

Police Funding as a Deficit of Democracy, not Deterrence

GUYORA BINDER, * ANTHONY O’ROURKE ** & RICK SU ***

Professor Noah Smith-Drelich’s Funding the Police is a welcome addition to the growing literature on structural barriers to implementing abolitionist visions of public safety. Professor Smith-Drelich’s central argument is consistent with our findings, in Defunding Police Agencies, that external funding of local police agencies imposes a set of “indirect constraints” that ensure robust police budgets and disincentivize spending on non-police social programs that might better ensure public safety. We believe, however, that Professor Smith-Drelich may be too sanguine about the deterrence potential of constitutional tort judgments. Misconduct judgments are largely financed through commercial insurance and public borrowing. Legal changes and political pressures are also foreclosing cuts to police budgets. As a result, misconduct judgements may actually contribute to pathological policing by starving municipalities of the resources necessary to address social problems through social services. In the most fiscally distressed localities, it is often the very people and communities most terrorized by abusive policing who ultimately bear the costs of efforts to hold the police accountable through the courts. This points to a disturbing irony that inheres in efforts to hold police accountable through liability judgments: it is the people, and not the police, who pay.

TABLE OF CONTENTS

I.	TWO FORMS OF BUDGETARY CONSTRAINT	2
II.	THE LIMITS OF THE DETERRENCE MODEL	4
III.	THE DISTORTIVE EFFECTS OF PRIVATELY FINANCED POLICE JUDGMENTS	7
IV.	CONCLUSION	9

* Distinguished Professor and Hodgson Russ Scholar, University at Buffalo School of Law, SUNY.

** Joseph W. Belluck and Laura L. Aswad Professor, University at Buffalo School of Law, SUNY.

*** Professor, University of North Carolina School of Law.

The authors wish to thank Alec Herbert and Shelley Payne for their excellent research assistance.

I. TWO FORMS OF BUDGETARY CONSTRAINT

*Funding the Police*¹ is a welcome addition to the expanding scholarly literature that attempts to “think alongside” social movements and take seriously the insights these movements have produced.² One such insight is that more policing is, at the very least, often not the optimal way to reduce violence. A better strategy is to increase opportunities and incentives for the most disadvantaged members of a community to engage in prosocial conduct.³ Coincidentally, that would also reduce the need for policing and its attendant costs.⁴ Shifting resources from a strategy of deterring crime to one of building prosocial capacity is the aspiration of the movement to defund the police.⁵ Yet as we showed in *Defunding Police Agencies*, the current process of financing law enforcement leaves local democratic majorities little realistic opportunity to make this choice.⁶

This process constrains local majorities and determines police budgets both directly and indirectly.⁷ Direct constraints include state legislation requiring local governments to maintain staffing, pay and benefits at certain levels, not only for the sheriff’s offices primarily responsible for policing 40% of the American population⁸ but for local departments as well.⁹ In addition, state legislation often requires and enforces collective-bargaining agreements governing pay, benefits and job security.¹⁰ These job protections can lock in staffing levels even when crime, population or tax base declines. State law often requires local governments to indemnify police against liability judgments for police misconduct.¹¹ Because these state-mandated expenditures are not state-funded, they limit local capacity to fund other services.

But, as Professor Smith-Drelich recognizes, external funding of local police constrains local funding priorities as well and deprives local government of the power over police policy and conduct that budgetary authority enables.¹² This

¹ Noah Smith-Drelich, *Funding the Police*, 84 OHIO ST. L.J. (forthcoming 2023).

² Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826 (2021). For what we view as our own contributions to this project, see Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1371–74 (2021) [hereinafter O’Rourke, Su & Binder, *Disbanding Police Agencies*]; and Rick Su, Anthony O’Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1198–99 (2022) [hereinafter Su, O’Rourke & Binder, *Defunding Police Agencies*].

³ Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1205.

⁴ *Id.* at 1201–02.

⁵ *Id.* at 1209–10.

⁶ *Id.* at 1231.

⁷ *Id.* at 1229–31.

⁸ O’Rourke, Su & Binder, *Disbanding Police Agencies*, *supra* note 2, at 1371–74.

⁹ Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1218–20.

¹⁰ *Id.* at 1221–22.

¹¹ *Id.* at 1220–21.

¹² Smith-Drelich, *supra* note 1, at 21–22.

insight is consistent with our findings in *Defunding Police Agencies*¹³ that such external funding constitutes a set of “indirect constraints” deterring local governments from reducing law enforcement agencies’ budgets, while incentivizing them to use police rather than other social services to address social problems.¹⁴ Examples of such external funding include federal grant programs like “Community Oriented Policing Services” as well as smaller state grant programs.¹⁵ The same is true of laws from other levels of government authorizing police to fund themselves through fines and forfeitures.¹⁶ When police agencies fund hires with temporary sources like public and private grants, those expenses are locked in, forming a ratchet that can force local legislatures to redirect resources from social services into the police budget when these sources dwindle.¹⁷

This dynamic helps explain how police budgets grew during the War on Crime, even as social service budgets shrank.¹⁸ It also explains the phenomenon of mission creep, in which police take over social service functions better performed by officials trained for and professionally committed to them.¹⁹ Police may neglect these functions or treat them as occasions for surveillance or violence.²⁰ This structure of police funding therefore links two contemporaneous features of neoliberalism, the simultaneous expansion of the carceral state and decline of the welfare state. A number of studies have examined how the neoliberal state came to “govern through crime”²¹ by massively expanding incarceration.²² Ours contextualizes the smaller, but still significant, growth of policing.

Locally elected officials’ lack of effective control over police budgets also reduces their capacity to influence police practices.²³ In fact, they may be

¹³ Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1231–61.

¹⁴ *Id.*

¹⁵ *Id.* at 1231–46.

¹⁶ *Id.* at 1252–59.

¹⁷ *Id.* at 1244.

¹⁸ *Id.* at 1240–52, 1259–60.

¹⁹ Su, O’Rourke, & Binder, *Defunding Police Agencies*, *supra* note 2, at 1240–42.

²⁰ *See id.* at 1241.

²¹ *See, e.g.*, JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 75–78 (New York: Oxford Univ. Press 2007).

²² *Id.* at 130. *See generally* BERNARD HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (Harvard University Press 2011); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (Duke University Press 2009); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (Cambridge University Press 2008); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (Earl Lewis, George Lipsitz, Peggy Pascoe, George Sánchez, Dana Takagi eds., University of California Press 2007); John Clegg & Adaner Usmani, *The Economic Origin of Mass Incarceration*, 3 *CATALYST* (2019).

²³ *See* O’Rourke, Su & Binder, *Disbanding Police Agencies*, *supra* note 2, at 1359.

tempted to incentivize reform by tying it to *increases* in funding.²⁴ But, even if the reforms wither, the budget increases survive. Moreover, the collective bargaining agreements discussed above, along with Law Enforcement Bill of Rights laws in some states, strong and vigilant unions, and insular officer culture further limit the capacity of elected officials to reform police behavior.²⁵

II. THE LIMITS OF THE DETERRENCE MODEL

If elected leaders can do little to improve police conduct, it seems we must turn to deterrence strategies. Perhaps courts can deter police abuses, by imposing civil liability on police agencies. Many scholars have held out the hope that civil rights damage remedies might deter police abuses.²⁶ Yet there are two difficulties.

First civil rights law defines the harms of policing too narrowly to overcome the governance problems it is supposed to solve. One motive for confining police governance authority to the local level is to maximize the influence over of Black and Brown voters, concentrated by residential segregation, over the policing decisions most likely to affect them. Although Black and Brown residents of cities often have significant local voting strength, we have seen that states have often removed significant issues of police governance from their agenda, including police budgets.²⁷ As we showed in *Disbanding Police Agencies*, this continues a long history of state distrust of the urban poor as the very population to be policed.²⁸ These expectations are reflected in patterns of policing. The well-documented racial disparities in police stops, searches, arrests, and violence suffered by racial minorities²⁹ are costs of policing, yet constitutional standards equating race discrimination with explicit bias render such patterns presumptively constitutional.³⁰ Federal grants may induce police departments to equip officers with more potent firearms, or more crash-resistant vehicles. These may result in more civilian deaths from uses of force the Supreme Court has deemed constitutional.³¹ A state law allowing police departments to keep a share of fines and fees may incentivize more traffic stops

²⁴ See Su, O'Rourke, & Binder, *Defunding Police Agencies*, *supra* note 2, at 1237.

²⁵ O'Rourke, Su & Binder, *Disbanding Police Agencies*, *supra* note 2, at 1346–50.

²⁶ See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 240 (2013); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 496 (2011); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL OF RTS. J. 755, 796 (1999).

²⁷ See Su, O'Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1219.

²⁸ O'Rourke, Su & Binder, *Disbanding Police Agencies*, *supra* note 2, at 1366–71.

²⁹ Guyora Binder & Robert Weisberg, *What is Criminal Law About?*, 114 MICH. L. REV. 1173, 1201 (2016); O'Rourke, Su & Binder, *Disbanding Police Agencies*, *supra* note 2, at 1340–42.

³⁰ See *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

³¹ See *Scott v. Harris*, 550 U.S. 372, 375–76 (2007); *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014).

in a low wealth jurisdiction with a correspondingly low tax-base, but without violating the Constitution.³² Thus the problems with nonlocal, nonlegislative funding of police transcend unconstitutional policing, to include policing that is merely undemocratic.

Second, empirical investigation casts doubt on the potential of civil rights tort awards to deter even the subset of harmful policing that violates the Constitution. Thus, Professor Joanna Schwartz found that even police agencies that must pay for misconduct settlements and judgments out of their own budgets do not necessarily suffer any financial burden from doing so.³³ Indeed, Professor Schwartz finds that “[s]ome law enforcement agencies pay millions of dollars from their budgets for settlements and judgments yet feel no financial consequences of these payments because they receive money during the budgeting process for litigation payouts, overages are paid from central funds, and litigation savings are not enjoyed by the agencies.”³⁴ This is to be expected, in light of the funding structure we summarized above. The same constraints that prevent elected officials from investing in social services at the expense of police budgets should also discourage depleting police budgets to pay damage awards. Thus, civil rights damage awards may leave policing unaffected, while reducing funds available for other social services. And since police are unusual among city services in their ability to seek external funding,³⁵ elected officials may respond to damage awards by encouraging them to do so. Moreover, these perverse effects of civil rights damage awards may be most pronounced in municipalities with the poorest populations—precisely those communities most in need of social services and least able to afford fines, fees, and forfeitures.³⁶

In *Funding the Police*, Noah Smith-Drelich illuminates how some of these budgetary realities frustrate the deterrent effect of civil rights damage awards.³⁷ In so doing, Professor Smith-Drelich both applies and tests an influential law-and-economics model of civil rights law, which treats “constitutional tort damage awards...[as] key not only to holding the police accountable, but for moderating untoward influences on policing.”³⁸ This model presumes that the costs, benefits, and control of police are all local and democratic: police are recruited, controlled, and paid by local residents, in their capacities as both

³² See Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1252–59.

³³ See Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1176–84, 1192 (2016).

³⁴ *Id.* at 1192.

³⁵ See generally Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2.

³⁶ Abby Phillip, *Why the Poor Often Pay for Police Misconduct with Their Pocketbooks*, WASH. POST (June 3, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/03/why-the-poor-and-disadvantaged-often-pay-for-police-misconduct-with-their-pocketbooks/?variant=bacbca59707f74b0> [<https://perma.cc/5B87-CBAW>].

³⁷ Smith-Drelich, *supra* note 1, at 4.

³⁸ *Id.* at 11.

voters and taxpayers.³⁹ These residents are potential victims of both crime and police abuse. Thus, they should be able to balance these competing risks, and the relative benefits of policing and other services. But collective choice by majority rule may undervalue interests of electoral minorities—particularly those who are unpopular or under-resourced—and differentially distribute the costs (and benefits) of policing. Accordingly, civil rights tort liability is supposed to correct such “governance failures”⁴⁰ by internalizing the costs policing imposes on underrepresented electoral minorities into collective decision-making.

Professor Smith-Drelich then identifies “external funding” of police—from sources other than local tax revenue—as one reason why police practices may not respond to the financial discipline of liability judgments as conventional law-and-economics theory might expect.⁴¹ These external funds include such public funding sources as government grants,⁴² and the publicly authorized collection of fines, fees, and forfeitures from targets of police investigation.⁴³ Here Professor Smith-Drelich draws on *Defunding Police Agencies*,⁴⁴ and other literature⁴⁵ criticizing the distortionary effects of such funding on the scale and focus of policing. He proceeds to show that such funding can also frustrate the deterrent function of damage awards.⁴⁶ External funders of police are not liable and do not directly experience the costs of unconstitutional policing strategies, while their funds can offset damage awards.⁴⁷ Importantly, he calls attention to the less-noticed influence of private donations, featuring a powerful example from his own litigation concerning protests against the Dakota Access Pipeline.⁴⁸ In this example, the private funder directly benefits from unconstitutional policing.⁴⁹ In others, private funders may favor unconstitutional policing ideologically. In such circumstances, they may

³⁹ *Id.* at 6 (“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.”).

⁴⁰ *See id.* at 10.

⁴¹ *See id.* at 21–36.

⁴² *Id.* at 27.

⁴³ Smith-Drelich, *supra* note 1, at 31–33.

⁴⁴ Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1200.

⁴⁵ Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 955 (2015); U.S. DEP’T OF JUST. CIV. R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015); Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1185–1205 (2017); Roger Michalski & Stephen Rushin, *Federal (De)Funding of Local Police*, 110 GEO. L.J. ONLINE 54, 61, 65 (2021).

⁴⁶ Smith-Drelich, *supra* note 1, at 21–22.

⁴⁷ *See id.* at 12–13.

⁴⁸ *Id.* at 22.

⁴⁹ *Id.*

purposely indemnify the offending police department and frustrate the aims of civil rights law.⁵⁰

Such private funding, Professor Smith-Drelich argues, contributes to the subversion of what should be the “essentially local and essentially public nature of police funding and control.”⁵¹ Private donations may be particularly influential on the discretionary judgment of public officials in disputes raising difficult legal issues—for example, where claims of property collide with claims under laws protecting environmental or labor interests, or where laws against public disorder or even violence, collide with speech protections. The Dakota Access Pipeline illustrates some of these dynamics.⁵² Police may choose to avoid forcible intervention for prudential reasons, deferring the judgment of controversial questions to courts or political decisionmakers. Alternatively, they may elect to be the first mover, and thereby shift the onus of institutional comity onto other branches of government that may be reluctant to antagonize the police officials on whom they rely to enforce their decisions. Thus, where legal rights are not clearly defined, police favor may be particularly valuable. The strategy of buying police support may therefore be particularly attractive to disruptive industries, expecting to disappoint settled expectations, impose novel external costs, and provoke resistance.

III. THE DISTORTIVE EFFECTS OF PRIVATELY FINANCED POLICE JUDGMENTS

If anything, Professor Smith-Drelich may be too sanguine about the deterrence potential of constitutional tort judgments in our current landscape of externally-funded and externally-governed and funded policing. To cover the costs of misconduct settlements and judgments, municipalities typically rely on some combination of the private insurance market (either directly or through reinsurance) and borrowing from the private sector.⁵³ It is through these private financing instruments that cities can pay for liability judgments without reducing police budgets in the wake of liability judgments.⁵⁴ Thus, much like the federal grants we analyzed in *Defunding Police Agencies*,⁵⁵ these private financing instruments can maintain police budgets even as money dries up to

⁵⁰ *Id.* at 16–17, 21–22.

⁵¹ *Id.* at 21.

⁵² See Smith-Drelich, *supra* note 1, at 22.

⁵³ See Schwartz, *supra* note 33, at 1162–64. As Professor Schwartz observes, many municipalities purchase insurance from public entity intergovernmental risk pools rather than from the private sector. *Id.* at 1162–64. These risk pools, however, tend to purchase reinsurance through the private sector. See Kenneth S. Abraham, *Police Liability Insurance after Repeal of Qualified Immunity, and Before*, 56 TORT TRIAL & INS. PRAC. L.J. 31, 36 (2021).

⁵⁴ See Schwartz, *supra* note 33, at 1176–84, 1192.

⁵⁵ See Su, O’Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1231–61.

address social problems through non-policing strategies.⁵⁶ Nevertheless, Professor Smith-Drelich expresses hope that one of these instruments, the commercial insurance market, serves to deter police misconduct.⁵⁷ But even this proposition recently has been cast into doubt.

Either directly or indirectly,⁵⁸ nearly all municipalities rely on the commercial market to protect themselves against paralyzing police liability judgments.⁵⁹ Drawing on John Rappaport's pathbreaking empirical research,⁶⁰ Smith-Drelich argues that this commercial market helps bolster police accountability, both by incentivizing insurance companies to regulate police misconduct and by punishing problematic police agencies with higher premiums.⁶¹ However, any such regulatory benefit of insurance is ancillary to its core function: encouraging productive risk-taking, thereby by reducing the insured's incentive to behave cautiously (in other words, creating "moral hazard").⁶² Drawing on this insight, Professors Kenneth Abraham and Daniel Schwarcz have recently cast doubt on the regulation thesis, arguing that it is highly unlikely that liability insurance results in less loss—in the policing context, harm caused by misconduct—than would exist in the absence of insurance.⁶³

Regardless of which side in this debate is correct, there is also a tension (which our current research explores) between efforts to hold police accountable through the democratic process and our collective reliance on the commercial insurance and municipal bond markets to finance police liability judgments. As we noted in *Defunding Police Agencies*, and further argue in the forthcoming work, private insurance providers may influence municipal policies in ways that complicate and subvert local democratic efforts to regulate police agencies.⁶⁴ Compounding this problem, using municipal bond market to finance police judgments may create pressure on municipalities to expand police budgets and

⁵⁶ We elaborate on this point in a forthcoming work.

⁵⁷ Smith-Drelich, *supra* note 1, at 14.

⁵⁸ Large cities tend to self-insure against misconduct judgments, while smaller municipalities have increasingly begun to rely on intergovernmental risk pools. See Abraham, *supra* note 53, at 33–36. Both of these options, however, make use of reinsurance purchased through the commercial market as a backstop against expectedly large liability judgments. *Id.*

⁵⁹ See John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369, 369 (2016).

⁶⁰ See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1542, 1547–50 (2017); Schwartz, *supra* note 33, at 1188–92.

⁶¹ Smith-Drelich, *supra* note 1, at 14–15.

⁶² Kenneth S. Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance*, 98 IND. L.J. 215, 219 (2022).

⁶³ *Id.* at 220–21. See also Abraham, *supra* note 53, at 46–50.

⁶⁴ Su, O'Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, 1260 n.443 (supplying anecdotal evidence suggesting that insurance companies have played a quiet role in opposing grassroots initiatives to reduce police budgets).

the expense of other social services, and to incentivize policing policies that create the conditions for misconduct.⁶⁵

IV. CONCLUSION

These dynamics suggest that judgments against police may do more than simply fail in the goal of deterring police misconduct. Because they are financed through private borrowing, in a legal and political landscape that forecloses cuts to police budgets, misconduct judgments actually *contribute* to pathological policing by starving municipalities of the resources necessary to address social problems through social services. This points to a disturbing irony that inheres in efforts to hold police accountable through liability judgments: it is the people, and not the police, who pay. In the most fiscally distressed localities, it is often the very people and communities most terrorized by abusive policing who ultimately bear the costs of efforts to hold the police accountable through the courts. Cities, unlike the federal government, cannot print money. Nor do they have as large a redistributive pool of funds as federal or state governments. Hence, to finance judgments against the police, these cities must tax or borrow. Taxes, however, often takes form of legal financial obligations imposed on the most vulnerable members of the community.⁶⁶ And borrowing is more easily paid for by cutting social services than by reducing the budgets of the police agencies that, by virtue of their misconduct, are responsible for the borrowing.⁶⁷

As a result, the cities where police abuse is likely to be the most relevant are the ones where the effects of a judgment against the police is likely to be the most perverse. We do not see this irony as an argument for abandoning efforts to hold police accountable, including through courts. We do, however, deem it a powerful argument for restructuring law and government to strengthen local democratic control over policing.⁶⁸ While local democratic control over policing is not a panacea,⁶⁹ it at least entrusts decisions about how to hold police accountable to those who must pay for those decisions.

⁶⁵ We further explore this issue in a forthcoming work. For a related argument, see JACKIE WANG, *CARCERAL CAPITALISM* 151–92 (Semiotext(e) 2018).

⁶⁶ Su, O'Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1252–59.

⁶⁷ *See id.* at 1241.

⁶⁸ *See* O'Rourke, Su & Binder, *Disbanding Police Agencies*, *supra* note 2, at 1398c1404; Su, O'Rourke & Binder, *Defunding Police Agencies*, *supra* note 2, at 1267–69.

⁶⁹ For the most compelling case against participatory democratic control over policing, *see* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 787–91 (2020).