

# Funding the Police

NOAH SMITH-DRELICH\*

*For all the discussion of defunding the police, far less attention has been given to how the police are funded. This Article shines a light on the wide range of sources, public and private, from which police draw their funding. This examination complicates the widely accepted notion of police as locally controlled and wholly public entities. Even when police policymaking remains ostensibly in local hands, funding from nonlocal or nonpublic sources will distort the incentives underlying policing decisions.*

*This Article examines the significant influence of external funding on the police, articulating the role that the source of police funding plays in police control and accountability. I conclude by proposing two novel reforms, each of which could be adopted under current law. First, the distorting effects of outside funding could be countered by adopting a more dynamic remedial approach in suits for constitutional wrongdoing. Second, these distorting effects could be reduced or even eliminated entirely by barring local agencies and departments from accepting outside funding.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	718
II. POLICE FUNDING AND CONTROL.....	721
A. <i>Local Funding and Local Control</i> .....	721
B. <i>Local Problems</i> .....	724
1. <i>Tolerable Misconduct</i> .....	724
2. <i>Governance Failures</i> .....	725
C. <i>Liability-Based Accountability</i> .....	727
D. <i>Refining the Liability Rules for Accountability</i> .....	731
1. <i>Agency-Cost Problems</i> .....	731
2. <i>Transaction Costs</i> .....	734
3. <i>Incentivizing Unlucrative Suits</i> .....	736
4. <i>Control vs. Accountability</i> .....	737
III. EXTERNAL FUNDING OF POLICE.....	737
A. <i>Private Payments</i> .....	738

---

\* Assistant Professor of Law, Chicago-Kent College of Law; J.D., Stanford Law School; M.S., Stanford University; B.A., Williams College. Thanks to Kimberly Bailey, Katharine K. Baker, Shima Baradaran Baughman, Thomas Bennett, Alexander A. Boni-Saenz, Bernard E. Harcourt, Harold J. Krent, Edward Lee, Roger M. Michalski, Sheldon H. Nahmod, Mark D. Rosen, Carolyn Shapiro, Ric Simmons, and the participants in the Civil Procedure Workshop, whose comments have been invaluable in shaping this Article.

B. <i>Third-Party Public Payments</i> .....	743
C. <i>Self-Funding Mechanisms</i> .....	746
D. <i>Earmarking External Funding</i> .....	750
E. <i>The Additive Effect of External Funding</i> .....	752
IV. REFORMING POLICE FUNDING.....	753
A. <i>Dynamic Remedies</i> .....	753
1. <i>Implementation</i> .....	754
2. <i>Limitations</i> .....	760
3. <i>Additional Observations</i> .....	764
B. <i>Defunding</i> .....	765
1. <i>Implementation</i> .....	766
C. <i>Rethinking Current Doctrine</i> .....	768
V. CONCLUSION.....	770

## I. INTRODUCTION

On a November night in 2016, several hundred Indigenous activists gathered at a bridge on the northern border of the Standing Rock Reservation.<sup>1</sup> Law enforcement officers responded to this largely peaceful assembly by soaking demonstrators with fire hoses.<sup>2</sup> It was twenty-three degrees outside and, just days prior, the same officers had issued a press release warning the same activists of the dangers of hypothermia in the cold North Dakota weather.<sup>3</sup> By the time morning arrived, there were over three hundred injuries, including over two dozen hospitalizations, most of which were for severe hypothermia.<sup>4</sup>

---

<sup>1</sup>Tim Stelloh, Molly Roecker, Chiara A. Sottile & Daniel A. Medina, *Dakota Pipeline: Protestors Soaked With Water in Freezing Temperatures*, NBC NEWS, <https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-authorities-clash-temperatures-drop-n686581> [https://perma.cc/B795-NJET] (Nov. 21, 2016); *Treaties Still Matter: The Dakota Access Pipeline*, SMITHSONIAN NAT. MUSEUM OF THE AM. INDIAN (2018), <https://americanindian.si.edu/nk360/plains-treaties/dapl> [https://perma.cc/F4XW-S3TA].

<sup>2</sup>Stelloh, Roecker, Sottile & Medina, *supra* note 1; Declaration of Thomas C. Frazier at 5, *Dundon v. Kirchmeier*, 577 F. Supp. 3d 1007 (D.N.D. 2021) (No. 1:16-cv-406). I am lead counsel in a lawsuit challenging the closure of the primary road to and from the Standing Rock Reservation at the height of the resistance to the construction of the Dakota Access Pipeline. Civil Rights Class Action Complaint for Damages, Declaratory, and Injunctive Relief at 31, *Thunderhawk v. Cnty. of Morton*, 483 F. Supp. 3d 684 (D.N.D. 2020) (No. 1:18-cv-00212).

<sup>3</sup>See Stelloh, Roecker, Sottile & Medina, *supra* note 1; Press Release, Morton County Sheriff's Department, Winter Conditions (Nov. 2016) (on file with author).

<sup>4</sup>Julia Carrie Wong, *Dakota Access Pipeline: 300 Protesters Injured After Police Use Water Cannons*, GUARDIAN (Nov. 21, 2016), <https://www.theguardian.com/us-news/2016/nov/21/dakota-access-pipeline-water-cannon-police-standing-rock-protest> [https://perma.cc/D7EP-L37K].

In the wake of these events, no administrative agency sprang into action and no legislative body opened an investigation into why such a dangerous means of crowd control was used to disperse a group gathered along a rural road, well distanced from any other people or property (the one exception, a strongly worded, but ultimately toothless, condemnation of the police's conduct by the United Nations).<sup>5</sup> This is because Congress has largely delegated the enforcement of constitutional rights and liberties to private parties, "private attorneys general," who are empowered to sue state actors for damages resulting from unconstitutional conduct by 42 U.S.C. § 1983.<sup>6</sup> The result is a powerful system, in which damage awards compensate victims of constitutional wrongdoing while encouraging potential tortfeasors, like Morton County, North Dakota, to take additional precautions to avoid committing constitutional harms.<sup>7</sup>

What happens, however, when the costs of these damage awards become financially offset, intentionally or unintentionally, by external sources of funding—such as through payments made by private third parties? The state and local governments responding to the Standing Rock-led demonstrations against the Dakota Access Pipeline, for example, received nearly \$20 million from Dakota Access, LLC and their controlling parent company to offset the costs of law enforcement.<sup>8</sup>

For one, such payments raise serious concerns of police independence and quid pro quo; Dakota Access, LLC had a strong vested interest in the suppression of the movement it was paying to have policed (and little other connection to the region). This Article contextualizes this payment in the broader universe of police funding, revealing a pervasive and influential practice

---

<sup>5</sup> Press Release, United Nations Permanent Forum on Indigenous Issues, Statement by Álvaro Pop Ac, Chair of the Permanent Forum on Indigenous Issues, and Dr. Dalee Dorrough and Chief Edward John, Expert Members of the Permanent Forum on Indigenous Issues, on the escalating violence against unarmed protestors at the Dakota Access Pipeline Construction Site (Nov. 22, 2016), <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Dakota-Access-Pipeline-22-Nov-2016-press-release.pdf> [<https://perma.cc/ADJ3-NJ4S>].

<sup>6</sup> Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that for most victims of constitutional wrongdoing, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees"); see also Candace McCoy, *How Civil Rights Lawsuits Improve American Policing in* HOLDING POLICE ACCOUNTABLE 111, 112 (Candace McCoy ed., 2010).

<sup>7</sup> Indeed, a § 1983 excessive force putative class action was filed arising from these events. Civil Rights Class Action Complaint for Damages and Injunctive Declaratory Relief at 1–2, *Dundon v. Kirchmeier*, 577 F. Supp. 3d 1007 (D.N.D. 2021) (No. 1:16-cv-406).

<sup>8</sup> Press Release, N.D. Off. of the Governor, Dakota Access Donates \$15M to Pay Down Loans Related to Pipeline Protest Response (Sept. 28, 2017), <https://www.governor.nd.gov/news/dakota-access-donates-15m-pay-down-loans-related-pipeline-protest-response> [<https://perma.cc/YFL2-HRFX>]; Hilary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protesters*, GUARDIAN (Oct. 5, 2021), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters> [<https://perma.cc/49KL-MBDW>].

that has gone mostly overlooked in the academic literature: there is a wide range of private support for policing in service of private interests—often against those of the general public. Indeed, the regularity with which private organizations, or parties with something to gain from policing, fund the police casts into question the public character of policing itself.

This Article argues, moreover, that police funding originating from sources other than the local fisc will influence policing *irrespective* of whether it comes with strings attached. External funding changes the expected value of policing, shifting the balance toward more aggressive police practices by offsetting, and therefore reducing, the marginal costs of such practices to taxpayers.<sup>9</sup> Thus, there need not be any explicit or implicit quid pro quo for external funding to impact police behaviors. Even payments that are made with good intentions and a pure heart will nevertheless impact the cost-benefit calculus of policing. The source of police funding should be a major consideration in shaping the law and policy in this context, but it has gone largely disregarded in both the academic and policy literatures.

Part II of this Article begins by providing a roadmap of police funding, control, and accountability. Tracing the funding and decision-making threads underlying policing reveals the ways in which financial incentives are assumed to shape police policymaking—and the ways in which the laws governing police accountability incorporate these assumptions.

This Article then turns to three police funding practices that weigh on policing in unaccounted for ways, skewing the financial incentive system underlying policing: Part III.A discusses direct financial contributions by private parties; Part III.B considers direct financial contributions by non-local public parties; and, finally, Part III.C describes self-funding mechanisms provided in the criminal justice system. Each of these funding sources can exert a significant influence on policing and police misconduct, but these effects remain largely overlooked, particularly in the context of § 1983 and *Bivens* actions.<sup>10</sup>

Finally, in Part IV, this Article proposes two potential resolutions to the systemic skews introduced by external sources of funding: the effect of such funding could be offset through above-compensatory constitutional tort remedies, which could be tailored to counter the influence of external funding; or it could be limited as part of a new campaign to defund the police—one that targets a very different source of police funding than that currently considered in most proposals (leaving local police more exclusively funded by the local fisc).

---

<sup>9</sup> See discussion *infra* Part III.

<sup>10</sup> See discussion *infra* Part III.

## II. POLICE FUNDING AND CONTROL

Policing is local—or at least so the story goes.<sup>11</sup> Most sheriffs are locally elected and department chiefs tend to be locally appointed.<sup>12</sup> And although the federal government and the states maintain some semblance of a police force, the overwhelming majority of policing in the United States is conducted at the county or municipal level. Judged solely by the number of officers employed or arrests made, policing *is* local.<sup>13</sup>

In Part II, this Article begins to untangle the knot that is local police funding. Who in local government pays for what in the context of policing? And why does it matter? This discussion is not intended to comprehensively explain any given community's exact system of police funding, let alone the precise structure used by *each* community. Instead, this discussion focuses on influence and control, asking how the flow of resources to and within police departments impact both policing and police accountability doctrine. What this reveals is a system of police control and accountability built on the assumption that the local police are, in fact, wholly local.<sup>14</sup>

### A. Local Funding and Local Control

There is a great deal of diversity in the size and sophistication of police in the United States. In a small rural community, the local police might consist of a single sheriff and handful of part-time deputies.<sup>15</sup> In major cities, on the other hand, the police department can include a large bureaucracy with a billion-dollar budget.<sup>16</sup> As different as they seem from one another, however, these police

---

<sup>11</sup> See, e.g., William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 665 (2002) ("The defining characteristic of American criminal law enforcement—the characteristic that most distinguishes it from law enforcement elsewhere in the developed world—is its localism.").

<sup>12</sup> *Id.* at 670; Alan Neuhauser, *Running for a Badge: Why Does the U.S. Still Elect Sheriffs?*, U.S. NEWS (Nov. 4, 2016), <https://www.usnews.com/news/politics/articles/2016-11-04/joe-arpaiio-david-clark-and-why-the-us-still-elect-sheriffs> [<https://perma.cc/4FSJ-6YYK>].

<sup>13</sup> Compare CONNOR BROOKS, U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2020—STAT. TABLES 4 (Sept. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fleo20st.pdf> [<https://perma.cc/5JPD-RVLX>], with SEAN E. GOODISON, U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENT PERSONNEL, 2020, at 2 (Nov. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/lpdp20.pdf> [<https://perma.cc/W72R-JY6U>].

<sup>14</sup> This is an assumption that I will challenge in Part III.

<sup>15</sup> Mark Berman, *Most Police Departments in America Are Small. That's Partly Why Changing Policing is Difficult, Experts Say.*, WASH. POST (May 8, 2021), <https://www.washingtonpost.com/nation/2021/05/08/most-police-departments-america-are-small-thats-partly-why-changing-policing-is-difficult-experts-say/> [<https://perma.cc/9R4G-AGWQ>].

<sup>16</sup> See, e.g., Ali Winston, *Stationed Overseas, but Solving Crimes in New York City*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/nyregion/terrorism->

departments share one key characteristic: “most police departments receive the brunt of their funding from local taxpayers (primarily local sales and property taxes).”<sup>17</sup> And with this local funding comes local political control; police departments answer exclusively to local voters (in the case of elected sheriffs) or their local government.<sup>18</sup> The vast disparities in the size and sophistication of police departments in the United States is a reflection of the wide range of local tax bases from which departments draw their funding and, to a lesser extent, diverging local political priorities when it comes to the police.<sup>19</sup> It is not a consequence of fundamental distinctions in the model of policing<sup>20</sup>: some communities have larger tax coffers than others, or prioritize their police to a greater extent, but the essentially local mechanisms of police governance is a near-universal constant.<sup>21</sup>

The funding and control of police generally works like this: the local municipality or county collects tax revenues from local taxpayers; local politicians then allocate those taxes according to the perceived needs of their polity, with the largest portion of funds commonly going to law enforcement;<sup>22</sup>

---

nypd-intelligence-crime.html [https://perma.cc/4ZTF-M5ZS] (discussing the international reach and billion dollar investments to fund the New York City Police Department); Chase Cook, *\$5.5 Million Ask: Anne Arundel Police Make Case for a New Helicopter*, CAP. GAZETTE (May 24, 2019), https://www.capitalgazette.com/politics/ac-cn-county-helicopter-20190525-story.html [https://perma.cc/HA8P-7384] (discussing the police budget for Anne Arundel County, housed in Annapolis, Maryland); A.D. Quig, *What’s the Full Cost of the Chicago Police Department? CPD Budget Doesn’t Give the Whole Picture, Former City Analyst Says*, CHI. TRIB. (Nov. 3, 2022), https://www.chicagotribune.com/politics/ct-chicago-police-budget-2022-report-20221103-sbyayutaujeg5cmklpyaaprcf4-story.html [https://perma.cc/T2PB-2VZ8] (describing the multi-billion dollar Chicago police department budget).

<sup>17</sup> Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 287 (2020).

<sup>18</sup> Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1360–66 (2021) (discussing the “mix of city ordinances, municipal charters, state law, and state constitutional provisions” structuring the police). State and national leaders have little control over local policing. *Id.* at 1389–96 (discussing law enforcement “exceptionalism” creating overlapping legal authorities that inherently obscure lines of control over police authorities in local communities).

<sup>19</sup> See, e.g., Rushin & Michalski, *supra* note 17, at 284 (“The best-staffed police departments in the county have *ten times* as many officers per capita than the county’s poorest communities.”).

<sup>20</sup> See KATE HAMAJI ET AL., CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 1 (2017), https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf [https://perma.cc/NN6J-F66K].

<sup>21</sup> Rushin & Michalski, *supra* note 17, at 286–87. Washington, D.C., given its unique governmental status, is an exception. See *Law Enforcement in Washington D.C.: An Explainer*, ROCK THE VOTE (April 6, 2021), https://rockthevote.medium.com/law-enforcement-in-washington-d-c-an-explainer-c72b79ebddcc [https://perma.cc/A3ZJ-7RJJ].

<sup>22</sup> See KATE HAMAJI ET AL., *supra* note 20, at 3. “In Oakland, California, for example, over 40 percent of the city’s general funds go to policing.” *Id.* A city’s “general fund” refers to a portion of its budget based on tax revenues not preemptively designated for specific

it is then the relevant police department—with some oversight from political officials—that determines how its allocated funds are spent; typically, the overwhelming extent of these allocated funds are spent on salary or benefits for police, up to ninety-six percent according to some estimates.<sup>23</sup> Thus, police funding flows from local taxpayers to their elected officials to police departments and ultimately, to individual police officers.

Political control over the police follows a similar path. Local voters either directly elect sheriffs (who supervise a staff of deputies), or elect county commissioners, a mayor, or other similar officials who appoint and oversee the police chief (who supervises a staff of officers).<sup>24</sup> Increasingly, too, sheriffs and police chiefs answer to civilian review boards and control boards—typically appointed by local politicians—which influence police oversight and policy, albeit often with the ultimate veto still held by local officials.<sup>25</sup> In this respect, too, political control over the police flows from local voters to their elected officials to police departments to, ultimately, individual police officers.

The essentially local nature of police funding and control makes a great deal of sense: policing is largely done on a local scale. From officers walking the beat to 911 responses to criminal investigations, policework has remained predominantly local, even in the increasingly interconnected twenty-first century. This is partially a reflection of the local nature of most criminal activity, partially a result of jurisdictional constraints binding policing, and partially a result of historical momentum: the structure of law enforcement has remained largely unchanged in the United States since its inception.<sup>26</sup> Regardless of the exact reasons, the result is a system of policing with a predominantly localized

---

purposes. For example, Los Angeles spends fifty-four percent of its general funds on its police force. Tom Tapp, *Los Angeles City Council Introduces Motion to Reduce LAPD's \$1.8 Billion Operating Budget*, DEADLINE (June 3, 2020), <https://deadline.com/2020/06/lapd-funding-city-council-reduce-operating-budget-1202950507/> [<https://perma.cc/T5RZ-GFEL>].

<sup>23</sup> *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> [<https://perma.cc/RQL9-4J8E>].

<sup>24</sup> Stuntz, *supra* note 11, at 670–71. Sheriffs are typically elected, but departmental chiefs are not, leading to disparities in the direct extent of local control of police. *Id.* at 670.

<sup>25</sup> See e.g., *Public Safety Committee Backs Compromise Plan to Create Civilian Police Oversight Panel*, CBS NEWS CHI. (July 20, 2021), <https://www.cbsnews.com/chicago/news/city-council-public-safety-committee-vote-civilian-police-oversight-commission-mayor-lori-lightfoot/> [<https://perma.cc/2GJS-SGAD>]; K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 681–82, 725–27 (2020) [hereinafter Rahman & Simonson, *Institutional Design*] (examining the complex dynamics of power that underly community control over the police).

<sup>26</sup> Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/LJ3S-65SM>] (discussing early policing as being local in nature); see also Rahman & Simonson, *Institutional Design*, *supra* note 25, at 681–82.

reach. For better and for worse, it is the local community that feels the effects of its police.

In theory at least, the combined local effects of, and control over, policing should facilitate a system that is reasonably responsive to any problems. If a local community is beset by crime, it can, through its elected officials and funding allocations, increase its police response accordingly. If a local community is instead burdened by the harms of overpolicing, it can, again through its elected leaders and/or funding, reduce the local law enforcement to desirable levels.<sup>27</sup>

### B. *Local Problems*

Given the feedback mechanisms inherent in the structure of policing and local governance, policing should track each community's interests and priorities. Why then does police misconduct—including, most concerningly, policing that violates the Constitution—seem so common?

#### 1. *Tolerable Misconduct*

First, a community might perceive the marginal benefits of certain police behaviors to outweigh some constitutional costs. Policing as we know it necessarily entails a great deal of activity that approaches the line of what is constitutional. Some level of unconstitutional conduct associated with policing might therefore be unavoidable. Mistakes are made in every line of work. When police officers err, however, the result can be a violation of the Constitution. So long as we expect our officers to arrest or detain, there is some risk of warrantless seizures or excessive force; so long as we deploy officers at protests, there is some risk that their actions will unconstitutionally suppress speech. The only policing strategy that ensures that constitutional rights are never violated may well be a strategy of not policing at all. Though most communities presumably desire to minimize constitutional violations associated with their police, few may be willing to tolerate the public safety tradeoffs necessary to eliminate those violations altogether.

This is not to say that all constitutional violations are incidental to policies with other goals. Communities may directly seek or reward unconstitutional behaviors as well. There may be circumstances, for example, in which the majority of voting members of a community decide something along the lines

---

<sup>27</sup> This is what Rachel Harmon has termed “harm-efficient policing.” See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792 (2012) (“Regulation of the police should promote harm-efficient policing—that is, policing that imposes harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms.”); see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 174–76 (1968); cf. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 185–242 (2001) (criticizing overly constrained measurements of “harm”).



of, “the marginal value to us of violating this speech exceeds the marginal costs of doing so,” and therefore directs its police to halt a disfavored protest.<sup>28</sup> Some viewpoints are so universally reviled, such as those espoused by the Ku Klux Klan, that communities may regularly respond by demanding more regulation than is constitutionally allowed, even accounting for the resulting harms.<sup>29</sup> And, of course, bigotry has been a powerful force throughout history, driving a wide range of oppressive behaviors.<sup>30</sup> It may sometimes be that the ends of policing sought by a community are themselves unconstitutional.<sup>31</sup>

Whether the police misconduct in question is an incidental (albeit ‘acceptable’) byproduct of other beneficial police practices or is itself the point, so long as the marginal benefits of policing are perceived to outweigh at least *some* constitutional costs, a perfectly responsive system of local policing will not be entirely free of constitutional wrongdoing. The answer to why there is so much police misconduct may therefore be that this represents the optimal perceived amount of misconduct; communities may be willingly choosing to tolerate a significant amount of unconstitutional policing in service of public safety or other such community interests.

For reasons that I will discuss below, it is unlikely that the full extent of police misconduct may be so explained. Nevertheless, *some* misconduct likely is. Whatever the perceived optimal amount of constitutional wrongdoing associated with policing is for any given community, it probably exceeds zero, sometimes substantially so.

## 2. Governance Failures

So far, this discussion has assumed that local control over the police is perfect—that each community’s needs are being exactly reflected in each community’s policing. There are many reasons to suspect, however, that policing rarely functions in this sort of ideal manner. Indeed, policing may not be particularly responsive to the needs of all those impacted by policing.

This is a problem because the community control model of police regulation relies on perfect political representation: political leaders must act on behalf of *all* of the members of the community (and then so must police chiefs, and then so must police officers).<sup>32</sup> If instead politicians (or police chiefs or police officers) favor the interests of some community members over others, then we

---

<sup>28</sup> Given the nature of policing and political control, it may be more accurate to note that such a decision will be made by the police and rewarded after the fact by the community, thereby encouraging future such decisions. *See* Harmon, *supra* note 27, at 793.

<sup>29</sup> *See* Becker, *supra* note 27, at 170–76.

<sup>30</sup> *See, e.g.,* HARCOURT, *supra* note 27, at 198–99 (discussing the criminalization of homosexual conduct).

<sup>31</sup> To be clear, the fact that the voting majority of a community desires (or accepts) certain unconstitutional behavior does not make that behavior any more constitutional, nor does it make victims any less entitled to recovery.

<sup>32</sup> *See* CJS POLICE FUNCTION STANDARDS, Standards No. 1-5.1 (AM. BAR ASS’N 2020).

should no longer expect the local regulation of the police to push toward practices that are optimal for everyone.<sup>33</sup>

This sort of favoritism can take a wide range of forms. Politicians, for instance, might weigh more heavily the safety of members of their own political party, or of their own race or religion, shaping policing policies that put the interests of some community members over others. Police, likewise, may also preference the interests of just some community members. Both politician and police favoritism and dis-favoritism likely happen with some regularity.<sup>34</sup> Take, for example, unhoused community members, who tend to vote at low rates and to disproportionately belong to groups that have long been subject to prejudices (including both historically oppressed racial groups and people with disabilities); it is not uncommon for the political and, ultimately, police response to homelessness to be callous or even cruel.<sup>35</sup>

Whatever the reason, when the interests of those impacted by policing are not accurately reflected in the decisions of the relevant police, the result will be the distortion of the responsive system of community policing.<sup>36</sup> Some policing

---

<sup>33</sup> Sometimes this distortion will be effectively random, as the needs of the community become garbled in the translation first to politicians, then to police departments, and finally to police officers. See discussion *infra* note 86 (describing the disconnect between who must actually pay the cost of liability judgements and who is directly responsible for the liability); cf., e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000) (noting the potential distortion resulting from a disconnect between financial incentives and political incentives); Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2468 (2014) (noting the potential distortion resulting from a disconnect between who makes decisions around policing and who pays for those decisions).

<sup>34</sup> See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2143–44 (2017) (“African Americans—particularly if they live in high-poverty communities—have relatively little say in who their representatives are or in the legislation that their representatives ultimately pass.”); cf. Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 148–49 (2020) (discussing similar governance failures in the context of predatory property taxes).

<sup>35</sup> See, e.g., Atuahene, *supra* note 34, at 148 (discussing the assumption by officials that individuals may choose frivolous purchases over basic needs); Dora Kingsley Vertenten, *As Few As 1 in 10 Homeless People Vote in Elections—Here’s Why*, U.S. NEWS (Oct. 15, 2020), <https://www.usnews.com/news/cities/articles/2020-10-15/as-few-as-1-in-10-homeless-people-vote-in-elections-heres-why> [<https://perma.cc/MHE4-97KL>]; *Homelessness and Racial Disparities*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/> [<https://perma.cc/9WN9-L2HQ>] (Apr. 2023); U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS IN AMERICA: FOCUS ON CHRONIC HOMELESSNESS AMONG PEOPLE WITH DISABILITIES 1 (2018), [https://www.usich.gov/resources/uploads/asset\\_library/Homelessness-in-America-Focus-on-chronic.pdf](https://www.usich.gov/resources/uploads/asset_library/Homelessness-in-America-Focus-on-chronic.pdf) [<https://perma.cc/33WN-Q6HA>]; NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 37–49 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/AVU7-WDG3>].

<sup>36</sup> Other reasons for governance failure may include collective bargaining agreements, which limit local officials’ freedom to set police policy, state laws that mandate certain levels

(and constitutional wrongdoing) may therefore follow not from the community as a whole's fully inclusive determination that the marginal benefits outweigh the marginal costs, but rather from the community's undervaluing of or disregard for a portion of the costs in question. For example, a predominantly White community might undervalue policing harms that impact Black community members, a mostly wealthy community might be willing to overlook some constitutional wrongdoing when the burdens predominantly fall on those who are indigent, etc. This may be expressed algebraically: a community might perceive that the full marginal benefits  $[b]$  of a particular policy outweigh just *some* of its marginal costs,  $[c][considered]$ , excluding or discounting, for example, the marginal costs impacting a disfavored group (so that  $[c][considered] < [c][actual]$ ).<sup>37</sup>

### C. Liability-Based Accountability

Enter constitutional tort suits. One purpose for constitutional torts is to correct for this exact type of governance failure.<sup>38</sup> This goal is generally described in terms of deterrence,<sup>39</sup> although, as this Part discusses, such a label masks the governance function of constitutional torts: constitutional tort damages deter to the extent necessary to combat failures in governance. As such, constitutional tort damage awards are key not only to holding the police accountable, but for moderating untoward influences on policing.

The deterrence model for constitutional torts follows from that used in the context of private law torts.<sup>40</sup> Both constitutional torts and private law torts deter

---

of police funding, and jurisdictional control issues related to the independent status of many sheriff's offices. *See, e.g.,* Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1218–24 (2022) (describing each of these contributing factors in detail).

<sup>37</sup> *See, e.g.,* O'Rourke, Su & Binder, *supra* note 18, at 1345–55 (discussing a variety of structural obstacles that impact police reform); *cf.* Harmon, *supra* note 27, at 777–78 (pointing out the limitations of relying on *constitutional* violations for holding police accountable).

<sup>38</sup> *See* Harmon, *supra* note 27, at 767–72 (describing and critiquing this “conventional paradigm,” wherein “courts impose and enforce conduct limits on the police, and those conduct limits constitute the primary means of regulating the police”); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 793–94 (2021) (describing and challenging this “traditional” view of policing). Constitutional torts also serve to compensate injured parties. John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 83–84 (1989); *cf., e.g.,* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”).

<sup>39</sup> *See, e.g.,* Wyatt v. Cole, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”).

<sup>40</sup> *See* Noah Smith-Drelich, *The Constitutional Tort System*, 96 IND. L.J. 571, 574 (2021).

primarily through compensatory damage awards.<sup>41</sup> Compensatory damages seek to make the victim whole, to match the damages paid by the tortfeasor to the damage done to the victim.<sup>42</sup> As such, compensatory damages shift the marginal costs of the tort—and only those costs—from the victim to the tortfeasor. By ensuring that the complete marginal costs of action are borne by the relevant actors, compensatory damages internalize the costs of tortfeasoring (ensuring that  $[c]_{\text{considered}} = [c]_{\text{actual}}$ ). Take, for example, a potential tortfeasor corporation considering the downriver pollution caused by its manufacturing. Such a company need not have any inherent interest in mitigating pollution to take heed when the marginal costs of such pollution are imposed on it via tort suits.

Notably, this model of deterrence does not seek to halt tortfeasoring entirely. To the contrary, compensatory damages only discourage action when the marginal costs of acting, including the risk-adjusted costs of possible torts, exceed the marginal benefits: “When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.”<sup>43</sup>

Constitutional torts impose the same essential consequences on potential tortfeasors as do private law torts, compensatory damages.<sup>44</sup> And constitutional torts effect, therefore, the same essential deterrence influence: they internalize the marginal constitutional costs of policing (ensuring that  $[c]_{\text{considered}} = [c]_{\text{actual}}$ ).<sup>45</sup> As such, constitutional torts push toward *efficient* rather than

---

<sup>41</sup> This is evidenced not only by the Supreme Court’s repeated affirmance of modeling constitutional torts after private law torts, but specifically by the Court’s declaration that compensatory damage awards will “ordinarily suffice to deter constitutional violations.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). I challenge and complicate this assumption in *The Constitutional Tort System*, by arguing, among other things, that the remedial scheme for constitutional torts must account for racial animus and political disagreement in order to sufficiently deter constitutional wrongdoing. See generally Smith-Drelich, *supra* note 40.

<sup>42</sup> See *Stachura*, 477 U.S. at 306–10.

<sup>43</sup> Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972). This is typically labeled “efficient deterrence.” Smith-Drelich, *supra* note 40, at 582. This is often described as the economic model of tort law, although it is probably better labeled as utilitarian: deterrence via compensatory damages allows *some* torts in service of maximizing overall welfare. *Id.*

<sup>44</sup> *Stachura*, 477 U.S. at 310.

<sup>45</sup> Posner, *supra* note 43, at 33. This, of course, assumes some degree of commensurability between financial costs and political costs. See, e.g., Levinson, *supra* note 33, at 367 (noting that “government actors respond to political, not market, incentives,” meaning that “[t]he only way to predict the effects of constitutional cost remedies is to convert the financial costs they impose into political costs”); Myriam Gilles, *In Defense of Making Governments Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001) (“[C]onstitutional damage remedies, although denominated in dollars, clearly translate into the political currency that moves political actors”); Smith-Drelich, *supra* note 40, at 591–92 (discussing these distorting factors at greater length).

*absolute* deterrence.<sup>46</sup> State action that leads to constitutional wrongdoing may yet be perceived as net beneficial, and therefore pursued.<sup>47</sup>

This end, efficient deterrence, is what is achieved via effective governance: communities (and therefore their elected officials, and therefore their police) will pursue policies and practices when the marginal benefits of doing so exceed the marginal costs—when  $[b] > [c]_{[actual]}$ . By shifting the marginal costs of wrongdoing to the police (thereby pushing  $[c]_{[considered]}$  closer to  $[c]_{[actual]}$ ), constitutional torts serve as a bulwark against failures in effective governance. Neither a community nor its elected leaders (nor its police department nor its police officers) need have any independent interest in the impacts of policing on a disfavored minority group to consider such impacts internalized via constitutional tort damage awards.<sup>48</sup>

These awards can be substantial in practice.<sup>49</sup> Because constitutional tort liability is most commonly resolved through confidential settlement, there is little comprehensive information about the actual size of constitutional tort

---

<sup>46</sup> Smith-Drelich, *supra* note 40, at 581. As is true for private law torts, there may be additional deterrence that flows from the reputational or transactional costs of constitutional litigation, although these can promote both more deterrence and less. *See id.* at 604. This Article discusses such costs in further detail in Part II.D.

<sup>47</sup> This is consistent with the approach taken elsewhere in the law. Federal and state agencies, for example, base safety measures on an estimated value of each life saved, the “value of a statistical life.” *See, e.g.,* COUNCIL OF ECON. ADVISERS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 3–4 (Nov. 2017), <https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> [<https://perma.cc/C2SJ-NZCC>] (explaining that the precise value used to calculate precautions differs from context to context, but can range from \$9.4 million to \$10.1 million); W. Kip Viscusi, *Identifying the Legitimate Role of the Value of a Statistical Life in Legal Contexts*, 25 J. LEGAL ECON. 5, 5 (2019); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 548 (2005) (noting that the value of a statistical life often differs significantly from the value of life calculations made in wrongful death suits, which rarely exceed \$3 million and often fall under \$1 million).

<sup>48</sup> *See, e.g.,* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 860–61 (2012) (describing the impacts of litigation against police on the spending and practices of the police); McCoy, *supra* note 6, at 143–45; Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151–56 (2016) [hereinafter Schwartz, *How Governments Pay*] (describing and complicating the view that constitutional tort damage awards predictably deter); *cf.* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1221 (2017) (presenting evidence that criminal defense litigation can also influence the cost–benefit calculus underlying governmental practices in a meaningful way).

<sup>49</sup> *See, e.g.,* Colgan, *supra* note 48, at 1185; Fola Akinnibi, *Self-Insured Minneapolis Will Tap City Budget to Pay Floyd Settlement*, INS. J. (Mar. 17, 2021), <https://www.insurancejournal.com/news/midwest/2021/03/17/605807.html> [<https://perma.cc/L8K3-6WV6>].

liability.<sup>50</sup> But what information is publicly available suggests that the liability costs of police wrongdoing are regularly too large to be easily absorbed into budgets without political ramification.<sup>51</sup> Minneapolis's settlement with George Floyd's family, \$27 million, greatly exceeded the amount budgeted for the city's liability and was therefore paid from the city's general budget.<sup>52</sup> Just two years earlier, the city's \$20 million settlement with Justine Ruszczyk Damond, another police-shooting victim, similarly dwarfed the city's liability fund.<sup>53</sup> And a \$10.6 million consent decree in Cleveland prompted the mayor to propose raising income taxes to cover those costs, thereby directly shifting the financial costs of constitutional wrongdoing to the voters.<sup>54</sup> These judgments add up quickly: the city of Chicago "paid out nearly one [police misconduct] lawsuit every two days, on average" in 2018, spending \$113 million in that year alone.<sup>55</sup> And according to documents produced in response to a recent Freedom of Information Act request, New York City paid around \$1.7 billion in these suits between 2010–2019.<sup>56</sup>

Indeed, the size and frequency of liability judgments against departments has increasingly led municipalities to seek out insurance. "Most small and mid-sized municipalities in the United States purchase insurance that covers a range of police misconduct claims, from improper service of process to outright assault and battery, discrimination, and other civil rights violations."<sup>57</sup> Even municipalities without private liability insurance often participate in public entity risk pools, which function similarly to private insurance, collecting

---

<sup>50</sup> Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 *FORDHAM URB. L.J.* 587, 589 (2000).

<sup>51</sup> See, e.g., Akinnibi, *supra* note 49.

<sup>52</sup> *Id.*

<sup>53</sup> Miguel Otárola, *Minneapolis Taxpayers Will Feel Effect of Record \$20 Million Settlement*, *STAR TRIB.* (May 10, 2019), <https://www.startribune.com/minneapolis-taxpayers-will-feel-effect-of-record-20-million-settlement/509756012/> [<https://perma.cc/XAL2-2LTG>].

<sup>54</sup> Tim Jones, Mark Niquette & James Nash, *Cities Pay Price When Police Punished*, *ARK. DEMOCRAT GAZETTE* (Feb. 28, 2016), <https://www.arkansasonline.com/news/2016/feb/28/cities-pay-price-when-police-punished-2/> [<https://perma.cc/7ZS4-WLYP>] ("‘Cities just don’t have this kind of money,’ said Kevin Kelley, president of the Cleveland City Council.”).

<sup>55</sup> Jonah Newman, *Chicago Spent More Than \$113 Million on Police Misconduct Lawsuits in 2018*, *CHI. REP.* (Mar. 7, 2019), <https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/> [<https://perma.cc/WL3F-RNLB>].

<sup>56</sup> Amelia Thomson-DeVeaux, Laura Bronner & Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here’s Why It’s So Difficult to Hold Departments Accountable.*, *FIVETHIRTYEIGHT* (Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/> [<https://perma.cc/BHY8-PAU5>]; see also *FiveThirtyEight/Police Settlements*, GITHUB, <https://github.com/fivethirtyeight/police-settlements> [<https://perma.cc/Q4LR-EXEM>] (hosting source data for requested information from municipalities across the country).

<sup>57</sup> John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 *U. CHI. LEGAL F.* 369, 369–70.

premiums based in part on the liability risk of each locality.<sup>58</sup> Although police liability insurance adds a layer of complexity to the regulation of police wrongdoing, there is reason to believe that this practice bolsters rather than undermines the liability-based system of police accountability: “In assuming the financial risk of bad police behavior, the insurers become motivated to marshal their substantial resources to prevent it.”<sup>59</sup> Even when insurers do not become directly involved in municipal policy, “higher litigation costs will lead to higher premiums,” raising the cost of constitutionally dubious policies and practices.<sup>60</sup> With constitutional torts or with effective governance, with liability insurance or without, the end result is thus the same: the costs of police wrongdoing are internalized into the decision-making around policing.

Crucially, this is a system of balance. The relevant actors here are incentivized to pursue policies and actions when and only when the marginal benefits of those actions exceed the marginal costs, when  $[b] > [c]$ . Police accountability therefore fails not whenever wrongdoing results,<sup>61</sup> but whenever this balance is disturbed: when state actors pursue policies with marginal costs that exceed their marginal benefits.

#### D. Refining the Liability Rules for Accountability

This model of police control and accountability drives both doctrine and policy in this context. Courts, Congress, and local governments alike have been swift to respond to perceived problems within this model—to circumstances in which this balance appears to have become skewed for one reason or another—so as to ensure that constitutional torts continue to affect the correct amount of deterrence.

##### 1. Agency-Cost Problems

First, because police control and accountability require the effective cooperation of communities, elected officials, police bureaucrats, and police officers, there are ample opportunities for a single agency failure to disrupt the entire system: all it takes is for one person within this chain to act out of accordance with the interests of the community for police policies and practices to no longer represent that community’s interests. One of the most important

---

<sup>58</sup> Schwartz, *How Governments Pay*, *supra* note 48, at 1188 (recognizing “[t]he financial carrots and sticks built into public entity risk pools,” although these incentives “are not always passed along to jurisdictions’ law enforcement agencies” directly).

<sup>59</sup> Rappaport, *supra* note 57, at 370 (recognizing the limitations of police regulation by private insurance).

<sup>60</sup> See Schwartz, *How Governments Pay*, *supra* note 48, at 1184–85.

<sup>61</sup> Constitutional tort damage awards do not facilitate absolute deterrence, after all.

and controversial police accountability doctrines of the past fifty years, qualified immunity, is responsive to exactly such a concern.<sup>62</sup>

Qualified immunity addresses the fear that constitutional tort liability may lead the interests of individual police officers to diverge from the interests of their departments and the broader community.<sup>63</sup> This divergence arises, the theory goes, because constitutional tort liability is largely individual, whereas the benefits of policing are predominantly collective.<sup>64</sup> Put algebraically, for an individual officer,  $[c][considered] = [c][actual]$  (because individual officers bear many of the burdens of constitutional tort liability) while  $[b][considered] < [b][actual]$  (because individual officers only personally experience a fraction of the societal benefits of a policing action).<sup>65</sup> Individual officers therefore may have “an incentive not to act for fear of § 1983 liability,” even when acting would be in the public’s interest.<sup>66</sup>

The doctrine of qualified immunity seeks to mitigate such effects by protecting officers from the consequences of any reasonable mistakes they make while policing.<sup>67</sup> Under the doctrine, officials are shielded from constitutional tort liability if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>68</sup> It is thus only “the plainly incompetent or those who knowingly violate the law” who face constitutional tort liability.<sup>69</sup> This should free officers to execute the will of their departments and therefore their communities without fear that a reasonable mistake made in the heat of the moment could subject them to crippling personal liability.<sup>70</sup> And the doctrine likely does exactly this:

---

<sup>62</sup> Smith-Drelich, *supra* note 40, at 587–95 (explaining the qualified immunity doctrine, the surrounding debate, including its implied assumptions); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (representing the Supreme Court’s first attempt at explaining the qualified immunity doctrine).

<sup>63</sup> This is an agency-cost problem. See, e.g., Smith-Drelich, *supra* note 40, at 598.

<sup>64</sup> See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 67–69 (1983); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 74 (1998).

<sup>65</sup> This simplified algebraic representation is intended to capture theories of qualified immunity. As this paper discusses elsewhere, however, there are other structural inputs that may influence this balance, like indemnification.

<sup>66</sup> Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 667–68 (2009).

<sup>67</sup> *Id.* at 671.

<sup>68</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>69</sup> *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986)). “[O]fficials should not err always on the side of caution” because they fear being sued.” *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)).

<sup>70</sup> Although it is easy to find noninstrumental language about “justice” in the many Supreme Court decisions that have been written about qualified immunity, the doctrine’s essential concern with the operation of financial incentives on policing is evidenced by its applicability only in the context of suits for *damages*, and in the fact that qualified immunity applies at the “earliest possible stage in the litigation,” so as to shield officers from even the



“Qualified immunity is a powerful shield that insulates [government] officials from suit.”<sup>71</sup> Unfortunately, in so doing, qualified immunity opens a significant hole in constitutional tort law’s bulwark against ineffective governance. Under qualified immunity, the consequence of constitutional wrongdoing is regularly *not* cost shifting via compensatory damages, but instead dismissal of the lawsuit.<sup>72</sup>

Qualified immunity is not the only influential reform dedicated to addressing this concern. Municipalities and police departments have also responded to this potential agency-cost problem by broadly indemnifying police officers.<sup>73</sup> The overwhelming majority of municipalities and police departments will fully pay for all constitutional tort damages awarded against officers, including, in most instances, punitive damages.<sup>74</sup> This accomplishes the same essential end as the doctrine of qualified immunity. If individual officers need not worry about paying legal judgments for any constitutional violations that they commit while working as a police officer, then officers should not avoid societally beneficial action in service of protecting their individual interests. Indemnification does this, moreover, without reducing the overall deterrent (and compensatory) function of constitutional tort suits: the costs of constitutional wrongdoing are still shifted, albeit to the indemnifying police departments or municipalities rather than the responsible officer personally.<sup>75</sup> Of course, as numerous critics of qualified immunity have pointed out, qualified immunity and indemnification are largely redundant, and so their combined effect may be more protective of the police than is necessary—thereby tilting the balance in favor of allowing above-optimal levels of constitutional wrongdoing.<sup>76</sup>

---

stress or stigma of discovery (at, of course, the cost of applying in some instances in which discovery would have indicated it was inappropriate). *See Hunter*, 502 U.S. at 227.

<sup>71</sup> *Eversole v. Steele*, 59 F.3d 710, 717 (7th Cir. 1995) (quoting *Gregorich v. Lund*, 54 F.3d 410, 413 (7th Cir. 1995)). “To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly.” *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting that the Court’s “one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment”).

<sup>72</sup> *See, e.g., Hunter*, 502 U.S. at 233 (Stevens, J., dissenting); *see also Smith-Drelich*, *supra* note 40, at 588.

<sup>73</sup> *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–30 (2014) (analyzing a national study on the prevalence of police indemnification and its use in the largest law enforcement agencies in the nation).

<sup>74</sup> *Id.* at 890.

<sup>75</sup> *See generally id.*

<sup>76</sup> *See, e.g., id.* at 895; Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 587 (1998); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 496–97 (2011); Smith-Drelich, *supra* note 40, at 580.

## 2. Transaction Costs

Qualified immunity and indemnification also address a second potential issue that arises within this model of police control and accountability: there can be significant transaction costs associated with constitutional tort litigation. As is true for private law torts, the full cost of constitutional tort liability is not limited to the sum of whatever compensatory damages are awarded; lawsuits are expensive, stressful, and, especially in the constitutional tort context, stigmatizing.<sup>77</sup> As such, the burdens of even unsuccessful suits on individual officers may be significant, meaning that individual officers have additional personal incentive to avoid constitutionally risky conduct beyond a desire to avoid having to ultimately pay damages. This, too, may contribute to agency-cost problems wherein individual officers act inconsistently with the interests of their communities: the cost, stress, or stigma of litigation, fully borne by the officer him or herself, may exceed the diffuse personal benefits of otherwise societally advantageous policing action. For such impacted officers, it is therefore possible that  $[c]_{\text{considered}} > [c]_{\text{actual}}$ , and that constitutional torts will therefore provide above-efficient deterrence.

Qualified immunity addresses this concern by applying at the earliest possible stage of litigation<sup>78</sup> and by carving out an exception to the final judgment rule to allow a denial of qualified immunity to be appealed at each consecutive stage of a suit.<sup>79</sup> By applying at the earliest possible opportunity, qualified immunity shields officers not only from the stress of trial, but potentially even from “broad-reaching discovery.”<sup>80</sup> And by allowing qualified immunity denials to be appealed, the Court has provided a backstop for ensuring that officers are not erroneously exposed to the cost, stress, and stigma of trial and discovery, i.e., the transaction costs of litigation.<sup>81</sup> In effect, this means that constitutional tort claims must survive four dispositive reviews before even going to trial.<sup>82</sup>

---

<sup>77</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18 (1982) (recognizing “the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service”—as well as “the burdens of broad-reaching discovery”).

<sup>78</sup> *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

<sup>79</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526–30 (1985).

<sup>80</sup> *Harlow*, 457 U.S. at 818.

<sup>81</sup> *Mitchell*, 472 U.S. at 526 (recognizing that qualified immunity is thus better conceived as “an immunity from suit rather than a mere defense to liability,” while describing these costs as: the “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service” (quoting *Harlow*, 457 U.S. at 816)).

<sup>82</sup> Qualified immunity is commonly asserted at both the motion to dismiss and summary judgment stages of litigation, prompting reviews by the district court judge and by a federal appellate court panel. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 34 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]. Indeed, as commentators have noted, qualified immunity denials have also drawn a great deal of attention from the

Municipalities and police departments likewise address this concern by paying not only the costs of legal judgments assessed against officers, but the costs of the legal defense as well—and, typically, by insulating officers from the burdens of litigation to the extent possible.<sup>83</sup> Indeed, police departments typically do such a good job of shielding their officers that officers are not always even aware of the ultimate outcome of suits involving their alleged misconduct.<sup>84</sup> However, as critics of qualified immunity have pointed out, these efforts to shield officers from the transaction costs of litigation may likewise render qualified immunity’s extraordinary protections redundant—and therefore excessive.<sup>85</sup> If officers do not experience significant cost, stress, or stigma from constitutional tort litigation, it may be more advantageous to allow these cases to proceed to discovery and/or trial, rather than risk dismissing a case improperly in service of minimizing the transaction costs of litigation.<sup>86</sup>

---

Supreme Court, which has taken an unusually active role in summarily reversing such cases. See, e.g., Madeline G. Ziegler, Comment, “Zooming In”: *Government Surveillance and the Role of Courts in Shaping Qualified Immunity Doctrine*, 80 MD. L. REV. 830, 840 (2021).

<sup>83</sup> See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 356–57 (2020) [hereinafter Schwartz, *After Qualified Immunity*].

<sup>84</sup> See, e.g., Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 953 (1983) (“Even those few officers who actually participate in a suppression hearing may not be made sufficiently aware of how they erred to enable them to modify their future conduct.”); see also Schwartz, *After Qualified Immunity*, *supra* note 83, at 356 (“[G]overnment employees rarely suffer financial or job-related costs of being sued . . .”).

<sup>85</sup> Schwartz, *After Qualified Immunity*, *supra* note 83, at 355–58; see *supra* note 76 and accompanying text.

<sup>86</sup> One additional concern raised about indemnification is that it creates a gap between who must actually pay the cost of liability judgments and who is most directly responsible for the liability. As Marc L. Miller and Ronald F. Wright have indicated, constitutional tort liability judgments are often paid out of a municipality’s general fund, rather than by even the department itself. Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 782 (2004). *Contra* Schwartz, *How Governments Pay*, *supra* note 48, at 1148 (reporting results of an empirical study revealing that “settlements and judgments in suits against law enforcement agencies and officers are not always—or even usually—paid from jurisdictions’ general funds”). With each degree of attenuation, there comes an opportunity for some distortion of a community’s needs. Indeed, it is unlikely that *anyone*—political representatives, departmental bureaucrats, individual officers, or the community itself—is tracking the costs and benefits of policing in anything approaching a systematic manner. Schwartz, *After Qualified Immunity*, *supra* note 83, at 356–57. The fact that this model of police accountability is most commonly practiced without much precision, working instead in broad sweeps, is an important consideration for shaping this accountability system; it does not, of course, suggest that this isn’t actually our model of police accountability after all. See *id.* at 356.

### 3. *Incentivizing Unlucrative Suits*

A third challenge for this model of police control and accountability relates to the fact that most constitutional tort suits are brought on contingency,<sup>87</sup> which may lead to enforcement gaps for certain low-financial value constitutional rights and liberties. By giving the plaintiffs lawyers a direct stake in the success of a case, contingency fees have proven to be a powerful factor in motivating zealous investigation and pursuit of tortfeasors in both the private law and constitutional tort context.<sup>88</sup> However, one downside of a contingency fee-based litigation system is that riskier cases and cases of lesser financial value will more rarely be pursued, given that such cases present a lower value proposition for plaintiffs lawyers.<sup>89</sup> This poses a unique problem for constitutional tort suits given their central role in bolstering effective governance by holding state actors accountable for constitutional wrongdoing. To the extent that there are certain categories of constitutional violations not typically associated with significant accompanying harms—and there likely are<sup>90</sup>—there will be large gaps in enforcement, leaving entire constitutional rights and/or liberties vulnerable to failures in governance.

This, too, is an issue to which policymakers have responded—in this case, the United States Congress. 42 U.S.C. § 1988 allows courts to award costs and attorney's fees to the prevailing party in constitutional tort actions, thereby mitigating the disruptive impacts of the low presumptive recovery value of certain constitutional claims.<sup>91</sup> Because of this fee shifting provision, a constitutional right or liberty need not have significant financial value in order for plaintiffs lawyers to be incentivized to pursue it.<sup>92</sup> Section 1988 thus ensures that constitutional tort claims are litigated irrespective of whether the constitutional harm in question is of a high financial value.<sup>93</sup>

---

<sup>87</sup> Miller & Wright, *supra* note 86, at 776.

<sup>88</sup> Schwartz, *After Qualified Immunity*, *supra* note 83, at 346–47.

<sup>89</sup> *Id.* at 348–49.

<sup>90</sup> Excessive force cases asserting violations of the Fourth Amendment are frequently associated with medical bills and therefore high recoveries, but that is not true across the board. *See, e.g., ACLU Sues Worthington for Arrest That Left Man with Nearly \$150K in Medical Bills*, CBS NEWS MINN. (Oct. 15, 2019), <https://www.cbsnews.com/minnesota/news/aclu-sues-worthington-for-arrest-that-left-man-with-nearly-150k-in-medical-bills/> [<https://perma.cc/G4A4-TEBL>]. Other constitutional violations, like procedural due process violations, more closely approximate dignitary harms and therefore give rise to minimal additional harms accompanying the violation of the right in question. *See People v. Ramirez*, 599 P.2d 622, 627–28 (Cal. 1979).

<sup>91</sup> *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (“The purpose of § 1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” (quoting H.R. REP. NO. 94-1558, at 1 (1976))).

<sup>92</sup> *See id.*

<sup>93</sup> *See id.* at 429–30. This is another area of constitutional litigation in which the Court's actions appear ill-advised; the Supreme Court has held that a party who successfully articulates a constitutional violation, but no accompanying harm, and who therefore recovers

#### 4. *Control vs. Accountability*

This system is not a perfect one. The innate control communities have over their police is inclusive of a broader set of considerations than its constitutional torts backstop: “constitutional rights establish only deferential minimum standards for law enforcement, without addressing the aggregate or distributional costs and benefits of law enforcement or its effects on societal quality of life.”<sup>94</sup> Because not all harms resulting from policing sound in constitutional law, constitutional torts can only partially compensate for failures in governance.<sup>95</sup>

As such, systemic failures in effective governance should be given at least as much attention as is devoted to failures in constitutional tort law. That is to say: a lot.<sup>96</sup> Courts, Congress, and local governments have been aggressive in addressing challenges to maintaining the balance between the need to protect constitutional rights and liberties, and to effectively govern and police.<sup>97</sup> These efforts, imperfect though they may be, reinforce the essential goal of balance in this context in *both* police control and accountability: the system fails whenever some factor tips the balance.

### III. EXTERNAL FUNDING OF POLICE

This Article now turns to discuss an overlooked systemic factor that does exactly this, tipping the balance of police control and accountability: a significant proportion of police funding comes from sources other than local taxes.

This is a problem because this entire system of control and accountability, including much of constitutional tort law, is premised on the essentially local and public nature of police funding and control.<sup>98</sup> There must be a close jurisdictional alignment between who funds the police, who controls the police, and who pays for police wrongdoing. If the *local* marginal costs of a policing policy or practice—internalized via the relevant department’s legal liability—exceed the *local* marginal benefits—internalized via the local voting

---

nominal damages is not a “prevailing party” for purposes of § 1988 and is therefore not entitled to attorney’s fees. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *cf.* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 601–05 (2001) (holding that § 1988 attorney’s fees are not appropriate when the lawsuit prompts a voluntary change in state policy).

<sup>94</sup> Harmon, *supra* note 27, at 763.

<sup>95</sup> A growing body of scholars have therefore directed their attentions to policing reforms that seek to bolster effective governance. *See generally id.* at 763, 790–816; Rahman & Simonson, *Institutional Design*, *supra* note 25, at 725–27.

<sup>96</sup> *See e.g.*, Miller & Wright, *supra* note 86, at 782.

<sup>97</sup> *See generally* Harmon, *supra* note 27; Rahman & Simonson, *Institutional Design*, *supra* note 25.

population's voting preferences—the department will avoid the policy practice in question. Thus, a South Dakota taxpayer will generally have little say over North Dakota policing; and a South Dakota liability judgment will, at most, only indirectly impact the North Dakota fisc.<sup>99</sup>

Except, not all police funding is local, nor is it public.<sup>100</sup> In Part III, this Article adds to the literature shining a light on the significant and growing set of non-local and non-public sources of police funding, what I call “external” funding. This includes private payments made directly to the police or the relevant governing body, or indirectly through police foundations.<sup>101</sup> This includes public funding provided by state or federal grants.<sup>102</sup> And this includes money collected from defendants themselves, through increasingly innovative self-funding mechanisms.<sup>103</sup>

Such external funding of police does not always appear on its face ill-intentioned. Indeed, much of this funding is likely made or facilitated in good faith, without any desire to distort our police accountability system. Irrespective of such good intentions—and not all these funding paths appear well intentioned—the external funding of police distorts the entire system of police control and accountability, influencing policing choices that should be in the hands of the local community while skewing the balance away from police accountability and toward undesirable levels of constitutional wrongdoing.<sup>104</sup>

#### A. Private Payments

First, many police departments and municipalities directly accept financial payments from private parties. And for those departments that do not, private payments are commonly made through “police foundations,” tax-exempt nonprofits established for the explicit purpose of funneling private funds to public policing priorities.<sup>105</sup>

At Standing Rock, for example, the company constructing the Dakota Access Pipeline donated a great deal of money to the state and local

---

<sup>99</sup> But, South Dakota liability judgments may impact premiums on North Dakota insurance. See Rappaport, *supra* note 57, at 369 (describing how “nearly all” law enforcement agencies rely on private insurers).

<sup>100</sup> See discussion *infra* Part III.A–B.

<sup>101</sup> See discussion *infra* Part III.A.

<sup>102</sup> See discussion *infra* Part III.B.

<sup>103</sup> See discussion *infra* Part III.C.

<sup>104</sup> Because the influence of external funding is exogenous to other failures in effective governance, reforms directed to ensure better community control over the police will not address the distorting effects of external funding. See, e.g., Harmon, *supra* note 27, at 763.

<sup>105</sup> See, e.g., Laura Nahmias, *Police Foundation Remains a Blind Spot in NYPD Contracting Process*, *Critics Say*, POLITICO (July 13, 2017), <https://www.politico.com/states/new-york/city-hall/story/2017/07/13/police-foundation-remains-a-blind-spot-in-nypd-contracting-process-critics-say-113361> [<https://perma.cc/Q2CW-7X8W>].

governments charged with policing the anti-Pipeline movement.<sup>106</sup> This included \$15 million donated by Dakota Access, LLC to the State of North Dakota, \$3 million to the city of Mandan (the county seat in question), \$140,000 to the North Dakota Emergency Management Services, \$35,000 to the North Dakota 4-H, and \$35,000 to the North Dakota Future Farmers of America Foundation—each a significant sum for the respective donee.<sup>107</sup> Similarly, Enbridge, the pipeline company constructing Line 3 in Minnesota “has reimbursed US police \$2.4m for arresting and surveilling hundreds of demonstrators who oppose construction of its Line 3 pipeline. . . .”<sup>108</sup> Even the relatively tiny Williams College (my alma mater) donated \$400,000 in 2019 to fund the construction of a new police station in Williamstown, Massachusetts, population 7,754.<sup>109</sup>

Many jurisdictions, however, prohibit this sort of direct funding, not least because of the appearance of impropriety that it creates. In such jurisdictions, and even in some jurisdictions in which direct payments are allowed, a novel practice has emerged in which “police foundations” are set up as tax-exempt nonprofits to use private donations to support nominally public policing

---

<sup>106</sup> Forum News Service, *Dakota Access Announces Donations to North Dakota First Responders, Youth Groups*, DICKINSON PRESS (Oct. 17, 2017), <https://www.thedickinsonpress.com/news/4344895-dakota-access-announces-donations-north-dakota-first-responders-youth-groups> [<https://perma.cc/T9VQ-EH66>].

<sup>107</sup> *Id.*; *Energy Transfer Donates \$3 Million for Mandan Improvement Projects*, CITY OF MANDAN, <https://www.cityofmandan.com/index.asp?SEC=2D86B9D1-D9CE-4F5E-A296-215D569359DA&DE=AD2A8115-8C1D-4F8F-8355-BBA15DB19779> [<https://perma.cc/3TGT-WCSH>]. Dakota Access LLC also donated \$5 million to the University of Mary (a nearby private university). Blair Emerson, *Energy Transfer Partners Makes Largest Donation Ever to University of Mary Capital Project*, BISMARCK TRIB. (Apr. 20, 2018), [https://bismarcktribune.com/news/local/bismarck/energy-transfer-partners-makes-largest-donation-ever-to-university-of/article\\_c2c7f71e-03bf-5ad2-9e4d-08b45e010029.html](https://bismarcktribune.com/news/local/bismarck/energy-transfer-partners-makes-largest-donation-ever-to-university-of/article_c2c7f71e-03bf-5ad2-9e4d-08b45e010029.html) [<https://perma.cc/FC7W-YJ8K>].

<sup>108</sup> Beaumont, *supra* note 8 (“Enbridge has paid for officer training, police surveillance of demonstrators, officer wages, overtime, benefits, meals, hotels and equipment.”); *see also* Alleen Brown, *Minnesota Police Expected Pipeline Budget Boost to Fund New Weapons*, INTERCEPT (July 22, 2021), <https://theintercept.com/2021/07/22/minnesota-pipeline-line-3-police-budget-boost-enbridge/> [<https://perma.cc/KY7U-V7ED>]; Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, PL-9/PPL-15-137, at 26 (Minn. Pub. Utils. Comm’n May 1, 2020), <https://healingmnstories.files.wordpress.com/2020/05/line-3-route-permit-2.pdf> [<https://perma.cc/G2HT-XWAN>] (establishing a “Public Safety Escrow Account” funded by Enbridge). Police have arrested over 900 demonstrators opposing the construction of Line 3. Beaumont, *supra* note 8.

<sup>109</sup> Nicholas Goldrosen, *College Helps Fund New Williamstown Police Station*, WILLIAMS REC. (Sept. 18, 2019), <https://williamsrecord.com/165080/news/college-helps-fund-new-williamstown-police-station/> [<https://perma.cc/S2PK-YLBF>]; *QuickFacts: Williamstown Town, Berkshire County, Massachusetts*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/williamstowntownberkshirecountymassachusetts/PST045221#PST045221> [<https://perma.cc/28UY-LZBH>] (Population 7,813 as of 2021).

practices.<sup>110</sup> Most commonly, police foundations support the police by purchasing equipment and gear that the department would otherwise have to fund from its own budget.<sup>111</sup> Such donations function as de facto direct financial contributions to the department, helping to offset reductions or gaps in the department's funding.

The resources provided through police foundations, like direct payments to the police, can be significant. Because these donations are not governed by public disclosure requirements, the extent of private support for the police through police foundations remains murky.<sup>112</sup> What little information has surfaced is, however, striking. The Atlanta police foundation, for example, received \$3 million from the SunTrust Foundation and \$2 million from the Coca-Cola Foundation alone.<sup>113</sup> And the New York City Police Foundation has distributed over \$120 million in grants since its inception.<sup>114</sup>

There is some intuitive appeal to private support for police, wherever that support originates. Direct payments and indirect funding through police foundations save local taxpayers money (and who doesn't like lower taxes!) and facilitate the purchasing of technology and equipment that might otherwise be cost-prohibitive.<sup>115</sup> Indeed, the important role that private largess plays in supporting public law enforcement has been culturally engrained since, at the very least, the early days of the Batman comics, with Wayne Enterprises providing substantial resources for the police even before Batman himself emerged as a vigilante.

Such payments, however, are not accounted for in the standard model of police control and accountability.<sup>116</sup> For a state that has been promised, or has received, a \$15 million private payment, the question becomes whether the marginal benefits of policing *inclusive of the payment* exceed the marginal costs:

---

<sup>110</sup> Ali Winston & Darwin Bond Graham, *Private Donors Supply Spy Gear to Cops*, PROPUBLICA (Oct. 13, 2014), <https://www.propublica.org/article/private-donors-supply-spy-gear-to-cops> [<https://perma.cc/CW7C-DBW7>]; CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST. INVESTING IN COMMUNITY SAFETY: A PRACTICAL GUIDE TO FORMING AND SUSTAINING POLICE FOUNDATIONS 1 (2014), <https://cops.usdoj.gov/RIC/Publications/cops-p302-pub.pdf> [<https://perma.cc/D2XJ-YNVN>].

<sup>111</sup> Winston & Graham, *supra* note 110.

<sup>112</sup> *Id.*

<sup>113</sup> *Atlanta Police Foundation*, LITTLESIS, [https://littlesis.org/org/173655-Atlanta\\_Police\\_Foundation/datatable](https://littlesis.org/org/173655-Atlanta_Police_Foundation/datatable) [<https://perma.cc/23TT-34T5>]. The Seattle police foundation similarly received at least \$25,000 each from CBS Corporation, Costco Wholesale Corporation, and Expeditors International of Washington. *Seattle Police Foundation*, LITTLESIS, [https://littlesis.org/org/173668-Seattle\\_Police\\_Foundation](https://littlesis.org/org/173668-Seattle_Police_Foundation) [<https://perma.cc/F2T6-TRWC>].

<sup>114</sup> Winston & Graham, *supra* note 110. Target Corporation's donation of controversial spy software to the LAPD via the Los Angeles Police Foundation, is another apparent effort to avoid public scrutiny. *Id.*

<sup>115</sup> Nahmias, *supra* note 105.

<sup>116</sup> See discussion *supra* Part II.C–D.



is  $[b] + \$15,000,000 > [c]$ ?<sup>117</sup> Thus, actions or policies that might otherwise be deemed sub-optimal—i.e., where the marginal benefits are outweighed by the marginal costs—become attractive to police departments. This is true irrespective of whether private payments are made with accompanying demands, or whether they are truly neutral, unattached from policy preferences. Either way, the effect of private payments is to change the value proposition of policing, incentivizing policies that might otherwise be rejected by the community in question. Moreover, in so doing, private payments offset the marginal costs of wrongdoing in whole or in part, leaving the police accountability system vulnerable to too-aggressive policing. At Standing Rock, for example, it is likely that the extent and nature of the law enforcement response to the anti-pipeline movement was more severe as a direct result of the substantial amount donated by Dakota Access, LLC; the payments raised the expected marginal value of policing without changing the expected marginal costs.<sup>118</sup>

One potential rejoinder to this concern is that corporations cannot vote, and, therefore, lack direct political representation. At Standing Rock, the biggest beneficiary of an aggressive police response to anti-Pipeline activists—the Texas-based pipeline company—had no vote in state or local elections.<sup>119</sup> And in the Line 3 protests in Minnesota, the biggest beneficiary of an aggressive police response is not even based in the United States: the company constructing Line 3 is a Canadian corporation.<sup>120</sup> Private donations can help close that gap. A corporation can ensure that its interests are accounted for by the relevant

---

<sup>117</sup> See, e.g., Brown, *supra* note 108 (describing the impact of expected private donations). When private donations are made as part of a *quid pro quo*, the question becomes whether the benefits of some desired policing action plus the donation outweigh the costs,  $[b][\text{desired police response}] + \$15,000,000 > [c][\text{desired police response}]$ . When private donations are made wholly disconnected from any specific police behavior(s), the question is instead whether the collective benefits of all policing policies plus the donation outweigh the costs,  $[b][\text{all policing responses}] + \$15,000,000 > [c][\text{all policing responses}]$ . In the latter scenario, the donation's impact on any *specific* policing action may be significantly more diffuse, but the overall effect will still be to tilt the balance significantly away from the protection of constitutional rights and liberties.

<sup>118</sup> Put another way, these donations lowered the expected costs of policing (by offsetting the risk-adjusted costs of litigation) without increasing the actual benefits. Cf. Su, O'Rourke & Binder, *supra* note 36, at 1260 (describing a somewhat different effect of external funding: it "allow[s] police agencies to circumvent oversight by local government funders"; local officials can fund priorities via external funding that they do not share with local taxpayers without needing to raise taxes).

<sup>119</sup> The anti-pipeline movement consisted almost exclusively of out-of-state residents and therefore also lacked local political influence. See, e.g., Press Release, N.D. Response, By the Numbers, (Jan. 9, 2017), <https://ndresponse.gov/2016/dakota-access-pipeline/press-releases/january-2017/numbers> [<https://perma.cc/N73A-8JZM>] (highlighting the fact that 94.5% "of Arrestees [were] from Out of State").

<sup>120</sup> *About Us*, ENBRIDGE, <https://www.enbridge.com/about-us> [<https://perma.cc/2Z4P-7TJK>].

decisionmakers through its donations.<sup>121</sup> Thus, a police department that fails to independently internalize the corporate marginal benefits of its policymaking,  $[b][considered] < [b][actual]$ , will internalize those corporate benefits when they are passed along via corporate payments.

There are several strong rejoinders to this argument. First and most fundamentally, corporate interests are already accounted for in the political system: the benefits corporations afford to both their shareholders and local communities—earnings, jobs, services, etc.—are internalized to political decision-making through the expressed preferences of those voters who benefit from the corporation(s) in question.<sup>122</sup> Giving corporations an additional quasi-vote on policing matters through corporate payments to the police will therefore result in an overrepresentation of corporate interests.<sup>123</sup> Our decision not to afford corporations a vote in elections evinces the conclusion that corporate preferences should not independently hold sway in matters of public policy.

It is, moreover, important to ask *what* exactly a corporate beneficiary of policing stands to gain, particularly when that corporation does not have a substantial local presence. This is an important question because the primary benefits of policing, like public safety, tend to be geographically limited. When an out-of-state or foreign corporation donates to police in some far-away locality in which the corporation has little presence, it will not generally be to bolster community safety, but for some other reason—such as to suppress a political movement detrimental to its financial interests. As I discuss in my article, *The Constitutional Tort System*, this is deeply concerning: allowing the utility that results from speech suppression to justify the state's suppression of speech runs counter to the purposes of the First Amendment.<sup>124</sup> Such 'benefits' should not therefore be internalized to police decision-making, yet private payments can do just that.<sup>125</sup>

---

<sup>121</sup> Chisun Lee, *Higher Corporate Spending on Election Ads Could Be All but Invisible*, PROPUBLICA (Mar. 10, 2020), <https://www.propublica.org/article/higher-corporate-spending-on-election-ads-could-be-all-but-invisible> [<https://perma.cc/DFK7-U5GY>].

<sup>122</sup> Indeed, in the context of police accountability, considering corporate benefits necessarily would entail balancing corporate boardroom profits against individual constitutional harms. Given that the police accountability system described in Part II is democratic, with its primary formal check, constitutional tort suits, centered on individual rights and liberties, there may be no justification, historical or otherwise, for introducing corporate interests into this equation. It may be that the best financial interest of a big-box retailer is to have a cadre of police roaming its parking lot routinely beating any suspected thief or mugger, and that the retailer is willing to donate enough to enable such brutality—but such policymaking through corporate donations should be deemed unacceptable.

<sup>123</sup> The fact that there are constitutional protections for corporate political donations, which the Supreme Court has recognized as First Amendment speech, does not weigh on the question of whether corporate interests should be directly internalized to police decision making. *Citizens United v. FEC*, 558 U.S. 310, 327 (2010).

<sup>124</sup> Smith-Drelich, *supra* note 40, at 600 n.141.

<sup>125</sup> *See id.*

Finally, there are numerous practical reasons to believe that private payments may go beyond merely helping to close some gap in governmental internalization failures. For one, given the amorphous benefits and unpredictable costs of policing, cold hard cash may carry an outsized influence in shaping policy. Departments may therefore overvalue interests—even constitutionally appropriate interests—backed by private payments.<sup>126</sup> Moreover, relying on private payments to ensure that law enforcement fully internalizes the impacts of its policies inherently favors entities with money, leading to police practices favoring wealthier communities and interests. Private payments to police can therefore be, at most, a limited solution to internalization problems in this context. Finally, even accepting that it may be desirable in *theory* to ensure that a police department internalizes all of the marginal benefits of its actions, in practice, if the marginal costs are not likewise fully internalized, this will lead to over policing. For better or for worse, one of qualified immunity’s more significant consequences is to routinely prevent victims of constitutional wrongdoing from recovering<sup>127</sup>—thereby significantly impeding the internalization of all the marginal costs of constitutional wrongdoing.

### B. Third-Party Public Payments

Payments from private parties do not represent the extent of third-party funding for law enforcement: non-local *public* entities are also regular and significant contributors.<sup>128</sup> There are dozens of statutes that allow federal agencies to financially support municipalities and local police departments.<sup>129</sup> Although some of these authorizations are intended to promote the enforcement of specific laws or coordinate law enforcement efforts across localities or departments, many are simply aimed at supporting local policing; the Law Enforcement Assistance Act of 1965 and the Omnibus Crime Control and Safe Streets Act of 1968, for example, provide flexible block grants for this purpose.<sup>130</sup>

---

<sup>126</sup> Cf. Su, O’Rourke & Binder, *supra* note 36, at 1231, 1237–40 (discussing, in the context of state and federal grant funding for police, how “even small sources of revenue can generate powerful incentives”).

<sup>127</sup> See *supra* discussion Part II.D.2.

<sup>128</sup> See, e.g., Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872 (2015) [hereinafter Harmon, *Real Costs*]. These grants are not solely federal. As Rick Su, Anthony O’Rourke, and Guyora Binder note, “at least two states, California and New York, have nontrivial law enforcement grant programs.” Su, O’Rourke, & Binder, *supra* note 36, at 1236.

<sup>129</sup> See, e.g., Harmon, *Real Costs*, *supra* note 129, at 872.

<sup>130</sup> *Id.* at 881–82; see also, e.g., NATHAN JAMES, CONG. RSCH. SERV., IF10691, THE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM (2023) (appropriating between \$170 million and \$2.55 billion annually for specific law enforcement purposes); Patrick Leahy *Bulletproof Vest Partnership*, U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, <https://www.ojp.gov/program/bulletproof-vest-partnership/overview> [https://perma.cc/CES4-

Like with private payments to police, these grants can be substantial.<sup>131</sup> The Community Oriented Policing Services program (COPS) funded \$400 million in grants to 596 law enforcement agencies in 2020, “allow[ing] those agencies to hire 2,732 additional full-time law enforcement professionals.”<sup>132</sup> In Albuquerque, for example, forty members of the police force—five percent of the entire department—were paid from an Operation Relentless Pursuit federal grant rather than from city funding.<sup>133</sup> And at Standing Rock, the Department of Justice awarded North Dakota \$10 million to defray the costs associated with the law enforcement response to the NoDAPL movement.<sup>134</sup> (North Dakota is also currently suing the Army Corps of Engineers for an additional \$38 million related to these law enforcement expenditures.)<sup>135</sup> Indeed, according to one recent estimate, federal funding makes up forty percent of the budget for those local governments that receive federal funding.<sup>136</sup>

As is true for private-party payments to law enforcement, the provision of external public funding changes the expected value of policing. For a state or municipality receiving a federal grant designed to defray the costs of policing, like North Dakota, the question then becomes whether the expected marginal

LK8Z] (Apr. 27, 2023) (providing \$573 million in federal funding since 1999 to purchase police body armor vests).

<sup>131</sup> JAMES, *supra* note 131; see also Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 131 (2021) (“While local police departments are largely funded by local taxes, federal funding has expanded in recent decades.”).

<sup>132</sup> Press Release, U.S. Dep’t of Just., Department of Justice Awards Nearly \$400 Million for Law Enforcement Hiring to Advance Community Policing (June 2, 2020), <https://www.justice.gov/opa/pr/departments-justice-awards-nearly-400-million-law-enforcement-hiring-advance-community> [https://perma.cc/Y9GD-NT3U].

<sup>133</sup> CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., COPS HIRING PROGRAM (CHP) 2020 AWARDS, [https://cops.usdoj.gov/pdf/2020AwardDocs/chp/Award\\_List.pdf](https://cops.usdoj.gov/pdf/2020AwardDocs/chp/Award_List.pdf) [https://perma.cc/B5PE-HDE6]; *Police Data Initiative: Albuquerque, New Mexico Police*, NAT’L POLICING INST., <https://www.policedatainitiative.org/participating-agencies/albuquerque-new-mexico-police/> [https://perma.cc/5G4Y-F77H]. Operation Relentless Pursuit awards grants to intensify federal law enforcement resources into seven American cities with violent crime levels several times the national average. CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., OPERATION RELENTLESS PURSUIT, <https://www.justice.gov/opa/press-release/file/1275536/download> [https://perma.cc/AMZ4-J7EX]; Press Release, U.S. Dep’t of Just., *supra* note 133 (directing \$51 million in grants to Albuquerque, Baltimore, Cleveland, Detroit, Kansas City, Memphis, and Milwaukee).

<sup>134</sup> John Hageman, *North Dakota Awarded \$10 Million from Feds for DAPL Protest Costs*, BISMARCK TRIB. (Aug. 15, 2017), [https://bismarcktribune.com/news/state-and-regional/north-dakota-awarded-million-from-feds-for-dapl-protest-costs/article\\_dcc4cea3-9616-583b-bedf-b3a97f8e98b8.html](https://bismarcktribune.com/news/state-and-regional/north-dakota-awarded-million-from-feds-for-dapl-protest-costs/article_dcc4cea3-9616-583b-bedf-b3a97f8e98b8.html) [https://perma.cc/5W3T-T7JE] (noting that this was provided through the DOJ’s Emergency Federal Law Enforcement Assistance program).

<sup>135</sup> John Hageman, *Stenehjem Files \$38 Million Claim Over DAPL Response*, INFORUM (July 20, 2018), <https://www.inforum.com/news/stenehjem-files-38-million-claim-over-dapl-response> [https://perma.cc/5CZ5-AUHY].

<sup>136</sup> Roger Michalski & Stephen Rushin, *Federal (De)Funding of Local Police*, 110 GEO. L.J. ONLINE 54, 59–61 (2021) (noting also that federal funding is very uneven—most departments get none).

benefits of policing exceed the federally subsidized expected marginal costs: is  $[b] > [c]$  - \$10,000,000? Needless to say, external public contributions can exert a great deal of influence on local policing decisions and strategies.<sup>137</sup> It is likely that North Dakota's policing of the anti-pipeline movement, for example, was significantly more severe because of the promise that federal grant money would ultimately mitigate local expenses. (And it is likely that North Dakota's policing of future such movements will be even more severe if the State is ultimately successful in recovering additional money from the DOJ via a judgment or, more likely, settlement.)

This calculus is, of course, complicated by the fact that at least some of the federal money used to fund local police comes from local taxpayers. If the relative contribution of Albuquerque residents to Operation Relentless Pursuit via their federal taxes is equivalent to the salary of the officers paid by Operation Relentless Pursuit grant funding, these officers *are* to some extent locally funded—albeit in a roundabout manner. Among other things, this means that the provision of federal grants will most distort policing practices when grants are provided disproportionately to the federal tax revenues collected in the area in question, i.e., when policing practices in one locality are effectively subsidized by another. This sort of cross-jurisdiction subsidization is likely common in this context, given that public grants are typically directed to lower income communities, which experience especially high rates of crime.<sup>138</sup>

Regardless, even when the costs of external public grants are significantly borne by local taxpayers by way of increases in federal taxes on personal income, fuel, etc., such funding is concerning because it may nevertheless have a distorting effect on police accountability. Taxpayers are less likely to respond politically to costs that they do not notice or fully comprehend.<sup>139</sup> There are significant additional layers of obfuscation accompanying federal grants, which are typically funded from a range of federal taxes provided for by act of Congress, and distributed, often years later, by some relatively unknown

---

<sup>137</sup> See, e.g., Harmon, *Real Costs*, *supra* note 129, at 899–900 (discussing a similar problem wherein federal assessments of such grants fail to account for the local costs of wrongdoing). This also raises unique federalism concerns: federal grants to local police function as a back door for federal control over what has long been recognized as a local function. See, e.g., *Portland Police Ass'n v. City of Portland ex rel. Bureau of Police*, 658 F.2d 1272, 1275 n.3 (9th Cir. 1981).

<sup>138</sup> Michalski & Rushin, *supra* note 137, at 59–61. This was almost certainly true for the special grant awarded to North Dakota related to the anti-Pipeline movement. See Richard Barrington, *Which States Pay the Most Federal Taxes?*, MONEYRATES, <https://www.moneyrates.com/research-center/federal-income-taxes-by-state.htm> [<https://perma.cc/WFU9-9J54>] (Dec. 12, 2022) (reflecting North Dakota's share of federal taxes less than all but three other states).

<sup>139</sup> See, e.g., NICHOLAS JOHNSON & IRIS J. LAV, CTR. ON BUDGET & POL'Y PRIORITIES, *SHOULD STATES TAX FOOD?* 38 (1998), <http://www.cbpp.org/archiveSite/stfdtax98.pdf> [<https://perma.cc/HFX4-572L>] (recognizing that governments regularly make changes to restaurant and grocery taxes—which are typically small-print line items on receipts—with little political blowback).

administrative body with little fanfare.<sup>140</sup> Put algebraically, the lack of clarity surrounding the return of local funds in the form of federal grants likely ensures that  $[c][\textit{considered}] < [c][\textit{actual}]$ , and, therefore, that above-optimal levels of policing are encouraged.<sup>141</sup>

### C. Self-Funding Mechanisms

So far, this discussion has cast law enforcement and local governments as mostly passive beneficiaries when it comes to resources. But police departments also supplement their funding themselves—often significantly—through various self-funding mechanisms provided administratively or in the criminal code: defendants are increasingly being charged for the costs of police investigation, prosecution, public defenders, trial, incarceration, and even the arrest itself.<sup>142</sup> South Dakota, for example, recently passed “riot boosting” legislation—in explicit anticipation of grassroots resistance to the Keystone XL Pipeline—which criminalizes the “incitement” of a riot (broadly defined), and holds convicted defendants jointly and severally liable for any costs incurred by the state.<sup>143</sup> There are no limitations to this, meaning that the state can recover *all* of its costs from a single convicted defendant irrespective of how aggressively law enforcement chooses to respond to the ensuing “riot” (which, under South Dakota’s law, can be as inconsequential as three high school friends egging a neighbor’s house).<sup>144</sup> In other legislation similarly passed in anticipation of anti-pipeline protests, Indiana recently criminalized the act of knowingly entering a critical infrastructure facility without permission—including a range of oil, gas, electric, water, telecommunications, and railroad facilities, as well as any “facility that is substantial similar”—imposing fines of up to \$100,000 for anyone who is found to have conspired in such a crime.<sup>145</sup>

---

<sup>140</sup> *Federal Grants to State and Local Governments*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/federal-grants-state-and-local-governments> [https://perma.cc/GM38-W2ZE].

<sup>141</sup> This is true, too, of state grants for local police. *See, e.g., ICJIA Grant Programs*, ILL. CRIM. JUST. INFO. AUTH., <https://icjia.illinois.gov/grants/programs/> [https://perma.cc/J9HN-QMB8] (describing Illinois state grant programs for local policing). With state grants, there will generally be a closer connection between the local taxpayers and the funding in question, and therefore less distorting effects. Nevertheless, the additional detachment of money collected by the state only to be returned to a local government will have some obscuring—and therefore distorting—influence, even when it is returned on a perfect one-to-one basis.

<sup>142</sup> *See, e.g., Developments in the Law—Chapter One: Policing and Profit*, 128 HARV. L. REV. 1723, 1727–33 (2015) [hereinafter *Developments in the Law*].

<sup>143</sup> H. 1117, 2020 Leg., 95th Sess. (S.D. 2020).

<sup>144</sup> *See id.*

<sup>145</sup> S. 471, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019). Mississippi and North Dakota have enacted similar laws imposing a \$100,000 fine on any organization found to conspire with someone violating specific similar statutes. *See* H.R. 1243, 2020 Leg., Reg. Sess. (Miss. 2020); S. 2044, 66th Leg. Assemb., Reg. Sess. (N.D. 2019). Oklahoma enacted a law that would fine anyone who entered into a property containing critical infrastructure without permission with intent to damage or otherwise harm the operations of the infrastructure facility \$100,000, and

And Arkansas enacted a law that imposes a \$10,000 fine on any person who purposefully enters or remains on any “critical infrastructure,” which would include protestors who hold a peaceful sit-in at a pipeline construction site.<sup>146</sup>

From fines for public intoxication to prison charges to “processing” fees, “financial penalties on the poor are now a leading source of revenue for municipalities around the country.”<sup>147</sup> By one estimate, in 2013, asset forfeiture alone—a self-funding mechanism in which police are authorized to seize and sell property they allege is involved in a crime (even if they ultimately do not make an arrest or obtain a conviction)—resulted in state revenues exceeding \$250 million.<sup>148</sup> Indeed, even in jurisdictions with laws that make such cost

---

would fine any organization found to have “conspired” with perpetrators *up to \$1,000,000*. H.R. 1123, 2017 Leg., Reg. Sess. (Okla. 2017); *see also* H.R. 3557, 86th Gen. Assemb., Reg. Sess. (Tex. 2019) (Texas law imposing a similar \$500,000 fine). The sponsor of Oklahoma’s law “told a House of Representatives committee that it was prompted by the Dakota Access Pipeline protests in North Dakota.” *U.S. Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative> [<https://perma.cc/S6TJ-L98U>].

<sup>146</sup> H.R. 1321, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); ARK. CODE ANN. § 5-4-201 (2022). Arkansas’s law also imposes a \$15,000 fine for anyone who purposefully and unlawfully “causes damage”—any damage—to critical infrastructure, which would include someone who paints protest slogans on construction material. H.R. 1321, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); ARK. CODE ANN. § 5-4-201 (2022). Similar laws have been passed in other states. S. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (implementing fines between \$500 and up to \$10,000); S. 172, 2021 Leg., Reg. Sess. (Kan. 2021); H.R. 727, 2018 Leg., Reg. Sess. (La. 2018) (imposing fines of up to \$10,000); H.R. 355, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019) (imposing fines of up to \$10,000); Elly Page, *US Protest Law Tracker*, [https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=&date=&date\\_from=2021-01-01&date\\_to=2021-12-01&type=legislative](https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=&date=&date_from=2021-01-01&date_to=2021-12-01&type=legislative) [<https://perma.cc/P4UD-K4WJ>]; H.R. 481, 67th Leg., Reg. Sess. (Mont. 2021) (imposing fines of up to \$4,500); H.R. 1426, 65th Leg. Assemb., Reg. Sess. (N.D. 2017) (imposing fines of up to \$20,000); Page, *supra*; S. 33, 133d Gen. Assemb., Reg. Sess. (Ohio 2021); OHIO REV. CODE § 2909.07 (2023) (imposing fines of between \$1,000 and \$10,000); H.R. 1123, 2017 Leg., Reg. Sess. (Okla. 2017) (imposing fines of up to \$10,000); S. 151, 95th Leg. Sess., Reg. Sess. (S.D. 2020); S.D. CODIFIED LAWS § 22-6-2 (2022) (imposing fines of up to \$2,000); S. 451, 2021 Leg., Reg. Sess. (Tenn. 2021); TENN. CODE ANN. § 40-35-111 (2022) (imposing fines of up to \$3,000); H.R. 4615, 2020 Leg., Reg. Sess. (W. Va. 2020) (imposing fines between \$1,000 and \$5,000); Assemb. 426, 2019 Leg., Reg. Sess. (Wis. 2019). Additionally, North Dakota enacted a law that would impose a \$3,000 fine on anyone who wore hooded clothing to conceal their identity while participating in a protest, so long as they also committed some offense, including minor offenses like jaywalking. H.R. 1304, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); N.D. CENT. CODE § 12.1-32-01 (2022); *Id.* §§ 39-10-01.1, 39-10-27.

<sup>147</sup> Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html> [<https://perma.cc/X8V6-8T63>]; Tanzina Vega, *Costly Prison Fees Are Putting Inmates Deep in Debt*, CNN (Sept. 18, 2015), <https://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/index.html> [<https://perma.cc/5LFD-JEPK>].

<sup>148</sup> Aallyah Wright, *Federal Loophole Thwarts State Curbs On Police Seizures of Property*, PEW CHARITABLE TR. (Aug. 18, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/18/federal-loophole-thwarts-state-curbs-on-police->

recovery difficult, a federal loophole “allows state and local law enforcement agencies to partner with federal agencies to seize and forfeit property under the federal government’s permissive laws and receive up to eighty percent of the proceeds, regardless of state law.”<sup>149</sup> Between 2000 and 2019, the federal government paid out more than \$8.8 billion for assets seized by state and local law enforcement through this loophole.<sup>150</sup> By some estimates, the debt alone resulting from criminal justice fees totals in the tens of billions of dollars.<sup>151</sup>

Self-funding mechanisms, too, change the expected value of policing, mitigating if not completely erasing policing costs. Under Indiana’s “critical infrastructure” bill, for example, law enforcement officers responding to anti-pipeline demonstrations will consider whether the marginal benefits of their actions  $[b]$  outweigh the marginal costs  $[c]$  *less* \$100,000 *per convicted defendant*: is  $[b] > [c] - n[\$100,000]$ ?<sup>152</sup> Even if the relevant officers correctly value the likelihood that their arrests will result in convictions—and there are many reasons to believe that officers will tend to overvalue such a possibility—self-funding mechanisms of this nature will significantly incentivize more aggressive police responses, resulting in more constitutional violations:  $[c] > [c] - n[\$100,000]$ .<sup>153</sup> Indeed, it is easy to imagine how actions could have net positive costs, where the expected fees obtained from arrests could exceed any harms associated with such arrests (thereby making the policing action not merely net-beneficial, but lucrative for the municipality).

Yet this, too, is a practice with at least some theoretical support. The costs recovered through such programs help offset the transaction costs of policing: policing costs money. Self-funding mechanisms like South Dakota’s joint and several liability effectively shift *all* of the costs of crime—including the costs of

---

seizures-of-property [https://perma.cc/F4D9-URNB]; DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JENNIFER McDONALD, INST. FOR JUST., POLICING FOR PROFIT 11 (2d ed. 2015) (reporting on forfeiture revenues from Arizona, California, Hawaii, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Texas, Virginia, and Washington).

<sup>149</sup> LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., POLICING FOR PROFIT 6 (3d ed. 2020).

<sup>150</sup> *Id.*

<sup>151</sup> See, e.g., Shaer, *supra* note 148.

<sup>152</sup> S. 471, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019). Under South Dakota’s “riot-boosting” bill, similarly, law enforcement officers responding to demonstrations will consider whether the benefits of their actions  $[b]$  outweigh the costs  $[c]$  *less whatever they expect to recover from convicted defendants* ( $n[c]$ , with  $n$  representing the percent likelihood of recovery): is  $[b] > [c] - n[c]$ ? H.R. 1117, 2020 Leg., 95th Sess. (S.D. 2020). For a different kind of example, “asset forfeiture laws motivate police officers to patrol and stop *southbound* traffic, where traffickers are likely to be carrying cash that police can seize; stops conducted on *northbound* traffic, by contrast, will be more likely to yield only drugs, which must be destroyed.” Su, O’Rourke & Binder, *supra* note 36, at 1254.

<sup>153</sup> This effect will be further amplified by the doctrine of qualified immunity, which forestalls liability except where the underlying right or liberty violated was clearly established.



detection and prosecution—to criminals.<sup>154</sup> (And the fee-based systems used elsewhere do so as well, albeit far more clumsily.)<sup>155</sup> In theory, this should lead to closer-to-optimal levels of policing.

In practice, though, the incentives generated by these systems have proven to be problematic, and there is a growing body of literature critiquing such policies.<sup>156</sup> Indeed, the Department of Justice’s detailed report on policing in Ferguson, Missouri, observed a great deal of law enforcement activity primarily in service of generating revenue rather than promoting safety.<sup>157</sup> This relationship between police and revenue collection appears to be widespread. In a recent investigation, the *New York Times* “found more than 730 municipalities that rely on fees and fines for at least 10 percent of their revenue.”<sup>158</sup> Municipalities’ reliance on fees and fines can be near total; Henderson, Louisiana, “got nearly 90 percent of its general revenue from fines and fees in 2019.”<sup>159</sup>

Such “policing for profit” most commonly arises, and has been given the most scholarly attention, in circumstances in which there is relatively little chance of constitutional tort liability: low-cost interactions like minor traffic infractions, where the costs in question are nearly all enforcement costs.<sup>160</sup> Even the most innocuous seeming of circumstances, however, can lead to police misconduct. Over the past five years, for example, police have killed over 400 drivers who were not brandishing weapons or being pursued for a dangerous crime.<sup>161</sup>

---

<sup>154</sup> H.R. 1117, 2020 Leg., 95th Sess. (S.D. 2020); see, e.g., Harmon, *Real Costs*, *supra* note 129, at 902 (discussing the many costs of policing that are already borne by prospective defendants).

<sup>155</sup> *Developments in the Law*, *supra* note 143, at 1727–33.

<sup>156</sup> See, e.g., *id.*

<sup>157</sup> Wilson Andrews, Alicia Desantis & Josh Keller, *Justice Department’s Report on the Ferguson Police Department*, N.Y. TIMES (Mar. 4, 2015), <https://www.nytimes.com/interactive/2015/03/04/us/ferguson-police-racial-discrimination.html> [<https://perma.cc/LZ32-DJ5P>]; see also Colgan, *supra* note 48, at 1185–205 (describing the revenue-generating nature of this system, and its likely unconstitutionality).

<sup>158</sup> Editorial Board, Opinion, *Train the Police to Keep the Peace, Not Turn a Profit*, N.Y. TIMES (Nov. 20, 2021), <https://www.nytimes.com/2021/11/20/opinion/police-traffic-stops-deaths.html> [<https://perma.cc/MX9N-BAT2>].

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., CARPENTER, KNEPPER, ERICKSON & McDONALD, *supra* note 149, at 16; Editorial Board *supra* note 159. Similar self-funding incentives exist elsewhere in the criminal justice system. See generally Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619 (discussing and decrying self-funding in prison labor and punishment systems); Atuahene, *supra* note 34 (discussing and decrying similar self-funding through predatory property taxes).

<sup>161</sup> Editorial Board, *supra* note 159. Another example of the ways in which these financial incentives drive police wrongdoing comes from Oliver, Georgia, where a recent state investigation determined that the Oliver Police Department wrote over \$40,000 of tickets on a road in which it did not have jurisdiction. Jessica Savage, *Oliver Police Department Under Review by State Agency for Writing Illegal Speeding Tickets*, WTOC,

Moreover, self-funding mechanisms can significantly impact all police behavior, including in high-stakes interactions in which constitutional rights and liberties are regularly at stake and there is a plausible threat of suit. South Dakota's riot-boosting bill, for example, will substantially influence the way in which speech is policed in the state; even if the statute can survive constitutional scrutiny under the *Brandenburg* speech carveout for incitement,<sup>162</sup> the lack of certainty surrounding what constitutes incitement means that the statute's self-funding mechanism will change the expected value of policing protected and unprotected speech alike.<sup>163</sup>

#### D. Earmarking External Funding

External funding will impact the incentives underlying policing irrespective of whether it comes with any strings attached. But it will be particularly influential when it is associated with a specific policy or practice. The Patrick Leahy Bulletproof Vest Partnership, for example, has provided \$548 million in federal funds for cities and municipalities to purchase bulletproof vests.<sup>164</sup> When one such city receives grant funding, its decision *to purchase vests* will be more directly affected than its other policing decisions. In the aggregate, the Patrick Leahy Bulletproof Vest Partnership makes bulletproof vests \$548 million cheaper for the local police than they would otherwise be;<sup>165</sup> the Partnership shifts a straightforward weighing of the marginal benefits and costs of bulletproof vests (is  $[b] > [c]$ ?) to one that accounts for the grant funding (is  $[b] > [c] - [\text{Partnership grant}]$ ?).<sup>166</sup>

---

<https://www.wtoc.com/2020/08/13/oliver-police-department-under-review-by-state-agency-writing-illegal-speeding-tickets/> [https://perma.cc/UXA8-FZCR] (Aug. 13, 2020). Oliver gets over half of its city budget from traffic fines. See Editorial Board, *supra* note 159.

<sup>162</sup> See *supra* notes 144–47; *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

<sup>163</sup> Put algorithmically, because  $[c] > [c] - n[c]$  for all values of  $n$  greater than zero, the statute will encourage more policing of speech in all circumstances in which there is *any* perceived possibility of conviction, however low. For a vivid example of how speech is often prosecuted even when there is no more than a minimal possibility of conviction, see Michael Hiltzik, *N. Dakota Charges Reporter with 'Riot' for Covering Protest—But Gets Slapped Down by Judge*, L.A. TIMES (Oct. 17, 2016), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-goodman-north-dakota-20161017-snap-story.html> [https://perma.cc/KFR7-6N2R] (describing how Democracy Now's Amy Goodman was charged with participating in a riot for her reporting at Standing Rock).

<sup>164</sup> *Patrick Leahy Bulletproof Vest Partnership*, *supra* note 131.

<sup>165</sup> See *id.*

<sup>166</sup> Similarly, the federal government spends more than \$600 million annually subsidizing traffic stops, which the *New York Times* reported has led at least twenty states to “evaluat[e] police officers based on how many stops they make per hour.” Editorial Board, *supra* note 159; see also Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES, <https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html> [https://perma.cc/RE7M-DCJV] (Nov. 2, 2021).

The consequence of such targeted funding will regularly *both* stimulate significant funding increases in the targeted area *and* subsidize purchasing that the department had already planned, thereby freeing departmental resources for other uses. For example, take Hagerstown, Maryland, which received \$18,800 from the Patrick Leahy Bulletproof Vest Partnership in 2020.<sup>167</sup> If Hagerstown would have spent \$10,000 on bulletproof vests regardless, then the effect of the Partnership grant would be to nearly double its spending on vests, from \$10,000 to \$18,800.<sup>168</sup> At the same time, such a grant will offset the \$10,000 that Hagerstown would have otherwise spent on vests, thereby effecting a \$10,000 subsidy for Hagerstown's other policing practices.<sup>169</sup> For each individual case of earmarked funding, the impacts of such spillover effects might be slight. Hagerstown, for example, has a \$120 million budget—and so an additional \$5,000 or \$10,000 in available resources is unlikely to spur significant department-level change.<sup>170</sup> Still, such spillover effects may make a significant impact in the aggregate; the Patrick Leahy Bulletproof Vest Partnership is just one of many sources of earmarked funding for local police.<sup>171</sup>

Because some police policies and practices may be associated with police wrongdoing to a greater extent than others, some earmarked police funding may have a greater impact on police wrongdoing than others. External funding dedicated to purposes associated with police misconduct, like the use of militarized equipment by the police,<sup>172</sup> can disproportionately distort the checks and balances holding police accountable by disproportionately incentivizing policies or practices with a high rate of accompanying wrongdoing. On the other

---

<sup>167</sup> OFF. OF JUST., DEP'T OF JUST., PROGRAMS, FY 2020 BVP AWARDS (2020), <https://www.ojp.gov/bvp/fy2020-bvp-awards> [<https://perma.cc/36Q4-DWVN>].

<sup>168</sup> It should also be noted that if Hagerstown would have spent \$0 on bulletproof vests, the grant could motivate a behavior—the acquisition of bulletproof vests—that would not have occurred otherwise.

<sup>169</sup> It is also, of course, possible that earmarked funding will exclusively subsidize purchases that the department had otherwise planned—without increasing spending in that area—in which case it will function in much the same manner as non-earmarked funding: such funding will free up departmental resources on a one-to-one basis. It is a fair presumption that funding will rarely be earmarked for such purposes, however. If police departments were already purchasing bulletproof vests as if price were no object, for example, there would be little need for the Patrick Leahy Bulletproof Vest Partnership. And earmarked funding will sometimes be dedicated to purposes to which the department would have otherwise dedicated no funding, in which case there might not be any spillover effects on other policing practices.

<sup>170</sup> *Budgeting*, CITY OF HAGERSTOWN, <https://www.hagerstownmd.org/271/Budgeting> [<https://perma.cc/VMS3-TJSF>].

<sup>171</sup> See *supra* notes 130–33 and accompanying text.

<sup>172</sup> See, e.g., BERNARD E. HARCOURT, *THE COUNTERREVOLUTION* 6 (2018); Mallory Meads, Note, *The War Against Ourselves: Heien v. North Carolina, the War on Drugs, and Police Militarization*, 70 U. MIA. L. REV. 615, 618 (2016); Harmon, *Real Costs*, *supra* note 129, at 872, 918–29 (noting that many federal policing programs “provide incentives to local police departments to conduct additional arrests, use force, intimidate citizens, take private property, and engage in electronic surveillance of individuals”).

hand, external funding earmarked for uses with only a minimal impact on police misconduct, such as (potentially) the construction of a new police station, may have a disproportionately small effect on police accountability; police who operate out of a state-of-the-art facility may be no more likely to violate the Constitution than police who do not. Regardless, however, because earmarked funding will regularly have spillover effects, even funding dedicated to purposes with relatively little connection to police misconduct may still change the cost–benefit calculus underlying policing more generally.

### *E. The Additive Effect of External Funding*

Any one of these external funding practices in isolation may exert a great deal of influence on policing, increasing the amount and severity of constitutional wrongdoing. Yet their effects are often compounded. At Standing Rock, for example, North Dakota law enforcement received \$15,000,000 from Dakota Access LLC and \$10,000,000 from the DOJ and were able to further offset policing costs through self-funding mechanisms like administrative fees added to plea deals (as well as bond forfeitures);<sup>173</sup> Jill Stein, to cite just one defendant, agreed to pay \$250 in administrative fees as part of her plea.<sup>174</sup> The policing decisions at Standing Rock were not, therefore, shaped simply by a calculation of the expected local marginal costs and benefits, but also by the substantial amounts of external funding that poured into the police: policing of the anti-pipeline movement was federally and privately subsidized by well more than \$25,000,000.<sup>175</sup> To contextualize the magnitude of this, the North Dakota Highway Patrol’s entire legislative appropriation for the *two-year* period surrounding these events (which lasted approximately eleven months) was only \$43,000,000.<sup>176</sup> Viewed in this light, law enforcement’s use of water as a crowd control mechanism in subfreezing conditions at Standing Rock appears not only unsurprising, but inevitable; drastically changing the cost–benefit calculation for law enforcement will lead to seemingly irrational decisions, like the decision

---

<sup>173</sup> Yessenia Funes, *Developer Behind the Dakota Access Pipeline Shelled Out \$15 Million to North Dakota for Policing Protests*, INSIDER (Oct. 3, 2017), <https://www.businessinsider.com/dakota-access-pipeline-developer-pays-15-million-for-protests-2017-10> [<https://perma.cc/CEJ5-VUEC>]; see *supra* notes 107, 135 and accompanying text.

<sup>174</sup> Associated Press, *Jill Stein Reaches Plea Deal Over Arrest at Standing Rock Protest*, GUARDIAN (Aug. 9, 2017), <https://www.theguardian.com/us-news/2017/aug/09/dakota-access-pipeline-jill-stein-arrest-green-party> [<https://perma.cc/9LJF-RPEN>]. Jill Stein, then the Green Party candidate for President, pled guilty to spray painting “I approve this message” on a piece of construction equipment. *Id.*

<sup>175</sup> See *supra* notes 174–75 and accompanying text.

<sup>176</sup> N.D. LEGIS. COUNCIL, HIGHWAY PATROL BUDGET, BUDGET NO. 504 (June 2017), <https://www.legis.nd.gov/files/fiscal/2017-19/docs/504.pdf> [<https://perma.cc/3UNV-8M7V>] (see portion referring to the 2015–2017 adjusted legislative appropriations).

to use life-threatening force to control a demonstration occurring on a closed rural road located miles from the nearest town or construction site.<sup>177</sup>

#### IV. REFORMING POLICE FUNDING

With so much external funding from so many different sources distorting policing everywhere, what can be done? This Article seeks to answer this question in Part IV by proposing two potential reforms. First, the effects of external funding could be countered by taking a more dynamic approach to constitutional tort remedies: courts could increase damage awards where public officials have accepted external funding, to offset the influences of such funding. Second, the effects of external funding could be reduced or eliminated by simply disallowing such funding. Either reform could be adopted in large part under current law.

##### A. *Dynamic Remedies*

First, whenever external funding weighs on policing, constitutional tort damage awards can be increased accordingly as a counterbalance.<sup>178</sup> Put algebraically, if constitutional tort damage awards are not limited to compensation ( $[c]$ ), but also account for the external funding received by the officials in question ( $[n][\text{external funding}]$ ), these increased constitutional tort damage awards could match and therefore counter the influences of external funding ( $[b] + [n][\text{external funding}] > [c] + [n][\text{external funding}]$ ), or ( $[b] > [c]$ ).

This proposal can be illustrated using a recent example of external police funding. Minnesota law enforcement have received \$2.4 million from Enbridge, the company constructing the Line 3 pipeline extension, to cover costs incurred policing anti-Pipeline demonstrators—thereby offsetting the perceived public marginal costs of decisions involving such policing by \$2.4 million ( $[b] + \$2.4 \text{ million} > [c]$ ).<sup>179</sup> Under this Article's proposal, if a court determines that any policing of Line 3 protestors violated the Constitution, it should take this external funding into account in its calculation of damages. Instead of limiting any damage awards to the costs of the wrongdoing in question— $[c]$ —such a court should aim to match the total amount of additional damages awarded against the police in Line 3-related cases to the external funding received, \$2.4 million. Under such a regime, policing decisions would weigh the marginal

---

<sup>177</sup> See Stelloh, Roecker, Sottile & Medina, *supra* note 1. The benefits of aggressive policing in such circumstances—the maintenance of public order in a location in which disorder would result in little-to-no harm—are limited, at best; whereas the costs—potential widespread loss of life—are not.

<sup>178</sup> This proposal builds from my previous work on dynamic remedies. See Smith-Drelich, *supra* note 40, at 604–18. See generally Noah Smith-Drelich, *Performative Causation*, 93 S. CAL. L. REV. 379 (2020).

<sup>179</sup> See *supra* note 108 and accompanying text; see also Beaumont, *supra* note 8. This could also be represented as ( $[b] > [c] - \$2.4 \text{ million}$ ).

benefits of any actions or policies ( $[b] + \$2.4$  million) against the enhanced costs ( $[c] + \$2.4$  million).

In effect, this amounts to an updating of the Supreme Court's assumption "that damages that compensate for actual harm ordinarily suffice to deter constitutional violations."<sup>180</sup> In a world with no external funding, that assumption might be accurate; police and public officials would be free to weigh the marginal benefits of their actions against the marginal costs, with compensatory damage awards internalizing whatever costs might otherwise be overlooked.<sup>181</sup> But as Part III outlines, this assumption fails whenever external funding supports the police.<sup>182</sup> Then, the relevant question becomes whether the marginal benefits of policing, *inclusive of any external funding received*, outweigh the marginal costs ( $[b] + [n][\text{external funding}] > [c]$ ).<sup>183</sup> Under this proposal, damages that compensate for actual harm *plus* exemplary damages may suffice to deter constitutional violations.<sup>184</sup>

### 1. Implementation

There are a number of different ways that this reform could be implemented. First, we could treat such exemplary damage awards in much the same way as we treat other exemplary damages—and leave the exact amount in each individual case to the discretion of the court. And some amount of discretion may be necessary: despite the calculable nature of external funding, determining the appropriate amount of exemplary damages in any given case may not be as simple as adding up the external funding at issue. This is because there will rarely be a one-to-one correspondence between police funding and liability.

---

<sup>180</sup> *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986).

<sup>181</sup> See discussion *supra* Part III; see also Smith-Drelich, *supra* note 40, at 584–604 (discussing ways in which this assumption fails).

<sup>182</sup> See discussion *supra* Part III.

<sup>183</sup> See discussion *supra* Part I; see also Smith-Drelich, *supra* note 40, at 586–604 (discussing other circumstances in which this assumption fails).

<sup>184</sup> The additional damages that would be awarded via this proposal are best characterized as 'exemplary' or 'punitive' damage awards (the terms are typically used interchangeably). To avoid the retributivist connotations of 'punitive,' this Article uses 'exemplary damages' throughout. Smith-Drelich, *supra* note 40, at 604 n.162. For others who have noted this semantic confusion, see, for example, *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) ("The term 'punitive damages' . . . contributes greatly to . . . confusion. For *punitive damages* . . . improperly emphasizes the retributive function of such extracompensatory damages at the expense of their multiplier-deterrent function."); Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890–91 (1998) ("[T]he adjective 'punitive' may sometimes be misleading. This is because extracompensatory damages may be needed for deterrence purposes in circumstances in which the behavior of the defendant would not call for punishment." (emphasis omitted)); cf. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 364–65 (2003) ("[I]t makes sense to entertain seriously the idea of a nonretributive rationale for punitive damages.").

Police funding will regularly influence a range of policing that could give rise to an assortment of different constitutional violations, many of which will lack an obvious connection to the funding.<sup>185</sup> When exemplary damages arise as a possibility, however, it will typically be in the context of a single case involving a relatively small subset of the total potential conduct at issue.

Challenging though this may be, such a discretionary judgment would fall well within the realm of what courts are regularly entrusted to determine. Courts commonly consider exemplary damages to punish or deter in circumstances in which a single course of conduct has impacted a large number of individuals, only one of which is suing.<sup>186</sup> In *Mathias v. Accor Economy Lodging, Inc.*, for example, the Seventh Circuit reviewed a punitive damages award of \$186,000 against a hotel for its handling of a bedbug infestation.<sup>187</sup> The case before the court involved just one pair of guests, though many were harmed by the hotel's conduct.<sup>188</sup> Writing for the court, Judge Posner considered the fact that other guests not suing were harmed, weighing that in favor of upholding the significant punitive damages award: the circumstances gave rise to a theoretical possibility of duplicative exemplary damage awards, but the larger concern was that most of those who were injured by the hotel's conduct would not sue, leading to underdeterrence.<sup>189</sup>

Indeed, courts regularly weigh wholly intangible factors in calculating both compensatory and punitive damage awards.<sup>190</sup> In *Mathias*, the judgment in question consisted of a \$5,000 award for pain and suffering for bedbug bites and \$186,000 in punitive damages, neither of which were based on anything discernably quantifiable.<sup>191</sup> In fact, as Judge Posner noted, the combined total amount awarded (\$191,000) appeared to correspond to "\$1,000 per room in the

---

<sup>185</sup> Funding for bulletproof vests likely falls into this category. An officer wearing a bulletproof vest may feel empowered to be more aggressive in policing than (s)he otherwise would, but it may not be possible to determine for which officers this holds true, let alone for which constitutionally dubious police encounters. Even where funding is clearly directed for a singular policing purpose with an immediate connection to potential constitutional wrongdoing, as was the case with donations made by Dakota Access, LLC and Enbridge to subsidize the policing of the respective anti-Pipeline movements, such policing will often give rise to multiple suits. *See, e.g., Brown, supra* note 108. This will be further complicated when earmarked external funding facilitates the rededication of resources to non-earmarked spending—such as, for example, when a municipality receives a grant for bulletproof vests it would have purchased otherwise, and therefore dedicates its resulting budgetary surplus to other purposes.

<sup>186</sup> *See generally Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (2003).

<sup>187</sup> *Id.* at 673–74.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 677–78.

<sup>190</sup> *See, e.g., id.* Courts similarly consider intangible factors in apportioning liability, such as in comparative negligence. *See, e.g., COLO. REV. STAT. § 13-21-111(3)* (2022) (“[T]he court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made . . .”).

<sup>191</sup> *See Mathias*, 347 F.3d at 674.

hotel,” an entirely arbitrary sum.<sup>192</sup> Yet the Court nevertheless upheld the award: “as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary.”<sup>193</sup> In stark contrast, courts tailoring exemplary damages to counter external funding will have a good deal of guidance as to what sort of award is appropriate. The total amount of external funding at issue sets both an upward bounds and ultimate target for exemplary damages.

A second approach for implementing this reform would be to make such exemplary damage awards nondiscretionary, and for courts to always, at the first possible opportunity, award the full amount of exemplary damages necessary to completely offset the influence of external funding. If this nondiscretionary approach were applied in the context of Line 3, the first suit to determine that a constitutional violation was associated with the policing of the anti-pipeline movement would award \$2.4 million in exemplary damages—the amount received from Enbridge<sup>194</sup>—on top of whatever compensatory damages were merited in that suit. The second suit to find a violation (and all subsequent suits) would then award strictly compensatory damages. That would be true irrespective of whether the first suit involved a single plaintiff or a class of plaintiffs, whether the conduct involved was borderline constitutional or particularly egregious, or whether other suits against the police remained pending.<sup>195</sup> So long as the actions in question appeared connected with external funding, the court should seek to fully offset that external funding at the first possible opportunity.<sup>196</sup>

This approach would have the advantage of minimizing discretion, and therefore any arbitrariness or unpredictability in the total amount of exemplary damages awarded. It would also do the most to ensure that exemplary damages

---

<sup>192</sup> *Id.* at 678.

<sup>193</sup> *Id.*

<sup>194</sup> Beaumont, *supra* note 8 (“Enbridge has paid for officer training, police surveillance of demonstrators, officer wages, overtime, benefits, meals, hotels and equipment.”); *see also* Brown, *supra* note 108; Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, PL-9/PPL-15-137, at 26 (Minn. Pub. Utils. Comm’n May 1, 2020), <https://healingmnstories.files.wordpress.com/2020/05/line-3-route-permit-2.pdf> [<https://perma.cc/G2HT-XWAN>] (establishing a “Public Safety Escrow Account” funded by Enbridge). Police have arrested over 900 demonstrators opposing the construction of Line 3. Beaumont, *supra* note 8.

<sup>195</sup> There may be constitutional due process limitations to such an approach. *See* discussion *infra* Part IV.A.2.

<sup>196</sup> This might also mean that courts should consider offsetting *public* funding potentially at issue—such as funding received from the Patrick Leahy Bulletproof Vest Partnership in some excessive force cases, and funding received through applicable self-funding mechanisms if, for example, some of those protesting with the plaintiff were arrested and charged administrative fees. *See Patrick Leahy Bulletproof Vest Partnership*, *supra* note 131; *supra* notes 165–72 and accompanying text.



consistently counterbalance external funding; under the discretionary approach, the aggregated exemplary damage awards made at individual courts' discretion will have more variability, sometimes falling short of and sometimes exceeding the amount of external funding at issue.<sup>197</sup> It would do so, however, at the cost of introducing a significant degree of horizontal inequity between cases, as well as a substantial first-mover advantage for would-be litigants: some plaintiffs will reap enormous windfalls based solely on the fact that their suits were tried to judgment first. Moreover, attempting to fully right the imbalance introduced by external funding at the first possible opportunity will work best in the simplest circumstances, in which the realm of external funding that may have impacted the policing in question is limited. Where multiple different private payments, federal grants, and cost recovery mechanisms all potentially bear on the challenged policing, calculating the 'total' external funding at issue could quickly become unmanageable. This approach may also run headlong into constitutional limitations on punitive damages, as it could give rise to exemplary damage awards far in excess of compensatory damages.<sup>198</sup>

A third approach would be to address the problem of external funding incrementally. Courts could either assign a fixed value amount of exemplary damages to every judgment, or apply a damage multiplier, until the total amount awarded in cases equaled the amount of external funding at issue.<sup>199</sup> Each of these mechanisms for implementing this reform—fixed damages and damage multipliers—are familiar within our legal system, having been adopted in other contexts.<sup>200</sup> Statutory fixed damages are found throughout both state and federal law.<sup>201</sup> The California Information Practices Act, for example, provides a minimum of \$2,500 statutory damages on top of any special or general damages awarded.<sup>202</sup> Damage multipliers are likewise common; certain violations of the federal Motor Vehicle Information and Cost Savings Act, for example, impose liability of “3 times the actual damages or \$10,000, whichever is greater.”<sup>203</sup>

---

<sup>197</sup> See *Mathias*, 347 F.3d at 673–78; COLO. REV. STAT. § 13-21-111 (2022); Beaumont, *supra* note 8. This might be due to the idiosyncrasies of judges and juries, to the difficulty of predicting when a particular judgment might be the last, or some other reason.

<sup>198</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). I discuss these limitations in greater detail later in Part IV.A.2.

<sup>199</sup> Cf. Smith-Drelich, *supra* note 40, at 617 n.222 (noting this possibility).

<sup>200</sup> See, e.g., *Liquidated Damages*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/liquidated\\_damages](https://www.law.cornell.edu/wex/liquidated_damages) [<https://perma.cc/2M5C-Q7NP>]; Neil Shouse, *Pain and Suffering Multiplier—How Does It Work?*, SHOUSE INJ. L. GRP. (Oct. 25, 2022), <https://www.shouselaw.com/ca/blog/pain-and-suffering-multiplier/> [<https://perma.cc/CS2S-8NKU>].

<sup>201</sup> Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 66 U. KAN. L. REV. 523, 536–38 (2018) (discussing examples).

<sup>202</sup> *Id.* at 538; CAL. CIV. CODE § 1798.53 (West 2022).

<sup>203</sup> 49 U.S.C. § 32710; see also CAL. CIV. CODE § 52(a) (West 2022) (authorizing exemplary damages of “up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney’s fees”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (referencing “a long legislative history,

Whether implemented by courts or via statute, such an incremental approach would constrain or eliminate judicial discretion while ensuring more horizontal equity than the “first possible opportunity” approach. Applied in the context of the Line 3 protests, for example, a court would award fixed additional damages (of, say, \$25,000 per suit) in every successfully litigated case until those damages totaled the external funding at issue: \$2.4 million. Or, a court could apply a damage multiplier (say, treble damages), again until the above-compensatory damages equaled \$2.4 million.<sup>204</sup> Such an implementation would effectively eliminate any risk of courts abusing their discretion, and it would greatly increase horizontal equity. On the other hand, this approach carries a significant risk that the exemplary damages awarded will not ultimately total the external funding. Unless the statutory damages or damage multiplier are predetermined at a high level, the absolute number of constitutional suits successfully litigated to a judgment may regularly be too low for such damages to provide the counterweight necessary to fully correct for the distortion of external funding.

For any of these approaches, there still remains a question of who should receive these exemplary damages. Exemplary damages could reasonably be awarded to the plaintiffs, to the plaintiffs’ lawyers, to a charitable third party as part of a *cy pres* judgment, or to some combination of the above. This is a decision of some consequence, impacting not only who benefits from this reform, but how and where suits are litigated.

Awarding at least some of these exemplary damages to the plaintiffs or plaintiffs lawyers would function as an incentive to litigate in much the same way as § 1988 attorney’s fees currently do.<sup>205</sup> And like with § 1988, because exemplary damages would only attach to successful judgments, any incentive to file shouldn’t significantly reach frivolous suits.<sup>206</sup> Thus, each of these implementations will generally incentivize constitutional litigation, but none should lead to a flood of specious cases.

Which specific suits are encouraged by awarding at least some of these exemplary damages to plaintiffs or their lawyers, however, will differ depending

---

dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish”).

<sup>204</sup> Another version of this approach would be to apply statutory damages or damage multipliers *ad infinitum* so long as some external funding potentially has impacted the action in question. Given the multiple overlapping potential sources of external funding, and the fact that the incremental approach is far more likely to fall short than to exceed the external funding at issue, eliminating a calculation of the ‘total’ external funding to determine the cap on these awards would greatly increase judicial efficiency without risking much by way of the police accountability system.

<sup>205</sup> *Cf.* S. REP. NO. 94-1011, at 6 (1976) (discussing the incentivization of plaintiffs lawyers through the provision of attorneys fees).

<sup>206</sup> *See* Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 328 (2015) (“[T]o receive an award of attorney’s fees in a § 1983 suit, a party must effectively litigate to judgment and win.”).

on the exact implementation. Fixed damages will likely do more to encourage low-value suits than discretionary awards or damage multipliers: the smaller the compensatory damages at issue, the greater the relative impact of fixed additional damages.<sup>207</sup> Section 1988 has had such an effect, providing a relatively large incentive to litigate otherwise low-value suits, given that attorneys' fees do not perfectly correspond with compensatory damages in constitutional litigation.<sup>208</sup> The "first possible opportunity" approach, on the other hand, would create a strong incentive to race to judgment—regardless of the compensatory value of the suit—doing little to incentivize subsequent suits.<sup>209</sup> This approach could also lead to unusual settlement practices, strongly disincentivizing parties from being the first to settle.<sup>210</sup>

As an alternative to awarding these exemplary damages to plaintiffs or their lawyers, courts might redistribute them to third parties via an expansion of the *cy pres* doctrine. *Cy pres*, French for "as close as possible," is an equitable doctrine used in the context of class actions.<sup>211</sup> *Cy pres* allows courts to redistribute unclaimed portions of class action judgments to third parties, typically educational institutions or charitable interests working in a field related to the subject of the judgment.<sup>212</sup> Although *cy pres* hasn't yet been used to redistribute non-class exemplary damage awards, it could be.<sup>213</sup> "[T]his general principle—that equity sometimes demands decoupling the plaintiff's recovery from the judgment itself—may be applied to redistribute exemplary damage awards toward purposes consistent with the judgment and tort law more generally."<sup>214</sup> After all, "[p]laintiffs have no moral or legal entitlement to exemplary damages awarded to deter rather than to punish. Therefore,

---

<sup>207</sup> If exemplary damages are fixed to \$50,000 per suit, \$50,000 cases would become \$100,000 cases—increasing by one hundred percent—whereas \$1,000,000 cases would become \$1,050,000 cases—increasing by five percent. It is likely that the discretionary approach will lead to exemplary damages that roughly correspond to compensatory damages. *See, e.g.,* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (requiring courts to ensure that exemplary damages are "proportionate to the amount of harm to the plaintiff and to the general damages recovered"). And, of course, exemplary damages will scale directly with compensatory damages under the multiplier approach.

<sup>208</sup> *Cf. S. REP. NO. 94-1011*, at 6 (1976) (discussing this goal). *But see* *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)) (undermining § 1988 by holding that some awards of nominal damages should not result in fee shifting).

<sup>209</sup> *See generally supra* notes 198–203 and accompanying text.

<sup>210</sup> The "first possible opportunity" approach could lead plaintiff's lawyers to adopt litigation strategies detrimental to their cases, risking an ultimate loss for the possibility of an exemplary damages windfall. *See supra* notes 195–98 and accompanying text.

<sup>211</sup> Chris J. Chasin, Comment, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return to Cy Pres Comme Possible*, 163 U. PA. L. REV. 1463, 1465 n.3 (2015).

<sup>212</sup> *Id.* at 1468, 1471 n.44 (citing *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 357 (S.D.N.Y. 1999); *Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 479–80 (N.D. Ill. 1993); 3 NEWBERG ON CLASS ACTIONS § 10.24 (4th ed. 2002)).

<sup>213</sup> Smith-Drelich, *supra* note 40, at 607.

<sup>214</sup> *Id.*

redistributing these awards would simply deprive certain plaintiffs of what would otherwise be a windfall.”<sup>215</sup>

For better or for worse, redistributing exemplary damage awards via cy pres will diminish or eliminate any incentive to litigate that would otherwise flow from these exemplary damages: plaintiffs and their lawyers will still receive the full compensatory damages awarded by courts, but nothing more. Given the systemic benefits of litigating for exemplary damages, it might be worthwhile to designate some portion of cy pres awards to plaintiffs and their lawyers to encourage them to pursue exemplary damages. This, too, could follow from class actions, wherein lead plaintiffs are commonly rewarded for their work and exposure as private attorneys general: courts will grant lead plaintiffs an “incentive award” of tens or even hundreds of thousands of dollars as part of the resolution of a successful case.<sup>216</sup> Likewise, plaintiffs and their lawyers could be incentivized in a similar manner to qui tam “relators,” whistleblowers empowered to bring suits on behalf of the federal government, who commonly receive between fifteen and thirty percent of the government’s ultimate recovery as an inducement to bring such suits.<sup>217</sup>

## 2. Limitations

Some of these implementations may be made under current law. Others would require federal statutory change. And at least the furthest reaches of this reform may be constrained by the constitutional limits of the Due Process Clause.

“[B]ecause qualified immunity screens out all but intentional or reckless constitutional violations—which is conveniently also the Supreme Court’s standard for awarding exemplary damages—exemplary damage awards are currently available to amplify the deterrent effect in nearly every case that survives to the liability stage of litigation.”<sup>218</sup> Under the current constitutional

---

<sup>215</sup> *Id.* (footnote omitted).

<sup>216</sup> Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1320–21 (2006) (finding a median award of \$18,191 and a mean award of \$128,804); Charles R. Korsmo & Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 VAND. L. REV. 1923, 1929 (2019) (describing an unpublished study by William B. Rubenstein and Rajat Krishna finding a median award of \$8,398 and a mean award of \$26,326 in 2002 dollars).

<sup>217</sup> Smith-Drelich, *supra* note 179, at 412 (noting that relators commonly split this incentive award with their lawyers); *see also id.* at 413 n.152 (describing how some have criticized this incentive model as being *too* successful).

<sup>218</sup> Smith-Drelich, *supra* note 40, at 608–09 (comparing the Court’s standard for punitive damages to the Court’s standard for qualified immunity and concluding that the two almost entirely overlap, meaning “that for all nonmunicipal defendants subject to damage awards, exemplary damages are thus available” (footnote omitted)); *see also* Smith v. Wade, 461 U.S. 30, 56 (1983) (requiring, for punitive damages, a “reckless or callous indifference” or “evil motive” for defendant’s conduct under § 1983 claims); Malley v. Briggs, 475 U.S.

litigation landscape, therefore, whenever qualified immunity fails, a court may appropriately award exemplary damages to deter. The discretionary approach could thus be adopted immediately: courts can, at their discretion, use exemplary damages against individual defendants (and therefore their departments and municipalities through indemnification) to offset the influences of external funding.<sup>219</sup>

On the other hand, if the discretion of courts is to be constrained, either via the “first possible opportunity” approach or an incremental approach making use of fixed damages or damage multipliers, that change must be affected via federal statute. Constitutional litigation as it currently exists is almost exclusively a federal litigation device, with most suits authorized by a single statute: 42 U.S.C. § 1983.<sup>220</sup> As such, any statutory reform should be relatively straightforward (at least in execution), involving little more than amending § 1983 to require exemplary damages to be added to compensatory damages to offset the skewing effect of external funding in one of the ways outlined above.

Irrespective of whether this reform is adopted voluntarily by courts, exercising discretion under current law, or addressed via statutory change, the biggest limiting factor on what can be done will be the Due Process Clause of the Constitution. In a trio of decisions, the Supreme Court has recognized that the constitutional guarantee of due process limits the award of exemplary damages.<sup>221</sup> In *BMW v. Gore*, the Court set forth three “guideposts” for courts evaluating the potential excessiveness of a punitive damages award: (1) the “degree of reprehensibility” of the conduct in question, (2) the “disparity between the harm or potential harm suffered” and the punitive damages awarded, and (3) “the civil penalties authorized or imposed in comparable cases.”<sup>222</sup> Then, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court considered the second guidepost further, noting that, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>223</sup> Finally, the Court returned to the first *Gore* guidepost in *Philip Morris USA v. Williams*, cautioning courts against considering injuries to nonparties not merely for

---

335, 341 (1986) (“[Q]ualified immunity . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”).

<sup>219</sup> This roundabout process is necessary under current law because municipal defendants are not subject to exemplary damages (or qualified immunity). *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259, 271 (1981); see discussion *infra* Part IV.C (arguing for a reconsideration of these rules on this basis); see also Smith-Drelich, *supra* note 40, at 609 n.183 (arguing for a reconsideration of these rules for related reasons).

<sup>220</sup> Martin A. Schwartz, *Constitutional Litigation Under Section 1983 and the Bivens Doctrine in the October 2008 Term*, 26 *TOURO L. REV.* 531, 531 (2010).

<sup>221</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007).

<sup>222</sup> *Gore*, 517 U.S. at 574–75.

<sup>223</sup> *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425.

purposes of evaluating reprehensibility, but for calculating exemplary damages.<sup>224</sup>

*State Farm v. Campbell* (and *Gore*) will likely bar most adoptions of the “first possible opportunity” approach and constrain aggressive implementations of either the discretionary or incremental approaches. Except in the smallest departments, the total sum of relevant external funding received may exceed the size of constitutional tort judgments by more than a nine-to-one ratio.<sup>225</sup> As such, it will be constitutionally impossible under *State Farm* (and *Gore*) in most instances to award the amount necessary to fully offset this funding at the first possible opportunity—though courts could still adopt a modified version of this approach and award exemplary damages up to the constitutional limit in the first possible opportunities until the external funding amount is matched. *State Farm*’s single-digit ratio cap will similarly limit both courts’ discretion and the size of an incremental approach, but because exemplary damage awards of up to nine times compensatory damages are still constitutionally permissible under *State Farm*,<sup>226</sup> courts and legislatures will retain a significant degree of flexibility in adopting some manner of either implementation. Treble damages, for example—a relatively aggressive damage multiplier—fall well within the bounds of what the Court has held to be constitutional.<sup>227</sup>

*Philip Morris* (and *Gore*) presents a more amorphous obstacle to this proposal. In *Philip Morris*, the Court considered whether “a plaintiff may show harm to others in order to demonstrate [the *BMW v. Gore* consideration of] reprehensibility.”<sup>228</sup> While affirming that “[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible,” the Court held that the State may not “use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent.”<sup>229</sup> This is because “a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge,” and also because “to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages

---

<sup>224</sup> *Philip Morris USA*, 549 U.S. at 353–54.

<sup>225</sup> Compare Jonah Newman, *Chicago Spent More Than \$113 Million on Police Misconduct Lawsuits in 2018*, CHI. REP. (Mar. 7, 2019), <https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/> [<https://perma.cc/GFD2-4496>] (noting that most of Chicago’s police misconduct settlements were in the tens of thousands of dollars), with *What Is the Chicago Police Department Budget*, CIVIC FED’N (June 23, 2020), <https://www.civiced.org/civic-federation/blog/what-chicago-police-department-budget> [<https://perma.cc/9CSB-HXPK>] (noting that the Chicago Police Department received over \$80 million in grant funding alone).

<sup>226</sup> See *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425.

<sup>227</sup> See *id.*

<sup>228</sup> *Philip Morris USA*, 549 U.S. at 355.

<sup>229</sup> *Id.* at 353, 355.

equation.”<sup>230</sup> Put simply, there is a fine line between viewing conduct in its broader context for purposes of evaluating its reprehensibility and “us[ing] a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties”—one that courts must carefully guard.<sup>231</sup>

Tailoring exemplary damages to external funding comes close to the line set by *Philip Morris* and *Gore*, but it does not cross it. In the most literal sense, this reform does not take injuries to nonparties into account. Indeed, external funding is relevant because of its presumptive impact *in the present case*: in each instance in which external funding bears on an unconstitutional action (like policing that violates the speech rights of Line 3 protestors), the cost–benefit calculus for that action has been impacted.<sup>232</sup> Exemplary damages would be appropriate only in such instances, and then only to the extent of external funding’s distorting influence.<sup>233</sup> Under each of the implementations discussed, the relation between the external funding impacting the decision in question and the exemplary damages awarded would be a direct one. And in no circumstance would exemplary damage awards exceed the amount of relevant external funding received by the department or municipality.

Moreover, in stark contrast with the “standardless” consideration of harms to nonparty victims decried by the Court in *Philip Morris*, this reform is constrained by clear and predictable standards. The amount of external funding accepted sets both a target and an outward bound for exemplary damage liability. Indeed, a department could predict to the nearest *dollar*, under any of the implementations of this reform, the full extent of its potential exposure to exemplary damages prior to engaging in any potentially violative conduct. This reform, therefore, carries a very low “risk[] of arbitrariness,” little “uncertainty,” and lots “of notice”—satisfying the “fundamental due process concerns to which [the Court] punitive damages cases refer.”<sup>234</sup>

On the other hand, there could be *Philip Morris*- and *Gore*-related issues with this reform springing from its assessment of exemplary damages against individual officers due to funding accepted by their departments or municipalities. Because the Supreme Court maintains the fiction that these suits impose only individual liability,<sup>235</sup> despite the fact that indemnification is effectively universal in this context, the Court might perceive a concerning misalignment between *personal* culpability and punishment in this reform. There would still be a direct connection between the exemplary damages assessed and the constitutional wrongdoing, but it may yet be too attenuated for

---

<sup>230</sup> *Id.* at 353–54.

<sup>231</sup> *Id.* at 355.

<sup>232</sup> See discussion *supra* Part III.A.

<sup>233</sup> See discussion *supra* Part III.A.

<sup>234</sup> *Philip Morris USA*, 549 U.S. at 354. That is particularly true for the two nondiscretionary implementations discussed.

<sup>235</sup> See *id.* at 353; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996).

the current Supreme Court, which has been protective to a fault of the interests of individual police officers.<sup>236</sup> To the extent that this is a problem, it would be remedied by replacing the practice of indemnification with vicarious liability, an idea I discuss in more detail in Part IV.C.<sup>237</sup>

### 3. *Additional Observations*

Several additional things attend this proposal. First, under any implementation, exemplary damages could not be awarded except where constitutional litigation resulted in a liability judgment. This means that departments and municipalities accepting external funding for their police that do no wrong (at least in the limited sense recognized per § 1983 or *Bivens*) will be able to fully retain such funding: any negative consequences to departments for accepting or collecting external funding only materialize after a judge determines that the department or its officers have violated the Constitution or federal statute. Departments and municipalities would therefore face a high-risk, high-reward choice when it comes to external funding. Accepting external funding would open any municipality to the possibility, but not guarantee, of greatly enhanced liability.

Somewhat counterintuitively, one consequence of this high-risk, high-reward choice could be to decrease constitutional wrongdoing to levels below that which would be present had the department simply refused the funding. That is because departments may be incentivized to use at least some of this external funding to take precautions to avoid constitutional wrongdoing. Such a department would therefore spend more in risk-avoidance measures than it otherwise would. For example, a department that accepts \$2.4 million in external funding, but then faces \$2.4 million of additional potential liability, not only has extra incentive to avoid liability but also extra resources that it can devote to reducing the likelihood that it will incur liability.<sup>238</sup> Importantly, this incentive toward extra avoidance of constitutional liability only exists when external funding is coupled with enhanced liability.

Second, this proposal would add additional stakes to litigation practices and judicial rules that limit liability, especially when those practices or rules limit liability without regard for whether any wrongdoing has actually occurred. Qualified immunity, for example, requires the dismissal of individual damage actions even when a constitutional violation has been committed so long as the

---

<sup>236</sup> Becky Sullivan, *The U.S. Supreme Court Rules in Favor of Officers Accused of Excessive Force*, NPR (Oct. 18, 2021), <https://www.npr.org/2021/10/18/1047085626/supreme-court-police-qualified-immunity-cases> [https://perma.cc/EDA3-9ZB7].

<sup>237</sup> Short of such a change, it is conceivable that this reform could be vulnerable to a Due Process Clause challenge.

<sup>238</sup> Indeed, under even the most expansive version of this proposal, wherein a single liability judgment could include the full amount of external funding, a municipality able to decrease its risk of liability to effectively zero at a lower cost than the value of the external funding available would be justified in accepting external funding with such precautions.



right violated was not “clearly established” at the time in question.<sup>239</sup> It is therefore possible that departments or municipalities might receive external funding, commit constitutional violations, and nevertheless escape liability (thereby avoiding exemplary damages).

As this discussion illustrates, exemplary damages present a promising if not perfect path toward countering the influence of external funding on the police accountability system.<sup>240</sup>

## B. Defunding

An alternative reform, which could be adopted independently or together with exemplary damages, would be to reduce or eliminate external funding for the police.

Much of the national conversation regarding police reform in 2020–2021 revolved around police funding.<sup>241</sup> Indeed, “defund the police” has become not only a protest slogan, but a potent political one, wielded by those on both sides of the issue to succinctly capture the perceived central role of funding in shaping how policing is done.<sup>242</sup> The total amount of funding received by the police, however, is not the only relevant question in this regard. As Part III explains, police accountability turns also on the *source* of police funding.

This Article’s defunding reform builds on that insight: one way of diminishing the influence of external sources of funding on the police would be simply to limit such funding. Police departments and municipalities that do not

---

<sup>239</sup> See, e.g., *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting) (describing the effect of this rule as “heads government wins, tails plaintiff loses”).

<sup>240</sup> One advantage of an exemplary damages-based reform over a defunding reform, discussed in Part IV.B *infra*, is that it would not further widen gaps in funding caused by differences in local resources. See Rushin & Michalski, *supra* note 17, at 298–99 (recognizing the policing inequities caused by such disparities).

<sup>241</sup> See, e.g., Darius Dixon, *Can Politics Handle Police Reform in 2020? An Expert Roundtable*, POLITICO (Oct. 15, 2020), <https://www.politico.com/news/magazine/2020/10/15/police-reform-politics-roundtable-421639> [https://perma.cc/7DDQ-QYZT]. This discussion has its roots in W.E.B. Du Bois and Angela Davis. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1613–14 (2019).

<sup>242</sup> See, e.g., Derek Hawkins, Katie Mettler & Perry Stein, ‘Defund the Police’ Gains Traction as Cities Seek to Respond to Demands for a Major Law Enforcement Shift, WASH. POST (June 7, 2020), <https://www.washingtonpost.com/nation/2020/06/07/protests-defund-police/> [https://perma.cc/BLN7-ZGL9]; Erin Tiernan, *Massachusetts State Troopers Blast NFL for Support of ‘Defund the Police’ Groups*, BOS. HERALD (Dec. 19, 2021), <https://www.bostonherald.com/2021/12/19/massachusetts-state-troopers-blast-nfl-for-support-of-defund-the-police-groups/> [https://perma.cc/U23G-B8XN]. Leading up to the 2020 election, Donald Trump tweeted: “The Radical Left Democrats new theme is ‘Defund the Police’. Remember that when you don’t want Crime, especially against you and your family. This is where Sleepy Joe is being dragged by the socialists. I am the complete opposite, more money for Law Enforcement! #LAWANDORDER.” Donald Trump (@realDonaldTrump), TWITTER (June 4, 2020, 4:08 PM), <https://twitter.com/realDonaldTrump/status/1268635752214208514> (on file with the *Ohio State Law Journal*).

accept private payments or public grant funding, and that do not raise revenues through criminal charges or asset seizures, cannot be influenced by such payments, grants, or criminal justice-associated fees.

### 1. *Implementation*

This proposal would be relatively easy to implement. Many municipalities already prohibit direct private financial contributions to the police, treating them akin to bribes.<sup>243</sup> Of course, there is still plenty of room to expand this prohibited practice: many cities and states continue to accept large private contributions, including from parties with a direct financial interest in one-sided police enforcement.<sup>244</sup> Likewise, indirect financial payments made via police foundations could be similarly barred; such private payments effect much the same influence on police accountability as direct payments, after all. Public grant funding would be even easier to cut from police budgets: municipalities and/or their departments could simply stop applying for such grants and return any grant funding received. Finally, self-funding mechanisms like asset seizures and fees associated with arrests also operate under the control of the municipalities and departments in question, which have the power to stop seizing assets, voluntarily return seized assets, and decline to seek administrative fees and fines as part of criminal prosecutions and plea agreements.<sup>245</sup> To put an end to the pernicious influence of external funding on police accountability, all local governments must do is ask.

This, of course, ignores the challenging political realities accompanying such a path to reform. Where cuts to local public funding save local taxpayers money or free resources that can be used for other politically attractive purposes, cuts to external funding have no such accompanying benefits; these external sources of funding, if turned away from the police, are by no means guaranteed to be redirected to other municipal priorities. Moreover, “[m]ost states have formal balanced budget requirements with some degree of stringency, and state political cultures reinforce the requirements,” so decreases in external funding for the police must be accompanied by either net decreases in police funding or increased taxes to make up for the shortfall.<sup>246</sup> As such, states and localities tend to be jealous in guarding *at least* their federal funding (the category of external

---

<sup>243</sup> Daniel Fridman & Alex Luscombe, *Gift-Giving, Disreputable Exchange, and the Management of Donations in a Police Department*, 96 SOC. FORCES 507, 507–10 (2017).

<sup>244</sup> *Id.* at 512–13.

<sup>245</sup> Even when such fees are provided by state law, local prosecutors and police departments have significant control over what fees are actually ultimately assessed. MONEY LAUNDERING & ASSET RECOVERY SECTION, U.S. DEP’T OF JUST. CRIM. DIV., ASSET FORFEITURE POLICY MANUAL 5–18 (2023), <https://www.justice.gov/criminal-afmls/file/839521/download> [<https://perma.cc/E7SY-QCJP>].

<sup>246</sup> NAT’L CONF. OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 2 (Oct. 2010), <https://docs.house.gov/meetings/JU/JU00/20170727/106327/HHRG-115-JU00-20170727-SD002.pdf> [<https://perma.cc/X64P-4CJV>].

funding for which there is the most transparency), changing policies when necessary to prevent any loss of such funding.<sup>247</sup> Decreasing or eliminating external funding from policing may well be within the power of local officials, but the political headwinds for adopting such reform may be regularly fierce.<sup>248</sup>

Nevertheless, most of these cuts may be made without local buy-in. Private donors aren't compelled to direct their funds to the police. Indeed, if the connection between such donations and police misconduct were more widely understood, it is likely that many such donations—from large corporations like Target to those by small schools like Williams College—would instead be directed to other charitable purposes. Likewise, federal grants for policing practices are regularly passed with bipartisan support based, presumably, on an incomplete understanding of the effect of such payments. And revenue collection through the criminal justice system is largely made possible by some combination of state law and federal policy—either of which can be changed to restrict even those municipalities without the local will to restrict themselves. Thus, external funding can be unilaterally limited by a local government *or* private donor *or* state government *or* the federal government.

Moreover, cuts to external funding need not be absolute to positively affect police misconduct. Because not all police funding has the same distorting influence on police accountability, limitations to external support for police can and should be targeted to those areas with the greatest impacts on police wrongdoing—like, for example, the militarization of police. Likewise, payments made by corporations with an active interest in a political movement currently being policed, like those associated with the construction of the Dakota Access Pipeline and Line 3, will exert a disproportionate impact on police misconduct.<sup>249</sup> Localities reliant on external sources of funding can, therefore, selectively limit external funding and reign in its most concerning impacts without losing the benefit of such funding altogether.

Though external funding for the police currently enjoys some amount of political support, it would be a mistake to view such funding as inviolable: in a June 2020 executive order, for example, President Donald Trump made police departments that failed to adopt “use-of-force policies [that] prohibit the use of

---

<sup>247</sup> Eaglin, *supra* note 132, at 131; NAT'L CRIM. JUST. ASS'N & VERA INST. OF JUST., THE IMPACT OF FEDERAL BUDGET CUTS FROM FY10-FY13 ON STATE AND LOCAL PUBLIC SAFETY: RESULTS FROM A SURVEY OF CRIMINAL JUSTICE PRACTITIONERS 2–12 (2013), <https://www.vera.org/downloads/publications/impact-federal-budget-cuts-public-safety.pdf> [<https://perma.cc/8MQ8-RFX8>] (reporting survey results showing serious concern from state and local law enforcement agencies over the possibility of decreases in federal support for their law enforcement). *But cf.* Michalski & Rushin, *supra* note 137, at 61 (reporting empirical study showing that most law enforcement departments do not receive any federal funding).

<sup>248</sup> These challenges will be exacerbated by state and local laws requiring minimum levels of police funding and even policing, which further constrain local officials' control over these sorts of decisions. Su, O'Rourke & Binder, *supra* note 36, at 1218–24.

<sup>249</sup> See *supra* Part III.A.

chokeholds” ineligible for federal grant funding.<sup>250</sup> Likewise, following the DOJ’s report on policing in Ferguson, Ferguson entered into a consent decree limiting its revenue collection through the criminal justice system.<sup>251</sup> With each dollar of external funding cut, the scales of police accountability tilt closer to balance.<sup>252</sup>

### C. Rethinking Current Doctrine

Either of this Article’s reforms—exemplary damages and targeted defunding—could be adopted successfully without otherwise changing the operation of qualified immunity, indemnification, § 1988 attorney’s fees, or any of the other doctrines or practices that comprise constitutional tort law. That is not to say that these doctrines or practices are untouched by the impacts of external funding, however. Far from it. In this final section, this Article comes full circle, reevaluating the foundation of constitutional litigation in light of external funding’s influence on police accountability.

First, to the extent that qualified immunity is intended to curb *overdeterrence* in this context, external funding’s influence diminishes the need for the doctrine. While the agency-cost problems to which qualified immunity is directed may lead individual officers to undervalue the marginal societal *benefits* of policing action, external funding will lead their departments to undervalue the marginal societal *costs*. Whatever the combined effect of these influences is, it is likely different from what the Supreme Court has assumed to be true: that without qualified immunity, officials “‘err always on the side of caution’ because they fear being sued,” i.e., that overdeterrence will result.<sup>253</sup> Indeed, because external funding is concrete and immediate whereas the threat

---

<sup>250</sup> Exec. Order No. 13,929, 85 Fed. Reg. 37,325, 37,325–26 (June 16, 2020). There were two federal bills introduced that same summer that would have similarly withheld federal funding from law enforcement agencies that failed to regulate police chokeholds. JUSTICE Act, S. 3985, 116th Cong. § 105 (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 363 (2020).

<sup>251</sup> Consent Decree at 19, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016). This, in turn, has drawn significant attention to such revenue collection, with the *New York Times* in particular leading a push to decrease municipal reliance on self-funding mechanisms. Editorial Board, *supra* note 159.

<sup>252</sup> Although this proposal is literally to defund the police, it is orthogonal to any push to “Defund the Police”: limiting external sources of funding need not be a part of *net* overall decreases in police funding. A locality that wishes to maintain or even increase its policing can still do so via increases in local public funding; the key aspect of this proposal is that funding from external sources is cut, not that the overall levels of funding for the police must decrease.

<sup>253</sup> *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Put algebraically, agency-cost problems lead  $[b]_{[considered]} < [b]_{[actual]}$ , but external funding leads  $[c]_{[considered]} < [c]_{[actual]}$ . There is no particular reason to believe that the effect of agency-cost problems is the greater one, and that overdeterrence is therefore the bigger concern.

of constitutional tort liability is uncertain, external funding's impacts will likely disproportionately dominate over any agency-cost problems, leading to systemic underdeterrence even in the absence of qualified immunity.<sup>254</sup>

Second, this Article's discussion of the effects of external funding on the police accountability system highlights the crucial importance of indemnification. If the costs of constitutional wrongdoing are not ultimately borne by police departments and municipalities—and therefore taxpayers—then constitutional tort suits' bulwark against failures in governance will be diminished.<sup>255</sup> Individual officers contemplating potentially unconstitutional conduct may still be deterred by the threat of personal liability, but departmental and municipal incentives to make better policy will be limited to that provided by *Monell* suits (which have been significantly constrained by the Supreme Court).<sup>256</sup> This means that departments and municipalities will make policy influenced by external funding without any significant check provided by constitutional tort damage awards.<sup>257</sup>

The importance of indemnification is particularly salient for this Article's exemplary damages reform, which is almost entirely dependent on the continuation of indemnification.<sup>258</sup> Yet a municipality that suddenly faces the prospect of indemnifying officers for millions of dollars of exemplary damages may balk at that prospect. It could be therefore worthwhile to formalize the essentially voluntary local practice of indemnification via state or federal statutory change along with any adoption of this Article's proposed exemplary damages reform. One particularly intriguing way of doing so would be to embrace vicarious liability, a private law tort doctrine that holds employers

---

<sup>254</sup> This would be particularly true if indemnification remains. Because indemnification provides a largely redundant (to qualified immunity) shield against agency-cost problems, eliminating only the doctrine of qualified immunity without adopting any accompanying reforms aimed at external funding will do little to cure the underdeterrence of constitutional wrongdoing. See *supra* Parts II.D.1–D.2. Qualified immunity and indemnification serve similar ends through similar means, and they must be considered together in any package of reforms.

<sup>255</sup> To be precise, the deterrent effect of these suits will be limited to specific deterrence. See generally *United States v. Peltier*, 422 U.S. 531, 556 (1975) (Brennan, J., dissenting) (“Deterrence can operate in several ways. The simplest is special or specific deterrence—punishing an individual so that he will not repeat the same behavior.” (emphasis omitted)).

<sup>256</sup> *Monell* permits § 1983 suits to be brought directly against municipalities. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978). Given the restrictive nature of such suits, however, *Monell* suits are litigated relatively infrequently. See Brett Raffish, *Municipal Liability in Police Misconduct Lawsuits*, LAWFARE (Oct. 19, 2020), <https://www.lawfareblog.com/municipal-liability-police-misconduct-lawsuits> [<https://perma.cc/782P-5CKH>].

<sup>257</sup> Put algebraically, municipal policymaking will consider whether  $[b] + [external\ funding] > [political\ costs]$ .

<sup>258</sup> Indemnification is also necessary for passing exemplary damages along to departments and municipalities. *Monell* provides no help whatsoever in this regard, given that exemplary damages cannot be assessed in *Monell* suits. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

liable for torts committed by employees acting within the scope of their employment.<sup>259</sup> Vicarious liability would effectively shift liability from officers to their departments, achieving much the same end of indemnification—and, like indemnification, largely obviate the need for qualified immunity. Because the Supreme Court has held that Congress did not intend to impose vicarious liability through § 1983, adopting vicarious liability in constitutional torts would likely require federal statutory reform.<sup>260</sup>

Finally, although external funding does not directly implicate § 1988 or its policy goal of incentivizing unprofitable constitutional tort suits via fee shifting, this Article's exemplary damages reform would. Countering the influence of external funding via exemplary damage awards would diminish the need for fee shifting.<sup>261</sup> This would be particularly true if such exemplary damages are implemented via fixed statutory damages, which would incentivize constitutional tort litigation irrespective of the size of compensatory damages. Such a statutory damages regime could do enough to incentivize small-value constitutional litigation that it could take the place of § 1988, even if the incentive effects of statutory damages would not perfectly replicate those of fee shifting. Replacing § 1988 fee shifting with this Article's fixed statutory damages reform should be seriously considered, as this would add a degree of predictability to constitutional tort liability while ensuring that constitutional tort damages better match the exact deterrence needs at hand.<sup>262</sup>

Each of these reforms would ideally be adopted in conjunction: the influence of external funding should be mitigated via exemplary damages or limitations on external funding; *and* qualified immunity should be eliminated; *and* vicarious liability should replace indemnification; *and* § 1988 should be reconsidered in light of any implementation of statutory damages. Nevertheless, whether adopted together or individually, the result will be a more sound system of police accountability, one that better resists the distorting influences of external funding.

## V. CONCLUSION

At the heart of this Article's examination lies a key question: who controls the police? That is not to say, however, that only the police matter. Government control and accountability more generally is also important—and, indeed, external funding likely plays a role throughout the government, as state actors,

---

<sup>259</sup> Smith-Drelich, *supra* note 40, at 580–81; *see also* Meyer v. Holley, 537 U.S. 280, 285 (2003).

<sup>260</sup> Monell, 436 U.S. at 692, 694; *cf.* Lisa D. Hawke, Note, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 848 (2005) (reporting study showing that “about half of the cities accept respondeat superior liability under state law for misconduct by individual police officers”).

<sup>261</sup> *See supra* Part II.D.3.

<sup>262</sup> Determining what amount of statutory damages would be necessary to sufficiently offset § 1988 awards falls beyond the scope of this Article.

not simply the police, are subject to both political checks and the bulwark of constitutional tort liability. The questions raised by this Article's examination of police funding should also be asked of other categories of governmental funding.

The stakes, though, are particularly high in the context of policing. The nature of policing puts officers in a formidable position vis-à-vis the constitutional rights of those around them. We allow police officers to carry weapons off limits to the general public and to use those weapons in a wide range of circumstances that would be unthinkable for civilians. We give police officers the authority to stop, to question, and to arrest. Affording these special powers to officers makes them particularly influential and particularly dangerous, making possible a wide range of conduct potentially violative of constitutional rights and liberties. Ensuring that policing practices are responsive to community needs, therefore, is not merely a matter of good governance—it is essential to guarding the rights and liberties enshrined in the Constitution. But so long as our system of police accountability ignores the external funding pouring into the coffers of municipalities and police departments everywhere, policing will not be responsive to community needs.