigns to disincorporate the worst offending towns (which would revoke the charters that authorize them to operate), making

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4. *See* Shannon Luibrand, *How a Death in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015, 5:39 AM), https://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/ [https://perma.cc/4Z3W-ZE65].

5. *See* discussion *infra* Part I.B.

6. Complaint ¶¶ 54–56, 79–81, Jenkins v. City of Jennings, 15-cv-00252 (E.D. Mo. Feb. 8, 2015), ECF No. 1, https://www.clearinghouse.net/chDocs/public/CJ-MO-0006-0001.pdf [https://perma.cc/FJS2-3JRJ].

7. *See* S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); S.B. 572, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); MO. SUP. CT. R. 37.65, discussed *infra* Part II.B.

examples of these towns, and building momentum for broader city-county consolidation.

Part I explains the policing for profit problem, including the historical factors that created an environment of splintered, segregated governance in the region, which allowed predatory law enforcement to fester. Part I also quantifies the profits that courts are collecting and discusses how people experience government in the region today. Part II surveys the reforms that were proposed after the Ferguson uprising, discusses the reforms that were enacted, and evaluates where enacted reforms fell short. Part III offers an in-depth legal analysis of two contrasting provisions of the Missouri Constitution––one that could be read to require towns to give up the money their courts collect and another that could be read to prevent that outcome. Drawing on Missouri legal history as well as caselaw from another jurisdiction with similar constitutional provisions, Part III outlines the argument that the Missouri Constitution can and should be read to require towns to remit fine collections to a public education fund, and that the legislature could effect this change statutorily. Part IV recaps how existing law can be better utilized to target the worst-offending towns and build political momentum for broader change.

I. THE PROBLEM WITH POLICING FOR PROFIT

In the years leading up to the Ferguson uprising, the policing for profit problem was severe and bound up in a web of policies that prevented people from escaping cycles of debt and incarceration. Historical residential segregation created an environment and governmental structures that enabled those policies. Part I quantifies the problem and explores its roots.

A. *Municipalities in St. Louis Generate an Excessive Amount of Revenue from Their Courts, Which Has a Disparate Impact on Black and Indigent People*

The municipal court system in the city and county of St. Louis extracts wealth from poor residents and maintains racialized social control. Police in numerous neighboring districts overzealously issue tickets for minor infractions and courts levy steep monetary penalties for those infractions as well as issue arrest warrants for people who fail to show up

to court or to pay.[8] For example, in December of 2014, in a town of roughly 21,000 people, the Ferguson municipal court had over 16,000 outstanding warrants on 32,975 offenses, of which 9,007 were in fiscal year 2013 alone.[9] The most common offenses leading to a warrant (because they were both frequently charged and the most likely to result in missed court payments or appearances) were driving with a suspended license, expired license plates, failure to register a vehicle, no proof of insurance, and speeding.[10] While Black people were 67% of the town's population, they accounted for 85% of traffic stops, 90% of citations, and most grotesquely, 96% of known arrests made exclusively because of municipal warrants.[11]

These stops have been a major source of revenue for the City. In 2015, Ferguson expected to collect $3.09 million in revenue from fines and fees, representing 23% of the City's total budget of $13.26 million.[12] That was up from $2.63 million in fines and fees budgeted in 2014, and $2.11 million budgeted in 2013 (the City actually collected $2.46 million that year).[13] Ferguson was not even the worst offender in St. Louis County. In 2014, St. Ann township (population 13,020) derived a whopping 39.6% of its general revenue from fines and fees ($3.61 million in fee revenues on a $9.12 million budget), and St. John township (population 6,517) was not far behind at 29.4% ($1.13 million in fees on a $3.84 million budget).[14] These data offer a local snapshot of a statewide phenomenon.

Today, fees and fines remain a major revenue source for municipalities in Missouri, although the numbers have declined in recent years, possibly due to recently implemented reforms. Data from the Missouri Judiciary's Annual Statistical report show that in 2014, municipal division courts reported a total of $109.66 million in fine collections statewide and $12.47 million in fees and costs.[15] In 2015, in response to the Ferguson uprising, the Missouri legislature passed Senate Bill 5 (S.B. 5) which imposed a cap on the percentage of revenue that a town can

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8. U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Q5RU-H5UK] [hereinafter DOJ REPORT].

9. *Id.* at 6, 55.

10. *Id.* at 56.

11. *Id.* at 62–63.

12. *Id.* at 10.

13. *Id.* at 9.

14. Mike Maciag, *Skyrocketing Court Fines Are Major Revenue Generator for Ferguson*, GOVERNING (Aug. 22, 2014), https://www.governing.com/topics/public-justice-safety/gov-ferguson-missouri-court-fines-budget.html [https://perma.cc/N8KE-GUF4].

15. MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2014, TABLE 94, MUNICIPAL NET DISBURSEMENTS/COLLECTIONS (2014), https://www.courts.mo.gov/file.jsp?id=83262 [https://perma.cc/G6XL-7F93].

derive from its court.[16] A year later 2016, municipal division fine and fee revenues fell to $78.69 million and $8.43 million, respectively.[17] In 2018, it was $60.53 million and $6.52 million,[18] and by 2020, it had fallen further, to $48.38 million and $5.25 million.[19] Independent analysis of the 2018 data found that, of towns reporting at least $100,000 in fee and fine revenues, 18 municipalities in Missouri exceeded 10% of their operating revenue from fees and fines, 6 exceeded the statutory cap of 20%, and 2 exceeded 30%.[20] Nationally, there were 600 towns with more than $100,000 in fee and fine revenues that derived more than 10% of their total revenue from this source, with 284 exceeding 20%.[21] While this Note focuses on Missouri as an example, other states are also overly-reliant on fees and fines and experience adverse consequences. For example, recent research has revealed excessive and inefficient fines in counties in Florida, New Mexico, and Texas.[22]

Although court revenues are declining, existing revenues are not evenly distributed across the population. Data from the state court administrative office of aggregate fee and fine revenues and traffic case filings do not include demographic information,[23] but police departments in the state are required to disaggregate traffic stops by race. According to the Missouri Attorney General, in 2018, "Blacks represent 10.9% of Missouri's driving-age population but 19.2% of all vehicle stops, for a disparity index of 1.76. This means that Blacks were stopped at a rate 76% greater than expected based upon their portion of the population sixteen

16. S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).

17. MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2016, TABLE 94, MUNICIPAL NET DISBURSEMENTS/COLLECTIONS (2016), https://www.courts.mo.gov/file.jsp?id=109581 [https://perma.cc/CV3Q-ABFX].

18. MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2018, TABLE 94, MUNICIPAL NET DISBURSEMENTS/COLLECTIONS (2018), https://www.courts.mo.gov/file.jsp?id=137389 [https://perma.cc/4X2V-F5ZY] [hereinafter 2018 MO. JUD. REP. SUPPLEMENT].

19. MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2020, TABLE 94, MUNICIPAL NET DISBURSEMENTS/COLLECTIONS (2020), https://www.courts.mo.gov/file.jsp?id=177532 [hereinafter 2020 MO. JUD. REP. SUPPLEMENT].

20. *Local Government Fine Revenues by State*, GOVERNING, https://www.governing.com/gov-data/other/local-governments-high-fine-revenues-by-state.html [https://perma.cc/9TR4-YHXE] (last visited Nov. 9, 2019).

21. Mike Maciag, *Addicted to Fines: Small Towns in Much of the Country Are Dangerously Dependent on Punitive Fees and Fines*, GOVERNING (Aug. 21, 2019), https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html [https://perma.cc/JXT8-957W].

22. Matthew Menendez, Lauren-Brooke Eisen, Noah Atchison & Michael Crowley, *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/K3LS-T75C].

23. *See, e.g.*, 2020 MO. JUD. REP. SUPPLEMENT, *supra* note 19; MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2020, TABLE 93, MUNICIPAL CASES FILED, DISPOSED, AND PENDING (2020) https://www.courts.mo.gov/file.jsp?id=177530.

and older."[24] Likewise, the individuals charged fines and fees are likely to be low-income, particularly because offenses like not having valid vehicle insurance or registration stickers are crimes of poverty.[25] The burden of fees and fines falls heaviest on low-income people.[26] A study of 500 randomly-selected individuals charged with a felony in Washington State in 2004 found that, by 2008, median legal financial obligations compared to expected earnings was 60% for white men, 36% for Hispanic men, and 50% for Black men; average legal debts compared to income were much higher, reaching an astounding 222% for Black men.[27] Because fees and fines extract wealth from people who have the least, the authors aptly titled their study "Drawing Blood from Stones."[28]

B. *The Excessive Number of Municipal Jurisdictions Compounds For-Profit Policing Via the "Muni Shuffle"*

The St. Louis region today is filled with tiny jurisdictions each with their own police forces, creating a landscape of duplicative policing and little public accountability.[29] St. Louis County, Missouri, is composed of *eighty-eight* municipalities, not including the City of St. Louis.[30] Some of

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24. ERIC SCHMITT, 2018 ANNUAL REPORT: MISSOURI VEHICLE STOPS – EXECUTIVE SUMMARY 8 (2018), https://ago.mo.gov/docs/default-source/public-safety/2018vehiclestops-executivesummary.pdf?sfvrsn=2 [https://perma.cc/J2BM-DACU].

25. The criminalization of poverty is an umbrella term describing policing and prosecuting practices that target poor people, often for minor public order offenses or for failure to have the resources to comply with rules and regulations. *See generally*, Jessica Brand, *How Fees and Fines Criminalize Poverty: Explained*, APPEAL (July 28, 2018), https://theappeal.org/the-lab/explainers/how-fines-and-fees-criminalize-poverty-explained/ [https://perma.cc/G7VT-3AQF]; PETER B. EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017).

26. *See generally* Menendez et al., *supra* note 22.

27. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1776 (2010).

28. *Id.* at 1753.

29. *See* Jesse Bogan, *St. Louis County's Municipal Courts Are Still Being Judged – And Some Are Still Falling Short*, ST. LOUIS POST-DISPATCH (Feb. 18, 2019), https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-s-municipal-courts-are-being-judged-and/article_7db02ecc-6644-5619-8f94-602fbd56095f.html [https://perma.cc/7JFH-ZXHY] ("Municipal courts have long been divisions of circuit courts, but over decades of running things their own way, in their own communities, oversight fell short.").

30. *Municipalities and Census Designated Places 2010*, OPEN GOV'T, ST. LOUIS CNTY., MO. (July 2018) https://data.stlouisco.com/datasets/municipalities-and-census-designated-places/geoservice [https://perma.cc/8HLX-BUSY]. While it is impossible to quantify what the "correct" number of jurisdictions in a metropolitan area is, the fractured St. Louis model stands in contrast to other metro areas where city and county government have merged. *See* Anders Walker, *House to House: Mergers, Annexations & the Racial Implications of City-County Politics in St. Louis*, 34 ST. LOUIS U. PUB. L. REV. 127, 135–37 (2014) (discussing applicability of the Miami-Dade and Indianapolis-Marion models to St. Louis).

these municipalities have minuscule populations or land areas. For example, the village of Champ has a population of thirteen (as of 2019), and Glen Echo Park has a land mass of 0.032 square miles.[31] Edmundson, population 800, has a police force of 11 officers, and in 2014, the mayor sent a letter to the officers reminding them that "the tickets that you write do add to the revenue on which the P.D. budget is established and will directly affect pay adjustments at budget time."[32] The perverse incentive of revenue collection combined with the fragmentation of government allows neighboring jurisdictions to target the same individuals, trapping them in a web of legal and financial obligations. This is known locally as the "muni shuffle."[33]

To understand how the muni shuffle works, consider these real-world examples from debtors prison litigation filed by the St. Louis-based indigent defense organization ArchCity Defenders against the City of Jennings[34] for practices the organization described as "Dickensian."[35] In 2014, Jennings issued 2.1 warrants per household, or 1.4 warrants for *every adult* in the city.[36] When defendants failed to pay, Jennings locked them in a squalid "jail," without any inquiry into their ability to pay or access to counsel.[37] The conditions inside the jail were barbaric: cells were overcrowded and at times covered in mucus, blood, and feces, creating an unbearable stench; inmates were subject to rampant physical abuse; and inmates lacked access to adequate food, medication, and basic hygienic products, such as toothbrushes and soap.[38] Some inmates even committed suicide while in custody.[39]

The Jennings plaintiffs were caught up in the muni shuffle. Edward Brown, sixty-two, was homeless and squatting without heat or water. His only source of income was Social Security Disability benefits, and he

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31. *See Quick Facts, Champ Village, Missouri)*, U.S. CENSUS BUREAU, https://www.census.gov/search-results.html?searchType=web&cssp=SERP&q=Champ%20village,%20MO [https://perma.cc/DG65-N7LL] (last visited May 17, 2021); *U.S. Gazetteer Files, 2020, Places, Missouri*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/docs/maps-data/data/gazetteer/2020_Gazetteer/2020_gaz_place_29.txt [https://perma.cc/GZ5F-UD8Y] (last visited May 17, 2021).

32. Teresa Mathew, *St. Louis County Is Profiting off the 'Muni Shuffle' Long After Ferguson Protests*, APPEAL (Jan. 18, 2019), https://theappeal.org/st-louis-county-fines-and-fees-ferguson/ [https://perma.cc/DH9J-7DSY].

33. *Id.*

34. Jennings has a population of 14,575 people, of whom 87.7% are Black, as of July 1, 2019. *Quick Facts, Jennings City, Missouri*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/jenningscitymissouri [https://perma.cc/HD9E-ZYKA].

35. Complaint, *supra* note 6, ¶ 8.

36. *Id.* ¶ 6.

37. *Id.* ¶ 1.

38. *Id.* ¶ 2.

39. *Id.* ¶ 3.

relied on food stamps.[40] He was issued tickets by Jennings for home occupancy violations (including not cutting the grass), allowing his girlfriend to sleep over without an occupancy permit, ordinance violations related to his pet dog, and trespassing.[41] In 2010, he was jailed for two weeks without access to counsel for failure to pay hundreds of dollars in fines, and when he managed to scrounge together money for a reduced $100 fine, he was not released, but rather, transferred to another jail in the City of Pine Lawn for failure to pay tickets there.[42]

When locals refer to the "muni shuffle," they are talking about shuffling poor defendants between the multiple jurisdictions where they owe money. In Mr. Brown's case, this series of events repeated itself multiple times annually from 2011 to 2014, with Mr. Brown being jailed again in both Jennings and Pine Lawn, which took a severe toll on his health.[43] Another individual, thirty-seven year old Keilee Fant, was arrested while taking her kids to school in October 2013 for failure to pay tickets in Jennings.[44] When she pulled together enough money to pay Jennings, she was "released" to the custody of the City of Bellefonte Neighbors, which is so small that it contracted with Jennings to hold her in the Jennings jail.[45] When she paid off Bellefonte Neighbors, she was "released" to the custody of Velda City, which contracted with the City of St. Louis to hold her.[46] After that, she was held for failure to pay tickets in two more towns: the City of Normandy and the City of Beverly Hills.[47]

Egregious debtors' prison practices like these have abated thanks to both litigation by ArchCity,[48] which has targeted specific towns and scared others into reforms, and recent rulemaking by the Missouri Supreme Court, which formally bars incarceration without a municipal court's consideration of one's ability to pay.[49] However, the phenomenon

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40. *Id.* ¶¶ 53–54.
41. *Id.* ¶ 55.
42. *Id.* ¶ 56.
43. *Id.* ¶¶ 57–71.
44. *Id.* ¶¶ 78–79.
45. *Id.* ¶ 81.
46. *Id.* ¶ 81.
47. *Id.* ¶ 81.
48. *See generally* Settlement Agreement, Jenkins v. City of Jennings, 15-CV-00252, (E.D. Mo. Dec. 12, 2016), ECF No. 35-1, https://www.clearinghouse.net/chDocs/public/CJ-MO-0006-0005.pdf [https://perma.cc/9Q3A-U628] (agreeing to settle the dispute between ArchCity and the City of Jennings).
49. MO. S. CT. R. 37.65(f) ("A judge may not incarcerate the defendant for nonpayment of a fine, fee, or cost unless the judge holds a hearing, with adequate notice to the defendant, and makes one of the following written findings: (1) The failure to pay was not due to an inability to pay but was willful or due to a failure to make bona fide efforts to pay; or (2) The failure to pay was not the fault of the defendant and alternatives to incarceration are not adequate in the circumstances of the case to meet the municipality's or county's interest in punishment and deterrence.").

of St. Louis residents racking up tickets in several jurisdictions at once is far from over.

C. *Today's For-Profit Policing Is Directly Related to the History of Residential Segregation in the St. Louis Metropolitan Area*

Because the "muni shuffle," described above, is made possible by the multiplicity of municipal jurisdictions in the region, attacking the problem requires some understanding of how those jurisdictions came about and what role racial segregation played in that process.

The City of St. Louis split from St. Louis County in 1876, in part due to a desire for greater local autonomy.[50] In the years leading up to and following the Civil War, city residents grew weary of state and county efforts to, as city residents saw it, exploit the city's wealth.[51] The state was micromanaging local affairs, and the city residents were paying the county for duplicative services.[52] The new state constitution of 1875 reflected residents' desire for greater autonomy, explicitly providing for the city's independence from the county.[53] Another motivating factor was a continuing power struggle among pro-Union Radicals who dominated the constitutional convention.[54] During the convention, the Radicals succeeded in purging non-Radicals from state government, including in St. Louis County, but they did not succeed in ousting from the city confederate-sympathizing conservatives, who made the city "'the center of opposition' to Radical rule."[55]

The city continued to grow, but the terms of the city-county separation agreement and the 1875 constitution fixed the city boundaries, subject to the approval of a board of freeholders and a popular vote.[56] Because of the difficulty of expanding the city, development occurred outside the city boundaries in the late nineteenth and early twentieth centuries, when the Black population began to rise.[57] Although the 1875 constitution gave the City of St. Louis the exclusive right to establish a charter form of self-government, the state later allowed all townships of

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50. MO. CONST. art. IX, §§ 20, 23 (1875). *See* Colin Gordon, *Patchwork Metropolis: Fragmented Governance and Urban Decline in Greater St. Louis*, 34 ST. LOUIS. U. PUB. L. REV. 51, 52–53 (2014).

51. Peter W. Salsich, Jr. & Samantha Caluori, *Can St. Louis City and County Get Back Together? (Do Municipal Boundaries Matter Today?)*, 34 ST. LOUIS. U. PUB. L. REV. 13, 19 (2014).

52. Gordon, *supra* note 50, at 52.

53. Salsich & Caluori, *supra* note 51, at 15–16; MO. CONST. art. IX, § 23 (1875).

54. Walker, *supra* note 30, at 130.

55. *Id.*

56. MO. CONST. art. IX, § 20 (1875); Gordon, *supra* note 50, at 53.

57. Gordon, *supra* note 50, at 53–54.

more than 5,000 people to enact a charter.[58] This made Missouri one of the first states to guarantee "home rule" in its constitution.[59]

Owing to these incentives, efforts to reunify the city and county repeatedly failed. Reformers mounted efforts to do so in 1926, 1930, 1954, 1955, 1959, 1962, and 1984, none of which succeeded.[60] These failures occurred even as other major U.S. metropolitan areas consolidated their governments in the second half of the twentieth century.[61] Nonetheless, in 1966, article VI, section 30 of the Missouri Constitution was adopted, allowing for the reunification of the city and county through a complex process by which voters petition for the appointment of a board of freeholders to propose changes which must then be approved by both the city and county.[62] Most recently, an effort to place a question on the statewide ballot about city-county reunification was abandoned in early 2019.[63] The earlier efforts for city-county reunification did however plant the seeds for greater regional cooperation and future unification. They produced a number of regional authorities, including a sewer and community college district; regional zoos, parks, museums, and sporting venues; and regional transportation, public safety, and economic development entities.[64]

Because of failed efforts to reunify St. Louis, today's street-level decisions about policing and ordinance enforcement are made against a backdrop of political and geographic segregation, which has resulted in the racialized dispossession of wealth and property. This is not an accident. Until the 1948 U.S. Supreme Court decision in *Shelley v. Kraemer*, which held that private deed restrictions barring land from being sold to people of a different race could not be enforced in court,[65] racial covenants were used to prevent Black people from leaving the city for the

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58. *Id.* at 53; MO. CONST. art. IX, § 20 (1875); MO. CONST. art. VI, § 19–19(a). *See also* MO. CONST. art. VI, § 17 (protecting the ability of towns to separate or consolidate).

59. Salsich & Caluori, *supra* note 51, at 15 n.12. "Home rule" is defined as "[a] state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms." *Home Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

60. *See* Walker, *supra* note 30, at 133.

61. E. Terrence Jones, *Toward Regionalism: The St. Louis Approach*, 34 ST. LOUIS U. PUB. L. REV. 103, 110–11 (2014) (describing city-county consolidation occurring in Indianapolis, Jackson, and Nashville).

62. Walker, *supra* note 30, at 134; MO. CONST. art. VI, § 30(a).

63. David Hunn, *Better Together Pulls St. Louis City-County Merger Proposal*, ST. LOUIS POST-DISPATCH (May 7, 2019), https://www.stltoday.com/news/local/govt-and-politics/better-together-pulls-st-louis-city-county-merger-proposal/article_c71a51d2-998b-5e95-9926-ad3707671690.html [https://perma.cc/27DB-FGUC].

64. *Id.* at 112–14.

65. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

county.[66] After *Shelley* made racial covenants unenforceable, white supremacists used municipal incorporation to promote segregation.[67] For example, Kinloch, Missouri (which neighbors Ferguson) was the only Black town in the county and was once a thriving center of Black culture.[68] Then, in 1938, the City of Berkeley split off from Kinloch to avoid sharing a school district.[69] The acrimony between the towns was so severe that, in the 1970s, Berkeley leaders wanted to build a wall dividing the towns.[70] In the 1980s, an adjacent airport began buying up land in Kinloch for an expansion, pushing residents out.[71] Today, Kinloch is a wasteland of vacant lots, trash, and abandoned streets.[72] The municipality is barely functional and risks literally "falling off the map."[73]

This story is not unique within the St. Louis area. In 1969, when residents of unincorporated St. Louis County sought to build a mixed-income housing project, opponents quickly mobilized to incorporate the City of Black Jack, which instituted restrictive zoning laws to block the project.[74] Black residents in the city sued, claiming that they were being shut out of housing and job opportunities in the suburbs.[75] The Nixon

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66. *See, e.g.*, Colin Gordon, *Mapping Decline, St. Louis and the American City*, U. IOWA LIBRS., http://mappingdecline.lib.uiowa.edu/map/ [https://perma.cc/9NGS-EB7L] (last visited Apr. 10, 2021) (mapping racial covenants in the St. Louis region and racial residential patterns from the early twentieth century through the present day).

67. *See generally id.* at Race & Property tab ("The history of greater St. Louis, is bound up in a tangle of local, state, and federal policies that explicitly and decisively sorted the City's growing population by race. These policies yielded both an intense concentration of African Americans in certain wards or neighborhoods of St. Louis itself and a virtually unbreachable wall between the City and its suburbs. The isolation of African Americans on St. Louis' near northside was accomplished and enforced in a variety of ways; some private and public strategies of exclusion overlapped and reinforced one another, others were cobbled together as legal challenges prohibited some of the more direct tools of segregation.").

68. Jeffrey Smith, *You Can't Understand Ferguson Without First Understanding These Things*, NEW REPUBLIC (Aug. 15, 2014), https://newrepublic.com/article/119106/ferguson-missouris-complicated-history-poverty-and-racial-tension [https://perma.cc/9XYQ-Y2QK].

69. *Id.*

70. Mary Delach Leonard, *Ferguson's Yesterdays Offer Clues to the Troubled City of Today*, ST. LOUIS PUB. RADIO (Aug. 2, 2015, 11:27 PM), https://news.stlpublicradio.org/post/fergusons-yesterdays-offer-clues-troubled-city-today#stream/0 [https://perma.cc/U2YB-4BYM].

71. Ben Westhoff, *The City Next to Ferguson Is Even More Depressing*, VICE (June 3, 2015, 12:00 AM), https://www.vice.com/en_us/article/bnpzda/the-spectacular-decline-of-the-historic-town-next-to-ferguson-missouri-602 [https://perma.cc/AMP4-NUYX].

72. *See id.*

73. *See id.*

74. United States v. City of Black Jack, 508 F.2d 1179, 1182–83 (8th Cir. 1974). *See also* William H. Freivogel, *Supreme Court Housing Discrimination Decision Had Its Roots in Black Jack*, ST. LOUIS PUB. RADIO (June 25, 2015, 5:39 PM), https://news.stlpublicradio.org/post/supreme-court-housing-discrimination-decision-had-its-roots-black-jack#stream/0 [https://perma.cc/6RF9-BZ3S].

75. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 125 (2017).

administration intervened on the residents' behalf, and the residents won at the Court of Appeals, allowing the project to proceed.[76] Most infamously, the City of St. Louis bulldozed twenty blocks of "slums" in 1952 to construct the massive, federally-funded Pruitt-Igoe public housing complex, consisting of thirty-three buildings of eleven stories each.[77] Igoe tower was intended to be white-only, while Pruitt was to be Black-only, but Black people were allowed to buy into Igoe when no white buyers could be found.[78] Pruitt-Igoe was quickly plagued by crime. [79] As a result, the city began imploding the buildings in 1972 in a watershed moment for U.S. urban development.[80] Today, much of the complex remains vacant and overgrown.[81]

This history is critical to understanding who wields political power in the St. Louis region and how a system of dispossessing already desperately poor residents of wealth via predatory policing could persist today. In short, it is no coincidence that St. Louis County is 25% Black and 68% white, the City of St. Louis is 46% Black and majority non-white,[82] and both maintain complex legal systems that subjugate Black residents and restrict their mobility. These systems are complimentary and mutually reinforcing; the Missouri Constitution makes it easy to create new towns, racial animus inspired citizens to create at least some of these towns, and the history of legalized racial segregation continues to shape residential patterns today.[83] White political leadership, even in majority Black jurisdictions, has compounded these problems, reflecting disparities in political power.[84] The next Section discusses the success and

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76. *Id.*

77. *See* Tim O'Neil, *45 Years Ago: A Final Blow Is Dealt to Pruitt-Igoe*, ST. LOUIS POST-DISPATCH (Apr. 1, 2018), https://www.stltoday.com/news/local/metro/years-ago-a-final-blow-is-dealt-to-pruitt-igoe/article_e2a30e7c-f180-5770-8962-bf6e8902efc1.html#1 [https://perma.cc/H6Y9-P26W]. *See generally Renewing Inequality: Family Displacements Through Urban Renewal 1950-1966, St. Louis, MO*, DIGIT. SCHOLARSHIP LAB, UNIV. OF RICH. https://dsl.richmond.edu/panorama/renewal/#view=0/0/1&viz=cartogram&city=saintlouisMO&loc=12/38.6178/-90.2353 [https://perma.cc/2FCD-A8J3] (last visited Apr. 17, 2021) (mapping urban renewal projects in St. Louis).

78. ROTHSTEIN, *supra* note 75, at 32.

79. *Id.* at 32.

80. *Id.* at 32.

81. *Id.* at 32; Michael R. Allen, *Pruitt Igoe Now: Before and After Pruitt Igoe*, http://www.pruittigoe-now.org/before-and-after [https://perma.cc/GMY4-RM5Z] (last visited May 9, 2021).

82. *Quick Facts, St. Louis City, Missouri.*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/stlouiscitymissouri,stlouiscountymissouri/PST045219 [https://perma.cc/ML2K-HJD2].

83. *See* MO. CONST. art. VI, §§ 17, 19; United States v. City of Black Jack, 508 F.2d 1179, 1182–83 (8th Cir. 1974); Gordon, *supra* note 66.

84. At the time of the Ferguson uprising, the city, which is 67% Black, had a mayor who was a white, Republican former police officer, and a council where six of seven members were white. *See* Charles D. Ellison, *Ferguson's White City Leadership Must Change*, ROOT (Aug. 18, 2014, 10:25 AM),

shortcomings of efforts to address these issues and remedy past inequities.

II. EXISTING SCHOLARSHIP AND REFORMS TO DATE

Since 2014, various studies have detailed the governmental failures that contributed to the uprising in Ferguson, Missouri.[85] These early efforts translated into legislative action to cap how much revenue towns can derive from their courts, as well as new court rules to create more procedural safeguards for defendants in municipal courts.[86] These steps diminished court revenues[87] but did not change who was collecting them, allowing towns to continue operating police and court systems that prioritize revenue collection. Thus, existing reforms are insufficient to dismantle the system of wealth extraction from the poor, and more is needed to achieve this goal.

A. *Existing Scholarship on Missouri Municipal Courts Calls for Court Reform, but Proposals to Change Perverse Incentive Structures Are Under-Developed*

The outcry over Michael Brown's killing and the protests that followed created demand and political space for reform. The indigent defense organization ArchCity Defenders quickly released its *Municipal Courts White Paper*, which focused on the severe deficiencies of the municipal courts where ArchCity attorneys had long practiced.[88] After the paper was published, then-Governor Jay Nixon convened a commission to study the underlying causes of the uprising.[89] The commission produced a comprehensive report, *Forward Through Ferguson: A Path Toward Racial Equality*, which called for consolidation of both municipal courts and police districts, and for a ban on municipal court judges practicing

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https://www.theroot.com/ferguson-s-white-city-leadership-must-change-1790876753 [https://perma.cc/E5BL-KEPV].

85. *See, e.g.*, DOJ Report, *supra* note 8; *see also* discussion *infra* pp. 114–15.

86. *See* S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); *see also* MO. S. CT. R. 37.65.

87. *See* discussion *infra* pp. 105–06.

88. THOMAS HARVEY, JOHN MCANNAR, MICHAEL-JOHN VOSS, MEGAN CONN, SEAN JANDA & SOPHIA KESKEY, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER (Nov. 23, 2014), https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf [https://perma.cc/VB53-N8HA].

89. *The Commission*, FORWARD THROUGH FERGUSON, https://forwardthroughferguson.org/report/executive-summary/the-commission/ [https://perma.cc/UNH2-4F9Q] (last visited Apr. 12, 2021).

in other municipal courts in the same county.[90] *Forward Through Ferguson* also called for municipal courts to end incarceration for non-violent offenses, end failure to appear warrants, cancel outstanding warrants, implement ability-to-pay hearings, and revoke some fines for inability to pay.[91]

Around the same time, an organization known as Better Together St. Louis issued the first of several reports in support of government consolidation in the city and county. At the invitation of Better Together, the Police Executive Research Forum (PERF) conducted an in-depth review of the many police districts in St. Louis County and produced a report calling for the regionalization of police services.[92] PERF found that the existing fragmented system was financially inefficient; produced departments that varied widely in policies, training, and resources; and allowed individual towns to treat their police forces as revenue generators.[93] To resolve these issues, PERF proposed distributing existing municipal police departments into three geographic "clusters" which would all use standard training and CompStat data sharing.[94]

The Missouri Supreme Court convened its own Municipal Division Working Group to issue recommendations for how it might use its supervisory powers to reform the municipal division.[95] Similar to the *Forward Through Ferguson* report, the Working Group called for curtailing arrest warrants for failure to appear, including dismissal of old warrants, and for codifying protections against incarceration for inability to pay court debts.[96] It also recommended rules against municipal judges and prosecuting attorneys practicing in other capacities in the same county.[97] A majority of the Working Group concluded, however, that the Missouri Supreme Court does not have the power to unilaterally consolidate municipal courts on its own authority, because the court's general supervisory powers are qualified by the state constitution's more specific provisions creating circuit and municipal courts.[98] Washington University

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90. FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 77–79, 85 (Oct. 14, 2015), https://3680or2khmk3bzkp33juiea1-wpengine.netdna-ssl.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf [https://perma.cc/3DG2-9EHY].

91. *Id.* at 94.

92. POLICE EXEC. RSCH. F., OVERCOMING THE CHALLENGES AND CREATING A REGIONAL APPROACH TO POLICING IN ST. LOUIS CITY AND COUNTY (2015), https://www.policeforum.org/assets/stlouis.pdf [https://perma.cc/JK74-TASP].

93. *Id.* at 2–3.

94. *Id.* at 3–6.

95. *See Municipal Court Reform*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=129997 [https://perma.cc/R472-9FCH] (last visited Mar. 1, 2020).

96. REPORT OF THE MUNICIPAL DIVISION WORK GROUP TO THE SUPREME COURT OF MISSOURI 5–7 (2016), https://www.courts.mo.gov/file.jsp?id=98093 [https://perma.cc/NF7C-JT3A].

97. *Id.* at 1–2.

98. *See id.* at 69–72.

Law Professor Kimberly Norwood dissented from this conclusion, writing that if the court has supervisory powers, it can make rules for the efficient administration of justice, which might include consolidation of small and underperforming municipal courts.[99]

The Working Group Report also recommended that all funds from ordinance violations be directed to the state education fund, just as funds from violations of state penal law are sent there.[100] The report called this reform "the most sure way to thoroughly and forever eliminate the perverse financial incentives affecting the municipal courts . . . ."[101] It directed that recommendation to the state legislature without addressing whether the Missouri Constitution permits the legislature to enact mandatory remittance of revenues from municipal courts to a state education fund, or whether a constitutional amendment would be needed to pass such a law.[102] In dissent, Professor Norwood argued that the Missouri Constitution already required such a remittance.[103]

B. *Reforms Enacted Since Ferguson Have Improved the Status Quo but Are Not Sufficient to Eliminate Policing for Profit*

1. Overview of the Enacted Reforms

In response to the Ferguson uprising, Missouri enacted S.B. 5 and a companion bill the following year, Senate Bill 572 (S.B. 572).[104] Beginning January 1, 2016, towns were prohibited from deriving more than 20% of their general operating revenue from courts, down from 30% in the amended "Macks Creek law."[105] Towns are required to report their

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99. *Id.* app. A at 13–15.

100. *Id.* at 78–81.

101. *Id.* at 81.

102. *See id.*

103. *Id.* app. A at 17–18; *see* discussion *infra* pp. 121–22.

104. S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); S.B. 572, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); *Missouri SB 5: Modifies Distribution of Traffic Fines and Court Costs Collected by Municipal Courts*, FINES & FEES JUST. CTR., https://finesandfeesjusticecenter.org/articles/missouri-sb-5-fines-fees-municipal-courts/ [https://perma.cc/S4GV-KRKC] (last visited May 9, 2021).

105. MO. REV. STAT. § 479.359 (2016). The moniker "Macks Creek law" comes from the town the law was first meant to target, Macks Creek, which was notorious for funding its operations by running a speed trap. John Rogers, *When Ticket-Writing Stops, Speed Trap Goes Broke*, L.A. TIMES (Aug. 2, 1998, 12:00 AM), https://www.latimes.com/archives/la-xpm-1998-aug-02-mn-9388-story.html [https://perma.cc/6GQ2-FYR2]. In 1998, three years after the law's passage, the town filed for bankruptcy. *Id.* The law originally set the cap at 45%. *Id.*; *see* City of Normandy v. Greitens, 518 S.W.3d 183, 189 (Mo. 2017) (tracing the history of the Macks Creek law revenue cap, from 45% in 1995 down to 30% in 2013), *abrogated by* City of Aurora v. Spectra Commc'ns Grp., LLC, 592 S.W.3d 764, 778 (Mo. 2019).

compliance with the State Auditor.[106] If the Director of Revenue certifies that a town did not remit excess revenues above the cap to the state as required, it must hold a disincorporation vote.[107] S.B. 572 made town consolidation easier by providing that residents could place a disincorporation vote on the ballot upon the petition of 25% of the town's voters.[108] Cumulatively, the laws contain provisions to curtail use of confinement to coerce payment of court debts, and to require courts to adopt procedures to consider indigency and ability to pay when assessing fines.[109]

Parts of S.B. 5 apply only to St. Louis County, because the policing for profit problem was thought to be especially severe there, and those provisions have been in legal limbo.[110] The revenue cap was set at 12.5%, rather than 20%, in counties with more than 950,000 people.[111] As of the 2010 Census, only one Missouri county meets that criterion—St. Louis County.[112] In 2017, the lower 12.5% cap was struck down in *City of Normandy v. Greitens* as an impermissible special law—a law that singles out members of a class for differential treatment—as opposed to a law of general applicability.[113] However, the Missouri Supreme Court held that the 12.5% cap was severable from the rest of that section of S.B. 5, which also imposed the 20% cap.[114] The Court applied the 20% cap to St. Louis County, rather than reverting to the 30% cap that existed before S.B. 5, believing that the former better reflected legislative intent.[115] Thus, for most of S.B. 5's lifespan, the 12.5% cap has been defunct. Additionally, S.B. 5 implemented enhanced minimum standards of data collection and reporting for town budgets and police forces in St. Louis County, and provided for a disincorporation vote for towns that did not follow those standards.[116] The *City of Normandy* decision also enjoined the enhanced

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106. MO. REV. STAT. § 479.360 (2016).

107. MO. REV. STAT. § 479.368(3) (2016).

108. MO. REV. STAT. §§ 77.700(2), 80.570(2), 82.133(2) (2016).

109. MO. REV. STAT. § 479.353 (2019); MO. REV. STAT. § 479.360 (2016).

110. *See* Benjamin Peters, *Missouri Supreme Court Upholds Most Provisions of Municipal Court Reform Law*, MO. TIMES (May 16, 2017), https://themissouritimes.com/missouri-supreme-court-upholds-most-provisions-of-municipal-court-reform-law/ [https://perma.cc/6CX5-ZMP7] (quoting bill sponsor Eric Schmitt describing municipal courts before SB5 "especially in the St. Louis region" as "a safe haven for overgrown local governments that treated citizens like ATMs rather than trimming their budgets . . .").

111. *Id.*; MO. REV. STAT. § 479.359.2 (2016).

112. *Total Population, 2010 Decennial Census, Table P1, Missouri*, U.S. CENSUS BUREAU (2010), https://data.census.gov/cedsci/table?q=missouri%20county%20population&g=0400000US29.050000&tid=DECENNIALSF12010.P1&tp=true&hidePreview=true [https://perma.cc/Z9DL-PP66].

113. City of Normandy v. Greitens, 518 S.W.3d 183, 197, *abrogated by* City of Aurora v. Spectra Commc'ns Grp., LLC, 592 S.W.3d 764, 778 (Mo. 2019).

114. *Id.* at 197.

115. *See id.* at n.19.

116. MO. REV. STAT. § 67.287 (2016).

minimum standards for municipal courts that applied only in St. Louis County.[117]

But recently, there has been a major doctrinal change. On December 24, 2019, the Missouri Supreme Court decided *City of Aurora v. Spectra Communications Group, LLC*, in which the court abandoned its previous, more demanding test for determining what constitutes an impermissible special law under the state constitution in favor of a rational basis test.[118] This decision abrogated the court's application of the special law doctrine in *City of Normandy*.[119] On January 30, 2020, the Attorney General of Missouri, Eric Schmitt, who was the sponsor of S.B. 5 when he was a state senator, petitioned the Cole County Circuit Court to reinstate the 12.5% cap in S.B. 5.[120] On December 1, 2020, the Cole County Circuit Court granted the state's motion and lifted the permanent injunctions on Mo. Rev. Stat. §§ 67.287 and 479.359.2, the heightened standards and the 12.5% revenue cap that applied only in St. Louis County, finding that the special treatment of St. Louis County was justified under *City of Aurora*'s deferential rational basis review standard.[121] As of this writing, an appeal has been filed in this case.[122] It remains to be seen what the impact of this ruling will be.

Besides legislative change, the Missouri Supreme Court also updated the rules that govern municipal courts. Rule 37.65, as amended effective January 1, 2019, provides that a municipal court must inquire about a defendant's ability to pay fees or fines if the defendant states that they are unable to pay.[123] If the defendant is unable to pay, or may be able to pay later, the court may impose a payment plan, reduce or waive fines or costs, or offer community service or court programs as alternatives, taking into account the defendant's access to transportation, caregiving, and employment responsibilities.[124] The rule also requires the court to issue a summons (rather than a warrant) if the defendant fails to appear once and an arrest warrant only if the defendant fails to appear more than once.[125] The rule also curtails incarceration for failure to pay and

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117. *Greitens*, 518 S.W.3d at 202 (enjoining application of MO. REV. STAT. § 67.287).

118. *Spectra Commc'ns Grp.*, 592 S.W.3d at 780–81.

119. *Id.*

120. Press Release, Eric Schmitt, Mo. Att'y Gen., Attorney General Schmitt Argues Court Should Allow Enforcement of Senate Bill 5 Provisions in St. Louis County (Jan. 30, 2020), https://www.stlmuni.org/wp-content/uploads/2020/01/Attorney-General-Eric-Schmitt-Reopens-SB-5-Challenge.pdf [https://perma.cc/4QJC-8YCC].

121. City of Normandy v. Parson, No. 15AC-CC00531-01, ¶¶ 49–60 (Cole Cnty. Cir. Ct. Dec. 1, 2020), *appeal docketed*, No. 15AC-CC00531-01 (Mo. Mar. 16, 2021), https://www.courts.mo.gov/fv/c/Order+and+Judgment_FINAL.pdf?courtCode=19&di=1978790 [https://perma.cc/H3LM-A6UG].

122. *Id.*

123. MO. S. CT. R. 37.65(a).

124. MO. S. CT. R. 37.65(b)-(c).

125. MO. S. CT. R. 37.65(e).

contempt of court, which may be used only where the defendant's non-payment was willful and not due to inability to pay, or where failure to pay was not the defendant's fault but "alternatives to incarceration are not adequate in the circumstances of the case to meet the municipality's or county's interest in punishment and deterrence."[126]

2. Assessing the Impact of Existing Reforms

These changes are good, but they fall short in a number of ways. First, although the reforms constrain how much money towns can take from their courts, they do not eliminate incentives for collecting fees and fines; towns can still retain revenues from their courts as long as they fall below the 20% cap. Second, the efficacy of these changes depends on aggressive enforcement by state and local actors, which can be difficult, especially given the large number of small jurisdictions that need to be monitored. Furthermore, although the Missouri Auditor has made towns' financial disclosures available online to improve accountability, the majority of disclosures are available only as individual PDF files for each town.[127] Thus, the information in these disclosures is not easily searchable, which limits its utility.

Activists should pressure the Auditor and other state actors, such as the Director of Revenue and the Attorney General, to use their powers to the fullest extent of the law. However, even well-intentioned state-level officials may hesitate to act, as taking legal action against a town for violating S.B. 5 amounts to accusing local officials of running an exploitative justice system, which presents political difficulties.[128]

Third, S.B. 5 is not stringent enough to change practices in many towns. Of a sample of 146 towns that responded to a budget survey from the Missouri Municipal League in fiscal year (FY) 2014, 7 had court revenues above 20% of their budgets before the cap went into effect.[129] That number rose to 8 of 146 respondents in FY15, the year the cap was

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126. MO. S. CT. R. 37.65(f)–(g).

127. *See Financial Reports*, OFF. OF THE MO. STATE AUDITOR, https://app.auditor.mo.gov/Local/SearchPolysubFinancialReports.aspx [https://perma.cc/8C3M-CAT4] (last visited Oct. 24, 2020) (providing a database searchable by county).

128. *But see* Press Release, Eric Schmitt, Mo. Att'y Gen., Missouri Attorney General's Office Settles Lawsuit with City of Marshfield over Alleged Ticket Quota (Aug. 27, 2020), https://ago.mo.gov/home/news/2020/08/28/missouri-attorney-general-s-office-settles-lawsuit-with-city-of-marshfield-over-alleged-ticket-quota [https://perma.cc/EGQ5-W3L9] (announcing enforcement action by the Attorney General against a non-compliant town).

129. Samuel Rubinstein, The Profit Motive and Courts: How Legislation in Missouri to Curb Towns' Reliance on Court Fine Revenues Changed Policing and Enforcement 96 (2017) (B.A. thesis, Brown University) (on file with author). Note that town fiscal years may start on January 1st or midway through the calendar year, making comparability difficult.

enacted.[130] In FY16, 2 towns of a sample of 161 still exceeded the cap.[131] Of those same samples, 6 towns were above 10% but below 20% in FY14, 5 were in that range in FY15, and 9 were in that range FY16.[132] Moreover, these survey responses were voluntary, meaning they may undercount towns with greater dependency on fine revenues that chose not to self-report.[133] Regardless, these data suggest that the law has had the greatest impact on outlier townships with the most abusive practices—assuming the cap is actually enforced against towns that are non-compliant. Targeting the worst offenders makes sense as a policy priority, but deriving 10 to 20% of a town's budget from fines and fees, as opposed to taxes of general applicability, is still significant.

Finally, these reforms have not done enough to change conditions on the ground for municipal court defendants. In March 2019, this author participated in court watching in St. Louis city and County with the indigent defense organization ArchCity Defenders.[134] We observed that municipal judges reduce the ability-to-pay inquiry Rule 37.65 demands to merely asking whether the defendant can pay that day or needs a payment plan. We did not observe any judge asking a defendant for documentation of public assistance to determine their indigence. If the defendant knew to ask for community service, the hours imposed could be onerous, despite the requirement to consider the defendant's other obligations.

We observed not just bad policies, but implementation of those policies in a culture of disrespect. In the City of St. Louis, where we observed at least thirty-two defendants, all of whom were Black, a judge insisted that he would not order a payment plan of less than $50 a month, hardly affordable for an indigent defendant, and repeatedly threatened defendants who were behind on payments with arrest warrants.[135] He candidly told us after court that he needed to bluff to scare defendants into paying their court costs, and that he was reluctant to impose community service

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130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* at 77. Other research suggests the problem was more widespread at the time. *See, e.g.*, Maciag, *supra* note 14 (finding three towns with fine revenue percentages over 20% and four more towns above 10%, from a survey of just nineteen jurisdictions in St. Louis City and County based on their 2013 financial reports). This underscores the need for the State Auditor to compile all of the mandatory municipal financial disclosures in one searchable and comparable database.

134. These court visits included Ferguson Municipal Court (Mar. 4, 2019), St. Louis Municipal Court (Mar. 5–6, 2019), Jennings Municipal Court (Mar. 5, 2019), Velda City Municipal Court (Mar. 6, 2019), Bel-Ridge Municipal Court (Mar. 6, 2019), Moline Acres Municipal Court (Mar. 6, 2019), and Calverton Park Municipal Court (Mar. 6, 2019).

135. Observation at St. Louis Municipal Court (Mar. 5, 2019, 2:00 PM) (data analysis of court watching forms by student volunteers).

because he doubted it would ever be completed.[136] In Jennings, we observed at least forty-two defendants, of whom at least 89% were Black, seated in rows of benches, until their row was called to stand in a line in front of the judge.[137] The judge scowled at one Black man for wearing a do-rag in court, which he called disrespectful.[138] He silenced defendants who tried to speak to him unprompted and speedily imposed harsh monetary penalties before repeating the process with the next person in line.[139]

These anecdotes, combined with the shortcomings and statistics described above, make it clear that future reforms must strike at the heart of the justice for profit system to meaningfully change the conditions that produced the Ferguson uprising, and that maintain racial- and class-based social control in the St. Louis area today. Part III offers one idea of how to do so.

III. A LEGAL MEANS TO END THE PERVERSE INCENTIVE PROBLEM

Limiting the amount and types of fines and fees that can be imposed is the best way to minimize the financial burden of fines and fees on residents. To that end, the legislature should fund the courts with general revenue rather than user fees, and it should reduce or eliminate fines that are disproportionate to the offense they penalize—or eliminate the offense altogether. To be sure, some fees and fines will persist, either because eliminating them is not politically feasible (e.g., replacing user fees with taxes), because they are necessary for public safety (e.g., speeding tickets), or because they are a less harmful alternative to incarceration (e.g., driving on a suspended license). Thus, fundamentally changing the incentive structure of fees and fines by removing the profit motive requires a legal barrier between the entity collecting the funds and the entity benefiting from the proceeds.

One readily-available way to do this would be to require towns to remit revenue from fines to the state government. That policy is already required by the Missouri Constitution for certain types of state fines, but reformers need a legal theory that applies the constitution's remittance requirements to municipal governments. Does the Missouri Constitution as currently written *permit* required remittance from towns to the state? Does it actually *require* such a remittance—and has that

136. *Id.*

137. Observation at City of Jennings Municipal Court (Mar. 5, 2019) (data analysis of court watching forms by student volunteers).

138. *Id.*

139. *Id.*

requirement long been ignored? Or does the Missouri Constitution *prohibit* a municipal remittance requirement and enshrine local autonomy? There are textual arguments for each of these propositions.

Dissenting from the Municipal Courts Working Group Report, Professor Norwood argued that the Missouri Constitution *requires* such a remittance but left other questions unanswered.[140] Professor Norwood identified two key provisions of the Missouri Constitution that are implicated by this discussion: article IX, section 7 and article V, section 27(16). Article IX, section 7 mandates that "the clear proceeds of all penalties, forfeitures, and fines collected hereafter for any breach of the penal laws of the state . . . shall be distributed annually to the schools of the several counties according to law."[141] She argued that fines collected by municipal courts are collected for breaches of state penal laws.[142] According to Professor Norwood, the fines are penal because double jeopardy attaches for fines in municipal courts,[143] although that doesn't fully explain how municipal ordinances are "penal laws of the state."[144] The second clause, article V, section 27(16) states in part:

> A municipal corporation with a population of under four hundred thousand shall have the right to enforce its ordinances and to conduct prosecutions before an associate circuit judge in the absence of a municipal judge and in appellate courts under the process authorized or provided by this article and shall receive and retain any fines to which it may be entitled. All court costs shall be paid to and deposited monthly in the state treasury.[145]

Of this section, Professor Norwood wrote "[n]one of those circumstances apply here,"[146] meaning that, according to her, proceeds from municipal courts should be remitted to the state under article IX, section 7. But Professor Norwood's dissent did not elaborate on why those circumstances did not apply.[147]

Unpacking these constitutional provisions raises some interpretive questions:

1. Are municipal ordinances "penal laws of the state"?

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140. *See* Kimberly Jade Norwood, *Recalibrating the Scales of Municipal Court Justice in Missouri: A Dissenter's View*, 51 WASH. U. J.L. & POL'Y 121, 160 (2016).

141. MO. CONST. art. IX, § 7.

142. Norwood, *supra* note 140, at 159.

143. *Id.* at 160.

144. *See* MO. CONST. art. IX, § 7.

145. MO. CONST. art. V, § 27(16).

146. Norwood, *supra* note 140, at 160.

147. *Id.*

2. Under what circumstances do the terms of article V, section 27(16) apply?
3. To which fines are municipalities entitled?

To answer these questions, this Note considers the history and text of these two provisions, as well as existing appellate authority. This Note concludes that the argument Professor Norwood advanced in her dissent is correct and aims to flesh it out more fully. Although the prevailing approach accepts that municipalities can constitutionally keep the proceeds of prosecuting ordinance violations,[148] there are strong historical and legal arguments for reading article IX, section 7 to prohibit the practice and for finding article V, section 27(16) largely inapplicable to present-day municipal courts. This Note argues that the Missouri legislature could and should legislatively require towns to remit the proceeds of fines to an education fund, which would maximize the reach of article IX, section 7.

A. *Are Municipal Ordinance Violations of "Penal Laws of the State" Whose Proceeds Must be Remitted?*

To interpret article IX, section 7 of the Missouri Constitution and its historical predecessors, it is helpful to look at how state courts around the country have construed analogous provisions in their constitutions, some of which may have been modeled after the Missouri Constitution. In 1986, Professor David Lawrence of the University of North Carolina wrote a historical account of such provisions in the *North Carolina Law Review*. Lawrence wrote that the 1868 North Carolina Constitution likely modeled its provision for remitting proceeds of penal laws to public education after the 1865 Missouri Constitution.[149] He speculated that, because Republicans dominated both constitutional conventions, "perhaps an informal network linked Republican party members in different states."[150] As it happens, the analogous provision of the present-day North Carolina Constitution is also codified at article IX, section 7.[151]

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148. *See generally* City of Normandy v. Greitens, 518 S.W.3d 183, 189–90 (discussing municipal fine collection practices and legislative efforts to curtail and regulate those collections), *abrogated by* City of Aurora v. Spectra Commc'ns Grp., LLC, 592 S.W.3d 764, 778 (Mo. 2019).

149. David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. REV. 49, 57 (1986).

150. *Id.*

151. The North Carolina Constitution provides:

> (a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties

Lawrence found that, as of his writing, twelve states had such provisions, five states once had but repealed them, and another three states designate to education the proceeds of "escheats and forfeitures."[152]

Versions of today's article IX, section 7 have appeared in the Missouri Constitution since 1865, and as a result, the Missouri Supreme Court has a long history of trying to determine which funds it applies to.[153] In 1878, the court held in *Barnett v. Atlantic & Pacific Railroad* that a law providing double damages to owners of livestock killed by railroads was penal, but that it was not covered by the public education fund clause because it addressed a private wrong.[154] The court also held that the legislature had the power to define which proceeds went to the state.[155] In *State ex rel. Rodes v. Warner*, the court invalidated a law directing fines for criminal violations of conservation laws to a "game protection fund."[156] It stated that penal laws that "are merely leveled at a violation of private rights" are not covered, nor are *qui tam* actions,[157] but that "where fines and penalties are prescribed as a punishment for a violation of public rights . . . the disposition of such recovered fines or penalties comes within the constitutional provision under consideration, and they may not be turned awry

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> and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.
>
> (b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

N.C. CONST. art. IX, § 7.

152. Lawrence, *supra* note 149, at 51–52 n.20. "Twelve other states currently have comparable provisions in their constitutions." *See* IND. CONST. art. VIII, § 2; MICH. CONST. art. VIII, § 9; MO. CONST. art. IX, § 7; NEB. CONST. art. VII, § 5; NEV. CONST. art. XI, § 3; N.M. CONST. art. XII, § 4; N.D. CONST. art. IX, § 2; S.D. CONST. art. VIII, § 3; VA. CONST. art. VIII, § 8; W. VA. CONST. art. XII, § 5; WIS. CONST. art. X, § 2 (amended 1982); WYO. CONST. art. VII, § 5. "In addition, five states at one time, but no longer, included a comparable provision in their constitutions." *See* ARK. CONST., art. IX, § 4 (1868); FLA. CONST., art. VIII, § 4 (1868); FLA. CONST., art. XII, § 9 (1885, amended 1926); IOWA CONST., art. IX, § 4 (1846); IOWA CONST. art. IX, § 4 (1857, repealed 1974); KAN. CONST. art. VI, § 6 (1859, amended 1966); MISS. CONST., art. VIII, § 6 (1869). "Three states allocate to education the proceeds of 'escheats and forfeitures.'" *See* OR. CONST. art. VIII, § 2; UTAH CONST. art. X, § 3; WASH. CONST. art. IX, § 3.

153. The provision first appeared as MO. CONST., art. IX, § 5 (1865), and then as MO. CONST., art. XI, § 8 (1875). *See* Gross v. Gentry Cnty., 8 S.W.2d 887, 889 (Mo. 1928); *see also* Lawrence, *supra* note 149, at 56 n.57.

154. Barnett v. Atl. & Pac. R.R. Co., 68 Mo. 56, 62–65 (1878).

155. *Id.* at 63–64.

156. State *ex rel.* Rodes v. Warner, 94 S.W. 962 (Mo. 1906).

157. *Qui tam* refers to "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[sic] from the prescribed constitutional course."[158] The *Rodes* court also speculated that it would be permissible for the legislature to "devote a reasonable portion of recovered fines and penalties by way of incentive or spur to officers in collecting them and enforcing the law" and the remaining part would be "clear proceeds" for the public school fund.[159] But elsewhere, the court has made clear that the public education fund provision constrains the legislature's discretion. In *Gross v. Gentry County*, the court stated that "[t]his provision is affirmative in its nature and direct in its terms; it consists simply in a mandatory declaration as to the disposition that is to be made of the public funds designated, and it is self-executing."[160]

In later cases, the Missouri Supreme Court has held that, for funds to be covered by article IX, section 7, they must be collected pursuant to a statutory enactment, although the enactment does not have to be criminal *per se*. In *New Franklin School District No. 28 v. Bates*, the court held that a fine assessed against an insurance company in a *quo warranto* action was not covered because it was not assessed pursuant to any statute.[161] The court stated, "[w]e hold that the words 'penal laws of the state' as used in Sec. 7, art. IX of the present constitution refer to statutory enactments fixing or providing for penalties, forfeitures and fines and for their assessment and collection."[162] In *Reorganized School District No. 7 v. Douthit*, the court applied article IX, section 7 to civil asset forfeiture from criminal drug sales, reasoning that a bright line rule between civil and criminal forfeitures would be overly formalist and would allow the legislature to circumvent the constitution's intent.[163] Reviewing its precedent, the court stated that "the cases consistently hold that sums payable to the state must go for school purposes, to the exclusion of other public agencies."[164]

This line of cases shows that the simple argument that municipal ordinances cannot be covered by article IX, section 7's requirements because they are not strictly "penal laws of the state" is unavailing. The Missouri Supreme Court prefers a penal purpose test to determine what is covered by article IX, section 7 over a formalist approach, and it has applied the article to governmental actions that are not criminal

158. *State ex rel. Rodes*, 94 S.W. at 966.

159. *Id.*

160. Gross v. Gentry Cnty., 8 S.W.2d 887, 890 (Mo. 1928).

161. New Franklin Sch. Dist. No. 28, v. Bates, 225 S.W.2d 769, 774 (Mo. 1950). *Quo warranto* is "[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed," or "[a]n action by which the state seeks to revoke a corporation's charter." *Quo Warranto*, BLACK'S LAW DICTIONARY (11th ed. 2019).

162. *New Franklin Sch. Dist.*, 225 S.W.2d at 774.

163. Reorganized School Dist. No. 7 v. Douthit, 799 S.W.2d 591, 594 (Mo. 1990).

164. *Id.* at 593.

prosecutions. Thus, it is insufficient to simply recite that municipal laws are not state penal laws to prove that they are not covered by article IX, section 7. However, these cases do not conclusively establish the inverse: that municipal laws are covered by article IX, section 7.

For that proposition, reformers might look for persuasive authority in other states with similar constitutional provisions. North Carolina (which, as mentioned, modeled its public education penalties clause after Missouri's),[165] has well-developed precedent in this area. The North Carolina Constitution of 1875 provides in article IX, section 5 that "the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state" will be designated for public education.[166] In 1872, North Carolina passed General Statutes Section 14-4, which made a violation of a local ordinance a misdemeanor and allowed towns to impose *additional* civil penalties.[167] It was not until a hundred years later, in 1972, that the legislature permitted towns to impose civil penalties *in lieu* of criminal charges.[168] Over that time, the Supreme Court of North Carolina changed its doctrine on how revenues from ordinance violations should be treated. The earlier approach, articulated in *Board of Education of Vance County v. Town of Henderson*, was to draw a distinction between "fines" imposed for violations of the criminal law under § 14-4 and "penalties" imposed for violations of municipal ordinances.[169] The former had to be remitted to the state education fund, while the latter towns could keep.[170]

But in later years, North Carolina took a broader view of what municipal revenues must be reserved for education, which could be instructive for Missouri. In 1980, the Supreme Court of North Carolina ruled in *Cauble v. City of Asheville* (*Cauble II*) that penalties paid for overtime parking had to be remitted to the education fund under article IX, section 7 of the current North Carolina Constitution because the Asheville ordinances provided that any ordinance violation was a crime under § 14-4 unless otherwise specified.[171] Although *Cauble II* reaffirmed *Henderson*, it moved away from the fine/penalty distinction:

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165. *See* Lawrence, *supra* note 149, at 57.

166. Comm'rs of Wake v. City of Raleigh, 88 N.C. 120, 122 (1883) (emphasis omitted).

167. Lawrence, *supra* note 149, at 77.

168. *Id.*

169. Bd. of Educ. of Vance Cnty. v. Town of Henderson, 36 S.E. 158, 158 (N.C. 1900). This distinction actually expanded the reach of N.C. CONST. art. IX, § 5 since the North Carolina Supreme Court had previously not applied that clause to municipal ordinances at all. *See Comm'rs of Wake*, 88 N.C. 120.

170. *Bd. of Educ. of Vance Cnty.*, 36 S.E. at 158; *see also* Lawrence, *supra* note 149, at 77.

171. *Id.* at 260.

> [D]efendant's reading of the language used by the Henderson Court to differentiate "fines" from "penalties" is unduly restrictive. The heart of that court's distinction lies not in whether the monies are denominated "fines" or "penalties." Indeed, we have often stated that the label attached to the money does not control. Neither does the heart of the distinction rest in whether there has been an actual criminal prosecution resulting in a "sentence pronounced by the court." The crux of the distinction lies in the nature of the offense committed, and not in the method employed by the municipality to collect fines for commission of the offense.[172]

Professor Lawrence argued that *Cauble II* was wrongly decided and that the original meaning of article IX, section 7 was closer to what the dissent argued: that fines were only covered by that section if they were collected in a full criminal proceeding.[173] Thus, municipal ordinance violation revenues were generally outside the reach of the constitution. But since his writing, later decisions have only expanded on the *Cauble II* reasoning.

In *Shavitz v. City of High Point*, the North Carolina Court of Appeals expanded on this reasoning to order that penalties paid under a municipal red-light camera ordinance, authorized by state law, had to be reserved for the education fund under article IX, section 7.[174] The court held that, *regardless* of whether the red-light penalty was criminal or civil, the proceeds had to be designated for education.[175] The court reasoned that the town was operating under state law, and under *Cauble II*, penal purpose is the test.[176] A contrary holding, the court warned, "would . . . permit High Point to 'circumvent the state constitution by setting up a local [penalty program] pursuant to state-delegated authority, and thereby develop a new revenue stream, while depriving the schools of funds directed to them by article IX, section 7 of the North Carolina Constitution.'"[177] The court found it significant that a police officer reviewed the red-light camera footage and made the ultimate decision to write a citation.[178] However, the City of High Point was allowed to keep up to 10% of

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172. *Id.* (citations omitted).

173. Lawrence, *supra* note 149, at 79–80.

174. *See* Shavitz v. City of High Point, 630 S.E.2d 4 (N.C. Ct. App. 2006).

175. *Id.* at 14 ("[T]he fact that the violation results in a civil penalty rather than a fine for an infraction is irrelevant if we are to observe the Supreme Court's admonition to consider "the *nature* of the *offense* committed, and not . . . the *method* employed by the municipality to collect fines for commission of the offense." (quoting *Cauble II*, 271 S.E.2d at 260)).

176. *Id.* at 14–15. *See* also N.C. Sch. Bds. Ass'n v. Moore, 614 S.E.2d 504, 517 (N.C. 2005) (quoting *Cauble II*, 271 S.E.2d at 260).

177. *Shavitz*, 630 S.E.2d at 14 (quoting Donoho v. City of Asheville, 569 S.E.2d 19 (N.C. Ct. App 2002) (holding that penalties under local air pollution ordinances must be designated for education).

178. *Id.* at 15.

the proceeds of the red-light program[179] because the legislature defined "clear proceeds" in article IX, section 7 as the full cost of the penalty minus the costs of collection, not to exceed 10%, which *Shavitz* upheld as constitutional.[180]

The combination of in-state precedent eschewing legal formalism about what counts as "penal laws of the state" and out-of-state persuasive authority applying that reasoning to local ordinances gives reformers in Missouri a lot to work with. They can unite those lines of precedent to argue that proceeds from municipal ordinance violations should be remitted to the education fund under article IX, section 7 of the Missouri Constitution. As described above, Missouri and other jurisdictions have moved away from a formalistic criminal/civil distinction for understanding the phrase "penal laws" in favor of a more purposive test.[181] Applying that principle in this context, municipal court ordinance violation cases have penal elements, including pleas of guilty or not guilty and a right to counsel if incarceration is a possible penalty.[182]

Still, reformers have huge hurdles to overcome. In arguing that towns cannot keep the proceeds of their ordinance prosecutions, reformers would be claiming that a long-established practice in every town in the state is unconstitutional. Moreover, reformers would have to directly challenge the constitutionality of sections 479.050 and 479.080 of the Missouri Code, which state that fines from violations of municipal ordinances heard by municipal judges or state circuit judges are to be placed in the municipal treasury.[183] And reformers would be arguing against the most natural reading of "penal laws of the state" in article IX, section 7, i.e., that the provision only covers state criminal laws.

None of these problems is insurmountable, though. Municipalities are creatures of the state and act pursuant to state law.[184] As the *Shavitz* court in North Carolina argued, towns cannot claim their authority from state law but disclaim the obligations state law imposes.[185] The *Shavitz* court's warning about towns granting themselves the power to create

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179. *Id.* at 15–17; N.C. GEN. STAT. § 115C-437 (2021).

180. *Shavitz*, 630 S.E.2d at 17.

181. *See* discussion *supra* pp. 124–25.

182. *See* MO. S. CT. R. 37.50 (right to counsel); MO. S. CT. R. 37.58 (pleas).

183. Mo. Rev. Stat. §§ 479.050–479.080.

184. *See* MO. CONST. art. VI, § 15 (allowing the legislature to provide for four classes of municipal government); *id.* at § 19(a) (providing that charter townships "shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.").

185. *Cf. Shavitz*, 630 S.E.2d at 14–15 (discussing how the City of High Point derives the authority to enact a red-light camera ordinance from state law, and that "money collected under the ordinance serves to punish transgressions of both local and state penal laws.").

new revenue streams and to retain the proceeds of their law enforcement presaged what transpired in Ferguson.[186] In Missouri, state law specifically designates authority for towns to establish a uniform schedule of penalties for traffic violations, known as a "violations bureau,"[187] so reformers could argue that violations of local traffic laws are also violations of state law, even if towns charge the offense under local rather than state codes. But to argue against a widely-accepted practice, reformers would likely need to do a significant amount of public education and constitutional advocacy before they could bring a lawsuit that convinces the Missouri Supreme Court to accept an alternative reading of article IX, section 7.

Reformers could also lobby the legislature to amend section 479.080 of the Missouri Code and give statutory force to article IX, Section 7, although that may be politically difficult. The Missouri legislature could define "penal laws of the state" to include municipal ordinances and stipulate that revenues from violations of those ordinances must be treated as article IX, section 7 prescribes. The legislature could follow North Carolina's lead and allow towns to keep the actual cost of collection, not to exceed 10% of the whole penalty.[188] Such a compromise might allow towns to game the system, but it could also make it easier for towns to withstand the resulting losses in revenues and for legislators to withstand political opposition. It would also allow the public to challenge towns' assessments of actual costs as excessive or unjustified. Finally, allowing towns to keep some monies to recoup their expenses could potentially resolve another constitutional barrier, as discussed below.

B. *In Which Circumstances Does Article V, Section 27(16) Apply?*

If article IX, section 7 of the Missouri Constitution creates a default rule requiring proceeds from fines to be placed in the state education fund, then article V, section 27(16) might be thought of as an exception to the rule, explicitly allowing towns to keep their ordinance revenues under certain circumstances. Under which circumstances is the exception triggered? Professor Norwood, taking the reformer position and seeking to constrain article V, section 27(16) as much as possible, stated summarily "[n]one of those circumstances apply here."[189] Reformers need to offer some explanation as to why that is the case. Recall that the section provides:

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186. *Id.* at 14.
187. MO. REV. STAT. § 479.050 (2016).
188. *See* discussion *supra* Part III.A.
189. Norwood, *supra* note 140, at 160.

> A municipal corporation with a population of under four hundred thousand shall have the right to enforce its ordinances and to conduct prosecutions before an associate circuit judge in the absence of a municipal judge and in appellate courts under the process authorized or provided by this article and shall receive and retain any fines to which it may be entitled. All court costs shall be paid to and deposited monthly in the state treasury.[190]

Applying the last antecedent rule, the best reading of this text holds that "shall receive and retain any fines to which it may be entitled" modifies the clause that immediately precedes it; that is, the final clause only applies in cases where a town is prosecuting its ordinances not in a town court, but in a state circuit (i.e., trial) or appellate court.[191] That is the pro-reform reading, since it narrows the reach of the clause substantially. Although towns may choose not to run a court and instead prosecute their ordinance violations in state court,[192] municipal courts hear a large number of cases; in 2018, the state's municipal courts disposed of 667,482 traffic cases and 192,342 non-traffic ordinance cases.[193] A town seeking a broad reading of article V, section 27(16) might argue that the final clause modifies the entire section, meaning that "[a] municipal corporation with a population of under four hundred thousand" is entitled to its fine revenues wherever it tries its cases. Under the last antecedent rule, that should be rejected.

There are also historical reasons why the provision should be read narrowly. In 1940, Missouri adopted its vaunted "Missouri Plan" for non-partisan judicial selection to combat machine politics in cities.[194] In 1970, voters extended the reform to St. Louis County, then to other counties three years later, and in 1976, the constitution was amended to reflect

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190. MO. CONST. art V, § 27(16).

191. The last antecedent rule is defined as "[a]n interpretive principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing." *Rule of the Last Antecedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

192. MO. REV. STAT. § 479.040 (2016).

193. MO. CTS., MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2018, TABLE 93, MUNICIPAL CASES FILED, DISPOSED AND PENDING (2018), https://www.courts.mo.gov/file.jsp?id=137388 [https://perma.cc/2SY6-LWLT].

194. Under the Missouri Plan, also known as the merit selection or non-partisan selection plan, a judicial selection commission creates a binding list of judicial candidates for a nominating authority (i.e., the governor) to select from. The successful candidate is then placed on the ballot in a retention election, in which voters are asked if the judge should be retained or rejected. The plan originated in Missouri and is now used by more than thirty states. *See* Missouri Bar, *The Missouri Plan – A Model for the Nation*, YOUTUBE (Aug. 27. 2014), https://www.youtube.com/watch?v=NoeXyccolJk [https://perma.cc/C9LH-WPB6].

these changes.[195] Section 27, entitled "Effective Date and Transition Provisions," was part of the 1976 amendments and implements the transition.[196] The section abolishes municipal courts as stand-alone entities and re-establishes them under the control of the state judiciary.[197] This creates a unified state judiciary.[198] Thus, municipal courts are formally the "municipal divisions" of the state circuit courts, even though they are furnished by towns.[199] Municipal divisions are part of the judicial department, over which the Supreme Court has "general superintending control."[200]

Section 27 also sets out special provisions for the City of St. Louis, which had unique judicial arrangements prior to the Missouri Plan.[201] During the transition, the legislature provided certain steps for towns of less than 400,000 to take to reconstitute their courts in the new system, but for larger towns, judges automatically carried over.[202] Thus, section 27(16) may be understood as explaining how ordinance violations should be heard in towns that failed to provide municipal judges after the transition.[203]

Professor Norwood is correct that section 27(16), when read in this light, does not apply to towns that have established municipal courts. Thus, the question at issue is where the proceeds from those courts should be directed. It seems incongruous that the only towns to lose revenue under section 27(16) are those that implemented the transition, but one could argue that towns that reconstituted their courts ceded authority over the courts' administration to the state, whereas towns that did not reconstitute their courts retained full control of them.

Even taking the broader reading of article V, section 27(16), the provision does not guarantee a town the right to keep the revenues of any and all fines, only those "to which it may be entitled." Recently, in just a few lines of text, the Missouri Supreme Court specified which fine revenues a town is entitled to: those not directed to other entities by statute.

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195. *Nonpartisan Court Plan*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=297 [https://perma.cc/4UGM-KH8L] (last visited Oct. 27, 2020).

196. MO. CONST. art. V, § 27.

197. *Id.* at art. V, § 27(2)(d); *see also* City of Kansas City v. Fasenmeyer, 907 S.W.2d 195, 197–98 (Mo. Ct. App. 1995).

198. GREG CASEY & JUSTIN BUCKLEY DYER, A GUIDE TO THE MISSOURI CONSTITUTION 126 (Peter Lesser et al. eds., 1st ed. 2018); JERRY A. MOYER, INST. FOR CT. MGMT., COURT CONSOLIDATION IN MISSOURI, WHERE ARE WE AFTER 20 YEARS? 10 (2001), https://www.ncsc.org/__data/assets/pdf_file/0016/16504/court_consolidation_mo.pdf [https://perma.cc/L6FF-2TNJ].

199. *See, e.g.*, *Local Courts*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=321 [https://perma.cc/8B33-AX3B] (last visited Feb. 9, 2020).

200. MOYER, *supra* note 198, at 16–17.

201. CASEY & DYER, *supra* note 198, at 158.

202. *See Fasenmeyer*, 907 S.W.2d at 199; MO. REV. STAT. § 479.030(3) (2016).

203. *Cf. Fasenmeyer*, 907 S.W.2d at 199.

As mentioned above, in *City of Normandy v. Greitens*, the City of Normandy challenged the legislature's imposition in S.B. 5 of a 12.5% cap on the percentage of operating revenues that towns in St. Louis County could derive from their courts; other towns were limited to 20%.[204] The City of Normandy succeeded in arguing that the 12.5% cap was an invalid special law,[205] though the court has since changed its special-law doctrine.[206] Normandy also raised and lost on an alternative argument, and that portion of *City of Normandy* has not been abrogated. The town argued that it could not be required to remit to the state excess revenues in violation of S.B. 5 because municipalities are entitled to the proceeds of their fines under article V, section 27(16). Here is the entirety of the court's discussion of that claim:

> The State, however, contends the amount of fines, if any, that a municipality is *entitled* to keep for ordinance violations is a function of statute, not the constitution. The constitution does not define the phrase "to which it may be entitled" but, in essence, leaves that to the General Assembly, which has plenary power to enact statutes on any subject not prohibited by the state's constitution. While municipalities are entitled to impose and retain fines pursuant to article V, section 27.16 of the Missouri Constitution, that right is subject to statutory limitations as determined by the General Assembly. There is no conflict between the statute and constitutional provision here.[207]

For reformers, this is powerful language, but it comes with some drawbacks. Employing the broader reading of section 27(16), the court treats that provision as though it applies in this case, because Normandy has a municipal court. But one could say that the court only accepted that proposition *arguendo*, to show that Normandy would not win even if section 27(16) applied. On the other hand, the court gives wide latitude to the legislature to define what revenues towns may retain.

Perhaps if the legislature were to pass the most far-reaching legislation possible and prohibit towns from keeping *any* revenue collected by their courts, that law would contravene section 27(16) under this reading. After all, the legislature's discretion is not limitless. But recall North Carolina's approach, in which the legislature stipulated that all the "clear proceeds" of ordinance violations belonged to the education fund, less

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204. *See* discussion *supra* pp. 116–17; City of Normandy v. Greitens, 518 S.W.3d 183 (Mo. 2017), *abrogated by* City of Aurora v. Spectra Commc'ns Grp., LLC, 592 S.W.3d 764, 778 (Mo. 2019).

205. *City of Normandy*, 518 S.W.3d at 197.

206. *See City of Aurora*, 592 S.W.3d 764.

207. *City of Normandy*, 518 S.W.3d at 202 (citations omitted).

the actual costs of collection, up to 10%.[208] The language in *Normandy* regarding section 27(16), and caselaw in Missouri dating back to 1906,[209] suggests that such a law would be constitutional in Missouri, and that the legislature could rationally decide that the only court revenues to which a town is "entitled" are those that recover its actual costs of collection.[210] That rule would go a long way toward changing Missouri municipal courts for the better; town courts would only be allowed to pay for their marginal costs and would no longer be profit machines.

IV. WHERE TO GO FROM HERE

This Note recommends a far-reaching new approach to resolving the continuing problem of policing for profit in the St. Louis region and beyond by arguing for doctrinal and legislative change that prevents towns from keeping the proceeds of their ordinance enforcement. This reform would require entrepreneurial interpretation that would allow a court to adopt a reading of the state constitution that is soundly-reasoned but departs from longstanding practice. It would also require activism to make political space for a court or a legislature to enact such a change. Those asks are doable and worth pursuing. In the short term, however, it does not appear that the political will for such a reform currently exists. Indeed, there have been attempts to repeal even the modest legislative response to the Ferguson uprising, S.B. 5.[211]

Defenders in the municipal courts and local activists should make better use of the tools that existing reforms have given them. As described above, S.B. 5 instated a process by which the State Auditor and Director of Revenue, upon a finding that a town or other subdivision is not complying with minimum standards for their courts, can initiate a ballot question to disincorporate the town.[212] Activists should be pressuring state actors to scrutinize towns' required audit reports, identify violators, and invoke the disincorporation provisions. Additionally, S.B. 572 created a process by which 25% of voters in a town can petition to hold a disincorporation vote at will.[213] Disincorporation would be a difficult and drastic step, but with many small towns or villages in St. Louis County,

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208. N.C. GEN. STAT. §§ 115C-437 (2021).

209. State *ex rel.* Rodes v. Warner, 94 S.W. 962, 966 (Mo. 1906); *see* discussion *supra* pp. 124–25.

210. *City of Normandy*, 518 S.W.3d at 202.

211. *See* Josh House, *Missouri Legislature Should Not Repeal Post-Ferguson Reforms*, ST. LOUIS POST-DISPATCH (Feb. 14, 2018), https://www.stltoday.com/opinion/columnists/missouri-legislature-should-not-repeal-post-ferguson-reforms/article_124ecc8d-3822-5a09-b7a4-811d28bdd2c9.html. [https://perma.cc/XPL4-E84G].

212. MO. REV. STAT. §§ 479.360, 479.368 (2016); *see* discussion *supra* Part III.B.

213. MO. REV. STAT. § 77.700 (2016).

canvassing for 25% of voters may not be as difficult as it seems.[214] Furthermore, the activism necessary to place a disincorporation vote on the ballot alone could signal to the legislature and the Missouri Supreme Court that there is demand for more aggressive reforms, even if the disincorporation question does not pass. Activists can also draw from the considerable research on fees and fines that has been done since Ferguson, including a recent study of four states that found that, on average, it costs $0.41 to collect court revenues for every dollar brought in, making fees and fines not just a regressive tax, but also a very inefficient way to fund government.[215]

Activists should identify which towns are the worst offenders, run a ballot petition campaign, and make the affirmative case to voters that they would be better off receiving municipal services like courts and police from a larger entity like the county. Although some towns have been voluntarily dissolving their courts or police and merging those functions with neighboring towns or county government,[216] the threat of total town dissolution could spur recalcitrant municipal leaders to accelerate that process. Once dissolution of some long-standing, notorious towns occurs, the idea of making major structural change in Missouri local governance will seem less far-fetched. Put another way, one response to the Ferguson uprising could have been eliminating the Ferguson government. Maybe that does not make sense for Ferguson itself, given its relatively large population and the scrutiny it has already received, but the option remains on the table. Activists can use the ballot initiative campaign to tell the stories of the Fergusons that have not received national attention but are just down the road, and to educate people that the law does not require residents to tolerate abusive and predatory local governments.

CONCLUSION

Six years after the Ferguson uprising, the worst excesses of the policing for profit regime have been abated, but so long as the profit motive remains, the problem will persist. Existing reforms have nipped at the edges of the problem, putting guardrails on how zealous towns can be in extracting revenue from the poor via their courts, but they have not

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214. *See generally Population by Place in St. Louis County*, STAT. ATLAS, https://statisticalatlas.com/county/Missouri/St-Louis-County/Population#figure/place/total-population [https://perma.cc/775M-B3ZQ] (last updated Sept. 4, 2018) (listing as many as fifty towns, villages, subdivisions, or other places with populations of less than 5,000).

215. Menendez et al., *supra* note 22.

216. Bogan, *supra* note 29 ("Statewide, 69 municipalities have transferred their court operations to circuit court, while others have restructured or consolidated.").

struck at the heart of the problem. The entities doing the law enforcement (police, judges, town executive officers) need to be separated from the entities receiving the proceeds of that enforcement (police, judges, town executive officers). This Note offers ambitious legal reforms to break those incentive structures and create that separation, either by doctrinal change in the courts or statutory change in the legislature. In the interim, this Note offers a roadmap for using existing law to arrive at those ends. For those invested in the work of criminal justice reform, the name Ferguson is now synonymous with a particular type of predatory policing, but broad recognition of the problem across the civil rights community has not yet galvanized sufficient reforms. We have to finish the work of legal change that the people of Ferguson demanded and keep the problem in the policy foreground. If we let it to fade into the background, Ferguson could also become a symbol of an incomplete legal reform movement that never achieved its stated goals, and a missed opportunity when conditions were ripe for change.