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# LAW, MONEY, PEOPLE: Insights From a Brief History of Court Funding Concerns

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## Introduction

It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments.<sup>1</sup>

—Michigan Supreme Court Chief Justice Brennan

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1. *Judges for the Third Judicial Circuit v. County of Wayne*, 383 Mich. 10, 20–21, 172 N.W.2d 436 (1969).

Concern with court funding is nothing new. What stands out as new is the role of monetary sanctions in commentary about, research on, and advocacy efforts related to court funding. Indeed, a brief history of how practitioners<sup>2</sup> and scholars frame court funding and its interplay with monetary sanctions shows clear shifts in perspective over time. The nature of these shifts illuminates the role concern over court funding played in the aggressively expanded use of monetary sanctions. Because of courts' pivotal position in sustaining the system of fines and fees, clarity on courts' relationship to these sanctions is valuable for advancing more equitable policy as well as effective reform efforts. To that end, this essay offers a reflection on how court funding has been framed over the years, suggesting that the successive centering of the law, money, and people characterizes three distinct phases of concern with court funding.

The first of these phases centers on the law, reflecting how court funding has long been anchored in the U.S. Constitution's inherent powers doctrine. As Justice Brennan's quote above suggests, courts have authority to pursue self-preservation via secured funding insofar as doing so is necessary to execute their constitutional functions. Monetary concerns dominate the second phase, which was marked by national fiscal crises in 2000 and 2008. These crises precipitated implementation of state-level austerity measures that prompted widespread budget shortfalls, with commensurate fretting and frustration. In this phase, the emphasis was on documenting and publicizing the negative consequences of underfunding courts, while agitating for the respect and support due to a coequal branch of government. This finance-focused phase also exposes a clear connection between austerity and proliferating monetary sanctions. The third and current people-oriented phase stands out for centering both the individuals assessing monetary sanctions and those experiencing disproportionately negative outcomes related to difficulty paying them. In the former group, judges and other practitioners question their role as debt collectors. In the latter, practitioners, scholars, and advocates for reform bring to light the harms caused by criminal justice debt that exceeds a person's ability to pay. Concern with various negative impacts on the court marks all three phases. After highlighting problematic aspects of monetary sanctions, this essay discusses the distinguishing characteristics of each phase as well as the insights to be gleaned from them. The essay concludes with ideas for paths forward via increased translational research and improved data quality and access.

## **I. Monetary Sanctions and Courts**

From the perspective of the courts, fines and fees are typically a financial necessity. According to the National Center for State Courts,

2. Practitioners refers to those directly involved in assessing, administering, and/or collecting monetary sanctions such as judges, court administrators, or attorneys, as well as those involved with professional organizations that develop, set, or promote court policy.

of the 34 states providing information, only nine do *not* retain revenue from criminal fines or fees and/or traffic fines and fees.<sup>3</sup> That most states retain money from fines and fees can be seen as a logical response to the fact that the average amount of the judicial branch budget as a percent of the state general fund is 1.84 percent. Vermont has the highest percent of the general fund at 4 percent, while Tennessee and Texas are the lowest at 0.40 percent.<sup>4</sup> At the same time, court systems have an attenuated ability to advocate for themselves as only in a minority of states is the judicial appropriation filed as a separate bill from the overall state budget.<sup>5</sup>

The reliance on monetary sanctions creates conflicts of interest and problematic tradeoffs. What can be understood as “indirect,” as opposed to “direct” restitution provides a useful example. While the latter is the traditional form of restitution, in which a person convicted of an offense compensates a specific victim for bodily or property harm, the former is actually quite dominant in modern monetary sanction use. Indirect restitution occurs when a person convicted of an offense—whether or not there is an identifiable victim—pays a separate fee or surcharge designated for crime victim compensation via a state fund or other mechanism.

All states receive federal funding for their Victim Compensation Funds, which is supported by the fines, forfeitures, and special assessments levied on people convicted of federal offenses. States also may have at least one surcharge or fee that goes to the state fund. Alabama exemplifies how indirect restitution commonly functions. The Alabama Crime Victims Compensation Fund receives \$2 from each moving traffic violation. It also receives funds from an “additional court cost” for every misdemeanor (\$10), municipal ordinance (\$10), or felony (\$15). In addition, the Fund receives the bulk of the mandatory misdemeanor (minimum \$25, maximum \$1000) and felony victim assessment fees (minimum \$50, maximum \$10,000).<sup>6</sup> With this structure, indirect restitution provides 63 percent of the revenue for Alabama’s Crime Victim Compensation Fund, while direct restitution provides less than 5 percent.<sup>7</sup> Similar examples can be found around the country.<sup>8</sup>

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3. S. Strickland et al., *Funds Dedicated to the Judicial Branch: 1.4c Sources of Revenue and Retention of Dedicated Funds*, NAT’L CTR. FOR ST. CT. (June 30, 2017), <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM16> [<https://perma.cc/6JHL-K6VN>].

4. *Id.*

5. *Id.*

6. The Office of Prosecution Services receives the second \$25 of the assessment. *The Alabama Crime Victims’ Compensation Commission Annual Report October 1, 2016 to September 30, 2017*, A.L.A. CRIME VICTIMS’ COMPENSATION COMMISSION, <https://acvcc.alabama.gov/downloads/annualreport2017.pdf>.

7. The financial summary indicates that \$2,770,583 came from court fees and victim assessment fees; \$206,384 came from direct restitution; which resulted in \$4,393,487 in total receipts. *Id.* at 6, 16.

8. Kansas’ VCF receives nearly 11 percent of fines, penalties and forfeitures from the district courts; Connecticut funds its Victims’ Compensation Assistance

The relevance of restitution to court funding is how monetary sanction payment is prioritized. There is an inverse relationship between statutorily prioritizing payment of direct restitution and courts receiving funds through court costs or other sanctions that help fund the courts. The alternative has problems of its own. Failing to prioritize direct restitution, means that victims are less likely to ever receive the compensation they are due.

A comparable dynamic plays out in the domain of surcharges, where the origin and the destination of funds raise questions about tradeoffs, primarily in terms of fairness and equity. Mississippi's \$235 criminal assessment imposed on each violation of the Implied Consent Law (Miss. Code Ann. Section 63-11-1 et seq.), for instance, is allocated to twenty-six different funds including the Spinal Cord and Head Injury Trust Fund, the Attorney General's Cyber-Crime Unit, and the Child Support Prosecution Trust Fund. In Nevada, the amount of a misdemeanor fine (up to \$1000, NRS 193.150) determines the amount of the administrative assessment. The administrative assessment ranges from \$30 to \$120, with allocations going to Juvenile Courts, Municipal Courts, the State General Fund, while the remainder is split almost equally between the Judicial Branch and the Executive Branch. The revenue from Iowa's surcharge on misdemeanor convictions goes primarily to its general fund, with the judicial branch, cities and counties, the Prison Infrastructure Fund, and Iowa's Victim Compensation Fund receiving dedicated percentages of what the courts collect. This type of divvying up of surcharges is commonplace and highlights the potential for admirable goals (e.g. well-funded courts and proportional punishment) to be set in opposition to one another.

These examples demonstrate how courts are at least somewhat dependent on revenue from fines and fees, but that the structure of monetary sanctions can be tortuous. The next Part explores how perspective on court funding and the role of fines and fees has changed over time.

## II. A Brief History of Concerns About Court Funding

### A. *Phase I "Law": Inherent Powers & Self-Preservation (Pre-2000)*

The earliest concerns with court funding were anchored in the doctrine of inherent judicial powers.<sup>9</sup> The idea is that since the Constitution establishes the courts as a coequal branch of government, they

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Program by levying an 18 percent surcharge on all criminal offenses, including motor vehicle offenses; Ohio's VCF draws approximately 20 percent of its revenue solely from a Driver's License Reinstatement Fee; Texas has "Offender Inmate Telephone Revenue" of which the first \$10 million each year goes to the state's VCF.

9. See Geoffrey C. Hazard et al, Comment, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286 (1972); John C. Cratsley, *Inherent Powers of the Courts*, 23 NAT'L JUD. C., A.B.A. AT U. OF NEV. (1980); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

have license to take actions necessary to realize their constitutional duties. That is, responsibility indicates authority to pursue constitutional functions;<sup>10</sup> therefore, insofar as this doctrine is a “positive safeguard of judicial independence,” it encompasses court budgeting.<sup>11</sup>

On this basis, early explanations of problems with court funding were primarily occupied with the dependence of courts on the other branches of government for resources. Indeed, this is a key finding of an authoritative book on the mechanics of public funding for state courts by Carl Baar, published in 1975. Other scholars in this era explained the situation as:

“Among the difficulties besetting the courts today is lack of money. In this respect, they share adversity with most public and charitable institutions such as schools, universities, hospitals, parks and libraries. But the fiscal dilemma of the courts is unique in certain respects. They constitute an independent branch of government, critically necessary to the balance of our constitutional system. Yet they are expected to eschew the normal political process and, unlike other competitors for public resources, are prohibited from cultivating their own constituencies and utilizing lobbyists. Furthermore, the judicial systems of most states are heavily dependent on local government for their finance”<sup>12</sup>

Because the legislative branch holds the purse strings, “[t]he tension in these interbranch disputes is between the need to insure the judiciary’s independence and the need to protect funding authorities from overreaching judges.”<sup>13</sup> A long history of cases relates to the reach of inherent powers into the domain of courthouse budgets and facilities,<sup>14</sup> with general support for the court’s right to expend funds it deems necessary.

Scholars in this pre-2000 era cited a variety of causes of reduced court funds, such as decreasing federal funds,<sup>15</sup> economic downturns,

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10. Hazard, *supra* note 9 at 1287.

11. G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12,14 (2004).

12. Hazard, *supra* note 9, at 1286.

13. Jackson, *supra* note 9, at 220.

14. Ex parte Turner, 40 Ark. 548 (1883); Bd. of Comm’rs of Vigo Cty. v. Stout, 136 Ind. 53, 35 N.E. 683 (1893); State v. Davis, 26 Nev. 373, 68 P. 689 (1902) (facilities); State v. Cunningham, 39 Mont. 165, 101 P. 962 (1909); Neosho Cty. Comm’rs v. Stoddart, 13 Kan. 207, 211 (1874) (facilities); Wichita Cty. v. Griffin, 284 S.W.2d 253 (Tex. Civ. App. 1955); Bass v. Saline Cty., 171 Neb. 538, 106 N.W.2d 860 (1960); Pena v. Dist. Court of Second Judicial Dist. In & For City & Cty. of Denver, 681 P.2d 953 (Colo. 1984) (facilities); Knuepfer v. Fawell, 96 Ill. 2d 284, 449 N.E.2d 1312 (1983); Hosford v. State, 525 So. 2d 789 (Miss. 1988); Matter of Alamance Cty. Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); Wachtler v. Cuomo, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991); see Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 122–135 (1994) for overview of Wachtler v. Cuomo.

15. For a discussion of the effect of federal funding in Iowa and Nevada, see Karin D. Marin, *Monetary Myopia: An Examination of Institutional Response to Revenue From Monetary Sanctions for Misdemeanors*, 29 CRIM. JUST. POL’Y REV. 630 (2018).

increasing caseloads related to the war on drugs, and reliance on local versus state funding.<sup>16</sup> Interestingly, increased fines and fees were not generally considered as a plausible solution at that time. In fact, one article of the era asserts that “[t]he courts’ oldest method of raising revenue—charging fees for their services—is now substantially unavailable and unavailing. Clearly this is so in criminal cases, where most defendants are more or less without money.”<sup>17</sup> This quote is notable both for acknowledgement of courts historically raising fees for self-preservation as well as for the prescient view that attempting to raise revenue from impoverished defendants would be ineffective.

Practitioners were active on the topic in this era as well. Perennial concern with underfunded courts prompted the State Justice Institute to launch an initiative leading to the National Interbranch Conference on Funding the State Courts in the mid-1990s. In 1995, a conference was held with the following objectives:

“ . . . to encourage interbranch strategic planning and joint venturing to foster communication and a common purpose with regard to State court resources; to increase the awareness of government officials and the public about State court resource needs; and to encourage innovative approaches to meeting State court resource needs, more effective use of existing resources, and more reliable and specific ways of measuring operational needs of State courts”<sup>18</sup>

Among the eight topics discussed were “interbranch relations in financial matters, . . . State court funding sources, fine and fee collection by State courts, court budgeting improvements, [and] technology and facilities as major change factors . . . ”<sup>19</sup> In terms of monetary sanctions, improving collection was the main goal, rather than expanded use. The overarching question was simply how to ensure adequate resources for courts, in light of their relationship with the State.

Pre-2000, concern with court funding was typically expressed as a constitutional matter. While budget shortfalls occurred, and the recession in the 1990’s exacerbated the issue, scholars and practitioners argued in the realm of law. The core of the question was about discerning the line between judicial and legislative authority and responsibility. Monetary sanctions were barely a consideration, either as a solution or as a problem. That changed in the next phase.

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16. Walter E. Swearingen, *Wachtler v. Cuomo: Does New York’s Judiciary Have an Inherent Right of Self-Preservation?*, 14 PACE L. REV. 153 (1994); Jackson, *supra* note 9; Hazard, *supra* note 9.

17. Hazard, *supra* note 9, at 1289.

18. R. W. Tobin, *Funding the State Courts: Issues and Approaches—Final Report on the National Interbranch Conference on Funding the State Courts—Serving the People Together*, NAT’L CRIM. JUST. REFERENCE SERV. (1996).

19. *Id.*

## B. *Phase II “Money”: Fiscal Austerity & Monetary Sanction Expansion (2000–2015)*

“It is axiomatic that the core functions of our government are supported from basic and general tax revenues. Government exists and operates for the common good based upon a common will to be governed, and the expense thereof is borne by general taxation of the governed.”<sup>20</sup> This quote from a Conference of State Court Administrators (COSCA) report titled “Courts Are Not Revenue Centers” perfectly encapsulates the tenor of the second phase of concern with court funding.<sup>21</sup> The fiscal crisis, precipitated by the collapse of the dotcom bubble in 2000, separates the first from the second phase. The collapse of the mortgage industry in 2008 further delineates this phase. Each incident prompted additional cuts to court funding with the attendant consternation from academics and court professionals alike. While the perpetual concerns of dependence on the other branches for funding persist in this era, it is at this point that monetary sanctions emerge as a popular solution to budgeting shortfalls.

Statistics such as the following raised the alarm: “In the 2010 fiscal year, 40 state court budgets were cut, and for the 2011 fiscal year, 48 project budget cuts”<sup>22</sup> Scholarly and practitioner-oriented publications in this era make statements such as: “[a]cross the country, courts are being asked to do more with less”;<sup>23</sup> “[t]he current fiscal crisis is provoking budget reductions so deep they threaten the basic mission of state courts”;<sup>24</sup> and, “[t]he courts of our country are in crisis.”<sup>25</sup> The connection between state budgets and court funding was clear. For example, the Conference of State Court Administrators’ “Position Paper on State Judicial Branch Budgets in Times of Fiscal Crisis” begins by asserting that “State governments today are experiencing the worst fiscal crisis in many decades.”<sup>26</sup>

The important backdrop to this and the previous phase is the rise of mass incarceration. As the prison population skyrocketed more than 500 percent between 1980 and 2000,<sup>27</sup> the sheer size of the system demanded

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20. Carl Reynolds & Jeff Hall, 2011–2012 Policy Paper: Courts Are Not Revenue Centers, CONF. OF ST. CT. ADMIN. (2012), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx>.
  21. Position Paper on State Judicial Branch Budgets in Times of Fiscal Crisis, CONF. OF ST. CT. ADMIN. (2003), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/BudgetWhitePaper.ashx>.
  22. Richard Y. Schauffler & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services*, THE BOOK OF THE STATES 2010, at 42.
  23. Joseph P. Nadeau, *Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding*, 43 JUDGES’ J. 15 (2004).
  24. Schauffler & Kleiman, *supra* note 22.
  25. AMERICAN BAR ASSOCIATION TASK FORCE ON THE PRESERVATION OF THE JUSTICE SYSTEM, REPORT TO THE HOUSE OF DELEGATES (2011).
  26. Reynolds & Hall, *supra* note 20 at 2.
  27. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (Jun. 2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.



more output with fewer resources. The issues in the New York Court of Appeals case *Maron v. Silver* are emblematic of the problem.<sup>28</sup> The state's judges sought a higher salary because their pay had not increased in eleven years. As their salaries were effectively reduced by 30 percent in that time frame by inflation and rising costs of living, their/the court's case dockets increased by 30 percent.<sup>29</sup>

Practitioners, in particular, tended to see three possible responses to budget shortfalls: cutting costs, improving efficiency, and increasing revenues.<sup>30</sup> It follows that increasing fees, fines, and costs were seen as “viable.”<sup>31</sup> In that vein, practitioner-oriented publications deemed certain responses to funding issues successful and worthy of propagating. For instance, in summer 2004, *The Judges' Journal* published a special edition with the theme of “Judicial Independence, Funding the Courts, and Interbranch Relations” focused on “the challenges and responsibilities of funding the nation's courts.”<sup>32</sup> The edition includes a number of examples of expanded monetary sanctions and the rationale for doing so.

One article, whose authors were affiliated with the National Center for State Court, explains that “[m]any states have opted for new or increased court costs or intensified their collection efforts during the current recession.”<sup>33</sup> Judge Jonathan Lippman, then the chief administrative judge of the New York State Unified Court System, asserted that New York “raised court fees and fines to increase revenue.”<sup>34</sup> Similarly, the chief justice of the Michigan Supreme Court reported that the court successfully generated increased revenue with new levies and improved efficiencies in apportioning assessments.<sup>35</sup> An Arizona court administrator writes that “[c]utbacks in state funding to the court and the county have been largely absorbed within the county's budget, counterbalanced by revenues from the new user fees, and offset by the court's fiscal restraint.”<sup>36</sup> These examples show how practitioners espoused monetary sanctions out of concern with court funding.

Around the same time, the National Center for State Courts generated a comprehensive list of “revenue generation strategies, including enhanced collection of uncollected fines, penalties and surcharges

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28. *Matter of Maron v. Silver*, 14 N.Y.3d 230 (2010).

29. AMERICAN BAR ASSOCIATION TASK FORCE, *supra* note 25.

30. Daniel J. Hall, Robert W. Tobin, & Kenneth G. Pankey, Jr., *Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis*, 43 JUDGES' J. 6 (2004).

31. Reynolds & Hall, *supra* note 20, at 12.

32. John K. Hudzik, *Judicial Independence, Funding the Courts, and Interbranch Relations*. 43 JUDGES J. 1 (2004).

33. Hall, Tobin, & Pankey, *supra* note 30, at 8.

34. Jonathan Lippman, *New York's Efforts to Secure Sufficient Court Resources in Lean Times*, 43 JUDGES J. 21, 22 (2004).

35. Maura D. Corrigan, *Finding Revenue in Hard Times: The Michigan Judiciary's Approach*. 43 JUDGES J. 24 (2004).

36. Marcus W. Reinkensmeyer, *Court Budget Strategies: Stewardship, Accountability, and Partnership in Maricopa County*. 43 JUDGES J. 38, 40 (2004).

through interception and garnishment of federal and state income tax returns, suspension of vehicle licenses or registrations, and institution of mail and credit card payment methods.<sup>37</sup> This list reflects how focusing on collection efforts accompanied enthusiasm for monetary sanctions as a source of financial support for courts. Altogether, this phase of concern with court funding situates courts' budget challenges as an outcome of shrinking state budgets due to larger macroeconomic factors. In this context, additional (or increased) monetary sanctions are seen as a way to generate funds for beleaguered courts. Professional associations spread the word and high-powered practitioners embrace the trend. Yet the response on a national scale was insufficient to avoid the repercussions from a second economic downturn.

The financial crisis of 2008 prompted another round of court budget reductions. Soon thereafter, in 2010, the American Bar Association formed a "Task Force on the Preservation of the Justice System" that was designed to address some of the most critical issues facing the legal profession today: the severe underfunding of our justice system, depletion of resources, and the courts' struggle to render their constitutional function and provide access to justice for countless Americans.<sup>38</sup> The following year, the ABA held public hearings,<sup>39</sup> there was a national symposium on "court underfunding," and the ABA held a forum on the topic at its midyear meeting.<sup>40</sup> The Kentucky Law Journal dedicated most of its 2011–2012 (Vol. 100) issue to the Symposium on State Court Funding. In 2013, the New England Law Review published a symposium of articles under the title of "Crisis in the Judiciary," which explored similar themes.

In this period, the issue was largely framed in terms of reductions in courts' ability to provide services, in part based on a 2011 survey conducted by the National Center on State Courts.<sup>41</sup> The survey found that 42 states cut judicial funding, 27 increased court fines and fees, 23 reduced court hours, and around 70 percent had various staffing vacancies.<sup>42</sup> Authors (both scholars and judges) detailed the budget crisis and proposed options ranging from state constitutional protections<sup>43</sup> to addressing the lack of public knowledge about the judiciary.<sup>44</sup> In 2012, the Conference of State Court Administrators reported that, while the previous four

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37. Reynolds & Hall, *supra* note 20, at 14.

38. AMERICAN BAR ASSOCIATION TASK FORCE, *supra* note 25.

39. Held in May 2011 at the University of New Hampshire School of Law, *see Shortfall in Court Budgets Directly Impact Public*, NATIONAL CENTER FOR STATE COURTS (May 25, 2011), <https://www.ncsc.org/newsroom/backgrounder/2011/court-budgets.aspx>.

40. AMERICAN BAR ASSOCIATION TASK FORCE, *supra* note 25.

41. Erwin Chemerinsky, *Symposium on State Court Funding: Keynote Address*, 100 KENTUCKY L.J. 743 (2011).

42. *Id.*

43. G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KENTUCKY L.J. 785 (2011).

44. Michael L. Buenger, *Do We Have 18th Century Courts for the 21st Century?*, 100 KENTUCKY L.J. 833 (2011).

years had been “particularly difficult,” appropriations to most state court systems increased slightly for fiscal year 2013. Yet, more than a third of states reported that responses to inadequate budgets resulted in reduced service to the public and more than a quarter reported that these responses led to limited access to court services.<sup>45</sup> These reports signified a slight shift in emphasis from constitutional framing in the prior phase toward highlighting what budget challenges prevent courts from doing.

The nod toward outcomes for justice preview what emerges as a central theme in the next phase. Some evidence suggests that the risks of using fines and fees to generate revenue were clear to practitioners in this era. For example, the Funding Alternatives Work Group in Washington State advised against using these sanctions to support funding for the trial courts because, among other reasons: “Fines and penalties should be set on the basis of the appropriateness of the punishment, not the revenue potential. Judges are placed in an inherent conflict of interest in determining the appropriate punishment for the offense on one hand and raising revenue for the courts on the other.”<sup>46</sup> Others echoed a desire to avoid potential conflicts. The ABA Commission on State Court Funding, for instance, urged “a predictable general funding stream for the courts—one that is not tied to fee generation.”<sup>47</sup>

Even as courts expanded the use of monetary sanctions, awareness of likely disparate impacts existed. Kansas Chief Justice Kay McFarland was heralded for the great financial success of an “Emergency Surcharge” she implemented in response to chronic underfunding.<sup>48</sup> An overview of the surcharge indicates that the “additional costs appear to be most acutely felt by low-income people, that is, by minorities and other disadvantaged groups for whom legal services and legal access are already problematic” as well as noting that the one-year surcharge was still in place two years later.<sup>49</sup> Similarly, the Conference of State Court Administrators, in its recommendations for increasing revenue with fines and fees, identified the potential of reducing access for low income individuals as just one among other concerns; the central concern still being apprehension about promulgating the idea that courts should be self-funding.<sup>50</sup>

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45. CONFERENCE OF STATE COURT ADMINISTRATORS, *THE 2012 BUDGET SURVEY OF STATE COURT ADMINISTRATORS* 4 (2012), <https://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/COSCA%20Budget%20Survey%20Summary%202012%20with%20Tables.ashx>.

46. COURT FUNDING TASK FORCE, *BD. FOR JUDICIAL ADMIN., JUSTICE IN JEOPARDY: THE COURT FUNDING CRISIS IN WASHINGTON STATE* 58 (2004), [https://www.courts.wa.gov/programs\\_orgs/pos\\_bja/wgFinal/wgFinal.pdf](https://www.courts.wa.gov/programs_orgs/pos_bja/wgFinal/wgFinal.pdf).

47. Joseph P. Nadeau, *Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding*, 43 *JUDGES' J.* 15, 16 (2004).

48. Cristel E. Marquardt, *Changing the Judicial Budget Process in Kansas*, 43 *JUDGES' J.* 27, 27–28 (2004).

49. *Id.* at 29.

50. Reynolds & Hall, *supra* note 20, at 12–14.

An emphasis on responding to fiscal austerity resulting from broader economic downturns characterizes the second phase of concern with court funding. Courts reacted to shrinking budgets during economic downturns by drawing attention to their subsequent curtailed services and capacity. Practitioners increasingly viewed monetary sanctions as a promising way to generate the revenue the courts so sorely needed. Although there was some awareness of the potential for additional monetary sanctions to place an undue burden on low income people, the promise of revenue dominated. That the relative weight of impact of fines and fees on people versus revenue generation appears to have shifted makes the next phase remarkable.

### C. *Phase III: “People” Debtor’s Prisons & Beyond (2015–present)*

In August, 2014, White police officer Darren Wilson shot unarmed African American Michael Brown, Jr. in Ferguson, Missouri. The U.S. Department of Justice (DOJ) launched an investigation of the shooting that year and, in 2015, published an unsparing report on the efforts of city officials, police officers executives, and the court to collect revenue from impoverished local residents.<sup>51</sup> Because the report was the first of its kind and documented in great detail how municipal court practices caused undue harm to African American residents, it functions as a turning point in the history of concerns about court funding. The report explains the excessive burden law enforcement and court practices placed on people living in poverty. Just as the shooting became a touchstone for reform advocates (including impact litigators, national advocacy groups, and community-based organizations), the DOJ report became a point of reference for scholars and practitioners on the potential for harm from fines and fees. As such, the incident and the report mark the beginning of the current phase of concern with court funding.

In this phase, the people most affected by the expanded use of monetary sanctions feature prominently. With an evergrowing catalogue of work by scholars and reform advocates on the topics of monetary sanctions and criminal justice debt, practitioners became increasingly aware of and vocal about the pitfalls of fines and fees. Attempts to rely on defendants to fund the judicial branch came to be seen as increasingly problematic—both for defendants and the courts themselves.

In 2016, COSCA released a Policy Paper, “The End of Debtor’s Prisons” that provided a number of guidelines and best practices aimed toward improving people’s ability to comply with court-ordered monetary sanctions and thereby “minimize [their] negative impact.”<sup>52</sup> That same year, the

51. U.S. DEP’T JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

52. Arthur W. Pepin, *Policy & Liaison Comm., The End of Debtors’ Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*, CONFERENCE OF STATE COURT ADM’RS 27 (2016), <https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx>.

Conference of Chief Justices and the Conference of State Court Administrators formed the National Task Force on Fines, Fees, and Bail Practices (The Task Force). Because of its authoritative status, breadth of stakeholders, and ability to reach judges around the country, the Task Force serves as an important voice in the field. The Task Force has since produced a variety of tools “to help courts improve their practices in this area,” including a bench card, model legislation, sample language, sample court rules. Most telling are two of its principles related to monetary sanctions:

Principle 1.5 Court Funding and Legal Financial Obligations

“Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should not be supported by revenues generated from Legal Financial Obligations.”

Principle 1.6 Fees and Surcharges: Nexus to the “Administration of Justice”

“While situations occur where user fees and surcharges may be necessary, such fees and surcharges should always be minimized and should never fund activities outside the justice system. Fees and surcharges should be established only for “administration of justice” purposes. “Administration of justice” should be narrowly defined and in no case should the amount of such a fee or surcharge exceed the actual cost of providing the service. The core functions of courts, such as personnel and salaries, should be funded by general tax revenues.”

Among the comprehensive set of principles, these two alone distill the main ideas of decades of concern about court funding as they relate to fines and fees. The inherent powers doctrine undergirds the notion of the court “fulfilling their mandate” in Principle 1.5, but now that concept is linked explicitly with a denunciation of doing so via monetary sanctions in Principle 1.6. Similarly, condemning the use of monetary sanctions as a substitute for tax revenues reinforces an established idea about courts being funded by the general public.

The concerns of this phase manifest in other forms as well. In 2017, the practitioner-oriented journal, *Trends in State Courts*, focused on fines, fees, and bail.<sup>53</sup> Articles challenged using driver’s license suspensions for nonpayment of fines and fees;<sup>54</sup> provided insight from sitting judges on the issue;<sup>55</sup> and, offered guidance on how courts can assess their use

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53. Maureen O’Connor & Laurie K. Dudgeon, *The Work of the National Task Force on Fines, Fees and Bail Practices*, in *TRENDS IN STATE COURTS 2017* 59 (Deborah W. Smith et al., eds., 2017), <https://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx>.

54. See Andrea M. Marsh, *Rethinking Driver’s License Suspensions for Nonpayment of Fines and Fees*, in *TRENDS IN STATE COURTS 2017* 20 (Deborah W. Smith et al., eds., 2017), <https://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx>.

55. See Elizabeth Hines, *View from the Michigan Bench*, *TRENDS IN STATE COURTS* 35 (2017) (Deborah W. Smith et al., eds., 2017), <https://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx>; see also Ed

of monetary sanctions. That same year, the U.S. Commission on Civil Rights held hearings and published a report on “Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications.”<sup>56</sup> Also in 2017, the National Task Force disseminated its bench card for judges to use when assessing fines and fees, based on a proposal made at a meeting of the Conference of Chief Justices.<sup>57</sup>

This practitioner and policymaker attention to the costs of monetary sanctions sets this phase apart from previous ones. While scholars and reform advocates have been prolific on the topic of fines and fees in this phase, the view of practitioners sheds most light on how concern with court funding currently presents. The events in Ferguson launched extensive self-reflection in terms of how courts participate in attempts to generate revenue from the people who unwillingly come into contact with them. The shift in seeing fines and fees as a potential revenue source to understanding their social costs marks an important change in rhetoric around court funding. As the current era unfolds, translating the awareness of the harms of criminal justice debt into more equitable policy would be eased by improvements on two fronts: improved data and translational research.

### III. Moving Forward: Data Improvements and Translational Research

A major hindrance to reform is the profound lack of knowledge and transparency in some jurisdictions. Improved data quality and access to data could significantly advance reform efforts. In the domain of court funding, many important open questions remain about the dynamics between legislative decisionmaking, court autonomy, and criminal justice debt. Given that so many jurisdictions grapple with these issues, there is, in fact, an abundance of data; the difficulty is in collecting and obtaining those data. It would be valuable to know, for instance, how an additional surcharge or a higher fee affects not just revenue, but collection rates. Such an endeavor would require diligent tracking of assessments and collections as well as transparency in budgeting. Specifically, monetary sanctions are often aggregated (e.g. “fees” includes public defender fees, court costs, victim fees, DNA fees, etc.) such that following a single

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Spillane, *View from the Texas Bench*, TRENDS IN STATE COURTS 41 (2017) (Deborah W. Smith et al., eds., 2017), <https://www.ncsc.org/~media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx>.

56. U.S. COMM’N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS (2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf).

57. See NAT’L TASK FORCE ON FINES, FEES & BAIL PRACTICES, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES (2019), <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles%201%2017%2019.ashx>; see NAT’L TASK FORCE ON FINES, FEES & BAIL PRACTICES, RESOLUTION 3: ENCOURAGING EDUCATION ON AND USE OF THE BENCH CARD ON LAWFUL COLLECTION OF COURT-IMPOSED LEGAL FINANCIAL OBLIGATIONS (2017), <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02012017-Encouraging-Education-Use-Bench-Card-Lawful-Collection.ashx>.

fee becomes functionally impossible. Truly understanding the nature of the monetary sanction beast will require a keen level of detail that court financial reporting can obscure.

Collaborative research between practitioners and academics stands to generate work useful to both groups. Specifically, *translational research* bridges the gap between lab-based academic research and the real world in which practitioners grapple daily with issues of shared concern. Rather than existing in isolation and remove from the processes academics investigate, translational research entails a deeply cooperative approach to identifying, asking, and addressing research questions. This approach, however, can be more costly, prone to being a theoretical, and more logistically difficult than traditional research.<sup>58</sup> However, the ability to conduct highly relevant and timely research, with near immediate insights for practitioners arguably outweighs these concerns.

Moving forward with translational research requires a willingness to engage across institutional boundaries with patience and flexibility. It also requires respect for institutional constraints (e.g. data security and human subjects protections) and an openness to navigating hurdles in partnership. Finally, this type of research demands support for producing deliverables that may meet the needs of only a subset of collaborators at a time (e.g. an interim report for elected officials versus a peer-reviewed academic article). This approach is an excellent way to leverage maximal knowledge of the different areas of expertise that academics and practitioners bring to the table.

## Conclusion

While court funding is a perennial issue, expanded use of and overreliance on monetary sanctions for revenue weaves a new strand of concern into a longstanding issue. This essay articulates the three phases of concern with court funding—law, monetary, and people-based concerns—exploring the role of monetary sanctions in each. The shifts in how scholars and, especially, practitioners view court funding has several implications for policy. First, we should anticipate yet another change in perspective. Given the significant momentum around advocacy for reform in monetary sanctions and related areas like bail, the next phase will likely reflect the impact of these efforts. Second, professional associations, and collaborations in particular, have potential to significantly influence discourse and practice. Moving forward, reform efforts that tailor messages and empirical information for these audiences could be momentous. Third, and relatedly, improved data and openness to partnering with researchers stands to provide the type of evidence necessary to attract the attention of policymakers. By harnessing collective concern with the status quo of monetary sanctions, joint efforts would be poised to alter the landscape of fines and fees.

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58. Phillip Atiba Goff, et al., (*The Need for*) *A Model of Translational Mind Science Justice Research*, 1 J. Soc. & Pol. PSYCHOL. 385 (2013).