THE HAMILTON PROJECT

Advancing Opportunity, Prosperity, and Growth

POLICY BRIEF 2019-06

A Proposal to End Regressive Taxation through Law Enforcement

MARCH 2019

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Our strategy calls for combining public investment, a secure social safety net, and fiscal discipline. In that framework, the Project puts forward innovative proposals from leading economic thinkers — based on credible evidence and experience, not ideology or doctrine — to introduce new and effective policy options into the national debate.

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A Proposal to End Regressive Taxation through Law Enforcement

Over the past few decades the focus of the criminal justice system in some places has shifted away from public safety and toward public finance. This shift has generated profound economic and legal burdens for the politically and economically vulnerable, particularly for underrepresented minorities. Given the incredibly high cost and heavy burden of successfully challenging a charge or negotiating a reduced sentence, the economically punitive "law enforcement as taxation" approach has resulted in a de facto form of regressive taxation. The financial burden is often greater—not just as a percent of income, but also in absolute magnitude—for lower-income households. Using law enforcement to generate revenue is also economically destructive, leading to substantial collateral damage for those who must navigate the labor market with a criminal record and the associated debt of a criminal conviction.

In a new Hamilton Project policy proposal, Michael Makowsky of Clemson University presents evidence that local governments' reliance on fees, fines, and asset forfeitures for revenue generation shapes law enforcement activities. Makowsky proposes a set of reforms that would decouple revenue collection from the public safety objectives of law enforcement. Breaking this link would realign the criminal justice system with its traditional public safety goals.

The Challenge

Many local governments cope with balancing the needs of their constituents with the fiscal strains of weakened property tax bases, uncertain state transfers, and growing legacy costs of pensions and other obligations. Some governments in distress have found fiscal relief in the revenue generated by traffic tickets, fines, and adjudication fees, as well as in the property seized on the front lines of the drug war.

Research connects jurisdictions with budgetary shortfalls to more speeding tickets issued, more property seized, and increased arrests for drug crimes, DUI, and prostitution. For some local governments and their police departments, these revenues have become substantial.

Makowsky's analysis of comprehensive data reveals wide variation in the use of these revenue sources (figure 1). In 2012 county fine and forfeiture revenues were equivalent to 15 percent of all law enforcement operating expenses. In 10 percent of police departments these revenues accounted for 32 percent of operating expenses. For the 1 percent of counties that were most reliant on the revenues, fines and forfeitures covered nearly the entire budget. Law enforcement has become a source of revenue that this minority of local governments depends on for fiscal solvency.

How Law Enforcement Generates Revenue: Fines, Fees, and Seizures

Local governments can raise revenue through the criminal justice system in a variety of ways. They can charge defendants fees and

FIGURE 1A.

Per Capita Fine and Forfeiture Revenues, 1977–2012

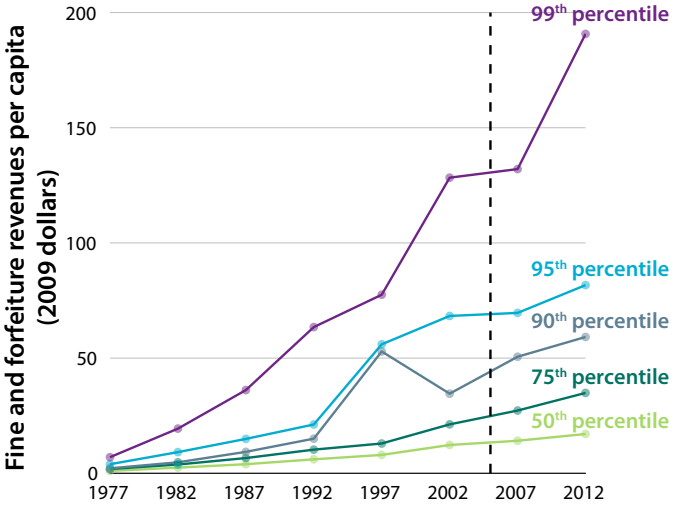
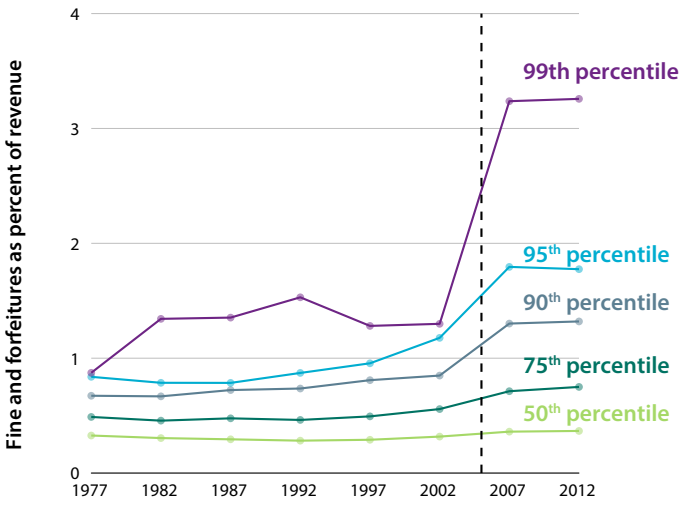


FIGURE 1B.

Fine and Forfeiture Share of Total Revenues, 1977–2012



Source: Census of Governments, U.S. Census Bureau 1977–2012; author's calculations.

Note: In 2005 the Census of Governments revised the classification manual, which for some local districts moved fine and forfeiture revenues from residual categories (e.g., from miscellaneous revenues). This did not have a significant impact on the median county but appears to have motivated many local governments above the 90th percentile to recategorize revenues as fines and forfeitures. This revision coincided with the expansion of the Census of Governments to smaller counties, generally those with populations less than 250,000. The dotted black line indicates when these changes took place. Percentile bins are recalculated in each year. The fines and forfeitures variable in the census of governments includes fines and forfeited bail and collateral but excludes the sale of confiscated property. Thus, it is likely an underestimate of the total revenues collected from total fines and forfeitures.

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Roadmap

- Congress will reform federal equitable sharing so that revenues from asset seizures by local-federal collaborations go to both federal and state general funds rather than to local police departments.
- State legislatures will end the retention of seized property by the arresting agency. Instead, law enforcement will remit any revenues collected through forfeitures to the state general fund.
- State legislatures will redistribute criminal justice revenues as per capita block grants to localities.
- State legislatures will require that any revenues generated via law enforcement be rebated to individuals at the state level. Households will qualify by one of two mechanisms: (a) by filing an income tax return that year with a gross household income below the SNAP threshold, or (b) by currently receiving SNAP benefits.

fines, or they can seize defendants' property (sometimes without conviction of a crime) if they deem it to be related to a crime.

While all arrests can potentially generate revenue for the local governing body, the author points out that some arrests, such as drug-related arrests, are potentially more lucrative than others. Civil asset forfeiture is also a prized source of revenue: in 26 states police can keep 100 percent of the value of any forfeited cash or property, and in an additional 16 states police can keep at least 50 percent.

A Regressive Tax

The author argues that fees, fines, and forfeitures amount to a steeply regressive tax due in part to the fact that low-income adults and youths from low-income households are more likely to be arrested and incarcerated. For example, in Miami and Philadelphia the average felony defendant earned less than $7,000 in the year prior to their arrest.

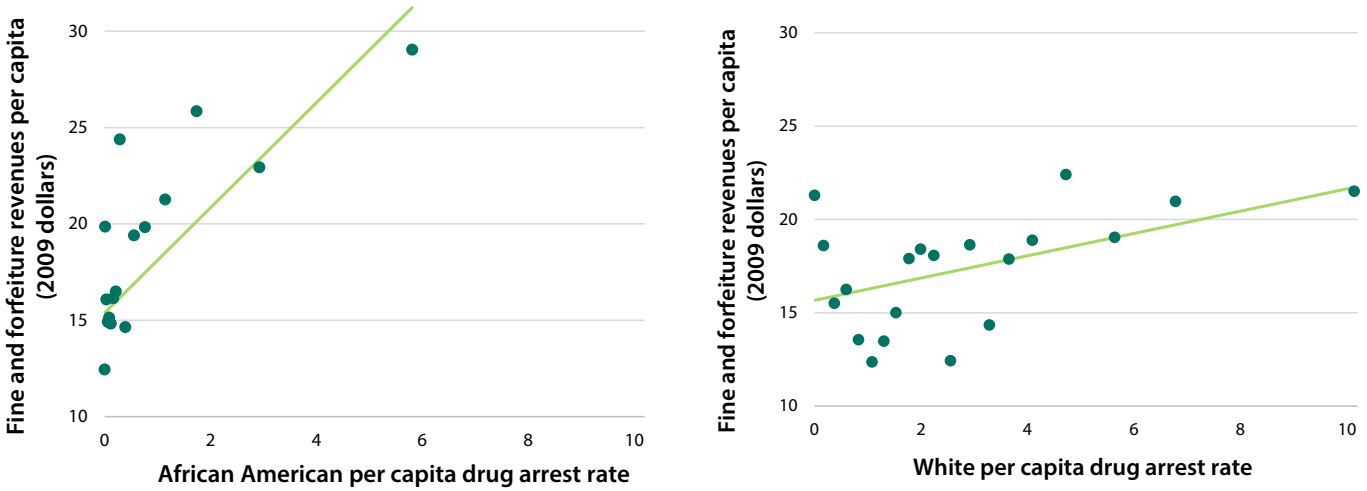
The costs associated with the criminal justice system become more regressive when we consider the financial barriers to paying up front, mounting an effective legal challenge, or negotiating a reduced sentence. Defendants without the resources to hire private legal representation are convicted at higher rates and incur harsher penalties, including larger financial penalties. Arrests in which property is seized are especially attractive to local governments and enforcement agencies as sources of revenue, in part because they are costly to defend against and in part because the burden of proof for retrieving the property is often on the defendant. Regardless of whether property is seized, it is costly to a defendant to have to await trial in jail, bail is often prohibitively expensive, and the price of hiring effective legal representation is beyond the reach of many. The optimal response for many low-income arrestees is to enter a guilty plea.

Racial Bias

The author argues that raising revenue through the criminal justice system exacerbates both racial bias and the expropriation of wealth from politically vulnerable groups. Figure 2 shows that per capita fine and forfeiture revenues for local governments within counties increase quickly with the arrest rate of African Americans for drugs; by contrast, revenues increase more slowly with the arrest rate of whites for drugs.

FIGURE 2.

Fine and Forfeiture Revenues over Drug Arrest Rates



Source: Bureau of Justice Statistics 2007–12; Census of Governments, U.S. Census Bureau 1977–2012; author's calculations.

Note: The figure is a binned scatterplot (Stepner 2014), where the x-axis variable (arrests per capita) is split into equal-sized bins, and the points represent the mean of the x-axis and y-axis variables (fine and forfeiture revenue per capita) within each bin. The line is a regression line using the full population of observations. The full population is county-year pairs for 2007 and 2012.

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A New Approach

Makowsky shows that law enforcement activities are shaped by incentives for revenue-motivated policing. He proposes four complementary reforms to directly address these incentives.

Proposal #1: End the Retention of Federal Equitable Sharing Revenues by Law Enforcement Agencies

When local and federal law enforcement departments cooperate in seizing property, the federal government may share the proceeds with the local department according to federal law rather than state law. This allows local law enforcement to bypass any state laws that prohibit retention of proceeds from forfeited property. Indeed, for a 25 percent reduction in the share of proceeds that local police were able to retain, researchers have found a corresponding $0.02 per capita increase in the revenues transferred to police via equitable sharing.

To dismantle fully the property seizure mechanism that has taken hold in police departments all over the country, the author proposes that federal equitable sharing be reformed. In the absence of this federal reform, increases in equitable sharing applications—and subsequent dilution of the benefits from state reform—would be an expected outcome from the complete removal of forfeiture proceeds from police budgets.

Makowsky proposes that revenues collected through federal equitable sharing be transferred to state and federal general funds, rather than to the relevant law enforcement agencies. With this change, federal equitable sharing would no longer constitute a workaround for law enforcement in states that have prohibited police departments from retaining property seizure revenues.

Proposal #2: End the Retention of Forfeited Property Proceeds by the Arresting Agency

As of early 2019 eight states do not allow the arresting police department to retain seized property, and instead require that police remit any collections to the state. Makowsky proposes that the other states adopt this policy and require police departments to turn over revenues to the state's general fund.

This policy would have several consequences. Most fundamentally, it would reduce the incentive for police to prioritize revenue generation. It could also diminish racial bias in policing: some research finds that the racial bias in arrest rates that typically exists when local governments are operating with a budget deficit is nonexistent in the eight states that do not allow the arresting police department to retain seized property. Beyond mitigating an important source of bias, severing the relationship between seized property and police department revenues—as Philadelphia most recently worked toward (see box 1)—removes an incentive to pursue lucrative arrests.

However, Makowsky's second proposal alone might not be enough to address the challenge completely. Even when police departments remit seized funds to a general or earmarked state fund, the subsequent distributions to local jurisdictions are often disproportionately allocated to police budgets, sometimes in rough proportion to the individual law enforcement agency's seizures.

Proposal #3: Redistribute Criminal Justice Revenues as Per Capita Municipal Block Grants

A key aspect of the policy challenge is the direct link between criminal justice revenues and the budgets of the arresting agency and local government. Each fine, seized asset, and court fee has a nontrivial impact on both the total revenues and the relevant law enforcement line items in the local budget. Makowsky proposes that all revenues be remitted to the state budget and reallocated as block grants to local governments in strict accordance with constituent population. Under this proposal, nearly all the additional revenue generated by any individual arrest would flow to jurisdictions other than the one in which the arrest occurred. At the same time, the per capita revenues received by a typical jurisdiction would be roughly like those received under the status quo. Only the 5 or 10 percent of local governments that are most reliant on criminal justice revenues would experience a substantial decline in funding. For these municipalities, the

BOX 1.

Dismantling Property Seizure in Philadelphia

In September 2018 the Institute for Justice announced a settlement with Philadelphia city officials to reform the city's civil forfeiture laws. The agreement consists of two consent decrees, with one limiting the city's civil forfeiture practices and the other entitling past victims to reparations. The first consent decree places tight restrictions on the conditions under which Philadelphia police and prosecutors are allowed to seize assets for forfeiture. Specifically, the settlement bans the confiscation of property for drug possession and forbids the seizure of any cash amount less than $1,000 without firm proof of criminal activity. Police officers must now give the arrestee a detailed receipt of the property seized and explain the process to retrieve seized property. In addition, the first decree ensures a prompt hearing for citizens to request the return of their seized assets and mandates the oversight of a judge in any legal proceedings.

The second component of the settlement establishes a $3 million fund to compensate those whose property was wrongly seized. In addition, in acknowledgment of the incentives facing police in the previous regime, the decree specifically requires that police departments give all forfeiture receipts to community-based drug prevention and rehabilitation programs. This effort to eliminate use of confiscated assets for funding police salaries or other self-interested purposes is welcome. How police react, including any alternative means they discover for funneling confiscated revenues to police budgets, will inform future policy design.

Learn More about this Proposal

This policy brief is based on The Hamilton Project policy proposal "A Proposal to End Regressive Taxation through Law Enforcement," which was authored by

MICHAEL MAKOWSKY

Clemson University

reduced incentive to collect revenue would result in better and more-equitable law enforcement.

Ideally, revenues included in the per capita block grant would include not just fines and forfeitures, but also the fees that defendants encounter at every step of the criminal justice system, including court and processing fees. Per capita redistribution would ensure that the busiest courts remain sufficiently funded, while undermining any incentives to compensate for lost law enforcement revenues with increased revenues from adjudication.

Proposal #4: The Public Safety Rebate

Makowsky further proposes that all revenues generated via law enforcement be rebated to constituents at the state level. This rebate is structured as a lump-sum transfer to the low-income constituents most likely to be victimized both by crime and by historical inequities in law enforcement. In contrast to his other policy proposals, this policy offers revenue neutrality (rather than simply budget neutrality) in law enforcement. That is, an officer's decision to make an arrest or issue a citation, or a judge's decision to issue a bench warrant for unpaid criminal justice debt, would not lead to increased revenue for any agency or jurisdiction.

Rather than build a new administrative mechanism for rebating the funds, the author proposes to tie the public safety rebate to the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, to minimize additional administrative cost.

Public Safety Rebate: Basic Structure

The pool of law enforcement revenues will be divided into shares, the value of which will depend on the number of qualifying households. Households will qualify by one of two mechanisms: (a) by filing an income tax return that year with a gross household income below the SNAP threshold, or (b) by currently receiving SNAP benefits.

Under the author's plan, households can qualify for up to four shares, depending on the fraction of the maximum SNAP benefit they would have qualified for that year: >0–25 percent = 1 share, 26–50 percent = 2 shares, 51–75 percent = 3 shares, > 75 percent = 4 shares. Using the SNAP qualification structure—which phases out gradually with increasing income—ensures that low-income communities will receive the rebate, while also minimizing any possible labor distortions.

Benefits and Costs

Rebating criminal justice revenues in per capita block grants would reallocate fiscal resources across jurisdictions, which would incur associated costs and benefits. For most jurisdictions, these shifts would be small.

Distributing criminal justice revenues to individuals would have negative implications for local government budgets. However, for 80 percent of counties, fines and forfeitures remain less than 1 percent of total revenues. It would be necessary for governments that do depend on these revenues to shift to other revenue sources.

Whether with a per capita rebate to jurisdictions or a public safety rebate to individuals, Makowsky expects that reduced fiscal motivation would lead to a shift from high-revenue, high-discretion, police-instigated arrests and citations (e.g., drug possession, jaywalking, speeding tickets) to lower-revenue, community-supported enforcement objectives that involve less officer discretion (e.g., arrests and citations for burglary, auto theft, assault). This shift would reflect a better alignment of law enforcement with its traditional public safety objectives and mitigate inequities in the criminal justice system.

Conclusion

Police officers are tasked with making difficult decisions, under pressure and with limited information, where errors can risk their lives and those of others. Maximizing the probability of success means securing the cooperation, input, and trust of the community served—which requires elimination of revenue-motivated policing.

Left unchecked, the use of law enforcement to generate revenue will likely increase. States and municipalities are currently making capital investments to increase the net contributions of law enforcement to their budgets in the form of license plate readers, credit card processing, and database integrations. The more dependent government budgets become on these revenues, the more politically difficult and fiscally costly it will be to relieve police of their unwelcome role as tax collectors.

Makowsky argues that eliminating the police retention of seized property and severing the link between revenues and expenditures constitute the core objective for reform. However, there is also an opportunity to improve the relationship between communities and law enforcement by returning proceeds of law enforcement to the communities currently suffering the most.

Questions and Concerns

1. How do your proposals fit together?

The first two policies aim to ensure that fine and forfeiture revenues are distributed across all a state's local governments, rather than to only municipalities or agencies. The third policy is a statewide redistribution of all criminal justice proceeds, with specific emphasis on the inclusion of fees, across all local governments within a state. This is, in effect, a fully complementary expansion of the first two proposals.

The fourth proposal is a rebate of fine and forfeiture proceeds to a state's low-income constituents. Like the second proposal, this one disallows local governments from retaining fine and forfeiture revenues. Instead of redistributing revenues in the form of per capita local grants, though, it rebates the revenues directly to constituents. Notably, statewide remittance of criminal justice fees—collected by courts and prisons—is complementary with a rebate of fine and forfeiture revenues.

Given concerns that a local government may shift a greater share of the financial burden from fines and forfeitures to judicial fees in an effort to evade contributing to a law enforcement rebate program, the optimal policy bundle would include both the remittance of criminal justice fees to the state general fund for statewide per capita redistribution as well as the rebate of fines and forfeiture revenues to low-income constituents, ensuring that high-population court systems remain adequately funded while continuing to constrain revenue-driven law enforcement and preventing adjudication proceedings from becoming a greater focus of revenue generation.

2. Are there alternative mechanisms for distributing the public safety rebate?

Using the SNAP structure is appealing because (a) SNAP is already established, and (b) there is an existing population of qualified low-income households who would stand to immediately benefit from the tax in every state. There are, of course, alternative disbursement structures available to states. The rebate could be constructed as a lump sum augmentation to Earned Income Tax Credit (EITC) payments that simply varies year to year with the size of revenues collected. Roughly half of states do not offer their own EITC independent of the federal program, however, and several of those states exclude individuals without dependent children entirely. In addition, the EITC goes only to those who receive labor income. The rebate could also be distributed as a means-tested college scholarship program for children of low-income families. The benefit of this method is that it would concentrate the benefits to a smaller number of people, increasing the impact. The small number of recipients within low-income communities, however, would undermine the benefits of engaging with the broader population.

3. Should states be allowed to exclude individuals from receiving the public safety rebate?

Any state effort to limit the population with access to the rebate is of paramount concern and could conceivably undermine the program. Several states still deny individuals with criminal records access to SNAP and Temporary Assistance for Needy Families (TANF). Any state that implements a public safety rebate program would benefit not just from structuring inclusion using the federal SNAP thresholds, but also from guaranteeing that SNAP eligibility, or similar means-testing, would be the only metric for determining eligibility for receiving the rebate. If we exclude populations disproportionately caught in the criminal justice system from the benefit, such a rebate program would not be effective.

Highlights

In this paper Michael Makowsky of Clemson University describes how the reliance of local governments on fees, fines, and asset forfeiture for revenue generation shapes law enforcement activities. Makowsky proposes a set of reforms that would decouple the revenue collection from the public safety objectives of law enforcement. Breaking this link would realign the criminal justice system with its traditional public safety goals.

The Proposals

End the retention of federal equitable sharing revenues by law enforcement agencies. The author proposes reforming the federal equitable sharing program so that state revenues collected through federal equitable sharing be transferred to state general funds, rather than to the relevant law enforcement agencies.

Eliminate the retention of proceeds from forfeited property by the local arresting agency. The author proposes that any revenues collected through forfeitures will be remitted to the state general fund.

Redistribute criminal justice revenues as per capita municipal block grants. The author proposes that all revenues be remitted to the state budget and reallocated as block grants to local governments in strict accordance with constituent population.

Require that any revenues generated via law enforcement be rebated to individuals. The pool of fine and forfeiture revenues would be divided into shares, the value of which will depend on the number of qualifying households. Households will qualify by one of two mechanisms: a) filing an income tax return that year with a gross household income below the SNAP threshold, or b) currently receiving SNAP benefits.

Benefits

Eliminating the police retention of seized property and severing the link between revenues and expenditures will bring law enforcement activities in closer alignment with public objectives. In addition, by returning the proceeds of law enforcement to the communities currently suffering the heaviest burden of crime, the proposal would be a major step toward reestablishing public trust in police officers to serve and protect their communities.

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