ILLEGALITY IN A WORLD OF PREDATION

BETH A. COLGAN*

Professor Bernadette Atuahene's theoretical framework for "stategraft" denotes actions by which state agents transfer cash or property from the people to the state in violation of the law or basic human rights norms. Because illegality is central to stategraft, attention to it may push other forms of state predation—those that are legal or whose legality are uncertain—out of the realm of reform given the dearth of funding for legal advocacy and difficulties in marshalling lawmaker attention. This Essay suggests, however, that consideration of stategraft provides opportunities for advocates to push back against legal, or not yet illegal, predatory practices. It does so by looking to recent advocacy efforts related to two types of predatory behaviors outside the bounds of stategraft: the use of fines and fees, and civil forfeiture practices.

INTRODUCTION

In *A Theory of Stategraft*, Professor Bernadette Atuahene presents a theoretical framework for "stategraft," a term denoting the actions by which state agents transfer cash or property from the people to the state's own coffers in violation of the law or basic human rights norms.[1] Illegality is central to stategraft, and distinguishes it from other forms of "[s]tate

1 Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1 (2023). The theory's focus on the transfer of wealth to the government would exclude circumstances in which government actors abuse their power for personal gain. *See, e.g.*, Adam Ferrise, *Man Says Arrested East Cleveland Cops Stole Cash from His Wallet: 'I'm Standing up for Everyone They've Done This to Before,'* CLEVELAND.COM (July 12, 2021, 7:03 PM), https://www.cleveland.com/metro/2021/07/man-says-arrested-east-cleveland-cops-stole-cash-from-his-wallet-im-standing-up-for-everyone-theyve-done-this-to-before.html [https://perma.cc/894B-CMM7]; Jessica Lussenhop, *Who Were the Corrupt Baltimore Police Officers?*, BBC (Feb. 13, 2018), https://www.bbc.com/news/world-us-canada-43035628 [https://perma.cc/6J4D-VEGY]; Kirk Semple, *Latino Drivers Report Thefts by Officers*, N.Y. TIMES (Mar. 2, 2014), https://www.nytimes.com/2014/03/03/nyregion/latino-drivers-report-thefts-by-officers.html [https://perma.cc/QU57-5REC]. While an examination of how predatory but legal systems and unsettled questions of illegality may contribute to these forms of corruption is worthy of study, I likewise set aside that set of problems here.

predation" that may otherwise be "economically or socially devastating," including the use of fines and forfeitures to generate revenue within the bounds of the law.[2]

Professor Atuahene's focus on illegality offers several benefits. The existence of illegal actions effected by local, state, and federal government officials raises questions about America's claims of operating as a liberal democracy in which all people—including government actors and institutions—are subject to the rule of law.[3] It pushes us to consider how, particularly for those politically vulnerable communities most likely to be the victims of such illegal conduct, stategraft "uniquely attenuates confidence in democratic institutions"—"the anchor of a functioning democracy."[4] And it presents opportunities to galvanize advocacy efforts around fighting illegal government behavior.[5]

In setting out the parameters and benefits of the use of an organizing term like stategraft, however, Professor Atuahene raises a particular concern: "[H]ighlighting the illegality component of complex social problems can downplay other essential aspects of the injustice" and may therefore "crowd out more radical change, including dismantling the system altogether."[6]

This Essay recognizes that concern as legitimate, while also positing that it may be a feature, rather than a bug. It begins in Part I by situating (illegal) stategraft in relation to two other areas of concern: legal but predatory practices and practices whose legality remains unsettled. Situating the theory in this way highlights the inability of stategraft's conceptual boundaries to capture more instances of state-sponsored harm. With that relationship in mind, this Essay turns in Part II to the question of whether stategraft's focus on illegality may crowd out broader reform efforts—particularly given the dearth of funding for legal representation and difficulties in marshalling lawmaker attention—or whether it may in fact promote structural reform efforts. Despite the risks, a focus on stategraft offers unique opportunities for advocates to shine a light on legal but predatory practices and unsettled areas of law and to effectively strategize as to which methods of advocacy will be most effective in vindicating harms against the people.

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2 Atuahene, *supra* note 1, at 25–26.

3 *See id.* at 124–26 (describing the promotion of a sanitized version of liberal democracy "which ignores the fact that state predation has been integral to the development and perpetuation of Western social orders" to maintain consistency with the values of "rule of law and protection of private property").

4 *Id.* at 127; *see also id.* at 123 ("[S]tategraft . . . unsettles the democratic agreement between citizen and state.").

5 *Id.* at 129–31 ("Fighting illegality is an unimpeachable cause and powerful unifier that can create common cause among both strangers and friends.").

6 *Id.* at 130.

I
SITUATING STATEGRAFT

In order to understand the potential risks and rewards of a focus on illegality that is central to stategraft, it is useful to consider where illegality does, does not, or merely could lie in relation to government practices. In what follows, I take up two examples of stategraft offered by Professor Atuahene: the use of fines and fees to generate revenue for the city of Ferguson, Missouri, and the use of civil forfeitures to generate revenue through the seizure of money and property.

A. Illegal Stategraft Versus Legal Predation

At the local, state, and federal levels, government officials and institutions strip money and property, frequently from the most politically and financially vulnerable members of society, in ways that are—often shockingly—legal.

Take, for example, the municipal court and policing scandal in Ferguson, Missouri. The City of Ferguson, like many other jurisdictions around the country,[7] certainly committed stategraft. The theory of stategraft is sufficiently broad to encompass not only court or other official decrees of illegality, but also actions identified by legal analysts to constitute illegal conduct through "informal yet well-substantiated readings of a law."[8] The Department of Justice investigation of Ferguson, which resulted in a detailed report documenting a raft of unconstitutional practices used by municipal actors to create opportunities to issue revenue-generating tickets for violations of municipal and state laws, constitutes such a reading.[9]

The illegalities documented in the Ferguson report included widespread practices by which police officers stopped people without reasonable suspicion or arrested people without probable cause in violation of the Fourth Amendment, as part of a scheme coordinated by the city's elected officials, municipal court, and police department to generate revenue through ticketing minor offenses.[10] As the report laid out, in addition to designing police operations to maximize opportunities for ticketing, officers were directed

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[7] *E.g.*, RAM SUBRAMANIAN, JACKIE FIELDING, LAUREN-BROOKE EISEN, HERNANDEZ STROUD & TAYLOR KING, BRENNAN CTR. FOR JUST., REVENUE OVER PUBLIC SAFETY: HOW PERVERSE FINANCIAL INCENTIVES WARP THE CRIMINAL JUSTICE SYSTEM 13–14 (2022) (describing how courts in Michigan and Louisiana improperly benefit from court-imposed fines and fees); John Archibald, *Police in This Tiny Alabama Town Suck Drivers into Legal 'Black Hole,'* AL.COM (Jan. 20, 2022, 3:00 PM), https://www.al.com/news/2022/01/police-in-this-tiny-alabama-town-suck-drivers-into-legal-black-hole.html [https://perma.cc/Z2NE-U6SH] (reporting on a police practice of ticketing for a left-lane violation that did not exist in the traffic code).

[8] Atuahene, *supra* note 1, at 19.

[9] *Id.* at 105.

[10] C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2–3 (2015) [hereinafter FERGUSON REPORT].

and incentivized to aggressively enforce the municipal and state codes by issuing as many tickets as possible during each stop to ensure that the "correct volume" of revenue would be generated.[11]

The report includes the following example of how multiple-citation ticketing worked as a mechanism for revenue generation in Ferguson:

> [I]n the summer of 2012, an officer detained a 32-year-old African-American man who was sitting in his car cooling off after playing basketball. The officer arguably had grounds to stop and question the man, since his windows appeared more deeply tinted than permitted under Ferguson's code. Without cause, the officer went on to accuse the man of being a pedophile, prohibit the man from using his cell phone, order the man out of his car for a pat-down despite having no reason for believing he was armed, and asked to search his car. When the man refused, citing his constitutional rights, the officer reportedly pointed a gun at his head, and arrested him. The officer charged the man with eight different counts, including making a false declaration for initially providing the short form of his first name (e.g., "Mike" instead of "Michael") and an address that, although legitimate, differed from the one on his license. The officer also charged the man both with having an expired operator's license, and with having no operator's license in possession.[12]

The Department of Justice's conclusion that the officer's behavior violated the Fourth Amendment is undoubtedly sound. Most obviously, the officer behaved illegally when he conducted a *Terry* frisk without sufficient evidence the man was armed[13] and when he pointed a gun at the man's head without any evidence of danger posed by the man to the officer or others.[14]

But notably, it is also true that the officer's actions, like those of many officers in the Ferguson police department, were heavy-handed. The Supreme Court has afforded so much authority to law enforcement to stop and search people that the Ferguson police had the option of generating ticketing revenue *legally*, as police departments around the country do every day.[15]

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[11] *Id.* at 10–12 (describing how prosecutors and high-ranking members of the police department pressured officers to ticket by posting each officer's citation rates in the stationhouse; closely monitoring citation counts; and linking ticketing to promotions, pay raises, staffing assignment, evaluations, and discipline).

[12] *Id.* at 18–19.

[13] *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (requiring reasonable suspicion a person is armed with a weapon in order to conduct a pat-down search, now known as a "*Terry* frisk").

[14] *See* Scott v. Harris, 550 U.S. 372, 381–86 (2007) (explaining that to assess whether law enforcement use of force is constitutionally reasonable, courts should weigh the threat posed by the suspect to the officer or members of the public against the risk of bodily harm to the suspect created by the officer's actions).

[15] *See generally* DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022) (detailing how the Supreme Court's Fourth Amendment doctrine provides significant power for law enforcement, including in ways that generate revenue from fines and forfeitures).

The officer had the option to engage the man in much the same way within the parameters of the power afforded to law enforcement by the Supreme Court.[16] As noted in the report, the officer's initial detention of the man was legal because the officer had observed the car's tinted windows.[17] The officer's decision to order the man out of his car was also legal.[18] From there, the officer could have legally placed the man under arrest for the window tinting violation even if that violation was punishable only by fine.[19] He would have then been able to legally handcuff the man[20] so he would be unable to use his cell phone. And the officer could have then legally conducted a search incident to that lawful arrest that would have been significantly more intrusive than a pat-down.[21] He could also have legally asked for consent to search the car to seek evidence of crimes unrelated to the window tinting violation without telling the driver that he could refuse.[22] And while he may ultimately have been mistaken that the use of a short-form name or current address were "ticketable" offenses,[23] and could not ticket for

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16 To be sure, there is significant evidence in the Ferguson report to suggest that Ferguson police engaged in racially discriminatory policing. *See* FERGUSON REPORT, *supra* note 10, at 64–78 (describing how Black people were disproportionately harmed by Ferguson law enforcement and municipal court predation). While the Court has held that racial bias by individual officers is irrelevant for Fourth Amendment purposes, it may raise equal protection issues. Whren v. United States, 517 U.S. 806, 812–13 (1996) (rejecting a Fourth Amendment challenge to intentionally discriminatory enforcement and explaining that the Equal Protection Clause is the relevant constitutional basis). It is possible—with significant effort and resources—to challenge policing on equal protection grounds. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (challenging stop-and-frisk practices on the grounds of racial and national origin discrimination). But it is also the case that the Supreme Court has made it extremely difficult to succeed in equal protection cases by requiring plaintiffs prove the government acted with discriminatory intent. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a showing of disparate impact was insufficient to sustain an equal protection claim).

17 FERGUSON REPORT, *supra* note 10, at 18–19.

18 Pennsylvania v. Mimms, 434 U.S. 106, 107–11 (1977) (per curiam) (holding that it is permissible under the Fourth Amendment for an officer to direct the vehicle's occupants to step out of the vehicle once it has been lawfully stopped and characterizing the incremental intrusion as de minimis).

19 *See* Atwater v. City of Lago Vista, 532 U.S. 318, 348–50, 354 (2001) (holding that so long as there is probable cause to believe an offense occurred, law enforcement may lawfully arrest a person even if the offense is minor and punishable only by a fine).

20 *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."); Brown v. Illinois, 422 U.S. 590, 593 (1975) (describing handcuffing as a component of the suspect's arrest).

21 *See* United States v. Robinson, 414 U.S. 218, 224–26 (1973) (affirming the categorical rule that upon a lawful arrest, law enforcement may conduct a search of the person and the area within the person's immediate control).

22 Schneckloth v. Bustamonte, 412 U.S. 218, 231–33 (1973) (holding that law enforcement is not required to advise a person that consent may be withheld).

23 Even this would have been forgiven if Ferguson's ordinances were sufficiently vague so that a reasonable officer might have misunderstood the code. Heien v. North Carolina, 574 U.S. 54, 57 (2014) (holding that an officer's reasonable mistake of law can serve as the basis for the individualized suspicion necessary to effectuate a stop).

both of the mutually exclusive license violations, he could have legally issued tickets for any other violations discovered during the encounter, including but not limited to the factually-supported license violation and the window tinting offense.[24]

In other words, there was significant money to be made through ticketing *legally* by working within the Fourth Amendment doctrine's strictures. As in most—if not all—jurisdictions, Missouri's traffic code is so broad that officers need not make up traffic violations to effectuate a stop, as the Ferguson police sometimes did,[25] but need only wait until drivers inevitably violate some actual traffic provision.[26] And also like in many jurisdictions, Ferguson's police were not limited to ticketing for traffic offenses; Ferguson's municipal code "address[ed] nearly every aspect of civic life," including "housing violations, such as High Grass and Weeds; requirements for permits to rent an apartment or use the City's trash service; animal control ordinances, such as Barking Dog and Dog Running at Large; and a number of other violations, such as Manner of Walking in Roadway."[27]

Another example of stategraft—and therefore illegality—offered by Professor Atuahene involves not fines and fees, but civil forfeitures.[28] Under civil forfeiture statutes, law enforcement may seize money or property believed to be proceeds of a crime, purchased with proceeds of a crime, or an instrumentality of a crime (e.g., a car driven during the commission of an offense).[29] As with fines, examples of civil forfeiture abuse abound.[30]

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[24] *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (explaining that an arresting officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"). Though ticketing for a codified offense is generally allowed, the extreme racial disparities in ticketing noted in the Ferguson Report led the Department of Justice to conclude that Ferguson police and municipal officials were violating federal statutory law—Title VI and the Safe Streets Act—as well as the Equal Protection Clause. FERGUSON REPORT, *supra* note 10, at 64–78; *see also supra* note 16.

[25] *E.g.*, FERGUSON REPORT, *supra* note 10, at 17 (describing an incident where the police stopped and ticketed a man for a broken brake light that was not broken).

[26] *See* Randy Petersen, *Let's Reconsider Traffic Enforcement*, RIGHT ON CRIME (Jan. 17, 2019), http://rightoncrime.com/2019/01/lets-reconsider-traffic-enforcement [https://perma.cc/BB7U-H44Z] (describing a police training in which officers were told: "If you are following a car for more than three blocks and you haven't found a violation to stop it for, then you just aren't looking").

[27] FERGUSON REPORT, *supra* note 10, at 7.

[28] Atuahene, *supra* note 1, at 5–6.

[29] *See, e.g.*, 18 U.S.C. § 981(a) (providing that courts shall order property forfeitures for certain criminal offenses).

[30] Over the last decade, exceptional reporting by investigative journalists has documented instances of stategraft as well as legal—or possibly legal—predation through the use of civil forfeiture. *E.g.*, Anna Lee, Nathaniel Cary & Mike Ellis, *TAKEN: How Police Departments Make Millions by Seizing Property*, GREENVILLE NEWS (Apr. 22, 2020, 7:34 PM), https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002 [https://perma.cc/228C-Z4VN] (summarizing the findings of an investigation project inquiring into

Professor Atuahene provides as one example the Philadelphia Police Department's confiscation of over $69 million worth of cash and property, including family homes, between 2002 and 2014.[31] After years of litigation, in 2021, the Eastern District of Pennsylvania approved a class action settlement grounded on the notion that Philadelphia's system violated due process.[32] Specifically, property owners seeking the return of their money and property should have been afforded the opportunity to contest their forfeitures before a neutral judge, and not the same district attorney's office that filed the forfeiture actions.[33] Under Professor Atuahene's model, that decision confirmed that Philadelphia's civil forfeiture practices constituted stategraft.

Again, the Supreme Court has legalized much of how lawmakers have designed federal, state, and local civil forfeiture systems. As noted above, the Court's Fourth Amendment doctrine places few barriers to law enforcement's ability to search and seize.[34] Further, the Supreme Court has blessed the use of these encounters pretextually, allowing officers to employ stops for minor offenses as an avenue to investigate drug and other crimes.[35] The Court has also approved the seizure of money and property based only on probable cause that the items were in some way related to a crime.[36] It has restricted the application of both the Double Jeopardy Clause and the Confrontation Clause with respect to civil in rem forfeitures.[37] It has interpreted the Sixth Amendment right to counsel to be inapplicable in civil forfeiture proceedings,[38] often leaving those whose cash or property has been

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the use of civil forfeiture by police departments and describing the severity of the abuse of civil forfeiture in South Carolina); Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize [https://perma.cc/4ZYX-BLTA] (describing the practice of civil forfeitures on highways); Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/M8WW-8AEJ] (providing examples of the abuse of civil forfeiture).

31 Atuahene, *supra* note 1, at 5.

32 Sourovelis v. City of Philadelphia, 515 F. Supp. 3d 321, 328 (E.D. Pa. 2021).

33 *Id.* at 328–29.

34 *See supra* notes 15–27 and accompanying text.

35 *See* Whren v. United States, 517 U.S. 806, 810–13 (1996) (holding that law enforcement may seize a person so long as there is probable cause to believe the person committed a crime, even if the officer's actual motivation for conducting the seizure is due to the person's race).

36 Cooper v. California, 386 U.S. 58, 61–62 (1967) (upholding the search and seizure of a car under California's forfeiture statute in connection with an arrest for narcotics possession and transportation).

37 United States v. Ursery, 518 U.S. 267, 274–87 (1996) (double jeopardy); United States v. Zucker, 161 U.S. 475, 481 (1896) (confrontation).

38 Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the Sixth Amendment right does not apply to non-felony cases unless imprisonment is ordered); *see also* Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 88 (2001) (regarding lower court rejections of Sixth Amendment claims in the civil forfeiture context).

seized to face complex processes alone.[39] And the Court has held that civil forfeiture systems that do not provide an innocent owner defense do not violate due process.[40] Although the Court has provided some protections related to civil forfeiture,[41] it has given government actors wide latitude to use civil forfeiture legally.

In short, whether in relation to fines and fees or civil forfeitures, stategraft exists alongside legal but predatory structures that lawmakers have crafted and courts have approved. The importance of that to understanding the risks and benefits of focusing on stategraft is addressed in Part II below.

B. Areas of Unsettled Legality

The theory of stategraft focuses on illegality within settled areas of law. Evidence of the illegality necessary to establish stategraft may, therefore, take the form of formal court findings of a violation of settled law. It may also be an "informal yet well-substantiated reading[] of a law" by an entity that has gathered evidence that the law has been violated, even short of a formal determination of illegality by a court.[42] It does not, however, encompass unsettled areas of law.

Again, Ferguson provides a useful example of how much law remains unsettled, and thus outside the bounds of stategraft. The Ferguson municipal court system was able to generate revenue as effectively as it did in part because it did not provide counsel to those appearing before it.[43] Without counsel, not only did obvious constitutional violations of the kind identified in the Department of Justice's report go unchallenged, but so too did

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[39] *See* Richardson *ex rel.* 15th Cir. Drug Enf't Unit v. $20,771.00, U.S. Currency, 878 S.E.2d 868, 887–88 (S.C. 2022) (Beatty, C.J., concurring in part and dissenting in part) (describing the difficulties of facing civil forfeiture proceedings without the aid of counsel); *see also* Stillman, *supra* note 30 (reporting the observations of Louis Rulli, Professor of Law and Director of Clinical Programs, University of Pennsylvania Law School, regarding the complexities of representation in civil forfeiture cases).

[40] Bennis v. Michigan, 516 U.S. 442, 446–53 (1996). Typically, "innocent" ownership centers on questions around the property owner's knowledge of or consent to the alleged criminal activity or whether the owner took reasonable steps to prevent the property's use in the criminal act. *E.g.*, KY. REV. STAT. ANN. § 218A.410(1)(j); 18 U.S.C. § 983(c)-(d).

[41] *See, e.g.*, Austin v. United States, 509 U.S. 602, 604 (1993) (holding that the Excessive Fines Clause applies to civil forfeitures); Lees v. United States, 150 U.S. 476, 480 (1893) (holding that the Fifth Amendment's privilege against self-incrimination applies in civil forfeiture actions); Boyd v. United States, 116 U.S. 616, 633–35 (1886) (holding that both the Fourth Amendment and the Fifth Amendment's privilege against self-incrimination applied to in rem forfeitures).

[42] Atuahene, *supra* note 1, at 19.

[43] Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1183–203 (2017) (detailing that Ferguson's revenue-generating scheme may have been disrupted had individual defense counsel been available to raise a variety of challenges arising under the Fourth Amendment and the due process, equal protection, and excessive fines clauses).

questions of law yet to be answered.[44]

Under Professor Atuahene's definition, Ferguson's denial of counsel does not constitute stategraft, as the Department of Justice report merely noted "considerable concerns" about the practice without reaching a conclusion as to its constitutionality.[45] The inconclusive nature of the report on this point is likely due to the state of the relevant doctrine. In *Scott v. Illinois*, the Supreme Court limited the Sixth Amendment right to counsel in non-felony cases (as all cases in Ferguson's municipal court were) to circumstances in which a term of imprisonment is imposed.[46] In other words, the Court determined that the imposition of fines was too minimal a punishment to warrant that protection. Later, in *Alabama v. Shelton*, the Court held that counsel *is* required in cases in which courts impose suspended terms of incarceration (including where continued suspension was dependent on payment of economic sanctions), given the risk that incarceration could result.[47] But what of a circumstance like that in Ferguson, where the court merely imposed fines, rather than suspended sentences of incarceration, but also routinely issued arrest warrants for nonpayment of fines that led to periods of incarceration?[48] That question remains unresolved.

In fact, the unsettled nature of the law on a variety of topics is a frequent and ongoing issue for advocates in Ferguson. As explained by Brendan Roediger, who is Director of the St. Louis University School of Law Civil Advocacy Clinic and has frequently represented people subjected to fines and fees in the municipal courts of Ferguson and other municipalities in the region, even after the Department of Justice investigation, new legal issues continue to emerge. These have included the following questions:

> Can cities use bail and incarceration to extort cash from poor people? Can city courts make up additional costs out of thin air and pocket the cash? Can rich people pay for a special municipal court that only prosecutes homeless people and releases them on the condition that they clean up after major municipal events?[49]

Likewise, the legality of many aspects of civil forfeiture practices remains unsettled. To take but one example, the question of whether a person's financial condition is relevant to determining whether the forfeiture

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44 *Id.* at 1192–96.

45 FERGUSON REPORT, *supra* note 10, at 58.

46 440 U.S. 367, 373–74 (1979).

47 535 U.S. 654, 666–67 (2002).

48 *See* FERGUSON REPORT, *supra* note 10, at 58. Muddying the waters even further, the Court has recognized that the Due Process Clause may afford a right to counsel, on a case-by-case rather than categorical basis, in child support contempt hearings in which the ability to pay is at issue when determining whether a parent may be incarcerated for failure to pay. Turner v. Rogers, 564 U.S. 431, 448–49 (2011).

49 Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 213–14 (2021).

violates the Eight Amendment's Excessive Fines Clause remains open.[50] The Supreme Court has held that to be unconstitutionally excessive, the severity of economic sanctions must be grossly disproportionate to the seriousness of the offense.[51] Lower courts have split as to whether the severity of that punishment should be measured only by the dollar value of the sanctions or instead should include consideration of the financial effect the sanctions would have on the person punished.[52] To date, the Supreme Court has declined to resolve the question.[53]

Once these issues are resolved, they may well fit within the definition of stategraft; however, for now, they remain beyond its purview. The implications of the exclusion of both predatory but legal practices and practices with unsettled legality from stategraft's umbrella are addressed next.

II
PROMOTING STRUCTURAL REFORM BEYOND ILLEGALITY

Having situated stategraft in relation to predatory but legal practices and those with unsettled legality, this Essay turns to the following question: Does the focus on illegality central to stategraft risk undermining broad structural reform efforts, or might it do meaningful work in support of curbing governmental abuses?

This question is worth considering because, as Professor Atuahene herself notes, a potential shortfall of the theory is that it may crowd out efforts to reform other forms of predatory—yet legal or *not yet* illegal—government behaviors.[54] This is a particularly important concern in light of the dearth of funding for legal representation for affected people and communities. While grassroots community efforts have made serious and important inroads in promoting reforms in this area, the need for legal

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50 Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (citing *Bajakajian*, 524 U.S. at 340 n.15) (noting the Court had not yet taken a position). This also remains an open question with respect to the fines and fees at issue in Ferguson. The Department of Justice report noted that the municipal court afforded "legally inadequate fine assessment methods that d[id] not appropriately consider a person's ability to pay" in contradiction to a Missouri statutory requirement, but did not address the applicability of the Excessive Fines Clause. FERGUSON REPORT, *supra* note 10, at 44, 53 (citing MO. REV. STAT. § 560.026); Colgan, *supra* note 43, at 1196–99.

51 United States v. Bajakajian, 524 U.S. 321, 334 (1998).

52 *Compare, e.g.*, Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 99, 101–02 (Colo. 2019) (holding that a person's financial circumstances are relevant to an excessiveness determination), *and* City of Seattle v. Long, 493 P.3d 94, 110–16 (Wash. 2021) (relying on history of the Excessive Fines Clause dating back to Magna Carta along with recent legal scholarship and court cases to conclude that financial condition is relevant to an excessiveness determination), *with* United States v. Rosales-Gonzalez, 850 F. App'x 668, 671–72 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 781 (2022) (holding that financial effect on the defendant is not relevant to an excessiveness analysis).

53 *Timbs*, 139 S. Ct. at 688.

54 Atuahene, *supra* note 1, at 33.

representation remains an important component of reform efforts.[55] And with no recognized constitutional right to counsel in the majority of cases in which fines, fees, and civil forfeitures are at issue,[56] representation is left to either often under-resourced civil legal aid providers, who can barely scratch the surface of meeting the wide variety of legal needs of the millions of people who meet the income qualifications for their services,[57] or—in the jurisdictions lucky enough to be situated nearby—the very few law school clinics that address these issues.[58] Under these constraints, there is always a risk that any given reform effort will squeeze out other similarly-minded efforts. In this case, the ability to challenge obviously illegal forms of wrongdoing may push advocates to spend their limited time and resources on that low-hanging fruit rather than steering their advocacy efforts toward reforming legal or uncertain practices.

There is also the risk that lawmakers will perceive success in eliminating stategraft as reform enough. Like advocates, lawmakers necessarily have finite time and resources to address myriad issues—not only fines, fees, and forfeitures, but also the environment, abortion rights, infrastructure spending, and so on. With so much on their plates, lawmakers might take the successful elimination of illegal practices as a win, full stop, and move on to what they perceive as more pressing issues. This is a particular risk in this context because lawmakers may suffer from myopia—both because of a tendency to prioritize more visibly provocative forms of abuse, and because fines, fees, and forfeitures stand to benefit lawmakers by generating revenue that can be used to support other public projects.[59]

But despite these risks, there are ways that stategraft's focus on illegality may actually promote broader reform efforts. By shining a light on behavior that is illegal, identifying instances of stategraft can create opportunities to more effectively challenge what was in its shadow: predatory practices so routine that—if perceived by lawmakers at all—appear so banal as to be harmless, and areas of the law, that if settled, could promote more robust constitutional protections. Further, because focusing

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55 For a discussion of the value of legal representation in conjunction with grassroots advocacy efforts, see generally Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017).

56 *See supra* notes 46–48 and accompanying text.

57 *See* OFF. OF ACCESS TO JUST., U.S. DEP'T OF JUST., CIVIL LEGAL AID 101 (2022), https://www.justice.gov/atj/civil-legal-aid-101 [https://perma.cc/7AY9-LTJW] (finding that while one in five Americans qualified for free civil legal assistance in 2014, more than half were turned away due to limited resources).

58 *See* Colgan, *supra* note 43, at 1184 (noting that pro bono representation through law school clinics accounted for only a small fraction of defendants in Ferguson's municipal courts).

59 *See generally* Karin D. Martin, *Monetary Myopia: An Examination of Institutional Response to Revenue from Monetary Sanctions for Misdemeanors*, 29 CRIM. JUST. POL'Y REV. 630 (2018) (analyzing lawmaker behavior in Iowa and Nevada and proposing the concept of "monetary myopia" by which lawmakers focus on the revenue-generating benefits of fines and fees rather than the societal costs of their use).

on illegality necessitates an understanding of just how little legal protection is afforded in these arenas—either because the Court and lawmakers have approved of problematic practices or because the law remains uncertain—attending to stategraft can be a useful tool for advocates in thinking strategically about the multidimensional nature of their reform efforts.

The sea change in effectiveness of fines and fees reform movements post-Ferguson provides an example of how advocates can use illegal practices to more effectively challenge the predatory systems in which they arise. Several organizations and directly affected community members worked diligently on fines and fees reform in Missouri and across the country before the Department of Justice's report on Ferguson brought widespread public attention to the issue.[60] And while there were successes at the margins of these efforts, the systemic harms caused by the use of fines and fees simply did not register with many lawmakers—after all, a $50 fine here and a $3 fee there do not seem like significant problems in the grand scheme of things. But the issue carried a different resonance when government actors were found to have employed illegal methods—even in service of a legal and typical municipal practice: the ticketing of low-level traffic and other minor offenses. This work has only grown since.

Post-Ferguson, advocates used the illegal practices of that municipality as a boogeyman, seeming to warn lawmakers that if they did not act to remedy their own systems, they would be thrust into the spotlight as the next Ferguson.[61] Doing so allowed these advocates to bring attention to the (importantly, legal) fines and fees system itself—employing narratives that challenge the system as a whole. Those narratives focused on the harms and financial instability caused by the imposition of fines and fees on people with limited financial resources.[62] Those harms include the inability to meet basic human needs such as housing, food, or medical care; being unable to attend employment or educational programming due to a loss of transportation; and

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60 In the Ferguson context in particular, this included the work of the ArchCity Defenders, a legal aid organization working alongside communities in St. Louis County to document municipal court practices before the police killing of Michael Brown brought the Department of Justice to Ferguson. *See* THOMAS B. HARVEY, JOHN MCANNAR, MICHAEL-JOHN VOSS, MEGAN CONN, SEAN JANDA & SOPHIA KESKEY, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER (2014). Other organizations working on these issues pre-Ferguson include the Brennan Center for Justice, Columbia Legal Services in Washington State, the Southern Center for Human Rights, and the Southern Poverty Law Center.

61 *See, e.g.*, LAWS.' COMM. FOR C.R. OF THE S.F. BAY AREA, E. BAY CMTY. L. CTR., W. CTR. ON L. & POVERTY, A NEW WAY OF LIFE RE-ENTRY PROJECT & LEGAL SERVS. FOR PRISONERS WITH CHILD., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6, 19 (2015), https://lccrsf.org/wp-content/uploads/2021/05/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-2015.pdf [https://perma.cc/7QNX-DGEM].

62 *See id.* at 5–8, 10–11, 13–20 (telling the stories of individuals affected by fines, as well as discussing how fines harm both individuals and communities, including communities of color and formerly incarcerated people and their families).

long-term or even perpetual debt.[63] They also include the threat or imposition of additional punishments for nonpayment, including further fines and fees, the loss of a driver's license, or arrest.[64] And the belief that a person is being punished not for the initial offense, but for their limited ability to pay, may lead to distrust in and estrangement from the government, both within and beyond criminal legal systems.[65] Importantly, the narratives around these harms were not dependent on the illegality of the government behavior.

Having used the illegalities of Ferguson to focus lawmaker attention and having built up narratives of the harms caused by both illegal and legal practices, advocates have achieved greater success in efforts to curb abuses within fines and fees systems as a whole. This has included, in various jurisdictions, elimination of certain types of economic sanctions in juvenile courts[66] and restrictions on highly punitive responses against individuals who are unable to pay, such as driver's license suspensions[67] or arrest warrants for nonpayment.[68]

Further, identifying what behavior is illegal, legal, or whose legal nature is unknown, brings with it a clearer understanding of how predatory systems operate as a whole, which can assist advocates in thinking strategically about

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63 *See, e.g.*, ALA. APPLESEED CTR. FOR L. & JUST., GREATER BIRMINGHAM MINISTRIES, UNIV. OF ALA. AT BIRMINGHAM TREATMENT ALTS. FOR SAFER CMTYS. & LEGAL SERVS. ALA., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 4 (2018), https://www.alabamaappleseed.org/underpressure [https://perma.cc/DS37-6QRF] (finding that large percentages of Alabamians with court debt burdens were forced to forgo necessary living costs, take on payday loans, rely on charity, or turn to illegal activities to attempt to stay current on court debt).

64 *See, e.g.*, William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585, 1594–96 (2020) (detailing the impact of license suspension, including suspension due to nonpayment of fines and fees); Roediger, *supra* note 49, at 224 (detailing the continued use of arrest warrants for nonpayment subsequent to the Department of Justice investigation of Ferguson).

65 *See, e.g.*, Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 19–22 (2018) (explaining how government behaviors like those in Ferguson signal to those subjected to such practices that they are excluded from the polity).

66 *See generally* Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401 (2020) (analyzing the abolition of fees in the juvenile legal system in California); Eli Hager, *California Ends Practice of Billing Parents for Kids in Detention*, MARSHALL PROJECT (Oct. 11, 2017), https://www.themarshallproject.org/2017/10/11/california-ends-practice-of-billing-parents-for-kids-in-detention [https://perma.cc/EV64-YZDC] (reporting on legislation eliminating certain juvenile court fees).

67 *See generally* Joni Hirsch & Priya Sarathy Jones, *Driver's License Suspension for Unpaid Fines and Fees: The Movement for Reform*, 54 U. MICH. J.L. REFORM 875 (2021) (analyzing the harmful impact of debt-based driver's license suspension policies and different avenues through which lawmakers and advocates are advancing reform efforts).

68 Beck v. Elmore Cnty. Magistrate Ct., 489 P.3d 820, 831–36 (Idaho 2021) (granting a writ of prohibition for the issuance of a warrant for nonpayment of fines). The *Beck* court reasoned that the court clerk's affidavit did not establish probable cause of willful nonpayment, in violation of the Fourth Amendment, and that, among other reasons, the failure to perform an ability-to-pay analysis in advance violated due process. *Id.*

what methods of advocacy to employ. Having that 30,000-foot view supports what Scott Cummings and Douglas NeJaime have called a "multidimensional advocacy" approach whereby litigation efforts, legislative advocacy, and public education campaigns can be used together to move reforms forward.[69] This approach recognizes that litigation—here, related to both illegal acts and aspects of the law that are legal or unsettled—can be used to spur lawmakers to make changes and to protect legislative gains; legislation can in turn provide both a retrenchment of predatory practices and new opportunities for litigation; and both can be used to build a record of the harms caused by predatory practices.[70] This approach can be particularly important for law-trained advocates, for whom litigation may be the most traditional approach, because it serves as a reminder that advocacy can happen not only at the courthouse, but also at the statehouse. The Constitution serves as a floor below which the government may not fall, not a ceiling above which it may not rise. Maintaining traffic codes so broad that a law enforcement officer can effectively stop any motorist at will for ticketing or for pretextual investigation is a political choice.[71] Creating an expansive set of public order offenses such as jaywalking and loitering that officers can use to detain and ticket pedestrians is a political choice.[72] Designing civil forfeiture systems that make it difficult, if not impossible, for people to challenge illegal seizures and excessive forfeitures is a political choice.[73] The failure to provide counsel is a political choice.[74] The failure to mandate meaningful ability-to-pay hearings at sentencing is a political

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69 Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1312–18 (2010) (regarding the use of multidimensional advocacy efforts in relation to the LGBT rights movement).

70 *Id.*

71 *E.g.*, Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1481–88 (2021) (explaining how the "breadth and imprecision of traffic laws create a low bar for officers to justify pulling over any driver" and how this combines with the Fourth Amendment doctrine to give law enforcement tremendous power to ticket, which falls disproportionately on motorists of color); Beth A. Colgan, *Revenue, Race, and the Potential Unintended Consequences of Traffic Enforcement Reform*, 100 N.C. L. REV. (forthcoming 2023), pt. I (detailing how governments generate fines, fees, and forfeitures through traffic policing).

72 *E.g.*, Bidish Sarma & Jessica Brand, *The Criminalization of Homelessness: Explained*, THE APPEAL (June 29, 2018), https://theappeal.org/the-criminalization-of-homelessness-an-explainer-aa074d25688d [https://perma.cc/4LEF-TFPX] (detailing policy decisions throughout the United States imposing criminal penalties for behaviors in which unhoused people must often engage to survive); Zoe Sottile, *You Will Soon Be Able to Jaywalk Ticket-Free in California*, CNN (Oct. 2, 2022, 1:06 PM), https://www.cnn.com/2022/10/02/us/california-jaywalking-law-trnd/index.html [https://perma.cc/4E3T-UUAW] (reporting on a new California law removing penalties for jaywalking in most circumstances).

73 *See infra* notes 83–85.

74 For example, Congress has created a statutory right to representation in civil forfeiture cases involving the person's primary residence or if the person is already represented by appointed counsel in a related criminal case. 18 U.S.C. § 983(b).

choice.[75] The decisions that put these systems into motion, and the decisions that continue to defend them, are all political.

An example of this multidimensional approach can be found in reform efforts related to civil forfeitures. The Institute for Justice ("IJ"), a libertarian civil rights organization, has taken a lead in civil forfeiture reform.[76] This includes litigating illegal practices related to civil forfeitures, an example of which is the litigation that resulted in the IRS returning "cash it unjustly seized from a grocery store owner in Michigan, a restaurant owner in Iowa, a distribution company on Long Island, N.Y., a bakery in Connecticut, a dairy farmer in Maryland, and two convenience store owners in North Carolina."[77] Its litigation efforts have also included challenges designed to address questions for which the law remains unsettled—including, most recently, engaging in litigation that resolved the open question of whether the Excessive Fines Clause was incorporated against the states in the affirmative.[78] At the same time, IJ is engaged in legislative advocacy[79] and public education efforts which include a fifty-state survey of forfeiture laws,[80] frequent editorials in major news outlets,[81] and a multimedia campaign.[82] Its work and the work of other advocates have shone a light on not only illegal behavior but also legal or uncertain forms of systematic predation.

Despite significant pressure from prosecutors and law enforcement that have stymied some reform efforts,[83] lawmakers in several jurisdictions have

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75 Lawmakers in some jurisdictions have allowed for considerations of ability to pay in some circumstances. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 102.018(b) (allowing waiver of fees related to visual recordings made by officers of people later convicted of intoxicated driving "if the court determines that the defendant is indigent and unable to pay the fee").

76 *See Civil Forfeiture*, INST. FOR JUST., https://ij.org/issues/private-property/civil-forfeiture [https://perma.cc/7ENP-XJJT] (describing the Institute for Justice's varied efforts to combat the practice of civil forfeiture).

77 *Id.*

78 Timbs v. Indiana, 139 S. Ct. 682, 687, 689 (2019).

79 *E.g.*, *Forfeiting Our Rights: The Urgent Need for Civil Asset Forfeiture Reform: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 117th Cong. 6–8 (2021) (statement of Dan Alban, Senior Attorney and Co-Director, National Initiative to End Forfeiture Abuse, Institute for Justice).

80 LISA KNEPPER, JENNIFER MCDONALD, KATHY SANCHEZ, & ELYSE SMITH POHL, INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (3d ed. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf [https://perma.cc/CJR5-PTJQ].

81 *Civil Forfeiture*, *supra* note 76 (noting that IJ advocates have written over 350 editorials).

82 *E.g.*, Institute for Justice, *DEA & TSA Take $82,000 Life Savings from Pittsburgh Retiree*, YOUTUBE (Jan. 15, 2020), https://www.youtube.com/watch?v=hsre7I0UUJA [https://perma.cc/L796-X32L]; Institute for Justice, *Policing for Profit Visualized: How Big Is Civil Forfeiture?*, YOUTUBE (Nov. 10, 2015), https://www.youtube.com/watch?v=KhAa2vep1z0 [https://perma.cc/HBV8-LP83].

83 *E.g.*, Mimi Wright, *How a Quiet Police Lobbying Campaign Killed Civil Asset Forfeiture Reform in Missouri*, ST. LOUIS PUB. RADIO (Dec. 30, 2019, 7:38 AM),

responded. In recent years, a majority of states have engaged in at least some efforts to reform forfeiture practices,[84] and four states have eliminated civil forfeiture altogether.[85]

CONCLUSION

In sum, examining government actions for stategraft may well have the benefit of galvanizing advocacy efforts against *illegal* government behaviors, but that is not the full scope of its promise. While the underfunding and dearth of legal services and inattention by lawmakers remain serious challenges, advocates may benefit from uncovering stategraft. So long as they attend to how illegalities take root in legal but predatory systems or systems with questionable but undetermined legality, room will exist for reform across that spectrum.

https://news.stlpublicradio.org/government-politics-issues/2019-12-30/how-a-quiet-police-lobbying-campaign-killed-civil-asset-forfeiture-reform-in-missouri [https://perma.cc/JEZ6-UUQV] (reporting on an unsuccessful Missouri bill that would have restricted law enforcement's ability to participate in a lucrative federal civil forfeiture program); Brian McVeigh & Dave Sutton, *Don't Gut Civil Asset Forfeiture*, AL.COM (Feb. 12, 2018, 12:40 PM), https://www.al.com/opinion/2018/02/dont_gut_civil_asset_forfeitur.html [https://perma.cc/UAJ2-Z5CE] (writing as the presidents of the Alabama District Attorneys Association and Alabama Sheriffs Association and threatening to end enforcement of drug crimes if lawmakers amended the state's civil forfeiture laws).

84 *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., https://ij.org/legislative-advocacy/civil-forfeiture-legislative-highlights [https://perma.cc/8P73-SVSV] (documenting reforms including expanding reporting requirements for law enforcement and limiting local and state law enforcement participation in federal forfeiture programs).

85 Nick Sibilla, *Maine Becomes Fourth State to End Civil Forfeiture*, INST. FOR JUST. (July 13, 2021), https://ij.org/press-release/maine-becomes-fourth-state-to-end-civil-forfeiture [https://perma.cc/72JT-AB5S] (noting that Maine, Nebraska, New Mexico, and North Carolina have abolished civil forfeiture).