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# Money and Punishment, Circa 2020

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The Arthur Liman Center for Public Interest Law  
at Yale Law School

Fines & Fees Justice Center

Policy Advocacy Clinic at UC Berkeley School of Law

Preprint not peer reviewed

## **Money and Punishment, Circa 2020**

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Yale Law School, Fall 2020

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## Preface

Money has a long history of being used as punishment, and punishment has a long history of being used discriminatorily and violently against communities of color. This volume surveys the many misuses of money as punishment and the range of efforts underway to undo the webs of fines, fees, assessments, charges, and surcharges that undergird so much of state and local funding. Whether in domains that are denominated “civil,” “criminal,” or “administrative,” and whether the needs are about law, health care, employment, housing, education, or safety services, racism intersects with the criminalization of poverty in all of life’s sectors to impose harms felt disproportionately by people of color.

In the spring of 2020, the stark inequalities of the pandemic’s impact and of police killings sparked uprisings against the prevalence of state-based violence and of government failures. Those protests have underscored the urgent need for profound, sustainable transformations in government systems that have become all too familiar. This volume maps the structures that generate oppressive practices, the work underway to challenge the inequalities, and the range of proposals to seek lasting alterations of expectations and practices so as to shape a social and political order that is respectful of all individuals’ dignity, generative for communities, and provides a range of services to protect safety and well-being.

What changes ought to be in focus is the subject of debate within this volume and beyond. For some, the goals are to abolish fees, end police funding, and redirect moneys to other institutions. Others believe that monetary sanctions, if levied in proportion to the offense and to the individual, are viable responses to be pursued. Also contested is the footprint of courts and the scope and nature of government-based services.

This book is long because of the proliferation of materials on this subject and the goal of helping to bring together information from legal and public finance analyses. In the Table of Contents that follows, we provide a road map of the readings within each segment. We have ruthlessly pruned excerpts to make accessible the depth of research on these problems and the range of ambitions for transformative change; we include the original publication information for easy access to the full articles.

This volume is the fourth in a series of co-edited, interrelated monographs focused on money as sanctions. In 2018, the volume *Who Pays? Fines, Fees, Bail, and the Cost of Courts* mapped the many modes by which localities tie their work to funds obtained from individuals, disproportionately poor and of color, who make payments as part of the law enforcement system. In 2019, we published *Ability to Pay*, that both updated research and the case law on monetary sanctions and detailed some of the many efforts based at law schools to interrupt the pernicious systems and to bring into the curriculum knowledge

about and work on altering corrosive practices. A third volume, *Fees, Fines, and the Funding of Public Services: A Curriculum for Reform*, published in 2020, provides a primer on these issues to bridge the work in the fields of public finance, state and local governance, and tax policy with legal materials focused on monetary sanctions. Parts of this volume take as their frame “Ferguson,” where police ended Michael Brown’s life in 2014 and which has come to mark the exploitative, racist use of money in local and state systems. This volume also provides background readings for the 23<sup>rd</sup> annual Liman Colloquium, *After Ferguson: Money and Punishment, Circa 2020*, which became a series of virtual events in the wake of COVID-19.

As these four volumes make plain, a remarkable array of efforts is underway to respond to the harms disproportionately experienced by communities of color and people of limited resources and to bring about profound change. Despite the length of this book, the excerpts provided here are a small subset of the commentary that has been written and of the resources that are available. This sampling, like the volumes that precede it, aims to contribute to national efforts to reconceive relationships between communities and the legal system that is supposed to support their wellbeing. Through monographs such as this—available as an E-book without charge, as are the other three volumes—we support the many activities aiming to shape just and equitable revenue-generation mechanisms that support governments without imposing harm on vulnerable individuals, families, and communities.

## Money and Punishment, Circa 2020

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The killings of Michael Brown in Ferguson in 2014 and of George Floyd in Minneapolis in 2020, as well as the mass protest movement underway related to those events, require that we address the ongoing violence of racial subordination, the abuse of government power, and the systemic inequalities of the criminal legal system. As more names are added to the tragically long roster of Black and Brown lives cut short by police and vigilante violence, calls for fundamental changes have proliferated.

Documentation is plentiful from policing, prosecution, detention, and probation to prisons, that these systems over-control individuals and communities of color and under-control state violence. Local groups in Missouri have released analyses of the events and, in 2015, the U.S. Department of Justice issued a report detailing how the police, courts, and elected officials in the City of Ferguson, Missouri, chose to exploit low-income people of color by discriminatorily imposing fines and fees to fund the city's budget.

Ferguson was appalling but not unique. Now, more than five years later, racial and economic inequality is all the more vivid and, in the wake of the current economic crisis, the risk of yet more exploitative fees and fines looms as state and local budgets are stretched.

This first segment of readings probe what the shorthand of “Ferguson” has come to denote, as commentators analyze what it does, should, or could mean. The excerpts address what has, and has not, changed since 2015 at local, state, and national levels. The need for money—sought by governments and spent by governments and private actors—is the justification for a wide array of fees and assessments. As these authors explain, the desire to punish *through* money has produced a welter of fines and economic penalties.

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Other materials address aspects of constitutional and state and municipal law that frame some of the discussion and litigation. As recounted, concerns about “excessive” economic burdens imposed by governments have a long history. In the English-United States legal system, governments are forbidden from levying “excessive fines” and from imposing “cruel and unusual punishments,” as well as required to respect life, liberty, and property. Since the 1980s, governments cannot turn monetary obligations into incarceration. While some commentators and jurists call for these constitutional rights to stop systems of punishment that “ruin” individuals, these provisions have not yet been read to end the racial and economic oppression of legal assessments. Indeed, through the post-Civil War Black Codes, convict leasing, and peonage systems, and with expansion of criminal systems in recent decades and charges of “pay to stay” in jails and prisons, inequalities abound and “ruin” has resulted.

Several commentators address jurisdiction-specific harms and make proposals for change. Excerpted are a series of case studies, analyses of race as a key variable, and arguments for how and why to revise, reform, and transform the use of money in conjunction with courts.

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## I. Ferguson as a Frame

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### **Municipal Courts White Paper (2014)**

Thomas Harvey, John McAnnar, Michael-John Voss, Megan Conn,  
Sean Janda, & Sophia Keskey  
ARCHCITY DEFENDERS

ArchCity Defenders represents St. Louis' indigent on a pro bono basis in criminal and civil legal matters while working closely with social service providers to connect clients with services. Our primary goal is to remove the legal barriers preventing our clients from accessing the housing, job training, and treatment they need to get on with their lives.

In the five years we have been doing this work, we have primarily focused on representation in the municipal courts that have jurisdiction over infractions for mostly

traffic-related offenses. Our direct representation of clients in these courts and the stories they shared of their experiences prompted us to conduct a court watching program to more closely observe the impact the municipal court system has on our clients' lives.

Clients reported being jailed because they were unable to pay fines. Some who have been incarcerated for delinquent fine payments have lost jobs and housing as a result. Indigent mothers "failed to appear" in court and had warrants issued for their arrest after arriving early or on-time to court and being turned away because that particular municipality prohibits children in court. Family members were forced to wait outside courtrooms while loved-ones represent themselves in front of a judge and a prosecutor. Many recounted being mistreated by the bailiffs, city prosecutors, court clerks, and even some judges. Each implicitly-condoned injustice carried out in St. Louis' municipal courts is a serious cause for concern. These practices violate the clear mandates of the United States Constitution, and they destroy the public's confidence in the justice system. Furthermore, indiscriminately ticketing and fining the poorest in any community exacerbates the plight of low-income families by imposing heavy financial burdens on those least equipped to bear it. The result: the poorest St. Louisans watch an unnecessarily expensive and incredibly inefficient network of municipal courts siphon away vast amounts of their money to support a system seemingly designed to maintain the status quo, no matter how much it hurts the communities the system is supposed to serve.

We observed over sixty different courts during our court watching program and obtained sworn statements from some of our clients and other individuals we encountered. Roughly half of the courts we observed did not engage in the illegal and harmful practices described above while we were present. But, approximately thirty of those courts did engage in at least one of these practices. Three courts, Bel-Ridge, Florissant, and Ferguson, were chronic offenders and serve as prime examples of how these practices violate fundamental rights of the poor, undermine public confidence in the judicial system, and perpetuate inefficiencies. This paper focuses on those three courts.

Overall, we observed that the poor, particularly poor minorities, suffer significantly in their forced dealings with St. Louis' municipal court system. Expired vehicle registration, outdated inspections, driving without insurance—while non impoverished people may occasionally be ticketed for such violations, the tickets are generally nothing more than a minor inconvenience or annoyance. For the poor living in North County St. Louis, these issues may exist as a consequence of their lack of money, and all of them can come to a head in a single traffic stop and quickly lead to daunting fines and oftentimes the revocation of driving privileges. What is more, poor minorities are pulled-over more frequently, they are let go without a ticket less frequently, and they are in all likelihood the only group to see the inside of a jail cell for minor ordinance violations. Matters are worsened by those involved in municipal government choosing to close courts to the public and allowing the incarceration of people for the failure to pay fines. These policies push the poor further into

poverty, prevent the homeless from accessing the housing, treatment, and jobs they so desperately need to regain stability in their lives, and violate the Constitution. These violations are ongoing and they implicate the most fundamental guarantees of the Constitution. They are the product of a disordered, fragmented, and inefficient approach to criminal justice in St. Louis County. Municipalities are failing to afford indigent defendants legal counsel and refusing to make reasonable bond assessments. The municipal court system fans the flames of racial tension, oppression, and disenfranchisement by allowing municipalities to appropriate the courts to act as governmental debt-collection agencies and implicitly charging courts with ensuring the municipalities' fine-generated revenues are sufficient to maintain inefficient governmental operations.

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**It's Not Just Ferguson: Missouri Supreme Court Should  
Consolidate the Municipal Court System (2015)**

ARCHCITY DEFENDERS

The municipal court system fans the flames of racial tension, oppression, and disenfranchisement by allowing municipalities to appropriate the court to act as government debt-collection agencies and implicitly charging the courts with ensuring the municipalities' fine-generated revenues are sufficient to maintain inefficient governmental operations.

-Arch City Defenders, August 2014

The Municipal Court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the city's financial interests. The harms of Ferguson's police and court practices are borne disproportionately by African-Americans, and there is evidence that this is due in part to intentional discrimination based on race.

-Department of Justice, March 2015

Extraordinary action is warranted in Ferguson. To help restore public trust and confidence in the Ferguson municipal court division, the Supreme Court of Missouri today transferred Judge Roy L Richter of the Missouri Court of Appeals, Eastern District, to the St. Louis County circuit court, where he will be assigned to hear all of Ferguson's pending and future municipal division cases.

-Missouri Supreme Court March, 2015

The Missouri Supreme Court's unprecedented decision to take control of Ferguson's Municipal Court was based primarily on issues raised during sustained protest following the killing of Mike Brown and reports published by ArchCity Defenders and the Department of Justice. These reports highlighted racial disparity in traffic stops, excessive revenue generation, and excessive warrants and arrests and confirmed the lived experiences of poor and Black people in St. Louis: there is a racially discriminatory and profit-driven approach to law enforcement made possible only by the collaborative efforts of local government, police, and courts.

These condemned practices are not unique to Ferguson. Rather, many St. Louis municipalities are demonstrably worse than Ferguson with respect to the highlighted factors. And while there have been legal victories in the past year, new legislation, and the sustained efforts of the Black Lives Matter movement, the Supreme Court should seize the opportunity to bring meaningful and transformative change to the region by following the recommendation of the Ferguson Commission, ArchCity Defenders, SLU Law Legal Clinics, Better Together, Missourians Organizing for Reform and Empowerment, and the Organization for Black Struggle: Order the consolidation of our 81 courts into a full-time, professional regional court system.

Consolidating this redundant and inefficient system would not only lessen the incentive to use racially discriminatory fines and fees as a revenue stream, but would also make it easier for poor and Black people to navigate the legal system in St. Louis County and make it easier for organizers and legal watchdogs to monitor compliance. Furthermore, consolidation will save millions of dollars in court operation costs. If the regional court system included four full-time professional courts, the total cost of the regional court system would amount to between \$6,000,000 and \$8,000,000. By comparison, the aggregate cost of St. Louis County's 81 municipal courts was \$15,843,552 in 2013. . . .

### The Way Forward

Greater steps must be taken to discontinue the racially discriminatory and revenue based constitutional violations that have become convention in many municipal systems. The ArchCity Defenders Report proposed several reforms, including mandating that courts make a constitutionally required inquiry into a person's ability to pay assessed fines prior to incarcerating them for non-payment. As the Report explains, this step is necessary to avoid accusations of deprivation of equal protection and due process rights, and to reverse the trend of debtor's prisons across St. Louis County.

Since our report was issued in August of 2014, we, along with Saint Louis University School of Law Legal Clinics, have advocated for the implementation of procedural protections to guarantee the rights of every defendant, the appointment of public defenders in the courts, and the consolidation of the municipal courts. Through

litigation filed with co-counsel at Saint Louis University School of Law Legal Clinics and Equal Justice Under Law, we have ended cash bail, ended the practice of arbitrary and indefinite detention following initial alleged failure to appear, implemented procedural protections reducing unnecessary incarceration, mandated an inquiry into a person's ability to pay a fine, and increased access to alternative sentencing including community service and reduced fines. While these were considered unthinkable in August of 2014, they are a reality today. Combined with the protections afforded defendants on minor traffic tickets only obtained through the passage of the important but limited Senate Bill 5, the municipal court landscape is very different today.

Unfortunately, these hard-earned wins through the combined efforts of organizers, activists, and the legal community are limited to only certain jurisdictions. While it is certain that all municipal courts will adopt these procedures to avoid future litigation and protest, the best way to ensure compliance with the protections of the United States Constitution is to consolidate the 81 municipal courts in St. Louis County into a single regional court system. Consolidating this redundant and inefficient system would not only lessen the incentive to use racially discriminatory fines and fees as a revenue stream, but would also make it easier for poor and Black people to navigate the legal system in St. Louis County and make it easier for organizers and legal watchdogs to monitor compliance. Furthermore, consolidation will save millions of dollars in court operation costs. If the regional court system included four of these full-time professional courts, the total cost of the regional court system would amount to between \$6,000,000 and \$8,000,000. By comparison, the aggregate cost of St. Louis County's 81 municipal courts was \$15,843,552 in 2013.

The cost savings is the result of the consolidation of overlapping, inefficient part-time courts into 4 full time courts with professional staff. On average, an individual municipal court in St. Louis County holds 2.21 court sessions each month. This means that, across St. Louis County, there are about 179 municipal court sessions each year. If the total docket load across St. Louis County remained constant, each proposed full-time regional court would have an entire year to handle what the average municipal court currently handles in 45 court sessions. Because most municipal courts are composed of a single part-time judge, a proposed full-time 86 87 16 regional court judge would be responsible over the course of a year for what the average municipal judge handles in 11 court sessions. What's more, if the regional court system adopted currently proposed procedural protections, including the elimination of the payment docket by mandating that fines and fees be collected in a manner consistent with the enforcement of civil monetary judgments under Missouri law, St. Louis County would see a substantial reduction in the total docket load. In practice, the docket load would be even further reduced, as the elimination of revenue incentives would mitigate frivolous ticketing and manifest in less cases filed in the first place. Not only would the proposed regional system save millions of



dollars in operating costs, but it would also allow for judges to hear defendants for longer than thirty seconds.

Ultimately, the current municipal court system proves incredibly costly, in terms of both financial inefficiencies and the squandered community trust that unjust practices have precipitated. Their practices violate the clear mandates of the United States Constitution and they destroy the public's confidence in the justice system. Indiscriminately ticketing and fining the poorest in any community exacerbates the plight of low-income families by imposing heavy financial burdens on those least equipped to bear it. The poorest watch an unnecessarily expensive and incredibly inefficient network of municipal courts siphon away vast amounts of their money to support a system seemingly designed to maintain the status quo, no matter how much it hurts the communities the system is supposed to serve. The municipal court system fans the flames of racial tension, oppression, and disenfranchisement by allowing municipalities to appropriate the courts to act as governmental debt-collection agencies and implicitly charging courts with ensuring the municipalities' fine-generated revenues are sufficient to maintain inefficient governmental operations. To remedy systematic injustices and open the possibility of civic reconciliation, the St. Louis County justice system must be reformed at-large.

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### **Five Years After Ferguson, Policing Reform Is Abandoned (2019)**

EQUAL JUSTICE INITIATIVE

<https://eji.org/news/five-years-after-ferguson-policing-reform-abandoned/>

The killing of 18-year-old Michael Brown by Ferguson police officer Darren Wilson on August 9, 2014, sparked protests in the small Missouri town that spread across the country and launched unprecedented federal investment in policing reform. But five years later, fatal police shootings have not declined, popular reforms like body cameras have fallen short of expectations, and the Justice Department has retreated from police reform.

...

#### **Five Years Later, Ferguson's Problems Remain**

In March 2015, the Justice Department released a 102-page report documenting its investigation into the police and courts in Ferguson. The investigation revealed racially discriminatory practices that Attorney General Eric Holder said have "severely undermined the public trust" and used law enforcement "not as a means for protecting public safety, but as a way to generate revenue."

Ferguson's police chief resigned after the report's release and city prosecutor Bob McCulloch lost his re-election bid after failing to indict the officer who killed Michael Brown. Ferguson's police department now has 21 black officers, a huge increase from four in 2014.

But the New York Times found that black drivers in St. Louis County continue to be stopped at much higher rates than white drivers. Despite a new state law capping the percentage of revenue that municipalities are allowed to earn from courts, the disparity in traffic stops of black drivers in Ferguson has increased by five percentage points since 2013, while it has dropped by 11 percentage points for white drivers.

"I can't say things have gotten better," Blake Strode, executive director of ArchCity Defenders, a legal advocacy organization that has fought ticketing practices, told the Times. "I understand the status quo to be one of structural racism, poverty, overinvestment in the carceral system, and policing and prosecution. That is as real today in 2019 as it was five years ago in 2014."

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**Thomas v. City of Edmundson**  
**Class Action Complaint**

United States District Court for the Eastern District of Missouri  
No. 18-cv-2071 (E.D. Mo. Dec. 12, 2018)

1. The City of Edmundson, through its police department, municipal court system, and prosecuting attorney's office, has terrorized the named Plaintiffs and many thousands of others through a deliberate policy established and implemented to fill the city's coffers by extorting money from thousands of poor, disproportionately African-American people in the St. Louis region, creating a modern-day police state and debtors' prison scheme that has no place in American society.

2. The scheme reflects an extraordinary abuse of governmental authority, starting with the over-policing of low-income communities of color and the issuance of excessive citations for traffic and other minor municipal code violations, followed by arbitrary fines, penalties, surcharges, and interest charges that pile up like debts to a loan-shark, arrest warrants auto-generated without good cause or even a semblance of due process, and imprisonment—imposed without assistance of counsel—in squalid debtors' prisons. This unconstitutional revenue-generation scheme disproportionately targets African-American residents, placing jobs at risk, leaving children without supervision, and debasing fundamental human rights, for as long as it takes to strong-arm payment from Plaintiffs and others.

3. Plaintiffs are a group of similarly situated individuals who are victims of this predatory scheme. Each of these human beings was locked in a cell solely because he or she was unable to afford a cash payment. And each was left to languish in filthy, often overcrowded jail cells because he or she could not afford to pay jacked-up fines, penalties, and other charges. Defendant did not inquire about, much less accommodate, the hardships its extortionate demands placed on Plaintiffs and their families. Nor did Defendant offer to provide Plaintiffs with counsel who could advise them of their rights or otherwise protect them from this predatory scheme.

4. Edmundson officials and employees – through their conduct, decisions, training, rules, policies, practices, and procedures – constructed and implemented this scheme for the overriding purpose of raising municipal revenue (and not for any legitimate law enforcement purpose).

5. Defendant gained the coercive leverage to effectuate this scheme by resurrecting a modern analogue of debtors' prisons – an institution this country rejected as inhumane more than a century ago. That leverage has made the scheme increasingly profitable. Edmundson's law enforcement and municipal court practices focus on maximizing revenue, rather than promoting public safety, administering justice, or providing the bare rudiments of due process. Defendant has forced the poorest and most vulnerable citizens to finance a municipal system that is a tool of injustice and oppression.

6. As a result, this scheme has targeted and persecuted people who live in or travel through Edmundson and its neighboring municipalities' borders, trapping people for years in a cycle of escalating fees, intractable debt, and imprisonment. In particular, Defendant has preyed on the most vulnerable, those living in or near poverty, who are least able to bear, or to avoid, the extortionate costs this system has imposed.

7. Thousands of people in the Plaintiffs' position were forced to divert funds from their disability checks, or sacrifice meager earnings their families desperately need for food, diapers, clothing, rent, and utilities, to pay spiraling court fines, fees, costs, and surcharges. Whether or not valid, a citation for a minor offense – a broken tail light, a lane change without signaling – often generates crippling debts for people like Plaintiffs, which resulted in jail time when they could not afford to pay, deepening their already desperate poverty.

8. The summary imprisonment imposed on people who have appeared in the municipal courts of Edmundson and its neighboring municipalities but who could not afford to pay the sums of money demanded has frightened many away from the courthouse, allowing Defendant to jack up the fines even further and issue arrest warrants – intended to coerce payment – for “Failure to Pay” and “Failure to Appear.” Month after month, year after year, the cycle has repeated itself, ensnaring Plaintiffs and those like them in a system from which it has been nearly impossible to extricate themselves.

9. Defendant has abused the legal system to bestow a patina of legitimacy on what is, in reality, extortion. If private parties had created and implemented this scheme, enforced it by threatening and imposing indefinite incarceration, and milked poor families of millions of dollars, the law would punish them as extortionists and racketeers, and the community would take steps to prevent them from exploiting the most vulnerable of its members. These predatory practices are no more legitimate—and indeed are more outrageous—when state and local government actors perpetrate them under color of law.

10. The treatment of the named Plaintiffs reveals a coordinated, systemic effort to deprive some of the area's poorest residents of their rights under the United States Constitution. For years, Defendant has engaged in the same conduct, as a matter of policy and practice, against Plaintiffs and thousands of other impoverished citizens. These citizens' fundamental constitutional right to liberty, however, does not depend on their income. Defendant has created or revived a *de facto* debtors' prison, using it as a tool to cow poor people into financing municipal government. Such flagrant abuse is not consistent with the values this country holds dear, with the rule of law, or with the constitutional guarantee of due process.

11. On its own, the City of Edmundson lacks the capacity to hold more than a few people at a given time, so it contracted with its neighboring municipality, the City of St. Ann, to arrest a significantly greater number of people for alleged municipal ordinance violations and ship them to St. Ann Jail, where arrestees languished until the Defendant could extract enough money from the individuals or their families to satisfy the Municipality's demands. Without the availability of St. Ann's recently-expanded jail, which "sleeps 42, not including a pen for short-timers and a juvenile area," the Defendant would not have been able to incarcerate, or threaten to incarcerate, human beings too poor to pay their debts.

12. Plaintiffs, by and through their attorneys, and on behalf of those similarly situated, bring this civil action pursuant to 42 U.S.C. § 1983 and the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution. Plaintiffs seek in this civil action the vindication of their fundamental rights, compensation for the abuse that Defendant has rained down on them, injunctive relief assuring that Defendant will not violate their rights again, and a declaration that the Defendant's conduct is unlawful. . . .

**Fant v. City of Ferguson,**  
United States District Court, Eastern District of Missouri  
No. 4:15-CV-00253-AGF, 2019 WL 3577529 (E.D. Mo. Aug. 6, 2019)

Audrey G. Fleissig, United States District Judge:

Plaintiffs in this putative class action claim that they have been jailed by Defendant, the City of Ferguson (the “City”), on numerous occasions because they were unable to pay cash bonds or other debts resulting from their traffic and other minor offenses. Plaintiffs allege that, in violation of the United States Constitution and as a matter of the City’s policies and practices, they were not afforded counsel, any inquiry into their ability to pay, or a neutral finding of probable cause in a prompt manner; and they were held in jail indefinitely, in overcrowded and unsanitary conditions, until they or their friends or family members could make a monetary payment sufficient to satisfy the City, as part of a broad, revenue-generating scheme. Plaintiffs’ amended complaint asserts seven claims pursuant to 42 U.S.C. § 1983, under the Fourth, Sixth, and Fourteenth Amendments. They seek compensatory damages as well as declaratory and injunctive relief.

The City moves to dismiss, for failure to join a party under Federal Rule of Civil Procedure 19, all claims in Plaintiffs’ first amended complaint except the claim relating to conditions of confinement (Count IV). This is the fourth motion to dismiss filed by the City in this now four-year-old case. This motion asserts arguments similar to those raised in prior motions but reframes them in terms of Rule 19. In short, the City argues that Plaintiffs’ constitutional challenges are directed solely to the conduct of the Ferguson Municipal Court (the “municipal court”), which the City argues is a separate entity, and that the municipal court is therefore required to be joined as a co-defendant under Rule 19(a). But the City argues that joinder is not feasible because the municipal court is an arm of the state under Missouri law and, as such, entitled to sovereign immunity. The City contends that because there is a potential for injury to the interests of the municipal court and because the municipal court is immune from suit, dismissal of the claims at issue is required under Rule 19(b). For the reasons set forth below, the Court will deny the City’s motion.

## DISCUSSION

Federal Rule of Civil Procedure 12(b)(7) permits dismissal of a claim for failure to join a party under Rule 19. Rule 19, in turn, sets forth a two-part inquiry. First, the Court must determine whether the absent person’s presence is “required.” Fed. R. Civ. P. 19(a)(1). Joinder is required when:

- (A) in that person’s absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is

so situated that disposing of the action in the person's absence may:

- (i) as a practical matter impair or impede the person's ability to protect the interest; or
- (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

"[T]he focus of Rule 19(a)(1) is on relief between the parties and not on the speculative possibility of further litigation between a party and an absent person." *Cedar Rapids Bank & Tr. Co. v. Mako One Corp.*, 919 F.3d 529, 534–35 (8th Cir. 2019) (citation omitted). When joinder is not required under Rule 19(a), "the inquiry is at an end, and the motion to dismiss for failure to join the party in question must be denied." *Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984).

If joinder is required but not feasible, the Court must proceed to the second step and "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," considering several enumerated factors. Fed. R. Civ. P. 19(b). Factors to consider include (1) the extent to which a judgment in the required person's absence might prejudice that person or the existing parties; (2) the extent to which such prejudice could be lessened or avoided by protective provisions or otherwise shaping the relief to be granted; (3) the adequacy of a judgment rendered in the person's absence; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(b). In analyzing these factors in the context of a claim of sovereign immunity, the Court must give sufficient weight to the sovereign status of the absent person, which "in some instances, [will mean] that the plaintiffs will be left without a forum for definitive resolution of their claims." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008).

The Rule 19 inquiry is a "highly-practical, fact-based endeavor," and courts are "generally reluctant to grant motions to dismiss of this type." *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 671 (8th Cir. 2015). "A decision under Rule 19 not to decide a case otherwise properly before the court is a power to be exercised only in rare instances." *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017) (emphasis in original) (citation omitted).

The Court concludes that the municipal court (perhaps more properly referenced as the municipal division) is not a required party under Rule 19(a). Rule 19(a)(1)(A)'s condition that a court be able to accord complete relief "does not mean that every type of relief sought must be available, only that meaningful relief be available." *Henne v. Wright*, 904 F.2d 1208, 1212 n.4 (8th Cir. 1990) (internal citations omitted). Here, the Court is able to accord meaningful relief to Plaintiffs without joinder of the municipal court.

Plaintiffs seek money damages from the City, a declaration that the City violated their constitutional rights, and an injunction enjoining the City from enacting and enforcing its allegedly unlawful policies and customs. The Court may provide such relief to the extent that Plaintiffs' claims prove to be viable and meritorious. The City's argument that the municipal court, and not the City, caused the alleged constitutional violations may be a reason to deny relief on Plaintiffs' claims, but it does not support a finding under Rule 19(a)(1) that joinder of the municipal court is required. . . .

Likewise, under Rule 19(a)(1)(B), even assuming that the municipal court has an interest relating to the subject of the action, disposition of the action in the municipal court's absence will not as a practical matter impair or impede the municipal court's ability to protect its interest. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). In support of its argument to the contrary, the City relies primarily on the Eighth Circuit's opinion in *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015). In that case, the plaintiffs claimed that the named defendants induced an absent sovereign, the United States, to breach its fiduciary duty by approving leases for interests in land held in trust. *Id.* at 792-93. In other words, in order to prevail on their claims against the named defendants, the plaintiffs were required to prove that the absent sovereign acted illegally. *Id.* at 796. A judgment entered in the sovereign's absence would thus "potentially cloud the validity of many of the land grants approved by the government." *Id.* For this reason, the Eighth Circuit found that the United States' ability to protect its interest would be impaired or impeded by its absence from the litigation. *Id.* at 797.

By contrast, here, none of Plaintiffs' claims requires a showing that the municipal court acted illegally. Rather, for Plaintiffs to succeed on their claims, they must demonstrate that the City acted unlawfully. . . .

Nor would the municipal court's absence subject the City to a substantial risk of incurring double or otherwise inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(1)(B)(ii). The City's own argument supports such a holding. The City asserts that, as a matter of law, it cannot be held liable for the municipal court's conduct. If the City is correct, and if the actions complained of were caused by the municipal court, then as explained above, Plaintiffs' claims may fail on the merits. But resolution of these issues does not require the municipal court's joinder. *See Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1430 (8th Cir. 1994). Because the municipal court is not a required party under Rule 19(a), the Court need not address whether dismissal is required under Rule 19(b). The City's motion must be denied. In light of the extensive briefing submitted on these issues, oral argument is unnecessary.

### Conclusion

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendant's motion to dismiss Counts I through III and V through VII, and motion for a hearing, are both DENIED. ECF Nos. 223 & 226.

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**“Preying on the Poor: Criminal Justice as Revenue Racket” (2019)**

Joshua Page & Joe Soss  
KALAMAZOO COLLEGE WEBER LECTURE

In March 2015, the U.S. Department of Justice (DOJ) reported that the city of Ferguson, Missouri had been operating what it called a “predatory system of government.” Police were acting as street-level enforcers for a program that used fines and fees to extract resources from poor communities of color and deliver them to municipal coffers. Three features of this regime stood out:

1. **The targeting and scale of the operation:** Black residents were clearly targeted, making up 90 percent of those ticketed for public safety violations. With the city averaging three warrants *per household*, fines and fees became almost-universal experiences for poor, black residents. Payments were pursued so aggressively that they made up one fifth of the city's entire revenue base in 2013 – an 80 percent increase over just two years prior.
2. **The intentional, top-down nature of the operation:** The DOJ Report concludes: “Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs.... The City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved.”
3. **The city’s construction and exploitation of debt:** Even when subjected to minor fines, Ferguson residents often became ensnared in a perpetual debt trap that led to ongoing entanglements with the criminal justice system and generated ongoing revenues for the city.

“How could this be?” pundits and politicians asked in shock. The entire story struck many as deeply un-American and sharply at odds with how governance normally works in American life.

Against this view, [we] argue that Ferguson’s regime of plunder was no anomaly. Instead, it reveals a broad complex of predatory criminal justice practices that is widespread and worthy of far more critical analysis than they have received.



So, let's begin with a descriptive question: How substantial are these practices, and how have they grown over time?

In America today, roughly 10 million people owe a total of about \$50 billion in criminal justice debt and make nearly \$40 billion in payments each year. The revenues they generate flow not only to governments but also to wide array of for-profit firms operating throughout the criminal justice system. And not surprisingly, given what we know about this system, the burdens of this resource-extraction regime are disproportionately borne by poor people of color.

The financialization of criminal justice has grown both wider and deeper over the past 25 years, with a burst of onset in the early-to-mid 1990s and periods of rapid expansion after 9/11, 2001 and during the Great Recession that started in 2007. Consider a few trends for some of the most important sites of extraction.

*We can start with fines and fees:* From 1991 to 2004, the percent of prisoners reporting legal financial obligations rose from 25 percent to 66 percent. Today, all 50 states defray prison costs by charging prisoners some form of *pay-to-stay fees*—almost always for room and board, but in some states also for medical care, clothing, and basic needs such as menstrual pads.

To secure payments for these fees, officials can seize virtually any money a prisoner might receive. They take percentages of the deposits people put in prisoners' accounts, and they seize funds received through the death of a relative, a legal settlement, or even intellectual property. In 2018, for example, an imprisoned author named Curtis Dawkins received a \$150,000 advance for his acclaimed short story collection, *The Graybar Hotel*, which he tried to place in an education fund for his children. The state of Michigan seized 90 percent of the funds as payment for stay.

In most cases, pay-to-stay fees simply produce debts, which states may pursue as reimbursements for years after a prisoner is released. This practice is especially common in juvenile systems, where parents may be billed for years after the end of a child's incarceration.

In addition, from 1990 to 2014, the number of states charging people for their own *probation and parole supervision* (in addition to prison pay-to-stay) rose from 26 to 44.

Some states now also charge defendants extra fees to exercise their right to a jury trial, and most allow courts to charge people who exercise their right to a public defender.

Bail charges also grew dramatically – in number and size – over the past 25 years, funneling poor people’s money to a handful of large insurance corporations *even in cases where no one is found guilty of a crime*.

At each step along the way, as actors create new points of resource extraction, others try to “piggyback” on it to get revenues for themselves. The process acts as a force multiplier for monetary transfers out of poor communities. Consider, as a small example, what happens when you run a stop sign in California. The base fine for failing to stop is \$35. But over time, state and local agencies have added 12 different fees and charges on top – many having no discernible relationship to processing the violation. In the end, after all the various agencies have gotten in on the action, the fine that must be paid for running the stop sign is not \$35; it is \$238.

*In addition to fines and fees, consider the rise of Civil Asset Forfeiture.* This procedure emerged from the War on Drugs and grew in the 1990s. It allows authorities to seize any assets they *suspect* may have illicit origins. The burden of proof is then on the owner to show – through a costly court challenge – that the assets have no criminal history.

The total value of seized assets rose sharply between 2004 and 2010 – reaching \$1.1 billion dollars in just 2013 alone. Between 2001 and 2013, \$2.1 billion in assets were seized from people who were not even charged with a crime.

At the local level, from 2011 to 2013, Chicago police “brought in nearly \$72 million in cash and assets through civil forfeiture.” The money was coming in so fast that they actually used some of the proceeds to buy a cash-counting machine – to speed up processing at the office. They also used some off the slushy funds to buy themselves controversial surveillance equipment that the city council had declined to approve.

In Philadelphia, between 2011 and 2013, city officials confiscated “some 100 homes, 150 vehicles, and roughly \$4 million in cash each year.” Most of these seizures involved small amounts taken from people in Philadelphia’s poor communities of color. A study that drew “a random sample of 351 cash forfeitures made in 2012 and 2013 revealed that half of all cash forfeitures were for less than \$192.”

*Or consider the dramatic rise in prison-based profits:* Alongside government takings, prison profiteering by market firms has risen steadily. Today, prison management contracts alone represent a \$5 billion industry, with additional revenues coming from detention in the areas of immigration and asylum-seeking.

Private prison firms now manage over 60 percent of immigrant detention beds. Between 2008 and 2016, contracts with Immigration and Customs Enforcement (ICE) generated a total of about \$1.8 billion in revenues for just the top two corporate providers

alone. These profits have increased considerably under the Trump administration's immigration crackdown.

In "public" prisons as well, state authorities have increasingly moved to commodify their control of human bodies and sell extraction rights to market firms. Prisoners have needs, and prisoners can be put to work. By purchasing access, often in monopoly form, firms are able to exploit prisoners – first, as underpaid labor and, second (and more deeply), as a captive market for overpriced goods. . . .

. . . There is no question that we are living amid a very serious injustice. But we are also living amid powerful efforts to fight these injustices and significant opportunities to make progress.

Predatory criminal justice practices have figured as central issues of contention in the Black Lives Matter movement, in prison labor strikes, and other protest actions in recent years. This is very important because, now as in the past, radical shifts in policy are likely to be significantly easier to attain if policymakers confront ongoing, disruptive protests from people in the communities most directly targeted by injustice.

More conventional advocacy groups are also mobilizing. Efforts to reform predatory bail practices – for example, to limit bail amounts based on defendants' ability to pay – are making headway in a number of states. Legal advocacy groups have won victories in litigation campaigns to curb the most predatory municipal practices. And efforts to fight civil asset forfeiture won a huge victory in the U.S. Supreme Court earlier this year in *Timbs v. Indiana*.

In another big win, just this month, California became the first state in the U.S. to pass a law forbidding contracts with for-profit operators of prisons and immigrant detention centers. The law mandates a phase out between now and 2028, with a complete ban thereafter.

There is no question – in my mind, at least – that practices pursued today in the name of criminal *justice* confront us with a very serious *injustice*. There is also no question – in my mind, at least – that change will come to this system.

To conclude that things will not change is to imagine that our present era stands apart from all preceding history. The question isn't whether things will change again. Of course, they will. The question is *how* they will change, and what role *we* will play in that change.

## Hidden Laws of the Time of Ferguson (2018)

Monica C. Bell

132 HARVARD LAW REVIEW FORUM 1

*Every society is really governed by hidden laws, by unspoken but profound assumptions on the part of the people, and ours is no exception. It is up to the American writer to find out what these laws and assumptions are. In a society much given to smashing taboos without thereby managing to be liberated from them, it will be no easy matter.*

– James Baldwin, *Nobody Knows My Name*

. . . Contemporary black writers and scholars perpetually rely on Baldwin not because his words remain persuasive and relevant to current social conditions—though they do—but because of what Baldwin represents: a stunningly free black truth-teller, unafraid to express himself, directly and damningly, about the American racial hierarchy. When Baldwin writes about poverty, he is also writing about race. When Baldwin writes of the “hidden laws” structuring American society, one can surmise that white supremacy is one of them.

We who invoke Baldwin are reminding ourselves and signaling to others that we are not naïve. Pulitzer Prize-winning essayist Rachel Kaadzi Ghansah explains as much in a recent piece, part of the Baldwin-referent anthology *The Fire This Time*:

And this is how his memory is carried. On the scent of wild lavender like the kind in his yard, in the mouths of a new generation that once again feels compelled to march in the streets of Harlem, Ferguson, and Baltimore. What Baldwin knew is that he left no heirs, he left spares, and that is why we carry him with us.

We are spares, barely. But invoking Baldwin to write *prescriptively about law* is composing in code. We know that there is only so much reforming doctrine or policy can do. We advocate for these changes because they could improve conditions at the margins, but we understand that the root issues that remain to be addressed are bound up in culture, ideology, and deep structure—knots that may have loosened but will take generations to unravel. Our condemnation of white supremacy might at times be less blistering and direct than Baldwin’s, but our work sits on a lower, feebler branch of the same tree. . . .

“No one should be in jail or punished because she is poor,” [Fred] Smith asserts [in his article, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018)]. He makes this declaration as if it is an irrefutable maxim on which there is wide consensus. But another hidden law with which reformers must reckon is that the overwhelming majority of people under penal control—people who are not contemplated in the litigation

surrounding rights to counsel and fines and fees--are punished because they are poor. They may not be incarcerated because they cannot pay a fine or bail, but they are still punished because they are poor. While these numbers cannot support a direct causal link on their own, it is likely no coincidence that, as of 2014, 57% of incarcerated men aged 27-42 and 72% of same-aged incarcerated women had preincarceration annual incomes less than \$22,500 in 2014 dollars, compared to 23% of nonincarcerated men and 48% of nonincarcerated women with such a low income. The current "criminalization of poverty" framework tends to focus on jail incarceration due to bail, fines, and fees, but prison and poverty (and race) are also inextricably linked. This is true in part because prison is the frontline response to many problems associated with deprivation and deep poverty.

The "criminalization of poverty" framework is helpful at points because it sheds light on a set of carceral processes of which many people are unaware. Before Ferguson, there was no widespread recognition that financially struggling cities might try to fund their survival by charging residents steep fines and fees and incarcerating them when they could not pay. These processes may need particular labeling to be understood, and this framing might arouse certain empathies that are frequently withheld from persons incarcerated for drug crime or violent crime, for example.

Yet I worry that centering particular forms of the "criminalization of poverty" obscures the myriad pathways through which poverty and involvement in the carceral state are linked. "Criminalization of poverty" in the current framework is reminiscent of the emphasis on decarceration for the class of offenders who Professor Marie Gottschalk calls the "non, non, nons"-- "nonviolent, nonserious, and nonsexual offenders." As others have explained, in order to significantly reduce mass punishment, reformers will have to wrestle with the blameworthiness of violence, noting that violent acts often emerge out of morally complex situations for which there are few easily identifiable culprits. Social welfare policy, which has long implicitly distinguished between the "deserving" and "undeserving" poor, provides another analogy. "Criminalization of poverty" reformers must be careful not to rely too heavily on implicit distinctions between the blameless and blameworthy incarcerated poor, and should instead take a more systemic and institutional approach to framing the issue of poverty criminalization. . . .

Researchers have detected complex relationships between poverty and involvement in the carceral state at multiple *levels of analysis* (individual, neighborhood, municipal, state, and federal), *types of offense* (felony, misdemeanor), *categories of punishment* (incarceration, supervision, monitoring), and *stages in the carceral continuum* (police interaction, arrest, charging, pleas, sentencing, reentry, and so forth).

At several levels of analysis and across multiple settings, poverty and punishment are inextricably linked. As explained above, poor individuals are simply more likely to go to prison than are higher-income people. Poor individuals move about daily life underneath

the gaze of the punitive state. Poor neighborhoods and institutions create conditions under which crime flourishes, and where crime-control institutions are omnipresent. Poor neighborhoods within cities are “incarceration’s ‘hot spots’” in places like Chicago and beyond, even controlling for crime rates. By reputation alone, when people envision high-crime neighborhoods, they often envision poor neighborhoods—specifically, poor predominantly black neighborhoods. Poor towns have often turned to the carceral system to propel their economies. As we have learned from Ferguson and from renewed scholarship and advocacy on penal fines and fees, poor cities may ratchet up ostensible crime control to generate municipal revenue. Many of the states with the least generous social safety nets use criminal justice to stand in for poverty alleviation and thus have had the nation’s highest incarceration rates. In addition, the slow-and-then-precipitous hollowing out of federal welfare corresponded with the rise of mass incarceration, which has led many scholars to envision the national expansion of incarceration and other forms of penal supervision as a specific strategy to make subjects of poor populations.

Poverty colors the criminal justice experience at the felony and misdemeanor levels, under confinement and supervision, and from entry to reentry. Researchers focused on felony conviction and incarceration see poverty as both cause and consequence of involvement in serious crime. Scholars have widely argued that misdemeanor justice is bound up with the social control of marginalized people, including poor people. Studies of community corrections, such as probation, parole, and supervised release, largely follow a similar line but also suggest that there is a “bifurcated” system of supervision that disadvantages poor people while granting greater privilege to those who are already relatively privileged. At the front end of the carceral spectrum, the use of police to manage the poor--and increasingly today, to deliver social services--is well documented. At the furthest end, people returning home after prison generally go home to poor neighborhoods and struggling families, and have a very difficult time raising themselves out of poverty--especially if they are people of color. To be sure, the precise mechanisms linking poverty and punishment are complex and vary across these settings and units of analysis; it is critical that those interested in *truly* decriminalizing poverty take a nuanced and sophisticated look at these connections. Qualitative research reveals specific processes that link poverty with criminal justice involvement. For example, Professor Victor Rios explains how poor Latino and black boys growing up in Oakland come to be involved in a “youth control complex,” including school officials, community centers, parents, and other actors that construct a world that criminalizes these boys, essentially shuffling them into the carceral state.

Poverty plays a master role in selecting who moves through this particular apparatus. Professor Forrest Stuart richly depicts how people living on Los Angeles’s Skid Row become “copwise,” developing cultural techniques to strategically engage with the police and to evade net-widening aspects of “therapeutic policing.” In an article on poor African American mothers in Washington, D.C., I describe how mothers sometimes report

relying on the police despite their stated distrust of them. Their constrained circumstances and the retrenchment of the welfare state mean that sometimes, law enforcement is the only institution that offers ready access to needed services. When children are frequently misbehaving, it might be difficult to find therapists, but police officers are readily available and can be conduits for services. When children are truant, tracking them down can be difficult--but if parents do not make a documented effort, they could get stuck with an educational neglect charge. Seeking out a police officer or probation officer to make sure the child attends school protects the parent, but it also directly introduces the child to the carceral state. Poverty is a primary conduit toward criminal punishment generally, and separating the form of poverty criminalization that emanates from fines and fees from other forms of poverty criminalization obscures this social reality. . . .

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## II. Funding Government: Fiscal Incentives, Inequalities, Reform, and Abolition

An understanding of public finance systems and tax mechanisms is central to engaging in debates about how to alter structures of government funding to reduce or eliminate monetary sanctions. The questions are why and how government funds are collected and allocated, and the impact of various modes of financing. Researchers have documented how certain funding mechanisms produce and reinforce inequality, and have honed in on the effects of funding government services through fines and fees in state and local public finance systems. The readings consider the decision-making and the politics that drive assessments. Knowing these incentives is requisite to changing them, and throughout this volume, commentators examine means to alter pernicious fiscal policymaking.

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### **Predatory Cities (2020)**

Bernadette Atahuene

108 CALIFORNIA LAW REVIEW 107

When Amazon publicly announced that it was searching for a second headquarters, 238 cities placed bids to lure the powerhouse online retailer and capture its promise of jobs and economic prosperity. Many financially desperate cities view investments from companies like Amazon as the only cure to their deeply entrenched economic ills. But private sector investment is elusive. With few other options, cities have increasingly sought to raise much-needed revenue from their own residents by increasing parking and traffic citations, passing jail expenditures onto incarcerated populations, and shifting other expenses that once came from the public purse onto private citizens. Some cities, however, have taken these extractive practices too far. They have become predatory. Predatory cities are urban areas where public officials systematically take property from residents and transfer it to public coffers, intentionally or unintentionally violating domestic laws or basic human rights. This Article explores the question: Why do some financially desperate cities become predatory?

After experiencing decades of economic decline – which worsened in the years just before it declared the largest municipal bankruptcy in US history – Detroit has devolved into a predatory city. Between 2009 and 2015, the City of Detroit, located within Wayne County, Michigan, assessed 53 to 84 percent of homes in violation of the Michigan Constitution, which states that no property shall be assessed at more than 50 percent of its market value. This led to illegally inflated property taxes that many homeowners could not afford to pay. Consequently, the Wayne County Treasurer confiscated homes at historic rates for non-payment of property taxes. To make matters worse, many affected residents were not even supposed to be paying property taxes in the first place because they live



below the federal poverty threshold and hence qualified for the Poverty Tax Exemption (PTE).

Mr. Jones's story perfectly illustrates the problem. He was born in Detroit and has never called any other city home. He remembers the army tanks that ominously rolled down his tree-lined street during the 1967 uprising. He told me about the good old days when working at a car factory placed your family comfortably in the middle class. He also recalled when the factories left, sending his beloved City in a downward economic spiral. Nevertheless, through the good times and the bad, "I stuck it out here," Mr. Jones said in a melancholy tone.

In 2012, after a lifetime as a blue-collar worker, Mr. Jones finally saved enough money to purchase his first home. He paid \$2,500, which was the approximate price others paid for similar threadbare homes in his neighborhood. Although Mr. Jones's home had been stripped, leaving only a shell with no windows, no furnace, no water, and no electrical lines, the City taxed his home as if it was worth \$49,824 – a clear violation of the Michigan Constitution's mandate prohibiting property tax assessments from exceeding 50 percent of a property's market value. Mr. Jones's only source of income was his pension, and he qualified for the PTE because his earnings fell below the federal poverty line. But Mr. Jones was unaware of this entitlement and never applied. In the end, Mr. Jones was unable to pay his illegally inflated property tax bill, so the Wayne County Treasurer foreclosed upon his home and sold it at auction for \$2,900. Mr. Jones lamented: "It's hard to describe the feeling when you lose your home, but it's an embarrassment that I don't think a person should go through more than once, if they survive it the first time."

Detroit, however, is not the only city engaging in this particular type of predatory behavior. A recent Pulitzer Prize nominated *Chicago Tribune* series found that homes in minority neighborhoods on the south and west sides of Chicago were paying effective tax rates twice as high as those in wealthier, predominately white neighborhoods on the north side. In addition, the preliminary results of an ongoing study by Christopher Berry show that most local property tax assessors not only in Chicago and Detroit, but also in New York City, Philadelphia, St. Louis, Phoenix, Miami, Los Angeles, Las Vegas, Boston, and Seattle are systemically inflating the property tax assessments of poor and minority homeowners in violation of existing laws.

In addition to property tax overcharges, judges, police, and other public officials also supplement public budgets by illegally extracting funds from residents. This includes New Orleans judges who jail defendants when they do not have the ability to pay court fees; Ferguson police who engage in unconstitutional policing and issue discriminatory fines; and Washington, D.C. police who abuse civil forfeiture laws. Fiscal austerity endured by economically embattled cities sometimes pushes officials to cut corners and violate laws

in order to augment shrinking budgets and replenish public coffers. This is a trend that scholars and policy makers can no longer afford to ignore.

In Detroit, Washington, D.C., Ferguson, New Orleans, as well as many other cities where public officials are illicitly taking money from residents to bolster public coffers, the burning question is: Why? . . .

. . . Predatory cities are precipitated by two emerging global trends: the rise of inequality and the retrenchment of local government budgets. As a result, the pressure for local officials to use illicit means to augment the public purse is mounting. In addition to Detroit, several other cities seem to have been beguiled by the siren song of illicit extraction, filling public coffers with dissonance. This Article is the first attempt to identify the phenomenon of predatory cities and explain why one local government could not resist the lure. I began this Article with Mr. Jones's story, so it is only fair that he gets the last word. Recall that the City of Detroit inflated his property tax assessment in violation of the Michigan Constitution, which led to illegally inflated property taxes that he could not afford to pay. Consequently, the Wayne County Treasurer foreclosed upon his home for failure to pay his property taxes. Adding insult to injury, he was not supposed to pay any taxes in the first place because his low income qualified him for a poverty tax exemption. Mr. Jones succinctly described the structural violence perpetrated by predatory cities when he said, "This whole mess makes me feel like I was stuck up and robbed."

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**The Implications of Inequality for Fiscal Federalism  
(or Why the Federal Government Should Pay for Local Schools) (2019)**

Brian Highsmith

67 BUFFALO LAW REVIEW 101

In designing public policy, a question of first principle is the degree to which government services—and the mechanisms of collecting revenue to finance those services—should be centralized within and across political systems. To inform their assessments of where redistribution should properly occur, public finance researchers have, to date, worked backwards from different assumptions about the mobility of residents within the political community. Scholars have disagreed about the viability of local governments' efforts to redistribute wealth—with traditionalists arguing that these efforts are made impossible by residential mobility, and recent reformists countering that limitations on mobility indeed allow for limited redistribution at the local level.

But these arguments have largely sidestepped questions about what level of centralization is theoretically optimal for redistributive programs. And by focusing on the

empirical question of residential mobility, they have ignored a variable that—I seek to demonstrate—is at least as important. In this Essay, I argue that those two deficiencies in the literature are connected. I introduce a simple model to show that economic redistribution becomes more difficult—indeed, approaches impossibility—as economic inequality increases, regardless of one’s assumptions about levels of mobility (by the rich or poor). That is because economic inequality has an inherent spatial dimension: so long as citizens exhibit anything short of perfect mobility (and perfect responsiveness to redistributive policy), its rise will result in an increasing geographic concentration of fiscal resources available to governments. For this reason, higher levels of economic inequality strengthen the case for centralizing the financing of any public good or program with redistributive goals—including the great bulk of what contemporary governments aim to do.

I introduce the concept of a “fiscal unit” to refer to the geographic scope of public financing—which might be, depending on the program, a school district boundary, a county, a state, or the entire country. In order to achieve an equitable allocation of public goods, policymakers should respond to rising income inequality by shifting the site of revenue collection to occur at widely drawn “fiscal units”. This can take two forms. It can be done by expanding the scope of fiscal boundaries—for example, by funding locally-administered programs at the state or federal level. Alternatively, policymakers could respond to inequality by increasing fiscal transfers from higher levels of government (wider fiscal units) to lower, geographically smaller governments.

Rather than an afterthought, the existing level of economic inequality within a political community may be the single most important question for this aspect of policy design. Where wealth is unequally distributed, the primary responsibility of assessing the revenues used to finance public goods should be assumed by levels of government representing the greatest number of people. This paper thus suggests that policymakers should respond to rising income inequality by shifting not only the burden but also the site of redistributive taxation.

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### **Fairness Matters: A Chart Book on Who Pays State and Local Taxes (2019)**

INSTITUTE OF TAXATION & ECONOMIC POLICY

There is significant room for improvement in state and local tax codes. State tax codes are filled with top-heavy exemptions and deductions and often fail to tax higher incomes at higher rates. States and localities have come to rely too heavily on regressive sales taxes that fail to reflect the modern economy. And overall tax collections are often inadequate in the short-run and unsustainable in the long-run. These types of

shortcomings provide compelling reason to pursue state and local tax reforms to make these systems more equitable, adequate, and sustainable.

Too often, however, would-be tax reformers propose policy changes that would worsen one of the most undesirable features of state and local tax systems: their lopsided impact on taxpayers at varying income levels. Nationwide, the bottom 20 percent of earners pay 11.4 percent of their income in state and local taxes each year. Middle-income families pay a slightly lower 9.9 percent average rate. But the top 1 percent of earners pay just 7.4 percent of their income in such taxes. This is the definition of regressive, upside-down tax policy.

State and local tax systems exacerbate growing income inequality precisely because they capture a greater share of income from low- or moderate-income taxpayers. Moreover, regressive state tax codes overall result in higher tax rates on communities of color, which are more represented in the low-, moderate- and middle-income quintiles, thereby worsening racial income and wealth divides.

State tax systems that ask the most of families with the least are also not well-suited to generate adequate revenues to fund schools, health care, infrastructure, and other public services that are crucial to building thriving communities. This problem is particularly acute in the long run since regressive tax systems depend more heavily on low-income families, whose incomes have remained largely stagnant, while taxing the superrich, whose wealth and incomes are growing rapidly, at lower rates.

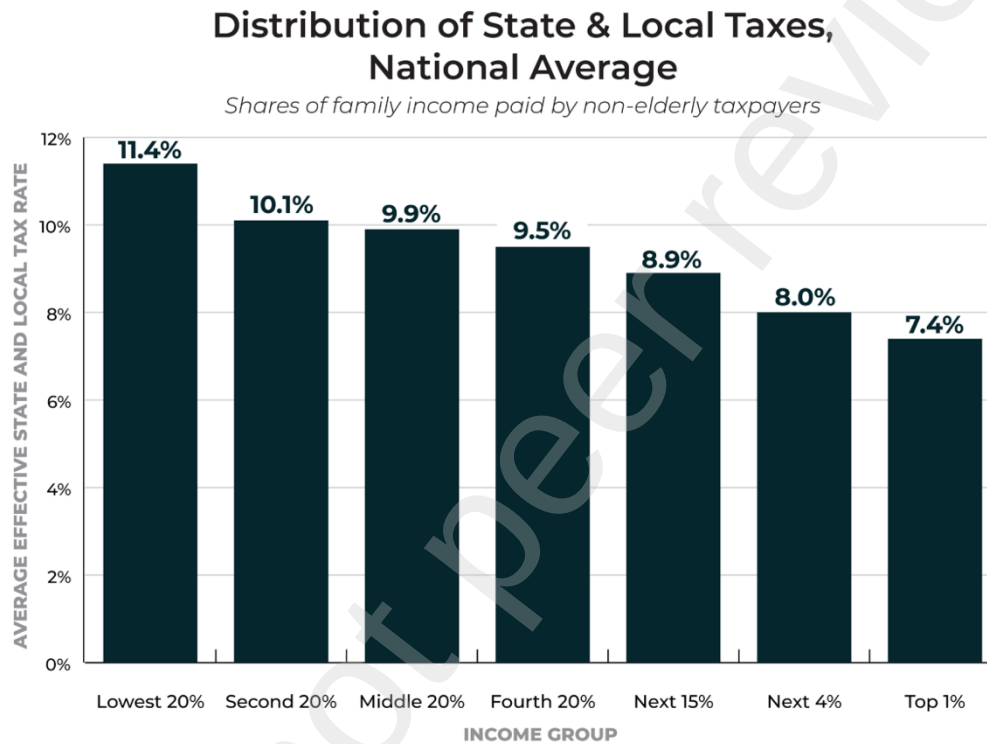
As information in this chart book helps illustrate, it does not have to be this way. States vary considerably in the fairness of their tax codes, and pursuing policies adopted by states with the least regressive tax systems is a proven strategy for reducing tax inequity.

States levying robust personal income taxes with graduated tax rates and targeted refundable credits, for example, tend to have overall tax systems that are more reflective of taxpayers' ability to pay. By contrast, states with flat-rate personal income taxes or no personal income tax at all have among the most regressive tax systems in the nation.

And contrary to claims that everybody pays a "fair share" under sales and excise taxes, states relying heavily on these taxes to fund government tend to fare poorly in terms of the distribution of their tax systems. As this chart book shows, middle- and low-income taxpayers typically pay more tax on what they buy (sales and excise taxes) than on what they earn (income taxes), though many families may fail to notice this since sales tax payments are spread over countless purchases made throughout the year. Relying on sales tax benefits high-income taxpayers at the expense of low- and moderate-income families who often face above-average tax rates to pick up the slack.

Given the detrimental impact that regressive tax policies have on economic opportunity, income inequality, racial wealth disparities, revenue adequacy, and long-run revenue sustainability, tax reform proponents should look to the least regressive states in crafting their proposals. . . .

State and local tax systems levy the highest effective tax rates on the lowest-income taxpayers.

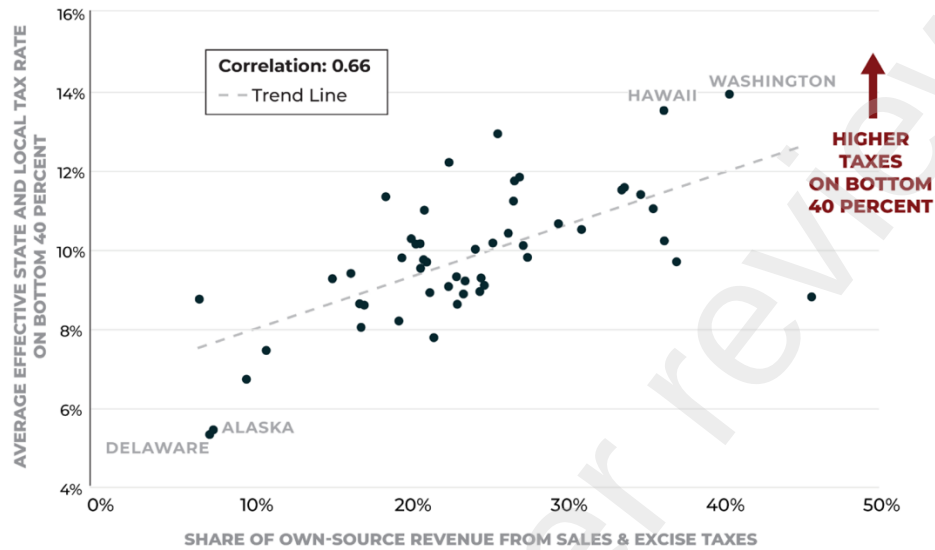


Virtually every state tax system is fundamentally unfair, taking a much greater share of income from low- and middle-income families than from high-income families. On average, the poorest 20 percent of taxpayers spend 11.4 percent of their income on state and local taxes, which is 50 percent higher than the 7.4 percent average effective rate for the top 1 percent.

While reasons for this disparity vary by state, an overreliance on regressive consumption taxes and the lack of a sufficiently robust personal income tax are two of the most common features of state and local tax codes. . . .

**Sales taxes often determine if a state is “higher tax” for low and moderate-income families.**

## Reliance on Sales & Excise Taxes and Effective Tax Rates for Low- and Moderate-Income Families

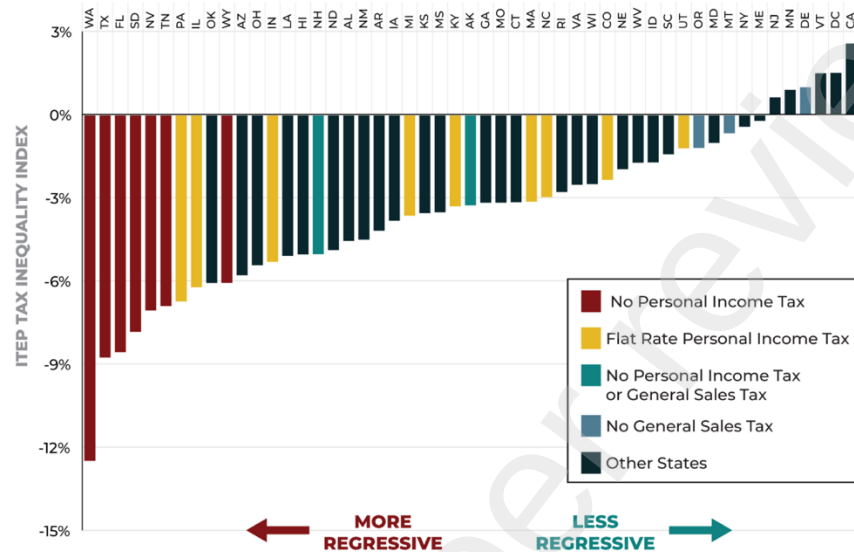


Source: Institute on Taxation and Economic Policy

While there is no single determinant of whether a state is “higher tax” for the bottom 40 percent of earners, the level of reliance on sales and excise taxes has a major impact. In states where sales and excise taxes account for 30 percent or more of state and local revenue, effective tax rates on lower-income people almost always exceed 10 percent. In states deriving 15 percent or less of their revenue from these sources, effective tax rates on this group are 8 percent or less.

The most lopsided state and local tax codes include a flat income tax or no income tax at all.

### Impact of Tax Systems on Inequality

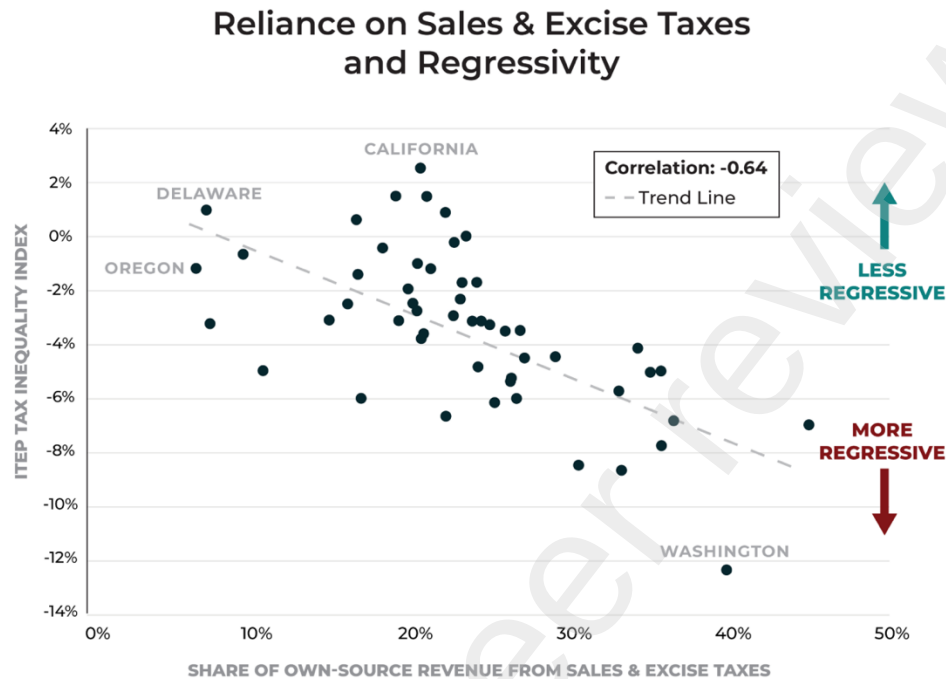


Source: Institute on Taxation and Economic Policy

The ITEP Tax Inequality Index measures the effects of each state's tax system on income inequality. It examines whether the gap in families' shares of income is wider or narrower after state and local taxes. States with regressive tax structures have negative inequality index scores, meaning that incomes are less equal in those states after state and local taxes than before. The farther the score falls below zero, the more regressive the tax code.

Of the 10 most regressive state and local tax systems in the nation, nine levy either a flat income tax or no personal income tax at all. By contrast, the 10 least regressive states (including six states with moderately progressive codes) all use graduated rate personal income taxes.

States raising more of their revenue with sales and excise taxes tend to have more regressive tax systems.



Source: Institute on Taxation and Economic Policy

A high degree of reliance on sales and excise taxes to raise revenue is a key feature of regressive tax systems. States where a significant share of revenue is derived from taxes on consumption tend to receive lower scores in ITEP's Tax Inequality Index, meaning that their taxes fall disproportionately on low- and middle-income families rather than on families with large incomes.

### Advancing Racial Equity with State Tax Policy (2018)

Michael Leachman, Michael Mitchell, Nicholas Johnson & Erica Williams

CENTER ON BUDGET & POLICY PRIORITIES

States and localities could do more to help undo the harmful legacies of past racism and the damage caused by continuing racial bias and discrimination. If state budget and tax policies were better designed to address these harms and create more opportunities for people of color, state economies would be more equitable and likely also would be stronger, which in turn could benefit many state residents of all backgrounds.



States and local governments account for nearly half of all domestic public-sector spending, and most of the funding for education and certain other investments important for economic growth. As such, how states and localities raise and spend revenue, including what services they finance, has major implications for racial and ethnic equity. Yet, while in recent decades people of color have made progress in many areas, state and local fiscal policies too often have not been part of this progress and instead have extended or cemented racial disparities in power and wealth.

Discriminatory public policies and racially prejudiced public and private actions of the past contributed to a historical context in which people of color were systematically held back. For much of our nation's history, people of color had little to no power in state legislatures, and white lawmakers could set policies that sustained white dominance, even in states where people of color were a significant share or even a majority of the population. In that sort of environment, state and local tax policies often deepened the profound challenges that people of color faced, even when those tax policies were not explicitly race-based. Examples of such policies that remain in place today include:

- The oldest supermajority requirement. In the post-Reconstruction era, wealthy white landowners in Mississippi demanded and won a constitutional requirement for a three-fifths vote in both houses of the legislature for all state tax increases, the oldest such requirement still on the books in any state. Delegates adopted the measure at a state constitutional convention in 1890, the same convention at which they disenfranchised nearly all of the state's Black voters. Referring to his fellow convention delegates, the delegate who introduced the supermajority requirement stated, "All understood and desired that some scheme would be evolved which would effectually remove from the sphere of politics in the State the ignorant and unpatriotic negro." While he was referring to the convention's aim of stripping political power from Black people, the supermajority requirement that the delegate championed added further to the barriers that Black people faced (and continue to face), by making public investments in schools and other public services that much more difficult to secure and adequately fund. Later in the Jim Crow era, Arkansas and Louisiana also adopted supermajority requirements to raise revenue, which remain in place today.
- Some of the earliest property tax limits. During state constitutional conventions called in 1875 and 1901 to re-establish white dominance following Reconstruction, Alabama adopted constitutional property tax limits that are among the oldest still on the books. Installing highly restrictive property tax limits in Alabama's constitution protected white property owners in the state from the possibility that African Americans and their allies could return to power and substantially increase property tax rates to fund education and other such measures. These limits have now been in place for over 140 years, producing a harmful

cumulative effect. Today, Alabama's property tax revenue as a share of its economy is the lowest of any state in the country, seriously hampering the ability of local governments to provide adequate schools and other public services. During this period in Southern history, Arkansas, Missouri, and Texas also adopted constitutional property tax limits that remain in force today.

- The first modern sales tax. In 1932, Mississippi adopted the nation's first modern retail sales tax, a tax that generally falls hardest on those with the least income (because sales taxes consume a larger share of their income). The state's governor urged adopting the new tax in part by emphasizing that the revenue would be used to reduce property taxes, and that as a result it would shift the state tax base away from property owners and more heavily onto consumers. What that meant in practice was a reduction in taxes owed by mostly white property owners and an increase in those owed by Black households that owned little or no property and had little else to tax. Other states across the country adopted sales taxes not long after Mississippi demonstrated the tax's feasibility and its significant revenue-raising power.

If states work to overcome racial inequities, in part by improving their tax and budget policies and more adequately financing needed public services such as education, the well-being and productivity of states' workforces should improve, which in turn should broadly benefit state economies. While the specific needs of states vary, lawmakers can pursue fiscal policies that:

- Ensure that households with high incomes pay a larger share of their income in state and local taxes than households with lower incomes — the opposite of the upside-down tax systems in place in 9 of every 10 states today. Most states' tax structures actually worsen racial and ethnic inequities because the tax structures are regressive and households of color are more likely to have lower incomes and less wealth than white households. States can take steps such as strengthening their income taxes and otherwise improving the structures of their tax systems, better taxing wealth, enacting or expanding tax credits for low-income families, and eliminating various fees used to raise resources for the courts, and other parts of the justice system, that can trap low-income individuals — often people of color — within cycles of debt and criminal justice involvement.
- Raise sufficient revenue for high-quality schools in all communities and for other investments in education, infrastructure, health, and the like, and target spending to help overcome racial and ethnic inequities and build an economy whose benefits are more widely shared. Specific steps that states can take include eliminating wasteful subsidies that allow corporations to avoid paying taxes on their profits, raising income tax rates for the most affluent, modernizing state sales taxes, and

better taxing carbon pollution and natural resource extraction. States can also better target their current spending, for example by reforming their criminal justice policies and using the savings from reduced incarceration to finance investments in low-income communities—particularly communities of color—and by reforming their school funding formulas to invest more in such communities. (Other education reforms are also necessary, but likely won't be sufficient by themselves in the absence of additional funding.)

- Improve the fiscal policy “rules of the game” so lawmakers don’t face artificial constraints that prevent them from raising more revenue from wealthier residents or to finance public investments that can promote broadly shared prosperity. Steps that states can take include reforming or repealing constitutional limits on property taxes; overturning other formulaic restrictions on revenue raising; eliminating supermajority requirements for raising taxes or eliminating unproductive, inefficient tax breaks; and improving the rules governing their “rainy day” funds.

State economies and communities generally do better when they make public investments that can enable their residents to more fully realize their potential, including: good schools to offer low-income children a better chance at a successful future; affordable colleges to boost opportunities for a broader group of students; economic supports to help struggling working families have stable housing, nutritious food, and lives that aren't filled with intense stress that has been found to affect children adversely; and health coverage to protect against health-related bankruptcies and other financial hardship, while producing a healthier, more productive workforce. When they are strong and administered with equity in mind, these kinds of public investments can help break down barriers to opportunity for communities of color and help more Americans achieve their potential, to the benefit of the broader economy. These investments will be still more effective if states and localities couple them with other policies that can improve equity such as boosting minimum wages, adopting family leave and sick leave policies, and protecting workers' right to form unions. . . .

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### **Envisioning Abolition Democracy (2019)**

Allegra M. McLeod

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For decades, police in Chicago chained people in their custody to the wall in dark, windowless rooms and subjected their captives to beatings, electric shocks, anal rape, and racial abuse. In July 2016, members of the #LetUsBreathe Collective, created in the aftermath of numerous police killings in Chicago and elsewhere, occupied vacant lots

adjacent to the Chicago Police Department's Homan Square facility—one of the locations where such abuse occurred. The Collective sought justice, not through recourse to the criminal courts or civil litigation, but instead by reconceptualizing justice in connection with efforts to end reliance on imprisonment and policing. The organizers redesignated Homan Square—which shares a name with the Chicago slumlord Samuel Homan—"Freedom Square." The organizers' idea was to begin to realize on a small scale what the scholar and activist Professor Angela Davis, echoing the words of W.E.B. Du Bois, has called "abolition democracy."

Organizers in Freedom Square and across the city amplified the penal-abolitionist platforms of the Movement for Black Lives and Black Youth Project 100 (BYP100), demanding that the state divest from policing and imprisonment and invest in new forms of more equitable and just coexistence. Freedom Square was to be an experiment in which participants would "imagine a world without police," a world where the 1.4 billion-dollar Chicago police budget would be directed away from detaining human beings and toward a democratic revitalization of public education, employment, restorative justice, mental health, housing, addiction treatment, arts, and nutrition. Before they disbanded, those engaged in the Freedom Square experiment provided meals to hundreds of people each day and offered educational workshops, clothing, books, and play spaces for neighborhood children.

Similar efforts took shape beyond Chicago, from New York City, where organizers launched a protest called "Abolition Square" that same summer, to Los Angeles, where Black Lives Matter activists occupied an area near police headquarters and issued calls to "decolonize City Hall." Across the country, contemporary movements against the violence of policing have taken up the cause of penal abolition, denouncing caging and minutely controlling human beings while re-envisioning democracy in genuinely liberatory terms. Through these abolitionist efforts—from those of organizers in Chicago confronting the decades of torture perpetrated by police, to those of people struggling together to address the aftermath of sexual assault and homicide, to those of community members organizing to ensure greater economic well-being and security—a new conception of justice has begun to emerge.

Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably. Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live. This conception of justice works, for example, to eliminate the criminalization of poverty and survival while addressing the criminality of a global social order in which the eight wealthiest men own "the same amount of wealth as" fifty percent of all people on earth. To approach justice in these terms requires what Professor Lisa Guenther, an abolitionist philosopher, describes as "collective resistance and revolution at

the scene of ‘crime’ itself.” Such resistance begins by unmasking the illegitimacy of much of what is subject to criminalization—for instance, the prosecution of immigration offenses, which compose at present more than half of the U.S. federal criminal docket. Resistance at the scene of crime itself also entails working to eliminate existing punitive institutions while identifying meaningful forms of accountability and prevention to respond to actual violence and wrongdoing. Finally, such resistance involves addressing how mainstream economic practices and arrangements perpetrate violent theft every day in ways that can be thoroughly redressed only by democratizing political and economic institutions so as to prevent and respond to the highly unequal distribution of resources and life chances.

Whereas reformist efforts aim to redress extreme abuse or dysfunction in the criminal process without further destabilizing existing legal and social systems—often by trading reduced severity for certain “non-violent offenders” in exchange for increased punitiveness toward others—abolitionist measures recognize justice as attainable only through a more thorough transformation of our political, social, and economic lives. To realize justice in abolitionist terms thus entails a holistic engagement with the structural conditions that give rise to suffering, as well as the interpersonal dynamics involved in violence.

This Essay argues that this abolitionist conception of justice presents a formidable challenge to existing ideas of legal justice. Whereas conventional accounts of legal justice emphasize the administration of justice through individualized adjudication and corresponding punishment or remuneration (most often in idealized terms starkly at odds with actual legal processes), abolitionist justice offers a more compelling and material effort to realize justice—one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.

Much of this Essay will focus on abolitionist projects unfolding in Chicago, in part because Chicago is a place where abolitionist organizing has flourished over the last decade, bringing together interracial coalitions working for immigration justice and racial inclusion, reparations, participatory budgeting, and social and economic transformation. But the sustained focus on a single place, with its particular history and present, is also an important dimension of the conception of justice embraced by contemporary abolitionists—namely, abolitionists are committed to justice grounded in experience rather than proceeding primarily from idealized and abstract premises with little attention to how those ideals are translated into actual practices. . . .

### **III. The Practices, Law, and Harms of Tying Monetary Assessments to Law Enforcement Systems**

Many commentators have focused on the criminal legal system as a source of revenue. These readings provide additional background on the history of criminal legal obligations, their impacts on individuals and families, how the harms track race and class, and what changes could make dents in the systems of unfairness. Excerpted essays explore government funding mechanisms and examine the formal distinctions among categories labeled “tax,” “fine,” and “fee,” their functional overlaps, and their effects.

Other materials address aspects of constitutional and state and municipal law that frame some of the discussion and litigation. As recounted, concerns about “excessive” economic burdens imposed by governments have a long history. In the English-United States legal system, governments are forbidden from levying “excessive fines” and from imposing “cruel and unusual punishments,” as well as required to respect life, liberty, and property. Since the 1980s, governments cannot turn monetary obligations into incarceration. While some commentators and jurists call for these constitutional rights to stop systems of punishment that “ruin” individuals, these provisions have not yet been read to end the racial and economic oppression of legal assessments. Indeed, through the post-Civil War Black Codes, convict leasing, and peonage systems, and with expansion of criminal systems in recent decades and charges of “pay to stay” in jails and prisons, inequalities abound and “ruin” has resulted.

Several commentators address jurisdiction-specific harms and make proposals for change. Excerpted are a series of case studies, analyses of race as a key variable, and arguments for how and why to revise, reform, and transform the use of money in conjunction with courts.

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#### **Glimpsing the Infrastructure of Fines and Fees**

##### **Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources (2015)**

Mary Fainsod Katzenstein & Maureen R. Waller

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In the last decades, the American state has radically enlarged the array of policy instruments utilized in today’s governance of the poor. Most recently, through a process of outright “seizure,” the state now exacts revenue from low-income families, partners, and friends of those individuals who in very large numbers cycle in and out of the nation’s courts, jails, and prisons. In an analysis of legislation, judicial cases, policy regulations,

blog, chat-line postings, and survey data, we explore this new form of taxation. In doing so, we endeavor to meet two objectives: The first is to document policies which pressure individuals (mostly men) entangled in the court and prison systems to rely on family members and others (mostly women) who serve as the safety net of last resort. Our second objective is to give voice to an argument not yet well explored in the sizeable incarceration literature: that the government is seizing resources from low-income families to help finance the state's own coffers, including the institutions of the carceral state itself. Until now, no form of poverty governance has been depicted as so baldly drawing on family financial support under the pressure of punishment to extract cash resources from the poor. This practice of seizure constitutes the very inversion of welfare for the poor. Instead of serving as a source of support and protection for poor families, the state saps resources from indigent families of loved ones in the criminal justice system in order to fund the state's project of poverty governance. . . .

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**Money (2018)**

Alexandra Natapoff

*in* PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (NY: BASIC BOOKS)

. . . It is hard to overstate the pervasive influence of money and wealth in shaping, motivating, and expanding nearly every aspect of the misdemeanor system. In the first instance, many low-level crimes are crimes of poverty: they punish people for being unable to afford car insurance, housing, or child care by making it a crime to drive without insurance, sleep in a public place, or leave a child briefly unattended. Misdemeanors also make people poorer in a variety of ways. Fines and fees strip them of their wealth. Driver's license suspensions – a common result of failing to pay traffic fines – get people fired and cause them to miss school, doctor's visits, and job interviews. Being jailed for failure to pay fines and fees drives people deeper into poverty. Since nearly half of all Americans have trouble coming up with an extra \$400 in an emergency, standard misdemeanor fines and fees threaten devastation for a broad swath of the population.

These regressive policies, in turn, help pay for the misdemeanor process itself. In effect, the petty-offense process is a method of taxation. It rounds up low-level offenders and charges them fines and fees, which are then plowed back into the system to fund those very same courts, jails, probation offices, and the local governments that oversee them. Thomas Edsall of the *New York Times* called this phenomenon “poverty capitalism,” a “unique sector of the economy [where the] costs of essential government services are shifted to the poor.” Often the misdemeanor process indirectly transfers wealth away from the poor behind the scenes; sometimes it does it overtly.

Judge Marilyn Lambert, for example, was the only judge on the Ascension Parish Court bench, a Louisiana municipal court handling misdemeanors and traffic infractions. If Judge Lambert convicted an individual, that person paid a \$15 conviction fee, which went into a judicial expense fund. If Judge Lambert found them not guilty, they paid nothing. Judge Lambert controlled the Judicial Expense Fund. In 2015, the Judicial Expense Fund paid a portion of Judge Lambert's salary – \$35,684 – as well as \$9,670 in retirement, \$6,000 for a car, and \$5,894 for travel and conference expenses, for a total of over \$57,000 – the equivalent of 3,800 convictions.

Sherwood, Arkansas, operates a “hot check court” every Thursday, which handles misdemeanors involving bounced checks. For each bounced check, regardless of the amount of the check, defendants are assessed fines and fees of at least \$400. In 2011, Nikki Rachelle Petree wrote a check for \$28.93 that was returned for insufficient funds. As a result of that one bounced check, the city of Sherwood arrested her seven times, charged her over \$2,600, and jailed her for over twenty-five days. The court collects so many fines and fees from its mostly low-income defendants that the court staff nicknamed it “Million-Dollar Thursday.” The city advertises the hot check court on its website as a “service . . . available to merchants . . . free of charge as part of our many efforts to create and maintain a business friendly environment here in Sherwood.” The website also boasts of its 85 percent collection rate.

The misdemeanor system regulates the poor and the low-wage workers in ways that make it an enormously influential socioeconomic institution, redistributing wealth and recasting people's lives while shaping the practices and economic viability of local governmental entities. The system is regressive – it takes largely from those with the lowest incomes. Like the rest of the criminal system, it is racially skewed, aimed disproportionately at poor people of color. Perhaps most fundamentally, it alters the very meaning of criminal justice because its arrests, convictions, and punishments can no longer be said to be motivated primarily by wrongdoing, public safety, or justice. Instead, they are heavily incentivized by money.

It is, of course, fundamentally wrong to punish people for profit. But that does not mean that fines are always bad. Sometimes monetary sanctions represent an enlightened alternative to incarceration or other harsh penalties. Fines, as Supreme Court justice Sandra Day O'Connor once noted, date back to “the early days of English justice” before the Norman conquest, serving as a substitute for vengeance by private parties. Some people deserve to be fined. In our modern penal system, especially in theft and fraud cases, fines enable restitution and vindication for victims. But the misdemeanor world has invested fines and fees with new and sometimes dysfunctional significance, skewing the entire criminal process against the less wealthy. They make punishments longer and harsher for people who cannot afford to pay. They strip poor and working people of their life resources,



often in order to fund the system itself. And because the system is so large, its aggregate effect on millions of people every year amounts to a kind of accidental anti-welfare policy, exacerbating economic inequalities on a massive scale. . . .

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**Inability to Pay: Court Debt Circa 2020 (2020)**

Judith Resnik & David Marcus

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Commitments to “access to justice” abound. So do economic barriers that undermine that premise. Fees, costs, fines, money bail, and other financial assessments—levied by courts, jails, and prisons—have become commonplace features of state and federal civil and criminal law enforcement.

Yet the challenges of funding courts and the harms of debt generated through interactions with the legal system have not yet become staples of law school teaching and scholarship. . . .

. . . [C]ontext is needed to show the links between the academy—focused on teaching about courts, procedure, bankruptcy, and criminal law enforcement—and the problems of courts and of the people using them. During the second half of the twentieth century, political and social movements brought into sharp relief inequalities and subordination based on race, class, gender, and many other status markers. Activism and scholarship pushed courts and legislatures to recognize a host of rights and entitlements, ranging from protections of criminal defendants and prisoners to habitable housing, government benefits, and fair treatment in interactions with the state.

Courts and legislatures responded in some instances with new doctrines and statutes addressing individuals interacting with criminal law enforcement systems, people seeking housing, recipients of federal benefits, and individuals harmed by various kinds of discrimination. While the United States Supreme Court declined to recognize poverty as a suspect classification, it relied on an alchemy of due process and equal protection to recognize the need to provide resources for some low-income individuals when in conflict with the state.

As a result, legal mandates require that, in some cases, states provide lawyers to indigent criminal defendants and, on rare occasions, to civil litigants; further, under certain circumstances, courts have to waive fees and subsidize transcripts and experts. In addition, Congress created the Legal Services Corporation and authorized fee shifting to encourage the pursuit of civil rights claims. Both legislatures and courts shaped class actions and other

forms of aggregation to permit cost sharing among litigants and to provide incentives for lawyers to represent groups. Moreover, the U.S. Supreme Court concluded that, rather than incarcerating people who lacked resources to pay fines, a hearing was required to inquire about their ability to pay.

During the last several decades, some of the efforts to facilitate access to courts have been cut back through changes in statutes and in judicial interpretation. State and federal prosecutorial efforts have expanded, and the country has had economic downturns. Many jurisdictions have tried to pass the costs associated with courts, policing, and detention on to individuals. Instead of responding through raising or reallocating general revenues or by altering policies, states and the federal government have produced a welter of fees and payback obligations.

“Court debt” has become one shorthand for obligations incurred from many sources, including administrative fees, money bail, punitive fines, and victim restitution charges, as well as charges for transcripts, public defenders, detention on arrests, diversion programs, monitoring in lieu of bail, and incarceration. In some jurisdictions, judges have become partners with law enforcement in what could sadly be termed a joint “fundraising” endeavor that treats individuals charged with offenses and infractions as sources of revenue instead of as needing to be helped and heard by law. For example, localities have assessed “registration fees” for a “free” public defender. Some jurisdictions seek recoupment of the costs of both lawyers and trials after an individual is convicted. And, as the United States Supreme Court detailed in *Nelson v. Colorado*, not all jurisdictions return the assessments when individuals are acquitted.

One focus of the burgeoning literature is on the costs imposed through criminal law enforcement. Another is on civil litigants facing a barrage of special fees, surcharges, and assessments. For example, in the federal courts, the decision to waive filing fees is not based on a uniform standard calibrated to national guidelines on income but on the local practices of the district in which litigants allege they cannot afford to pay fees. And, in some states, defendants obliged to reply to a lawsuit are also charged to file in court. Another category of cases relates to immigrants. Detention in the “civil” immigration system reflects individuals’ resources. Immigrants held in detention during the pendency of their asylum or removal proceedings may not be able to afford bonds, if they are set at all.

An aggregate picture of the different sources of “legal financial obligations” (“LFOs”) comes from an impressive array of empirical evidence that attends to the racial inequalities and that has documented how fees assessed, bail imposed, and debt associated with the legal system put individuals, families, and communities into cycles of poverty and punishment. In some jurisdictions, driver’s licenses can be suspended because of unpaid court debt; in others, voting rights can be cut off. The impact of such practices is felt most acutely by people with limited resources and by communities of color, either because they

seek assistance from the legal system or because they are subjected to over-policing, prosecution, and punishment. Moreover, rather than serving to improve public safety, court-imposed financial obligations result in locking people out of participating in programs aimed at rehabilitation. As a result, interactions with courts can lead to more social dislocation and crime.

Vivid examples of the injuries have been encapsulated in the sad shorthand of “Ferguson,” which made national headlines in 2015. Ferguson was not *sui generis*. Activists, researchers, members of the media, a host of local, state, and national bar associations, judicial task forces, translocal organizations of government actors, and litigators have now detailed how LFOs undermine fair and just decisionmaking. In response, commitments to change egregious practices have grown. New legislation and administrative actions have resulted in significant proposals for and, in some instances, enacted reforms that include limiting or ending the assessment of fees and abolishing money bail. The research and legislation have also helped to produce new case law. In 2019, the United States Supreme Court concluded in a case in which a person convicted under state law faced the forfeiture of his car that the Excessive Fines Clause of the Eighth Amendment applied to the states. An amalgam of due process and equal protection analyses have prompted lower courts to hold unconstitutional the automatic suspension of driver’s licenses, the imposition of money bail for those unable to pay, the fees levied by judges who benefit from their assessment, and the setting of bond amounts for immigrants without an inquiry into ability to pay. . . .

Many of us who teach about courts provide an idealized version of what the constitutional and procedural rules require. Given the impact that courts can have in shaping people’s lives, the purpose of . . . this set of Essays is to bring into our classes and resources the structure of courts and the experiences of the users of courts. Whether by reading case law, exercises such as drafting in *forma pauperis* applications, or through articles such as those in this mini-symposium, teachers of law can help students and the public understand both the impressive research and reforms of the last few years and the need for more. Given the pervasive use of fees and fines to fund court processes, the questions that ought to preoccupy us all are whether and how constitutional democracies can meet their obligations to make justice accessible. Our hope is that . . . the costs imposed by courts will become part of mainstream discussions in law schools. The invitation to readers is to use this commentary as an entry point into thinking, teaching, and writing about how to make the legal system live up to the constitutional aspirations for fairness, justice, and equality.

## **The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States (2020)**

Sarah Shannon, Beth M. Huebner, Alexes Harris, Karin Martin, Mary Pattillo, Becky Pettit, Bryan Sykes, and Christopher Uggen

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Monetary sanctions have long been a part of the U.S. criminal justice system, but there is a burgeoning body of legal scholarship and social science research that has identified legal financial obligations (LFOs) as a key feature of hidden forms of inequality and social control. There has been unprecedented growth in the pervasiveness and scope of LFOs, and the potentially predatory nature of LFOs was highlighted prominently by the Department of Justice.

Researchers have found that LFOs can be conceptualized variably as a dimension of punishment and a source of revenue. Scholars have raised questions about how LFOs affect poverty, racial and socioeconomic inequality, and the fair and efficient administration of justice.

The research broadly suggests that for individuals who do not have the financial means to comply with financial sanctions, LFOs can widen the net and intensify the entanglements with the criminal justice system. Even small criminal justice debts can have enduring consequences. In particular, failure to comply with sanctions can have broad implications for felon disenfranchisement, driver's licensing, and institutional and community corrections. The scope of sanctions continues to widen, particularly with the use of private agencies to collect debt and enforce conditions of the sentence.

This project, entitled the Multi-State Study of Monetary Sanctions, was designed to build on the emerging research conducted on LFOs. The goal is to examine the multi-tiered systems of monetary sanctions operating within multiple states representing key regions of the United States (California, Georgia, Illinois, Minnesota, Missouri, New York, Texas and Washington). Like several studies of this type, we explore the ever-changing legal environment in these states. Importantly, we document how the law is practiced on the ground and with what effect. Unique to this project, we engage a large and diverse group of individuals with legal debt and criminal justice stakeholders, and we augment these data with lengthy, systematic court observations. This multi-method study was designed to fill important gaps in understanding the systems of monetary sanctions across the United States and has the potential to provide data that can be used for guiding policy

### **I. Study Design**

We began this endeavor by outlining the policies within each state that guide the sentencing, monitoring and collection of monetary sanctions. Each state team documented

state and local LFO policies and practices. In 2016, we conducted interviews with people who owed or paid LFOs (total = 510). In 2017 and 2018, we conducted interviews with court decisionmakers (total = 436), including judges, prosecutors, defense attorneys, court clerks, and probation officers. We also conducted court observations, approximately 200 hours per site, of sentencing and noncompliance hearings within selected jurisdictions in the study states. Efforts were made in each state to observe courts and interview individuals and court actors in rural, suburban, and urban jurisdictions to better reflect the implementation of law across diverse communities and criminal justice systems in the state. During the court observations, we took detailed handwritten field notes and completed standardized court observation sheets that detailed court hearing types, amounts sentenced, and defendant characteristics.

The focus of this research is the application of the law at the state level by court officials and the perceptions of the process by those sentenced to monetary sanctions. The United States lacks a single coherent set of laws, policies, or principles governing the imposition and enforcement of LFOs. Much like other aspects of the criminal justice system, from policing to the imposition of custodial sentences, the policies and practices governing LFOs are set by federal, state, and local governing and administrative bodies. Even the terminology used to describe LFOs varies across jurisdictions. This work captures some of the variability in the imposition of the law regarding monetary sanctions and provides some initial policy suggestions based on these findings.

### Theme 1: The Process of Punishment Is Not Transparent

The results of the study overall show that LFOs are routinely imposed for misdemeanor and felony cases. The process of punishment, however, is opaque in some jurisdictions. Many litigants reported that they did not know how much they owed. Even when states and municipalities made this information easily available, those sentenced to LFOs were not told where to look or even that they had outstanding debts. Defendants also reported confusion with the court process in general. Court observations revealed that defendants often showed up at the wrong time or place, and guidance from courtroom officials was often not readily available. None of the states studied had a central state repository where information on the total amount owed could be found. However, in the superior court in Washington, clerks send payment reminders every three months that included detailed information on the LFOs due, and a similar notification procedure was followed in the lower courts in the state. Georgia's Department of Community Supervision maintains an automated LFO information system, but this database does not capture contacts or LFOs from lower courts. In Illinois, many county courts have searchable online databases where defendants can see how much they owe, and Missouri maintains a similar system, although very few defendants knew about this resource or had regular Internet access.

Many defendants expressed confusion about how their LFOs had been calculated or how much they had left to pay. One person from Washington commented, “I don’t know how they come up with their calculations, but I don’t think they’re right.” We noted in our observations that the full extent of defendants’ LFOs are not always obvious at the time of sentencing. Some judges tell defendants to see the court clerks for the total amounts of LFOs, and most judges do not include probation or treatment fees in their final calculations.

The collection of monetary sanctions also varies within states and communities. Individuals assessed monetary sanctions most often pay the court directly, either in person to the court clerk or through an online payment system; however, the courts collect payments in other ways, as well. In several municipal and state courts, individuals who are not able to pay for LFOs outright are required to attend payment dockets or status review hearings. During these hearings, judges review payments and question defendants who have not paid at all or kept up with the requisite payment schedule. In Texas, the researchers observed the practice of defendants making a “down payment” on LFOs—say \$75—and then having a payment plan of \$25 a month. A similar system was observed in the municipal courts in Missouri. In many states, if individuals did not comply in a timely manner, the sanction could be transferred to private collections or, in New York and Illinois, could be converted to a civil judgement.

There was little standardization across the states of the assessment of defendants’ ability to pay. All states maintained legal language that allowed for an ability to pay assessment, but, in practice, the process of determining indigence varied widely. In California, some judges relied on presentence investigation reports to provide context on the litigant’s financial capabilities; in other states, judges used information on public benefits (WIC, Medicaid) to determine ability to pay. In Georgia and Washington, some court actors used the application for public defender representation as a de facto ability to pay assessment. A judge in Washington described the process they used to assess indigence:

I have what they call a bench card, which is a standard series of questions that I ask. “Are you on SSI? Are you on supplemental nutrition assistance? SNAP, food stamps? Are you employed? Do you have any savings or assets?” The answer almost without exception is, “I don’t have a job, I don’t have any assets.” Not every defendant is on public assistance, but almost all of them are statutorily indigent by law.

Two states—New York and Washington—had statutes in place that disallowed waiver of certain costs, regardless of an indigence assessment. In New York, surcharges cannot be waived. Statutes in Washington impose mandatory fees in superior court including the victim penalty assessment (\$500 for a felony or \$250 for a gross

misdemeanor) and a DNA collection fee (\$200 if DNA has not been previously collected from the individual).

## Theme 2: The Process of Punishment Varies Widely by Type of Court and Jurisdiction

Observations of lower courts across the eight states found substantial variation in the types and scope of costs that could be imposed. In felony courts, LFOs were either statutorily imposed or were negotiated within statutory guidelines as part of a sentencing or plea agreement. Litigants could also face additional costs and fees not always apparent during sentencing, particularly in some lower courts and for specific types of cases (i.e., DUI, domestic assault). The use of private probation, court-ordered treatment, and electronic monitoring programs, for example, were also more prevalent in these systems, and all required the defendant to pay additional fees. However, we observed that these costs were not always discussed in open court.

Costs for treatment and electronic monitoring are separate from statutory court fees and costs. They often must be paid directly to the service provider in order to be in compliance with the sentence. In California, for example, it is commonplace to have defendants and probationers show that they have sought treatment for substance abuse, domestic violence, anger management, parenting classes, or other court-ordered services that infringe upon their ability to pay other fines and fees. In Washington and Illinois, probation fees could be waived in some circumstances, but the states' statutes require that individuals pay all of the costs related to court-ordered private treatment programs. Judges in Minnesota agreed that even when they did all that could be done to reduce monetary sanctions, the state surcharge and supervision fees increased the burden on an indigent person. Both defendants and judges in Minnesota saw additional fees for items such as Secure Continuous Remote Alcohol Monitoring (SCRAM) bracelets as particularly burdensome.

Several municipal and circuit courts also use private probation for misdemeanor convictions. Observations in Missouri and Georgia suggest that private probation companies charge higher fees than traditional state run probation. In Missouri, the private probation system is reserved for individuals sentenced for misdemeanor or ordinance violations. A public defender commented on the judge's common practice of sentencing defendants to private probation:

We have a judge in this county who is well known for using this private correctional service relentlessly. And I just watched a girl today plead guilty to possession of marijuana, without a lawyer, and it is misdemeanor possession – a \$500 fine. She ends up with two years of supervised probation at \$50 a month, 20 hours community service, and \$100 to the law enforcement restitution fund.

In sum, at both the misdemeanor and felony levels, we encountered substantial variation in the types and amounts of LFOs imposed as well as whether and how these costs are communicated to defendants at sentencing. We observed this variation not only between the states in our study but also within states; sentencing practices and LFO amounts frequently differed by local jurisdiction and even by court or courtroom within the same jurisdiction.

### Theme 3: Noncompliance Can Result in Large Total Financial Obligations and Extralegal Consequences

Respondents who were not able to pay faced additional consequences, including protracted involvement in the criminal legal system. Stress was a common refrain among participants, and many participants had to make choices as to what to pay, as they struggled to pay for their homes, buy needed medications, and support their families. When asked how much he had paid on his LFOs, one defendant in Washington commented:

I haven't paid off anything. Yeah, I haven't honestly. That's the other thing I've been slacking on, but it's like the only reason it's like that is because I don't have extra money to be paying hundreds of dollars on fines. I have rent. I have a fiancé to take care of. I take care of my mom and my grandma. There's so much responsibility on my shoulders.

Participants also reported challenges in accessing the courts. Court is traditionally held during the day, and many defendants reported challenges getting time off from work. Difficulty in finding reliable transportation was also a common theme. If individuals miss court, the judge has the ability to issue a failure to appear warrant, which was commonplace in many states. A failure to appear charge can be associated with an additional fine and can extend and deepen the consequences of the original charge.

There are a number of consequences of nonpayment or failure to comply with court orders. Respondents described negative long-term consequences to their financial status resulting from their inability to pay their monetary sanctions. Among the multitude of problems, interviewees most commonly mentioned bad credit but also listed barriers to opening savings and checking accounts, loan denials, bankruptcy, fear of filing taxes, and insurance denials.

There are also legal ramifications for failure to pay. Several states, including Missouri, Minnesota, Illinois, and Georgia, suspend driver's licenses as punishment for nonpayment of court debt. One Minnesota judge commented on the practice of suspending driver's licenses:

I really think we should rethink the policy of taking driver's license away for nonpayment of fine. I just think that creates so much flouting of the law, because



let's be real; somebody doesn't pay their fine, they'll get a notice, if they get the notice to their last address on their driver's license, that says, "You can't drive anymore." We're creating a system where it's a small breach of the law, so I should just drive, and if I get caught, I'll probably get fined and won't go to jail, and then I'll have more fines, and then it's a snowball effect. And then good luck going down to the local DMV and trying to get your license back.

These sentiments were echoed by many others and reflect the long-term potential consequences of small contacts and failure to comply with the criminal justice system.

As a result of their interactions with the system, many respondents reported a deep cynicism toward the criminal justice system. Many expressed frustration with and distrust of representatives of the criminal justice system. Some commented that they had been sentenced to what they called "insurmountable debt" and had limited resources to repay it. Individuals felt that they were forced to comply with the system but were not protected and instead overtly ostracized, what Monica C. Bell deems legal estrangement.

#### Theme 4: States' Data Collection and Court Actors' Participation Varies Substantially

The original goal for collecting quantitative data was to gain access to automated, statewide case processing data in each of the eight states that would allow for the analysis of fiscal penalties imposed at the felony, misdemeanor, and juvenile court levels (pooled across the eight states for a comparison). Each team pursued access to such data and only two states were able to acquire data sets that fit the original criteria. Our Minnesota and Washington teams obtained statewide data covering all court types (e.g., felony, misdemeanor), all cases, and over multiple years. These data sets include exact dollar amounts and detailed information on types of LFOs (e.g., fines, fees, surcharges, and restitution), as well as amounts ordered and balances owed. At the other end of the spectrum, New York does not collect or maintain sufficient data statewide for accurately tracking the assessment and payment of monetary sanctions.

The other six states fell somewhere in between these extremes. Researchers in Illinois and Texas were able to obtain data that met most of our original criteria but lacked some specificity. In California, the data sets obtained are missing actual dollar amounts of LFOs. Our teams in Georgia and Missouri obtained data but with more substantial limitations. In Georgia, for example, there is no centralized collection of case-level court data in the state. We were able to obtain a cross-sectional data set of all individuals on felony probation supervision as of December 31, 2018 from the Georgia Department of Community Supervision. There are significant limitations in these data, and they do not provide any information on misdemeanor cases in Georgia. In Missouri, we were only able to obtain data from the city of St. Louis. Statewide court data in Missouri is collected, but data on monetary sanctions assessed are not documented in this data set.

In some cases, bureaucratic complexity and outsourcing data collection to private entities in our study states make it very difficult to identify and analyze data within the judicial branch. In several of our study states, private companies provide courtroom management software. In some ways, the data have been privatized, thereby privileging those companies in securing collections contracts. Further, in some jurisdictions in our states, public officials lack the skills, capacities, or access to analyze or make available the data that we requested. As a result, such data might exist but are not easily accessible for research. The challenges we encountered in collecting comparable quantitative data sets across all of our study states reveal a significant barrier to answering basic questions about the scope and functioning of these systems of monetary sanctions. We also had mixed results across the states in recruiting some subsets of criminal justice decision makers for our qualitative interviews. Our original goal was to interview a set number of actors in each of five decision maker categories: defense attorneys, prosecutors, judges, clerks and probation officers. Among the groups we interviewed, prosecutors and probation departments stand out as being most reluctant or inaccessible. This resistance and the particular sites of resistance within each state are instructive and provide insight into the structure and bureaucratic rules present in many criminal justice organizations. The reasons for lack of participation might span multiple concerns, including system overload, lack of time, lack of interest, lack of trust of researchers, or concerns about public opinion on these issues. In some cases, a longer period of study might have facilitated further interviews. Many court actors manage heavy caseloads and might have eventually found time to meet with us. In several jurisdictions, individual court actors expressed interest or willingness to speak with us but were blocked from doing so by general counsel or supervisors. For example, in one jurisdiction we were told that we could not interview probation officers without applying for a costly (\$3000) state-level intuitional review board process. Regardless of the reasons for nonparticipation, these obstacles limited our data collection and, in some cases, highlight the lack of willingness of some court actors to share information about systems of monetary sanctions in their states. . . .

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### **Fines, Fees, and Forfeitures (2017)**

Beth A. Colgan

4 ACADEMY FOR JUSTICE, REFORMING CRIMINAL JUSTICE 205 (Erik Luna ed.)

The use of fines, fees, and forfeitures has expanded significantly in recent years as lawmakers have sought to fund criminal justice systems without raising taxes. Concerns are growing, however, that inadequately designed systems for the use of such economic sanctions have problematic policy outcomes, such as the distortion of criminal justice priorities, exacerbation of financial vulnerability of people living at or near poverty,

increased crime, jail overcrowding, and even decreased revenue. In addition, the imposition and collections of fines, fees, and forfeitures in many jurisdictions are arguably unconstitutional, and therefore create the risk of often costly litigation. This chapter provides an overview of those policy and constitutional problems and provides several concrete solutions for reforming the use of fines, fees, and forfeitures.

## INTRODUCTION

The use of fines, fees, and forfeitures of cash and property are long-standing practices that have boomed in recent years as lawmakers have sought to fund an expanding criminal justice system without raising taxes. In many jurisdictions, economic sanctions begin accruing from the moment one is stopped by the police (e.g., fees for law enforcement costs and pretrial detention), to trial (e.g., public-defender fees or jury costs), through sentencing (e.g., incarceration or probation costs, statutory fines, surcharges, and restitution), and collections (e.g., interest charges or collection fees). For those without the means to pay, the consequences can be drastic. The inability to pay economic sanctions may result in the imposition of what have come to be known as “poverty penalties”: interest and collections costs, probation and a host of related fees for probation services, the loss of government licenses and benefits, and even incarceration. The use of forfeitures is also ubiquitous, including the growing use of what are known as “civil asset forfeitures,” which are imposed without a criminal conviction. Like fines and fees, forfeitures can be financially devastating as the loss of funds that would otherwise be used to cover basic needs—a vehicle one depends on to get to work or school, or a family home—can have profound consequences for those against whom forfeiture is imposed.

Systems for imposing and collecting fines, fees, and forfeitures are often poorly designed. . . . Abuses in both systems have resulted in a surge in efforts by advocates and investigative reporters to document and challenge the real, and often alarming, consequences of relying on criminal justice systems to generate revenue. Fueled by public outcry regarding the use of “modern-day debtors’ prisons” in places like Ferguson, Missouri, and jurisdictions around the country, as well as a plethora of incidents in which law enforcement have seized money or property and sought its forfeiture without any meaningful evidence of criminal activity, calls for reform now have support from both conservative and liberal camps.

These systems have also captured the attention of scholars from a variety of fields, including law, sociology, economics, and criminology. In this chapter, I provide a brief examination of two lines of scholarship that explore poorly designed systems involving fines, fees, and forfeitures. The first analyzes the policy implications of the use of criminal justice systems to generate revenue. The second involves explication of constitutional deficiencies that arise in poorly designed systems. This chapter concludes with a series of

policy recommendations tied to these lines of scholarship for the reform of the use of fines, fees, and forfeitures. . . .

## RECOMMENDATIONS

As the manner in which governments employ fines, fees, and forfeitures for punishment has continued to unfold, attention to the reform of such systems has increased. For example, a 2016 report from the Criminal Justice Policy Program at Harvard Law School and a 2017 joint report from the Harvard Kennedy School of Government and the Bureau of Justice Assistance provide numerous policy recommendations to transform the use of fines and fees to avoid the policy and constitutional problems described herein. The following non-exhaustive list of recommendations is intended to complement those efforts by highlighting reforms to the use of fines and fees, as well as forfeitures, that are directly related to the scholarly literature detailed in this chapter's previous sections. While the implications for government budgeting are necessarily dependent on the unique circumstances of a given jurisdiction, each proposal contains a brief indication as to whether it is likely to be revenue-enhancing, revenue-neutral, or would entail additional expenditures of government resources.

### 1. Eliminate poverty penalties and other policies that negatively impact ability to pay.

A deep irony of many systems involving fines, fees, and forfeitures is that the governmental interest in obtaining full payment is undermined by public policies that make it more likely that people will have no meaningful ability to pay. As detailed above, poverty penalties make it more difficult for people to obtain and maintain housing and employment and to remain connected to family, each of which in turn contributes to an inability to pay economic sanctions. Further, any number of other direct and collateral consequences of conviction can reduce the capacity to pay. For example, certain convictions—particularly related to drug offenses—result in exclusion from public housing or obtaining occupational licenses, ultimately making it less likely a person will be able to satisfy fines and fees or recover from forfeiture. Lawmakers would be well-served to eliminate poverty penalties altogether, and also to study the ways in which direct and collateral consequences undermine the viability of using economic sanctions as a means of punishment.

The elimination of certain poverty penalties, such as incarceration or probation, is likely to be revenue-enhancing as the costs associated with such penalties often outweigh funds collected. Eliminating others—such as interest, collections costs, and other fees—may result in the loss of some revenue, though it is likely in many jurisdictions that the change will be revenue-neutral. Though such penalties are intended to recoup costs to the government for collections-related practices, it is unclear whether administrative expenditures are really recouped both because chasing after debt requires the expenditure

of resources and because the added debt may make it less likely that debtors pay economic sanctions.

## 2. Create systems for meaningful consideration of financial effect.

As detailed above, the failure to account for the financial effect of fines, fees, and forfeitures places people who are financially vulnerable in precarious straits, and in so doing undermines governmental interests related to its constituents' economic and social stability, crime reduction, administration of jails, and efficient government spending. Further, not attending to the financial effect of such punishments may violate the Excessive Fines Clause of the Eighth Amendment on the front end and risks significant Equal Protection and Due Process Clause problems during collections.

In a forthcoming work, I examine a largely forgotten period in the late 1980s and early 1990s, in which a handful of jurisdictions around the country experimented with a model for graduating economic sanctions according to ability to pay known as the "day-fine." Day-fines involve a two-step process in which a penalty unit is assessed based on offense seriousness, and then that unit is multiplied by the defendant's adjusted daily income, resulting in the economic sanction to be imposed. While the day-fines experiments suffered from some design flaws, they show that a well-designed system for graduating economic sanctions is fully consistent with the efficient administration of the courts and may even result in improved revenue generation due to increased payments, as well as a decrease of expenditures related to collections, supervision, and incarceration. In other words, attending to a defendant's ability to pay fines, fees, and forfeitures has the potential to not only be fairer, but also to be revenue-enhancing.

## 3. Develop non-incarcerative alternative sanctions.

Even with the use of graduated economic sanctions, there will be some subset of defendants who are destitute, and therefore effectively unable to pay economic sanctions of any kind. Rethinking the use of fines, fees, and forfeitures provides an opportunity to consider alternative forms of punishment. In devising alternatives, lawmakers should take care to ensure that the alternatives are not disproportionate to the underlying offense (in particular by prohibiting the use of incarceration as a substitute for economic sanctions), and that alternatives are designed to avoid unintended consequences that undermine other societal interests. For example, while community service is often offered as a substitution for the use of economic sanctions (albeit one that is unworkable for people who are unable to participate due to issues such as disability or child care), it may have negative consequences for local labor markets or fail to adequately protect those sentenced to perform labor, and therefore should be carefully constructed to avoid such pitfalls.

In the short-term, the development of non-incarcerative alternative sanctions will require additional governmental expenditures. There is strong evidence, however, to believe that in the long term, such expenditures could prove to have significant financial benefits. A meta-analysis conducted by the Washington State Institute for Public Policy (WSIPP), a nonpartisan research center created by the Washington Legislature, involved the measurement of the benefit-to-cost ratio created by reduced recidivism and criminal justice involvement of various programs, many of which could be the basis of promising alternative sanctions. For example, for every dollar spent, the benefit-to-cost ratio for employment training and job assistance in the community was \$18.17, for day reporting centers was \$5.71, and restorative justice conferencing was \$3.49, to name a few. Therefore, while developing alternative sanctions may require additional expenditures initially, over time, these alternative sanctions carry the promise of reduced systems costs through reductions in crime.

#### 4. Restrict the use of fines, fees, and forfeitures in cases involving juveniles.

The bulk of attention regarding these practices has been focused on the use of fines, fees, and forfeitures in adult courts, but the same practices are used against juveniles. A 2016 report by the Juvenile Law Center, for example, documented the imposition of economic sanctions and poverty penalties against juveniles adjudicated delinquent and their families. A related empirical investigation by Alex Piquero and Wesley Jennings linked the use of economic sanctions with increased rates of recidivism among juveniles. In 2017, the Policy Advocacy Clinic at the University of California-Berkeley School of Law released an in-depth examination of the use of administrative fees in juvenile courts in California, and the resulting harms to low-income juveniles and their families. Each of these reports affords a better understanding of how juvenile courts are also contributing to the modern debtors' prison crisis. Lawmakers should consider reviewing juvenile court practices to assess the extent to which the use of economic sanctions conflict with the juvenile justice system's primary aim of rehabilitation and the constitutional rights articulated above.

Again, while the reduction of the use of economic sanctions in juvenile courts may require the development of non-incarcerative alternatives, as in the adult context there is the potential to improve outcomes while simultaneously reducing governmental expenditures. The WSIPP meta-analysis, for example, showed that, with respect to juveniles, for every dollar spent, education and employment training had a benefit-to-cost ratio of \$31.24, various therapy programs had benefit-to-cost ratios ranging between \$1.64 and \$28.56, and participation in mentoring programs had a benefit-to-cost ratio of \$6.53. The use of supportive programming in lieu of economic sanctions has the potential for significant fiscal benefit while promoting the rehabilitative aim of juvenile justice systems.

#### 5. Require criminal conviction for forfeiture.

With widespread support among both conservative and liberal organizations, a growing number of states prohibit the use of civil asset forfeiture, requiring instead that forfeitures may occur only upon criminal conviction. Unlike the reforms discussed above, there is no question that this proposal will result in a considerable reduction in the revenue-generating capacity of forfeiture programs, given that approximately 80% of cases processed through the federal Equitable Sharing Program are civil asset forfeitures, and therefore completed without a conviction and in many cases without criminal charges ever being filed.

The benefits of this reform, and the reason for its bipartisan support, involve the perception that civil asset forfeiture perverts the presumption of innocence that is the bedrock of criminal justice in the United States by eliminating the requirement that the government prove guilt beyond a reasonable doubt and instead forcing people to prove their innocence. There is good reason for this concern, as evidence is mounting that a significant percentage of civil asset forfeitures involve seizures that cannot even pass reduced evidentiary standards. For example, in an in-depth investigative report by the Washington Post examining nearly 62,000 cash seizures, only a small fraction of the seizures were challenged, likely due to the lack of access to counsel. In over 41% (4,455) of cases where challenges were raised, however, the government agreed to give back all or a portion of the cash or property, often in exchange for an agreement not to sue regarding the circumstances surrounding its seizure by law enforcement. Therefore, even though this reform will eliminate a significant revenue stream, the requirement of criminal conviction promotes fairness and provides an important protection against government overreach.

#### 6. Insulate criminal justice actors.

A key component of reforming the use of fines, fees, and forfeitures is to ensure that criminal justice actors are insulated from the pressure to generate revenue and from the benefits of revenue produced from those economic sanctions. Two key reforms in this context involve full funding of criminal justice systems and ensuring that funds are directed away from the control of those criminal justice actors with significant authority over the imposition of fines, fees, and forfeitures.

Jurisdictions across the country have decimated criminal justice budgets related to all facets of the system, and in particular, for the maintenance of the courts. As just one example, the Oklahoma Legislature cut its funding of district courts by “60 percent between 2008 and 2012” As a result, judges find themselves under pressure to support increases in economic sanctions that bolster judicial budgets, which can lead to an unconstitutional breakdown that pits revenue generation against the due process right to fair proceedings. Lawmakers should take care to insulate judicial actors from the

jurisdiction's financial interests to avoid tainting the judicial process, and do so in part by providing full funding to the courts.

In addition, lawmakers can also reduce the profit motive that exists for criminal justice actors involved in the imposition of fines, fees, and forfeitures. For example, so long as law enforcement agencies are allowed to retain funds seized through forfeiture processes, the risk remains that law enforcement priorities will be distorted to focus on crimes for which revenue are readily available rather than crimes—including violent crimes—that do not carry forfeiture opportunities. Lawmakers can reduce this incentive by requiring that money obtained through forfeiture is transferred to a general or other fund unrelated to law enforcement or prosecution spending, a practice already in place in several jurisdictions.

Full funding of criminal justice systems is, of course, not revenue-neutral. However, although revenue generated through forfeiture will be significantly reduced if the prior reform requiring a criminal conviction is adopted, forfeitures obtained in conjunction with a criminal conviction can also generate significant revenue. That revenue in turn could be used to bolster criminal justice budgets—and even to fund law enforcement and prosecution activities in a manner promoting budgetary oversight of criminal justice priorities—which has the dual benefit of reducing the profit incentive created through retention of forfeited cash and property while also decreasing the need to rely on fines and fees to fund the criminal justice system.

#### 7. Provide meaningful access to indigent-defense counsel.

While as detailed above, open questions remain regarding the reach of the constitutional right to counsel under the Sixth Amendment and Due Process Clause, it is important to understand that whether people are provided access to counsel is not simply a constitutional issue—which provides only a floor for when provision of counsel is required—but a policy choice within lawmakers' control. Provision of counsel provides an important check against the worst consequences of the use of fines, fees, and forfeitures, because as jurisdictions began slipping further and further from the constitutional dictates detailed in Part II of this chapter, counsel has the capacity to seek the enforcement of those restrictions.

Of course, the use of counsel as a check against governmental abuses is meaningful only if access to counsel is expanded and indigent-defense systems are fully funded so that counsel has the capacity to issue challenges to unconstitutional activity. This is an expensive endeavor, but one that has the benefit of helping check jurisdictions before they slip into systemic and unconstitutional practices, and thereby helps ward off the likelihood of costly litigation on those grounds. And, as with other aspects of the criminal justice system, funds collected through properly designed fines, fees, and forfeitures, with insulation to ensure



indigent-defense budgets are not dependent upon the imposition of such economic sanctions on defense clients, could be used to fund indigent-defense programs.

#### 8. Implement data-collection practices.

Finally, as reforms are instituted regarding the use of fines, fees, and forfeitures, it is important to collect data regarding a wide variety of issues, including changes in the average amount of fines collected, collection outcomes, and changes in recidivism. While data collection does require the outlay of resources, it is critical for assessing whether reforms are functioning as intended, need adjustment, or are insufficient to address the types of policy and constitutional concerns detailed herein. Therefore, as with criminal justice reforms more broadly, data collection helps provide a foundation for transparency regarding the operation of criminal justice systems and an opportunity to ensure that the ills that stem from poorly designed systems for imposing and collecting fines, fees, and forfeitures are in fact cured.

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### **Framing the System of Monetary Sanctions as Predatory: Policies, Practices, and Motivations (2020)**

4 UCLA Criminal Justice Law Review 1

Alexes Harris

... While the laws, policies, and court practices vary, each state in the United States imposes some sort of scheme to sentence those who violate the law to pay justice system fees, fines related to specific offenses, and restitution to directly or indirectly reimburse victims, in addition to a host of costs related to non-full payment. Many states have legislatively established “mandatory” fines or fees, where judges have no discretion with regards to whether or not to sentence people, even people deemed indigent. Over the past twelve years, research has emerged to outline local and state level practices, documenting the varying dimensions of court mechanisms used to assess the costs, monitor repayment and nonpayment, and punish people who do not pay. This research has examined the consequences of judicially-imposed fines and fees on the lives and families of people who owe the debt, the practices by which local jurisdictions collect the penalties, and the disparate effects of monetary sanctions for youth, communities of color and people who are poor. Research has also begun to raise attention to justice practices related to the imposition of fines and fees, such as the privatization of services and products within justice systems and state revenue generation foci and practices. Theoretically, scholars have begun to develop a theoretical framework of the system of monetary sanctions as one that reproduces social and legal inequality as a process allowing for wealth extraction from poor communities, one that has been described as “predatory.”

Given extensive research on the lived experiences of debtors, the concept of predation was a reoccurring theme during the Harvard 2019 convening, “Progressing Reform of Fees and Fines: Towards A Research and Policy Agenda.” Scholars over and over returned to rhetoric that framed the system of monetary sanctions as a greedy and destructive set of practices, purposefully implemented by state policymakers and reinforced by local justice actors. . . .

Many of these questions are related to obtaining a better understanding of the financial structure of the system of monetary sanctions and the availability of relevant data. One of the largest open questions is about better insight into the policies and practices that sustain the system of monetary sanctions. How does the financing operate? How much of the revenue generated is retained by local court administrators, how much is used for general state operating funds, and how much supports programs for victims? To date, there is little scholarship uncovering these questions regarding the redistribution of the money generated by financial sanctions. Another area demanding research attention is local jurisdiction and state level data availability. Do data exist that would allow for such financial investigations? What justice system issues prevent accessing or sharing such data? Grappling with the realities of how the money is disbursed, particularly in relation to victim restitution, would better inform and clarify the overarching stated and implicit aims of the system of monetary sanctions. What, if any, nonpredatory purpose does such an inequality producing system seek to serve?

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## **The Longevity of the Practices**

### **Law, Money, People: Insights from a Brief History of Court Funding Concerns (2020)**

Karin D. Martin

4 UCLA Criminal Justice Law Review 213

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

##### *Phase I “Law”: Inherent Powers & Self-Preservation (Pre-2000)*

The earliest concerns with court funding were anchored in the doctrine of inherent judicial powers. The idea is that since the Constitution establishes the courts as a coequal branch of government, they have license to take actions necessary to realize their constitutional duties. That is, responsibility indicates authority to pursue constitutional functions; therefore, insofar as this doctrine is a “positive safeguard of judicial independence,” it encompasses court budgeting.

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.”

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 over-reaching judges” A long history of cases relates to the reach of inherent powers into the domain of courthouse budgets and facilities, 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, economic downturns, increasing caseloads related to the war on drugs, and reliance on local versus state funding. 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”. 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”

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 . . . ” 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.

### ***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”. This quote from a Conference of State Court Administrators (COSCA) re- port titled “Courts Are Not Revenue Centers” perfectly encapsulates the tenor of the second phase of concern with court funding. 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”. 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”; “[t]he current fiscal crisis is provoking budget reductions so deep they threaten the basic mission of state courts”; and, “[t]he courts of our country are in crisis.” 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.”

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, the sheer size of the system demanded more output with fewer resources. The issues in the New York Court of Appeals case *Maron v. Silver* are emblematic of the problem. 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.

Practitioners, in particular, tended to see three possible responses to budget shortfalls: cutting costs, improving efficiency, and increasing revenues. It follows that increasing fees, fines, and costs were seen as “viable”. 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”. 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”. 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”. 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. 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”. 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 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.” 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. The following year, the ABA held public hearings; there was a national symposium on “court underfunding;” and the ABA held a forum on the topic at its midyear meeting. 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. 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. Authors (both scholars and judges) detailed the budget crisis and proposed options ranging from state constitutional protections to addressing the lack of public knowledge about the judiciary. In 2012, the Conference of State Court Administrators reported that, while the previous four 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. 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”. 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”.

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. 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. 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.

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.

*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. 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 ever-growing 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”. That same year, the 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. Articles challenged using driver’s license suspensions for nonpayment of fines and fees; provided insight from sitting judges on the issue; and, offered guidance on how courts can assess



their use 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.” 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.

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. . . .

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### **Nonmarket Criminal Justice Fees (2020)**

Ariel Jurow Kleiman

71 HASTINGS LAW JOURNAL \_\_ (forthcoming)

. . . Eileen DeNino could not afford to pay the court fees and fines from her children’s truancy. While serving a two-day jail sentence for nonpayment of the debt, Eileen died from health complications. Like Eileen, others who cannot afford to pay these criminal justice fees face life-altering punishment, from drivers’ license suspension, to disenfranchisement, to imprisonment.

Distinct from fines (which seek to punish) and restitution (which seeks to make victims whole), criminal justice fees seek to raise revenue. These fees reimburse government for the cost of running the criminal justice system by offloading expenses onto system users. They begin at arrest and accrue throughout adjudication, incarceration, and supervision, covering costs ranging from prosecutor expenses, to prison room and board, to ankle monitors. They attach to all manner of transgressions, from parking tickets to felonies, and become quite substantial as they accumulate, with amounts reported around \$2,000-\$3,000 per infraction.

Scholars and advocates are well aware of these out-of-control fees and their damaging collateral consequences. They argue that the fees violate constitutional due process rights and protections against excessive fines, that incarceration for nonpayment

amounts to illegal debtors' prison, and that the fees undermine reentry and rehabilitation goals. Indeed, even those who advocate fines and restitution often decry criminal justice fees as inappropriate.

Yet, user fees in other contexts are not so terrible. Indeed, the public finance literature is more sanguine on user-fee financing, noting that user fees can improve public good provision by introducing market-like efficiency—a view largely absent from the scholarship on criminal justice fees. User fees provide government with both price and usage information, allowing agencies to tailor services to user demand and to reallocate resources to increase public wellbeing. Fees can also reduce wasteful overconsumption of public goods by forcing users to internalize the costs of their use. In the context of criminal justice services, therefore, charging system users may cause criminal defendants to reduce their use of the services, while also reducing the financial burden on other taxpayers.

This Article contributes to the growing scholarship on criminal justice fees by reconciling these two viewpoints, using a public finance lens to uncover a fundamental flaw in criminal justice fees. Specifically, criminal justice fees occur outside of the market-like environment envisioned for traditional user fee financing, making impossible the various allocative benefits that user fees are meant to provide. This nonmarket structure arises for two reasons. First, criminal courts and law enforcement agencies are monopolistic providers of mandatory services. They thus have the power to decide the amount of fee-funded services that users must consume. Moreover, in most cases, levying agencies directly benefit from fee revenue, creating incentives to inflate the services provided. Second, users' demand for criminal justice services is nonresponsive to fee levels—a departure from the standard, downward-sloping demand curve contemplated in the public finance model. Various psychological and structural factors underlie this nonresponsiveness, the result of which is that criminal defendants are unable or unlikely to change their behavior in response to fee levels. Consequently, consumer demand imposes no downward pressure on criminal justice fee levels. Together, these two structural deficiencies describe a nonmarket environment, quite distinct from that envisioned by public finance fee models. The result of this structure is that these nonmarket fees are subject to little meaningful restraint, facing no downward pressure and significant upward pressure on fee levels.

Courts, the restrainer of last resort, have mostly abdicated responsibility to reign in criminal court fees in many states. Over the past several decades, as fees have expanded, courts across the country have winnowed the restrictions imposed upon them.<sup>20</sup> In many states, criminal court fees need only maintain a superficial relationship to the broad category of services being provided. Worse, in the context of criminal justice fees, most courts do not question the propriety of the services provided to payors, nor do they meaningfully restrict the fee amounts.

Unbounded, nonmarket criminal justice fees are inequitable and inefficient. Unrestrained fees encourage fee-chasing behavior, leading to over-policing of fee-funded crimes and undersupply of other services. Moreover, criminal justice agencies face incentives to target politically powerless groups in order to reduce the risk of political reprisal and protect their unbounded revenue stream. Ballooning fee burdens also inflict significant human cost. Criminal defendants and their families suffer mounting debt, bad credit, wage garnishment, and indefinite monitoring by criminal justice systems. Finally, a lack of restraint is per se problematic, denying payors meaningful protection from potentially exploitative government exactions.

In addition to highlighting this fundamental flaw in criminal justice fees, reconciling the public finance and criminal justice fee literatures is useful for at least two reasons. First, this analysis provides a framework for evaluating other potentially exploitative nonmarket fees. In furtherance of that goal, the Article offers a list of user fee characteristics that may erode meaningful constraints. While criminal justice fees stand out as the worst on a continuum of nonmarket fees, novel fee structures are continually arising in resource-strapped cities and counties. Policymakers and advocates can use the framework provided herein to identify and prevent potentially unbounded nonmarket fees before they become entrenched revenue streams.

Second, the public finance lens suggests certain judicial and legislative reforms to nonmarket fees. Perhaps most importantly, policymakers should seriously consider whether fee-financing is appropriate where a monopolistic agency provides mandatory services to captive payors. Fees may be patently unsuitable in extreme nonmarket contexts like the criminal justice system. If policymakers decide otherwise, nonmarket fees should be subject to meaningful restraint and should not create perverse incentives for collecting agencies. To that end, the Article briefly surveys several judicial and legislative reforms, including increasing judicial scrutiny, prohibiting local agencies from keeping the fee revenue they collect, and placing a low per-person cap on total fees. . . .

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## **The Scope and Scale of Government Reliance on Monetary Sanctions**

### **Monetary Sanctions:**

#### **A Review of Revenue Generation, Legal Challenges, and Reform (2019)**

April D. Fernandes, Michele Cadigan, Frank Edwards & Alexes Harris

15 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 397

Criminal justice reform is on the minds of many. In fact, the United States Congress is currently considering the First Step Act, House Bill 5682, which has bipartisan support.

Among other issues, the legislation bans the shackling of pregnant and postpartum women, retroactively applies the Fair Sentencing Act, lowers lifetime mandatory minimums for people with prior nonviolent felony drug convictions, and provides identification cards to every person released from custody. Although this legislation addresses many concerns about inhumane treatment during incarceration, sentencing disparities, and reentry problems, the legislation does not address the prominent and disturbing issues capturing mainstream media headlines, such as state-sponsored violence and the intrinsic connection between poverty and social control in the United States. The death of Michael Brown and the aftermath in Ferguson, Missouri, was a watershed moment that shed light on the unequal systems embedded in municipal court systems and upheld by law enforcement and court actors. The resulting Ferguson Report detailed a punitive and racist system of law enforcement practice and municipal court procedures that targeted the economically disadvantaged African American residents of Ferguson with numerous and costly court fines and fees. The unfair and burdensome monetary sanctions system and its impacts on communities of color in Ferguson spurred discussions about the pervasive yet largely unexplored use of the monetary sanctions system to provide revenue for local and state governments.

The report prompted investigations into the policies, practices, and laws in other states, cities, and jurisdictions that undergird the practice of assessing and collecting court-related fines, fees, and costs. At the heart of these explorations into the complex set of systems that constitute these court costs were questions about whether Ferguson was an outlier or whether we could see similar patterns in other locales. Researchers have suggested the monetary sanctions system is part and parcel of larger policies, procedures, and legislative shifts that constitute a punitive racialized system of processes and sanctions. The growing empirical literature suggests that Ferguson's reliance on fines and fees generated through the criminal justice system is not unique but rather a more widespread practice than previously realized.

Ferguson's reliance on criminal justice revenue is far from unique. We provide a brief illustration of the scale of the revenues generated by local governments from the criminal justice system with data from the *Annual Survey of State and Local Government Finance*. **Table 1** displays the revenues per capita and revenues as a percentage of own-source revenue for municipal governments in the United States by county metropolitan type. We display both the mean value and values at the 95th percentile. On average, in 2012, cities in large central metropolitan areas collected approximately \$40 per capita from fines and forfeitures, whereas rural municipalities collected approximately \$25 per capita. Fines and forfeitures tend to make up a larger share of own-source revenue in suburban large fringe municipalities when compared with municipal governments in other metro types. We display histograms of the distribution of fines and forfeitures revenue per capita in **Figure 1** and fines and forfeitures revenue as a percentage of own-source revenue in **Figure 2**.

**Table 1**      **Fines and forfeitures revenue in US municipalities, 2012**

| <b>Metro type</b>     | <b>Revenue per capita, mean</b> | <b>Revenue per capita, 95th percentile</b> | <b>Revenue as percent of own-source revenue, mean</b> | <b>Revenue as percent of own-source revenue, 95th percentile</b> |
|-----------------------|---------------------------------|--------------------------------------------|-------------------------------------------------------|------------------------------------------------------------------|
| Large central metro   | \$40.61                         | \$108.09                                   | 3.3                                                   | 9.72                                                             |
| Large fringe metro    | \$38.55                         | \$133.82                                   | 4.32                                                  | 16.54                                                            |
| Medium or small metro | \$25.84                         | \$86.31                                    | 3.71                                                  | 15.03                                                            |
| Rural                 | \$24.81                         | \$87.06                                    | 3.61                                                  | 13.34                                                            |

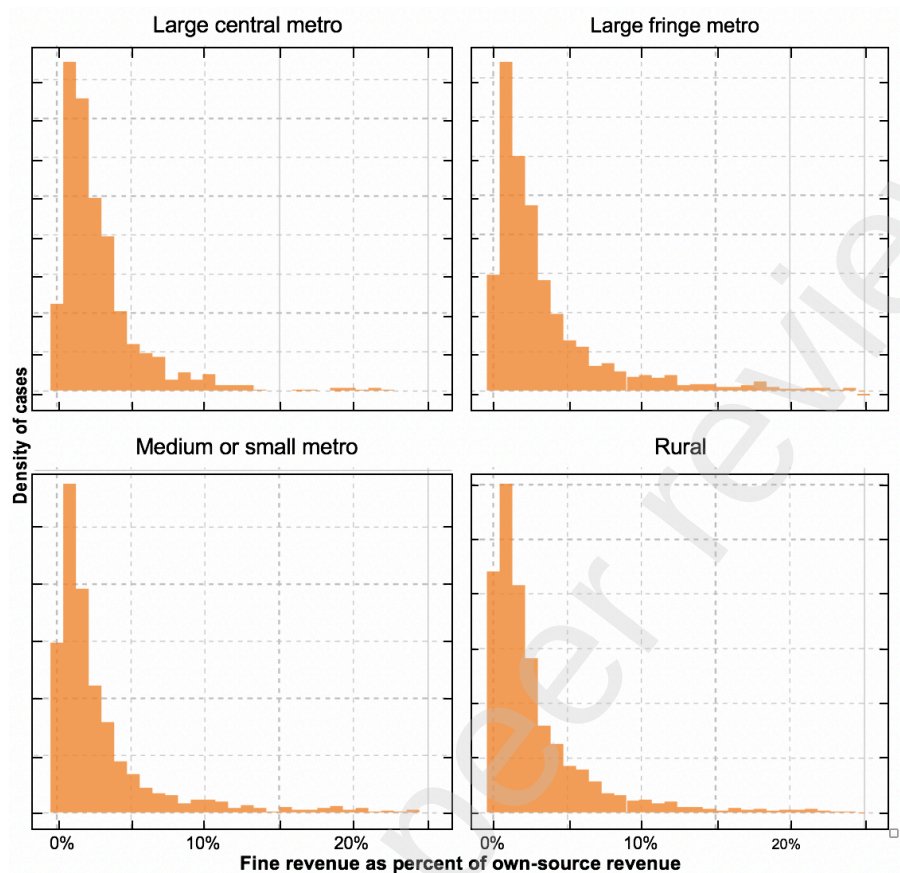


**Figure 1**

Fines as a percent of municipal own-source revenue by county metro type (2012) (data from US Census Bureau 2012).

In 2012, Ferguson reported that it generated approximately \$2.2 million in revenues from fines and forfeitures, or approximately \$105 per capita. These fines and forfeitures revenues accounted for more than 20% of the city's own-source revenue for that year. As shown in **Figures 1** and **2**, Ferguson is not the only municipal government with criminal justice revenues at these extreme levels. In 2012, 355 municipalities (with populations of more than 500 residents) collected at least \$100 in fines and forfeitures revenues per capita, and 208 municipalities generated at least 20% of their own-source revenues from fines and forfeitures. Of these, 54 were cities in large central metropolitan areas, 137 were cities in large fringe metropolitan areas, 109 were cities in medium or small metropolitan areas, and 119 were municipalities in rural areas. Criminal justice revenue dependence is a widespread phenomenon, and many municipal governments are at or above the troubling levels reported by the Department of Justice (DOJ) in Ferguson.

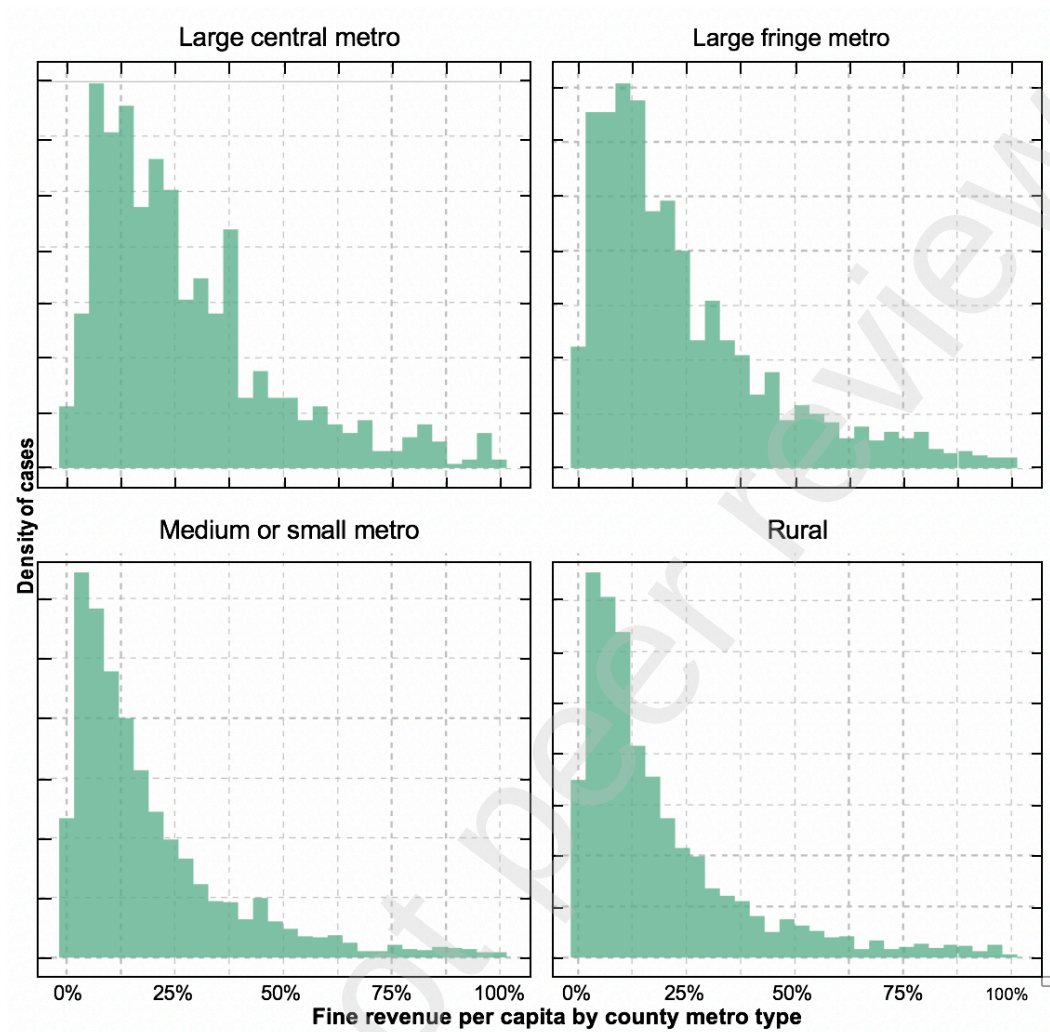


**Figure 2**

Municipal fines and forfeitures revenue per capita by county metro type (2012) (data from US Census Bureau 2012).

The results suggest that Ferguson is not an isolated case, but that in fact these policies, practices, and procedures have been fully entrenched in the criminal justice and law enforcement systems in various municipalities, disproportionately affecting individuals and communities of color. The DOJ investigation of Ferguson, along with studies in other states, brought the monetary sanctions system to light; however, such revenue-generating systems had been working silently in the background for decades.

Buried deep in state and city statutes, the procedures for assessment, collection, and enforcement of court fines, fees, and costs have been formulated to compensate for increasing budget shortfalls for over-expanded court and incarceration systems. The

stakeholders that benefited from the assessment and collection of these sanctions ballooned, including those far outside the court system, from the public school system to health care. These external and internal pressures facilitated the expansion of the monetary sanctions system, with states and municipalities increasing the types and amounts of fines, fees, and costs assessed. The growing reliance on monetary sanctions revenue then necessitates collection procedures and practices that range from wage garnishment and tax levies to driver's license suspensions to recoup costs. Because these sanctions were often levied on those who did not have the means to pay, more punitive sanctions, such as arrest warrants and incarceration, were implemented to dually punish and collect on legal debt. Such practices represent increased burdens on those who were the most affected in Ferguson: the poor and communities of color.

The disproportionate impact exists beyond Ferguson, with those most likely to be targeted for contact with the criminal justice system being assessed exorbitant amounts for infraction, misdemeanor, and felony convictions. Without the ability to pay, poor communities and communities of color are more likely to be subject to the pervasive collections and sanction procedures for failure to pay their outstanding legal debt, compounding the consequences that result from contact with the system. Such practices foment increased distrust of law enforcement and the criminal justice system, as well as extending the time that individuals spend under surveillance. Monetary sanctions and the accrual of legal debt may prompt individuals to engage in system avoidance to avoid further contact with the system and punitive collection procedures, such as wage garnishment, tax liens, and driver's license revocation. Existing research on system avoidance suggests that individuals who have had contact with the criminal justice system are more likely to avoid formal institutions and organizations, resulting in increasing exclusion and stratification. The expanded reach of the monetary sanctions system may be yet another mechanism that prompts individuals with outstanding legal debt to not engage in the formal labor market, financial institutions, and health care systems, among others, or to be locked out of these institutions as a result of legal debt. . . .

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### **Addicted to Fines (September 2019)**

Mike Maciag  
GOVERNING

Flashing police lights are a common sight all along Interstate 75 in rural south Georgia. On one recent afternoon in Turner County, sheriff's deputies pulled over a vehicle heading northbound and another just a few miles up on the opposite side of the interstate. In the small community of Norman Park, an officer was clocking cars near the edge of



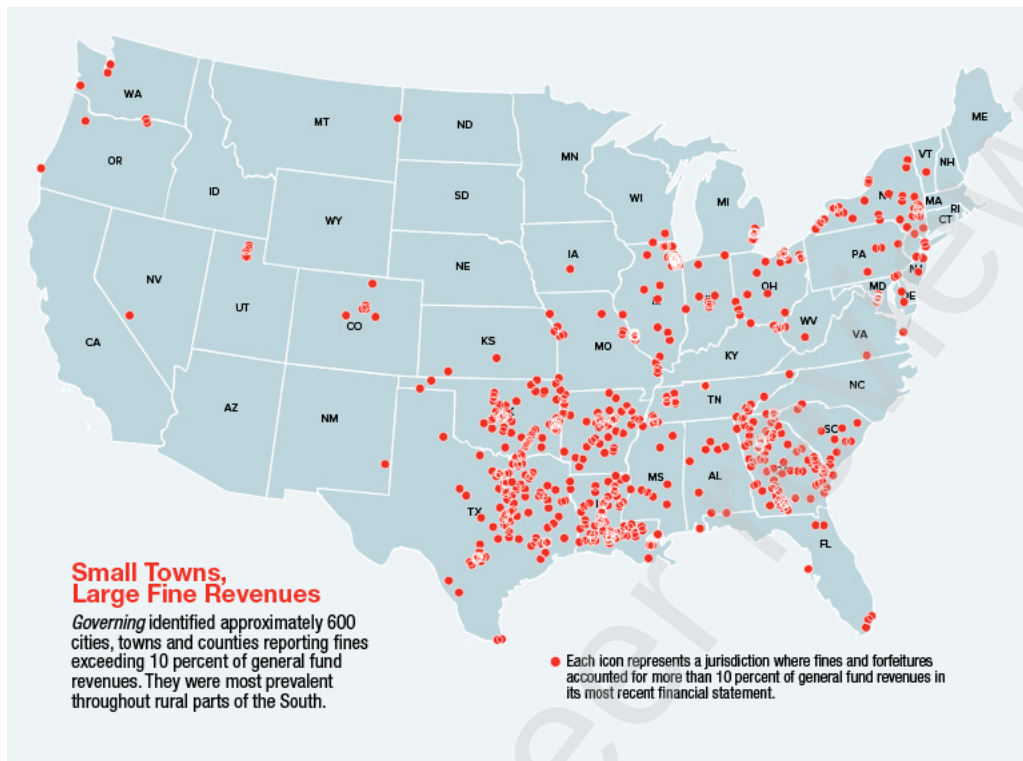
town. In Warwick to the north, a police cruiser waited in the middle of a five-lane throughway.

These places have one thing in common: They issue a lot of tickets, and they finance their governments by doing it. Like many other rural jurisdictions, towns in south Georgia have suffered decades of a slow economic decline that's left them without much of a tax base. But they see a large amount of through-traffic from semi-trucks and Florida-bound tourists. And they've grown reliant on ticketing them to meet their expenses. "Georgia is a classic example of a place where you have these inextricable ties between the police, the town and the court," says Lisa Foster, co-director of the Fines & Fees Justice Center. "Any city that's short on revenue is going to be tempted to use the judicial system."

This is by no means just a Georgia phenomenon. Throughout the country, smaller cities and towns generate major dollars from different types of fines, sometimes accounting for more than half of their revenues. Some places are known for being speed traps. Others prop up their budgets using traffic cameras, parking citations or code enforcement violations.

To get a picture of just how much cities, towns and counties rely on fines and fees, *Governing* conducted the largest national analysis to date of fine revenues and the extent to which they fund budgets, compiling data from thousands of annual financial audits and reports filed to state agencies.

What we found is that in hundreds of jurisdictions throughout the country, fines are used to fund a significant portion of the budget. They account for more than 10 percent of general fund revenues in nearly 600 U.S. jurisdictions. In at least 284 of those governments, it's more than 20 percent. Some other governments allocate the revenues outside the general fund. When fine and forfeiture revenues in all funds are considered, more than 720 localities reported annual revenues exceeding \$100 for every adult resident. And those numbers would be even higher if they included communities reporting less than \$100,000 in fines; those jurisdictions were excluded from our analysis. In some places, traffic fine revenue actually exceeds limits outlined in state laws.



High fine communities can be found in just about every state, but they tend to be concentrated in certain parts of the country. Rural areas with high poverty have especially high rates. So do places with very limited tax bases or those with independent local municipal courts. And these jurisdictions are far more common in the South than elsewhere. The states that stood out in our analysis were Arkansas, Georgia, Louisiana, Oklahoma and Texas, plus New York. Fines and forfeitures accounted for more than one-fifth of general revenues in the most recent financial audits for 52 localities in Georgia, and 49 in Louisiana. By contrast, several Northeastern states with high property taxes had no localities exceeding the 10 percent threshold.

Five years ago, the issue of excessive fines gained national notoriety following the revelation that Ferguson, Mo., and other St. Louis-area municipalities generated outsized revenues from fines and court fees. Since then, advocacy groups and state lawmakers have stepped up political pressure to address what they say are excessive fees. Multiple lawsuits in several states are challenging municipal court practices and fines, and some cities are beginning to revisit their fines with an eye toward social justice and equity for low-income residents and communities of color. On top of those legal and political pressures are other looming changes, including new advancements in driving technology, that could one day drastically limit the money that cities can take in through speeding tickets and other violations. The fact is that fines and fees are a volatile revenue source, and the towns that rely the most on them face an increasingly uncertain fiscal future. . . .

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## Understanding Fines and Fees as Regressive Taxes

### New York State Testimony: The Regressive Tax Burden (2019)

Joanna Weiss

FINES & FEES JUSTICE CENTER

Good Morning. My name is Joanna Weiss and I am the Co-Director of the Fines & Fees Justice Center. Our organization seeks to restore integrity to our justice system by eliminating the harmful and unjust impacts of fines and fees. Our goal is to eliminate fees in the justice system and ensure that fines are equitably imposed and enforced. I'm grateful for the opportunity to testify against making Governor Cuomo's property tax cap permanent, and I urge the Committee to end the cap entirely.

No one likes taxes, but taxes are a fair way to fund government. When local governments cannot use property taxes to fund the services their residents need, they fill revenue gaps by increasing both the number of tickets issued for traffic and low-level municipal code violations and the amounts of fines and fees imposed for those violations. This kind of regressive taxation unfairly burdens low-income people and communities of color and undermines public safety.

Local governments admit that they increase the imposition and enforcement of fines and fees and implement new fees in response to fiscal stress, including that caused by the tax cap. In fact, since the property tax cap was enacted in 2011, some local governments have seen major revenue increases from fines and fees. Guilderland saw an increase from \$503,000 in 2011 to \$799,000 in 2017. Amherst's revenue went from 1.6 million to 2.1 million. East Hampton's justice court revenue went from 1.1 million dollars to 2 million.

This taxation scheme is troubling: Property owners in, for example, East Hampton are well positioned to afford taxes, but instead ordinary drivers—some of whom likely do not reside in East Hampton—bear the cost. These drivers may be crushed by the unanticipated and exorbitant fines and fees imposed. Forty-seven percent of Americans don't have \$400 saved in case of an emergency. The East Hampton Justice Court charges \$243 to \$325 for speeding. When cities rely on fines and fees to fund local government, simple traffic stops can destroy the lives of ordinary New Yorkers.

While traffic stops may not seem catastrophic, drivers who cannot afford the resulting fines and fees enter a cycle of poverty and criminal justice involvement. Courts suspend drivers' licenses for failure to pay on-time and in-full, and driving on a suspended license is a crime punishable by incarceration for long enough to lose a job, miss a rent

payment, and get Child Protective Services involved, if the driver has children without alternative caregivers. But to save up and pay off the court debt, individuals need transportation to get to work. Simply because they are poor and cannot afford their ticket, hundreds of thousands of low-income New Yorkers are forced to choose between forgoing their basic needs and committing a crime.

Take, for example, Jane Doe, a 27-year-old medical assistant with three children from a predominantly black neighborhood in Buffalo. In July 2015, she was driving and arrived at a traffic checkpoint operated by the Buffalo Police Department. A police officer approached the car and saw her three children secured in their booster seats. The officer, without asking about the children's height and weight, told her she needed a five-point harness and issued her three seatbelt violations and a violation for driving on a learner's permit. Ms. Doe bought new booster seats and a five-point harness for her younger child. But the Buffalo Traffic Violations Agency (BTVA) found her guilty of all four violations, assessed eight points on her driver's license, and imposed \$446 in fines and \$450 for a Driver Responsibility Assessment. During this time, Ms. Doe was a full-time student with no income. BTVA refused to accept partial payments or provide a payment plan. Solely because of her poverty and inability to pay the high fines and fees, her learner's permit was suspended.

Ms. Doe would have had to work more than 92 hours at the 2017 minimum wage to clear her debt, and that's before the additional fees she would be charged to have her permit reinstated. And Buffalo, like many local governments, keeps adding new fees. To defer payment, pay \$15. For late payment, add \$30 to \$90. Default convictions cost \$75, and motions to vacate them cost another \$75. All traffic violations in Buffalo now come with a \$55 Public Safety Fee and a \$45 Driver Responsibility Fee. Then, if you can't afford to pay all this debt, Buffalo will file a monetary judgment with the Erie County Clerk's Office, for an additional fee of \$100. This is taxation pure and simple—but a far more regressive form than property taxes.

Buffalo is just one example, but this is a problem for local governments nationwide and particularly in New York. Ferguson, Missouri became the touchstone example of how regressive and dangerous fines and fees can be when relied upon for revenue. In 2014, the Civil Rights Division of the US Department of Justice investigated Ferguson in the wake of police shooting Michael Brown. They found that Ferguson's focus on fines and fees revenue, rather than public safety needs, resulted in practices that prioritized, "aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation."

Cities across New York are operating much like Ferguson. In fact, of the hundred small cities in the United States that are most reliant on fines and fees for revenue, six are

in New York. Of the seventeen cities nationwide that top Ferguson for their reliance on fines and fees, three are in New York.

Not only is this hidden taxation unfair, it's dangerous, creating perverse incentives and outcomes. First, New York towns and villages now need people to break the law for local government to break even. Second, increasing fines and fees diverts police resources from dangerous crime to what is essentially tax collection. A 2018 study found that the average city derives 1-2% of its budget through fines and fees. Every 1% increase in revenues from fines and fees is associated with a 3.7% decrease in the violent crime clearance rate. The study results "suggest that institutional changes—such as decreasing municipal government reliance on fines and fees for revenue—are important for changing police behavior and improving the provision of public safety." The tax cap does the opposite.

Moreover, these fines and fees schemes come with draconian punishments that further jeopardize road safety. New York State law currently allows driver's license suspension for failure to pay without requiring that fines and fees be affordable or payment plans made available. Each year, hundreds of thousands of New Yorkers have their drivers' licenses suspended because they can't afford the increasingly expensive fines and fees cities use to fund government. The result: Drivers are forced to choose between driving on a suspended license—risking more fines and fees, a criminal record, and even jail—or forgoing access to their jobs, health care, and basic necessities. In most parts of our state, driving is a necessity to take care of ourselves and our families. So, even with a suspended license, many people have no choice but to continue driving. And without a valid license, they may not be able to get insurance. Relying on fines and fees as revenue sources pushes more uninsured drivers onto the road, making us all less safe.

Public safety and basic fairness require an end to the property tax cap. Lifting the cap will help prevent the harms that come from alternative regressive tax schemes imposed by local governments in the form of fines and fees. To serve the named goal of the proposed tax cap, to relieve New Yorkers of unfair tax burdens, we must eliminate the tax cap and the unsafe, unfair, regressive taxation schemes it incentivizes. Thank you.

**The Price of Taxation by Citation:  
Case Studies of Three Georgia Cities That Rely Heavily on Fines and Fees (2019)**

Dick Carpenter, Kyle Sweetland & Jennifer McDonald  
INSTITUTE FOR JUSTICE

Code enforcement is supposed to be about protecting the public by discouraging—via monetary sanctions—dangerous driving and other hazardous personal conduct or property conditions. But in practice, local governments may also—or instead—use their code enforcement powers to raise revenue. This is taxation by citation. It is not a new phenomenon, but only in the past few years has it become an object of national concern. Despite the fresh spotlight, little is known about cities that engage in taxation by citation, beyond a few particularly egregious examples.

To gain a better understanding of taxation by citation, this study explores the phenomenon through the lens of three Georgia cities—Morrow, Riverdale and Clarkston—that have historically relied on fines and fees from traffic and other ordinance violations for large proportions of their revenues. Consistent with case study research methods, we drew upon public data, a survey of and interviews with residents, photo and video records, and direct observation of the three cities and their municipal courts, which process the cities' citations. Our results show:

Over a five-year period, Morrow, Riverdale and Clarkston generated on average 14% to 25% of their revenues from fines and fees, while similarly sized Georgia cities took in just 3%. Such high levels of fines and fees revenue account for the second largest proportion of the cities' revenues and may indicate taxation by citation.

The three cities' fines and fees revenues peaked in 2012 before beginning to decline as tax revenues increased. These trends generally correspond to the recession of the late 2000s and early 2010s and the subsequent recovery. This suggests the cities—which are poorer than average, face uncertain economic futures and have few means of generating substantial revenues—may have seen fines and fees as a way out of a budget crunch.

The sample cities issued many of their citations for traffic and other ordinance violations that presented little threat to public health and safety. Traffic violations posed only moderate risk on average, while property code violations were primarily about aesthetics. This suggests the cities are using their code enforcement powers for ends other than public protection.

To process citations, Morrow, Riverdale and Clarkston have their own courts, which are created and funded by the cities. These courts

function as highly efficient revenue collectors. They process more cases than courts in similarly sized cities, and nearly everyone coming before them pleads or is found guilty.

The three cities have few legal provisions preventing them from using their code enforcement powers for reasons other than public protection – or from violating citizens' rights in the process.

Cities may pay a price for taxation by citation. Morrow, Riverdale and Clarkston residents with recent citations reported lower levels of trust in government officials and institutions than residents without, suggesting cities that use code enforcement for revenue or other non-public safety reasons may undermine trust and cooperation in their communities.

Taken together, these findings suggest taxation by citation is a function of the perceived need for revenue and the ability to realize it through code enforcement. Moreover, the phenomenon may be a matter of systemic incentives. City leaders need not set out to pick the pockets of residents. Instead, they may see fines and fees revenue as the answer to their cities' problems and, absent obstacles such as independent courts or robust legal protections for people accused of ordinance violations, find themselves able to pursue it. And once in effect, the mechanisms necessary for taxation by citation – such as supremely efficient court procedures – may stick, becoming business as usual and ensuring fines and fees remain a reliable source of revenue.

Our findings also suggest taxation by citation is shortsighted. Cities may gain revenue, but they may also pay a price for it in the form of lower community trust and cooperation. To avoid this outcome, cities should find other ways of shoring up their finances and use their code enforcement powers only to protect the public – and then only with meaningful safeguards for citizens' rights in place. . . .

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### **Taxation by Citation?**

#### **Exploring Local Governments' Revenue Motive for Traffic Fines (2020)**

Min Su

80 PUBLIC ADMINISTRATION REVIEW 36 ©

Anecdotal evidence suggests that local governments may have a revenue motive for traffic fines, beyond public safety concerns. Using California's county-level data over a 12-year period, this article shows that counties increased per capita traffic fines by 40 to 42 cents immediately after a 10 percentage point tax revenue loss in the previous year;

however, these counties did not reduce traffic fines if they experienced a tax revenue increase in the previous year. This finding indicates that county governments probably view traffic fines as a revenue source to offset tax revenue loss, but not as a revenue stabilizer to manage revenue fluctuation. This article also finds that low-income and Hispanic-majority counties raised more traffic fines. Counties that generated more revenue from the hotel tax – a tax typically paid by travelers and visitors – raised more traffic fines, indicating a possible tax-exporting behavior by shifting the traffic fine burden to nonlocal drivers. . .

#### Evidence for Practice

- The correlation between counties' tax revenue loss in the previous year and an increase in per capita traffic fines in the current year raises a reasonable concern that these county governments have a revenue motive for traffic fines.
- The discretion in traffic enforcement, the challenge of raising tax revenue, and the lack of institutional constraints on fines and forfeitures make traffic fines an attractive revenue source for local governments, especially those experiencing fiscal stress.
- The finding that low-income counties and Hispanic-majority counties rely more on traffic fine revenue invites inquiry into the distribution of traffic fines – do traffic fines disproportionately encumber minority drivers and low-income drivers?
- Fines and forfeitures are civil penalties meant as restitution for wrongdoing. They should not be used as means to generate revenue. "Taxation by citation" – the excessive use of traffic fines for revenue purposes – could seriously undermine trust between citizens and law enforcement agencies.

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#### Legal Boundaries (or Not): Constitutional Constraints

##### **(Un)Constitutional Punishments:**

##### **Eighth Amendment Silos, Penological Purposes, and People's "Ruin," (2020)**

Judith Resnik

129 YALE LAW JOURNAL FORUM 365

Forfeiting a car in rural Indiana or an automotive business in South Dakota. Losing a driver's license for failure to pay fees or fines in Tennessee, Virginia, New York, and Michigan. Sent to prison for being too poor to pay a \$500 fine for a petty theft or for \$425 in traffic tickets. Placed in a prison segregated by race; chained; subjected to filth and violence; given only bread and water; or locked into solitary confinement to spend 23/7 in a tiny cell for years on end. Disenfranchised because of a conviction. Denationalized. Executed.



Individuals subjected to each of these punishments have argued to federal judges that the U.S. Constitution bars their imposition. Many have relied on the Eighth Amendment's mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

What do those words mean, and what rights do they confer on individuals? Given that the Eighth Amendment draws on the 1689 English Bill of Rights and on early state constitutions, one might have thought that answers would come from a jurisprudence that was centuries old. Instead, the U.S. Supreme Court has only recently begun to answer a host of questions about constitutional constraints on punishment. Each of the examples with which I began are drawn from cases decided in the last seventy years, and each has prompted at least some Justices—and on occasion the Court—to insist that, although governments have wide latitude in choosing punishments, some are impermissible.

The decision in *Timbs v. Indiana* is thus an important occasion to mark. It is an opportunity to reconsider the import of the Court's punishment jurisprudence to date. In this Essay, I bring together different facets of the Court's case law on criminal sanctions to analyze their contours and how *Timbs* contributes to punishment jurisprudence.

I begin with a sketch of ideas developed long before the 1960s, as theorists argued that certain punishments were illegitimate, and a few Supreme Court decisions addressed the legality of particular sanctions. I then turn to the 1960s, when issues of race and poverty brought the Court into sustained engagement with state-based punishment and firmly established the proposition that the "duly convicted" (to borrow from the Constitution's text) have the authority to contest their punishments. I integrate the law on unconstitutional sentences with the law on unconstitutional prison conditions because both kinds of claims require courts to address the same question: what constrains the sovereign power to punish?

Answers become visible through amalgamating lines of doctrine not regularly grouped together. Whether the legal categories are sentencing, prison conditions, equal protection, due process, or other constitutional provisions, the Court insists that state punishment cannot be aimless or random but must forward legitimate goals of governments. Discussions often proceed along the lines of a utilitarian inquiry that identifies permissible ends ("penological purposes") and, relying on a rationality test, evaluates the means.

As many decisions reflect, the purposes that courts identify are capacious and can be deployed to justify an array of sanctions. What the case law also reflects is that a utilitarian account does not capture the full range of punishment rulings. When horrified by a particular form of punishment and seeing its injustice, the Court has refused to permit

it, even when it is historically grounded, commonplace rather than “unusual” (the term in the Eighth Amendment), and arguably related to licit ends. . . .

I conclude by arguing that the 2019 decision in *Timbs* and the small set of other Excessive Fines Clause rulings can be used to interrupt the siloed discussions of distinctions among either the clauses of the Eighth Amendment or other constitutional provisions applied to punishment. Even as the Court in *Timbs* did not decide the merits of whether the forfeiture at issue was unconstitutional, the Court explained that the principle animating the Excessive Fines Clause was that governments should not use punishment powers to exploit and undermine individuals (as the “draconian fines” of the Black Codes had done), to “retaliate or chill” speech, or otherwise to abuse people. Justice Thomas, concurring, encapsulated the point by describing the Clause as prohibiting the economic “ruin of [a] criminal.”

This prohibition, traced back to Magna Carta, was forged in eras replete with branding, transportation, and execution rather than incarceration. Below, I explore how the prohibition on ruinous fines relates to the development of case law that limits certain sentencing practices and forms of in-prison punishments, yet condones others. By digging into what the civil-rights revolution of the 1960s has produced during the last seventy years, I show that constitutional law has revised what constitutes legitimate aims of punishment, even as the Justices have not described themselves as doing so.

Before the 1960s, prisons could ruin people by leaving them in filth and darkness, feeding them rotten food, and giving no medical care. Until the 1970s, state and federal governments resisted claims that the Constitution compelled different behavior. But as people who were convicted and imprisoned gained recognition that they were entitled to the Constitution’s protection, they persuaded courts to impose new boundaries on punishments. The Court’s rulings have generated affirmative duties to provide assistance of various kinds and to intervene to prevent harms. These constitutional duties augment whatever common-law and statutory obligations of safekeeping exist.

Examples, discussed below, come from opinions holding that the Cruel and Unusual Punishments Clause prohibits states from confining prisoners in violent and filthy conditions and from deliberately withholding needed medical care. Beginning in the 1960s and 1970s, the Court recognized prisoners’ rights to adequate food, exercise, access to courts, religious freedom, some First Amendment opportunities for expression and association, equal protection, and to due process when certain post-conviction decisions are made. . . .

. . . [B]y piecing together the mosaic of case law on sentencing, prison conditions, and the Excessive Fines Clause, I show that the anti-ruination principle links many punishment decisions. Although the term “ruin” is not yet part of the Court’s lexicon

outside the excessive fines context, the word describes some of what law now requires – that governments ought not aim to undermine a person’s physical and mental capacities.

I analyze why this constitutional democracy has no licit penological purpose in seeking to ruin people economically or by imposing destructive forms of confinement. More than that: the purposes of punishment have to include recognizing the legal personhood of all individuals by maintaining their well-being even when sanctioning them in ways that reduce their autonomy and impinge on their dignity. Moreover, the idea that governments are not supposed to use their punishment powers to debilitate people is enmeshed in, yet distinct from, whatever obligations to support rehabilitation exist. . . .

Before constitutional law became a significant source of regulation, punishment’s legitimacy had long been of interest to political, moral, economic, religious, and social theorists. Once judges began to develop the constitutional metrics of state punishment through incorporation of the Bill of Rights, they also incorporated ideas distinguishing legitimate from illegitimate punishments. . . .

. . . [B]efore the 1960s, the people who were subjected to punishments (along with lawyers and judges) were mostly on the sidelines. In the United States, the writ of habeas corpus had a narrow application, and prisoners lacked recognition as rights-bearers. The Supreme Court thus encountered the question of punishment only when individuals subjected to federal jurisdiction challenged their punishments or when a few state defendants tried (generally unsuccessfully) to obtain relief by relying on the Eighth Amendment, or on the Double Jeopardy, Ex Post Facto, Infamous Crimes, Due Process, and Equal Protection Clauses.

A search of the Court’s engagement with punishment before 1960 identified thousands of mentions of the word “punishment,” and a much smaller number of cases in which the Court addressed arguments that particular punishments were unlawful. In several rulings, Justices rejected those claims through cursory assertions that punishments (such as the manner of execution or harsher sentences imposed for crimes committed in prison and for interracial sex) were within government authority.

In a few decisions, Justices did address the merits. . . .

. . . [T]he sparse pre-1960s federal case law relied on judges’ understandings of punishments’ harms, a bit of social science, and a sense of modernity that could render once-acceptable practices unlawful. But mostly, federal courts addressed punishment to say that they had nothing to do with it because convicted persons had no authority to contest that application of state power. . . .

Race and poverty finally brought federal judges into sustained oversight of state-based punishments. The civil-rights revolution of the 1960s pressed the Court to rethink its relationship with America's detained and incarcerated population. Racial discrimination in the death penalty was the impetus for one sequence of decisions. Challenges to racial segregation in prisons and to the targeting of incarcerated Black Muslims and other religious minorities were part of a first wave of prisoners' claims that succeeded. And whether black, white, or otherwise, the people subjected to state punishment were overwhelmingly poor. That indigency was another factor moving some Justices to insist that law had to equip individuals with the means to defend themselves from state prosecutions and that law had to insulate individuals from serving extra prison time only because they were too poor to pay fines.

The shift began when federal courthouse doors opened for habeas claim-ants contesting convictions and sentences and for affirmative litigation (some-times through class actions) challenging prison conditions. Prisoners gained lawyering resources and jurisdictional authority through a series of decisions and legislative action. In 1963, in *Gideon v. Wainwright*, the Court recognized rights to counsel for felony defendants, and *Fay v. Noia* broadened the scope of habeas review. In its 1964 decision in *Cooper v. Pate*, the Court applied Section 1983 civil-rights claims to state prison officials.

Public defenders (gaining new funds because of *Gideon*) joined lawyers at the Legal Defense and Education Fund (LDF), the ACLU, and law schools, all of which received foundation grants to support work on civil rights. Political action in prisons, including the uprising at Attica, put prison conditions on newspapers' front pages and marshalled support in some quarters for reform. After 1976, more resources became available because Congress mandated that successful plaintiffs' lawyers could recoup fees from defendants in civil-rights cases.

To provide an account of constitutional punishment law that is lawyer-and-judge-centric is, however, to miss that the law started with the people subjected to these punishments. Credit goes to "duly convicted" prisoners who imagined themselves to be rights-bearing individuals when law told them they were not. Prisoners were the pioneers in theorizing law's relationship to punishment. Supported by social-movement lawyers, prisoners succeeded in generating new legal precepts that stopped governments from imposing any sentence and form of confinement they choose.

To pull together the results requires linking the law of sentencing and the law of prisoners' rights because decision-making about punishment does not stop once a judge or jury imposes a sanction. . . .

Putting questions about sentencing, probation, and prison conditions into different silos or walling off punishment decisions from their implementation and administration

misses that assessing the lawfulness of sentences and of prison conditions always requires an evaluation of governments' punishment powers. Moreover, constitutional regulation comes not only by interpreting the Eighth Amendment but also by applying the First, Fourth, and Fourteenth Amendments. The result is a checkerboard of rulings that, unlike the pre-1960s case law, is voluminous. Below, I sketch the contours and detail a few of the decisions to show how, even as the Court has tolerated ruin by death and life-long imprisonment, many opinions contribute to a jurisprudence aiming to prevent states from causing people's destruction through physical and mental degradation.

The constitutional law of sentencing (as discrete from a myriad of statutory challenges) focuses on the death penalty and LWOP. In brief, the Court attends to the proportionality of the punishment to an offense, the status of the person subjected to a particular punishment, and the rationality of its imposition. . . .

Adjusting punishments in light of a person's capacity reflects concern for individuals, because either their age or their disabilities undermine their ability to participate in the criminal law-enforcement process. The Court's proportionality tests have not, however, rendered unconstitutional statutes that require long-term incarceration for minor offenses; thefts of small value can count as a "third strike" that results in a life sentence. These de facto or de jure LWOP cases license forms of ruin, as people are prevented from what living outside of prison can entail, such as family life. But . . . while incarcerated, those same people have a modicum of protection against debilitating conditions. Governments still have to protect the safety and some aspects of the well-being of the people confined.

Another strand of sentencing law (albeit not always catalogued under that heading) that intersects with the problem of economic ruin dates from before the Court's high-visibility death-penalty decisions. Financially marginal individuals challenged the conversion of unpaid fines into prison time in the 1970 decision *Williams v. Illinois*, followed in 1971 by *Tate v. Short*. As continued in 1983 by *Bearden v. Georgia*, these rulings require judges to inquire into individuals' ability to pay fines before ordering incarceration.

*Williams* is a case in the equal-protection canon because it held, as explained below, that the conversion of a fine to prison time discriminated against the poor. In addition, *Williams* and its progeny are central to understanding the constitutional boundaries of punishment. Long before the 2019 decision *Timbs v. Indiana* applied the Excessive Fines Clause to the states, Justices learned about the impact of punishment on poor people. Indeed, had *Timbs* been decided in the 1960s, *Williams* might also have explored the import of the Excessive Fines Clause.

In 1967, Illinois charged Willie E. Williams with having “knowingly obtained unauthorized control over credit cards, checks and papers of the value of less than one hundred and fifty dollars, the property of Edna Whitney.” Williams could not afford to post the ten percent bond for bail set at \$2,000, nor did he have funds to hire a lawyer. In a bench trial, a Cook County Circuit Court judge convicted Williams of “theft of property . . . not exceeding \$150” and gave him the maximum sentence authorized for that offense: a year in prison, a \$500 fine, and five dollars in costs. But after Williams served his time in prison, the state sent him back because he could not afford to pay the \$505 owed. Instead, Williams was to “satisfy” the fine at a rate of five dollars a day. . . .

Writing for the Court and describing “nonpayment [as] a major cause of incarceration in this country,” Burger concluded that imprisonment exceeding the “maximum period fixed by statute” because of an “involuntary nonpayment of a fine or court costs” was an “impermissible discrimination which rests on ability to pay.”

As in the many decisions that followed to form the jurisprudence of constitutional punishment, the Court identified the state’s “wide latitude . . . in fixing the punishment for state crimes.” But the Court reserved to itself the authority to analyze whether, given that the statute specified the “outer limits” of prison time required to satisfy what the Court termed the state’s “penological interests and policies,” the state could add prison time for a “certain class of convicted defendants . . . solely by reason of their indigency.” The answer was no.

Soon thereafter, in a decision written by Justice Brennan, the Court applied that precept to Preston Tate, who had accumulated \$425 in traffic violations and had been “committed” to a “municipal prison farm” to “work off” those fines at five dollars a day. A Houston lawyer, Peter Navarro, had explained that the \$425 in fines represented “more than the equivalent of four disability checks” that the Veterans Administration sent to Tate monthly and that supported Tate, his spouse, and two small children. On behalf of Tate, Navarro argued to the Texas Court of Criminal Appeals the disproportionality of this “enormous amount of money,” as he raised three constitutional deficits: that the fine violated the Eighth Amendment’s prohibition against “excessive, cruel, and unusual punishment,” Texas’s parallel provision, and the equal-protection guarantees of the Fourteenth Amendment.

In the Supreme Court, the path for Tate’s appellate lawyers was clear. A year earlier, in *Williams*, four members of the Court had “anticipated” the question of whether the discrimination principle announced applied to people like Tate (jailed for nonpayment of fines); the four had concluded that the Constitution banned converting fines into jail time. In 1971, ruling for Tate, Justice Brennan reminded states that they had “alternatives” such as seeking payments through installment plans.

The same year, the Court issued another decision, *Boddie v. Connecticut*, obliging states to subsidize the use of courts for people too poor to pay fees when seeking a divorce. But within two years, the effort to build strong links between poverty and equal protection was rejected. In 1973, the majority of five in *San Antonio School District v. Rodriguez* refused to require states to equalize school financing across rich and poor districts. That decision stymied efforts to cast poverty as a constitutional problem akin to race.

Yet, what I have elsewhere called the “alchemy” of due process and equal protection has continued to sustain the *Williams-Tate* line of cases. The Court has not required a showing of intent to discriminate, which is now standard in its equal-protection doctrine, but instead has used a *mélange* of the two clauses to remedy some of the burdens of poverty in courts. The 1983 decision in *Bearden v. Georgia* is an exemplar, requiring an “ability-to-pay” determination before revocation of probation for nonpayment of a fine and of restitution. In the last few years, lower courts have built on this case law to invalidate bail systems that make no provisions for inquiries into ability to pay and the automatic suspension of driver’s licenses for nonpayment of traffic fees or fines.

The other body of constitutional law central to punishment jurisprudence is about in-prison sanctions. Those cases begin in the 1960s, when the federal courts ended their “hands-off” approach toward prisons. The first system-wide case to reach the Supreme Court was *Lee v. Washington*, decided in 1968. The Court upheld a 1966 three-judge court ruling that Alabama’s segregation of prisoners into “white” and “colored” housing units was unconstitutional.

In the same year, lower federal courts responded to claims that prison officials were violating the Cruel and Unusual Punishments Clause of the Eighth Amendment. In an opinion by then-Judge Harry Blackmun, the Eighth Circuit concluded that the Arkansas prison system could not whip prisoners for violating its rules. Around the same time, the Second Circuit ruled that a federal judge had wrongly dismissed a challenge to New York, which had put a person “denuded” into a cold, solitary cell for weeks. In both opinions, the appellate courts cited *Trop v. Dulles* and explained that the Eighth Amendment incorporated “standards of decency.”

In 1970, another watershed occurred in Arkansas: for the first time, a federal judge concluded that an entire “prison System” constituted cruel and unusual punishment. Two years later, a federal judge condemned Mississippi’s Parchman Farm as “unfit for human habitation” and held that conditions there breached the Eighth Amendment. Soon after, a federal judge ruled that Alabama’s prisons, where people were left in a “doghouse” (“a concrete building with no windows . . . no lights, no ventilation, no toilets, no furniture, no beds, no running water, and no sinks or showers . . . [and] a single hole in the concrete floor for the men to use in place of a toilet” as punishment for violating prison rules such as being late for work ) likewise violated the Eighth Amendment. In 1976, the Supreme

Court concluded that the Cruel and Unusual Punishments Clause barred Texas from being deliberately indifferent to the known medical needs of prisoners. In 1978, the Court reviewed almost a decade of recalcitrance in implementing court orders in Arkansas, detailed disgusting conditions, and sustained an attorneys' fee award against the state. By 1987, more than thirty state prison systems were in litigation about constitutional violations.

First Amendment guarantees as well as substantive and procedural due process, sometimes mixed with the Eighth Amendment, have also limited state punishments and protected incarcerated individuals' opportunities for expression, association, and fair treatment. Federal courts look to prison officials' justifications, ask whether they are "reasonably related" to legitimate penological interests," and at times identify constraints on punishments based on their understanding of the weight to be accorded "fundamental rights" and institutional management concerns.

For example, the Court has rejected state punishments that prevent individuals from religious observance, entering into marriage, or being hitched to posts for hours on end. Further, the Court has required that governments provide some procedural protections before taking away good-time credits. And even as the Court cut back judicial oversight in various ways, including by ruling that prisoners have procedural-due-process protections only when prison officials impose "atypical and significant hardships," federal courts continue to be called on to assess punishment's lawful parameters.

In 2019, *Timbs* affirmed this obligation. Tyson Timbs alleged that Indiana's seizure of his \$42,000 car was "grossly disproportionate" to the gravity of his conviction (dealing in a controlled substance), for which he had been sentenced to one year of home detention and fined "fees and costs totaling \$1,203." Writing for the Court, Justice Ginsburg ruled that the Fourteenth Amendment incorporated the Excessive Fines Clause and hence that states had to meet federal punishment standards as well as those of their own constitutions. Justice Thomas concurred. In his view, the Privileges or Immunities Clause gave citizens protection from the government's imposition of "ruinous fines."

While *Timbs* was the first to apply the Excessive Fines Clause to states, the Court has issued four other decisions responding to challenges to federal forfeitures. To date, the Court has read the Clause to constrain governments aiming to punish (rather than "remediate") a wrong; the Clause does not protect private parties ordered to pay punitive damages to other private actors. As a result, some civil and criminal sanctions remain in silos, even as they have much in common analytically and experientially. Rather than look to the Eighth Amendment, the Court's analyses of the constitutionality of state punitive damages stem from interpretation of the Due Process Clause, as does the Court's law on detention of individuals held without criminal convictions. The Court has, however, insisted on control over the categorization; the label that governments attach to their actions is not dispositive. Rather, the Clause regulates all government fines and forfeitures



designed to punish, whether they are termed “civil,” “criminal,” “in personam,” or “in rem.”

This approach meant that the Excessive Fines Clause protected Richard Lyle Austin from the federal government’s “civil” forfeiture seeking to take his mobile home and auto body shop after a drug-offense conviction. Justice Blackmun explained that the constitutional point was “to prevent the government from abusing its power to punish” by extracting payments “in cash or in kind.” In *Timbs*, Justice Thomas reiterated that the Excessive Fines Clause, imported at the founding from England, aimed to ensure that the state “should not deprive a wrongdoer of his livelihood”; governments’ sanctioning power ought not result in “the ruin of the criminal.”

The potential breadth of this proposition merits discussion. Historians re-count that protection against excessive fines did not only inure to the King’s “enemies” (and hence a class of potential defendants with resources the King sought to gain or was especially interested in deflating) but also to merchants and other “villains.” This cross-class insulation aimed to prevent taking what now would be termed one’s “livelihood” and what was then described as one’s “contentment,” “wainage,” or “merchandise.”

Of course, a puzzle about these historic protections exists, given that England imposed what today are seen as the “barbaric” punishments of branding and executing people as well as transporting them to colonies. Eighteenth-century commentaries proffered a utilitarian rationale for the incongruity that permitted governments to end a person’s life yet not “ruin” a person economically. One explanation was about perverse incentives, if a minor offense left a person in a “worse Condition” than committing a capital crime. Moreover, as Benjamin Franklin put it, taking the property that was “necessary to a Man” was not what the “Welfare of the Publick” could demand.

Return then to Illinois in the late 1960s, where Willie Williams, who had stolen less than \$150, was put in prison for twelve months and fined three times that amount. The brief filed for Williams explained that by incarcerating him, the state subjected him “to severance of family relations, loss of pay, loss of employment, loss of educational opportunity . . . poor food, and housing.” Think also about the pile of traffic fines from Texas that Preston Tate had faced before 1971 and about his lawyer’s argument that the sum of \$425 was disproportionate given his need to support his family on his \$105 monthly Veterans Disability benefits.

The metric by which to judge “excessiveness” can be that a punishment is disproportionate (or “grossly disproportionate”) to an offense or to a person’s ability to pay. *Williams* and *Tate* exemplify both kinds of excessiveness, as well as discrimination against people with limited income and wealth. In the 1970s, however, before incorporation of the Excessive Fines Clause, the unconstitutionality in *Williams* and *Tate*

of converting financial sanctions into prison time rested on the Justices' views that, despite states having licensed that swap, incarceration was incommensurable with money.

*Timbs* has now dispatched state courts to address constitutional constraints on monetary punishments through both kinds of constitutional protections under federal and state law. Whether courts and legislatures will link the explanations for the prohibition on excessive fines provided in *Timbs* to the disparate economic-impact analysis of *Williams-Tate* remains to be seen. In *Timbs*, Justice Ginsburg discussed the incentives to use fines as a “source of revenue,” which she noted was “scarcely hypothetical.” Justice Thomas’s concurrence mapped the English history about how such fines produced ruination of criminals, the U.S. Constitution’s commitment to their prohibition as a “fundamental right of citizenship,” and the concerns about the severe economic penalties imposed by the Black Codes during the era when the Fourteenth Amendment was ratified.

In this past decade, “Ferguson” became the sad shorthand for the role that race and poverty play when localities exploit their power to impose monetary sanctions. Documentation that these practices were not unique to this Missouri town comes from research and litigation around the country, as counties charged families of children held in juvenile detention, assessed indigent defendants “registration fees” for “free” public defenders, or sought payments for time spent in detention. A new shorthand “LFO” – for “legal financial obligations” – represents mounds of debt and, for some, the loss of driver’s licenses, or voting rights, and at times imprisonment for noncompliance with court orders or for committing infractions such as driving without a license. . . .

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**Financial Hardship and the Excessive Fines Clause:  
Assessing the Severity of Property Forfeitures After *Timbs* (2020)**

Beth A. Colgan & Nicholas M. McLean  
129 YALE LAW JOURNAL FORUM 430

When police arrested Tyson Timbs for attempting to sell a small quantity of heroin to an undercover officer, Timbs was driving a \$42,000 Land Rover. Because the Land Rover had been used to drive to the location at which the drug sale was supposed to occur, the State of Indiana claimed that the vehicle should be forfeited on the grounds that it was an “instrumentality” of a criminal offense. Timbs challenged the forfeiture as a violation of his rights under the Eighth Amendment’s Excessive Fines Clause. That challenge found initial success in the state trial court and on appeal, but the Indiana Supreme Court reversed: it held that the Excessive Fines Clause governed only the actions of the federal government, not the states. The U.S. Supreme Court granted *certiorari* and, in its February

2019 decision in *Timbs v. Indiana*, held that the Fourteenth Amendment incorporated against the states the rights protected by the Excessive Fines Clause.

The Land Rover at issue, which Timbs had purchased with insurance proceeds following his father's death, had particular importance to Timbs in light of his personal economic circumstances. Timbs had no income and few other assets at the time of his sentencing. The Land Rover had been his primary means of transportation. "Without my car," he later explained, "it is incredibly difficult to do all the things the government wants me to do to stay clean, like visit my probation officer, go to AA, and keep my job[.]" In other words, the vehicle had importance to Timbs for reasons above and beyond its \$42,000 book value, measured in the abstract. The deprivation of the vehicle threatened to impose significant hardship on Timbs as a result of contextual factors—those individualized considerations that can make an item of property particularly important in the hands of one owner, as opposed to another.

Whether a court called upon to assess the excessiveness of a property deprivation under the Excessive Fines Clause should determine the severity of the punishment based solely on the dollar value of the property at issue, or also treat as relevant the hardship imposed through the property deprivation, remains unsettled. The Supreme Court has adopted a gross disproportionality test for measuring excessiveness, which requires weighing the severity of the punishment against the seriousness of the offense. But the question--as articulated by Chief Justice Roberts during the *Timbs* oral argument--remains: a forfeiture worth "[f]orty-two thousand dollars," might not "seem excessive to" a multimillionaire, "and yet, if someone is impoverished, it is excessive? Does that matter?"

On remand following the Supreme Court's decision in *Timbs*, the Indiana Supreme Court answered that unsettled question by holding that to understand whether a forfeiture is excessive, it is critical "to consider the punishment's magnitude" for the individual. It went on to explain that "the owner's economic means—relative to the property's value—is an appropriate consideration for determining that magnitude." The Indiana Supreme Court in turn remanded Timbs's case back to the trial court for further consideration, although—as pointed out in a dissent—it did so without providing guidance as to how to value forfeited property beyond stating that an individualized inquiry of the property owner's circumstances is necessary. This Essay aims to explain why the Indiana Supreme Court's embrace of an individualized inquiry is warranted, and to offer further guidance on how courts may engage in such an analysis.

We posit that lower courts may—and the Supreme Court ultimately should—adopt a test under which determining the severity of a property forfeiture for purposes of the excessiveness analysis would include both the forfeiture's dollar value and individual considerations limited to those directly related to its foreseeable consequences for one's financial condition. Some lower courts have already taken steps toward such an approach,

recognizing that “certain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others,” including the imposition of significant hardship to the owner and his or her family.

The Supreme Court has already begun to forge an interpretive path that leads to this conclusion. As briefly described in Part I, the Court’s repeated reliance on the historical foundations of the Excessive Fines Clause—which have long been closely associated with the preservation of basic economic self-sufficiency—and the Court’s adoption of the gross disproportionality test from the Cruel and Unusual Punishments Clause context, offer a solid doctrinal foundation for taking into account a forfeiture’s real-world consequences. The existing doctrine also suggests important limiting principles that would focus the excessiveness inquiry on mitigating economic insecurity, instability, and impoverishment.

Taking into account the financial hardship inflicted by property forfeitures as part of the excessiveness inquiry will help ensure that the Excessive Fines Clause remains the “constant shield” against “[e]xorbitant tolls” that it has been “throughout Anglo-American history.” To set out the importance of including such considerations, in Part II, we use the specific type of property at issue in *Timbs*—the personal vehicle—as an exemplar of how courts can operationalize subjective inquiries into punishment severity and, importantly, how forfeitures can impede employment and educational attainment, interfere with the ability of property owners and their families to meet basic human needs, undermine familial and social stability, and satisfy other legal obligations including child support orders and probation and parole conditions. . . .

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### **A Proposal to Stop Tinkering with the Machinery of Debt (2020)**

Brandon Buskey

129 YALE LAW JOURNAL FORUM 415

The use of money as punishment has disfigured our criminal court systems. The rise of financial punishments—an array of fines, fees, surcharges, and other court costs—on people with convictions has been thoroughly documented. The debt created by these punishments is devastating, forcing people to forgo necessities for themselves and their families, such as food, utilities, and housing payments. Those who cannot make these sacrifices face jailing in our “modern” system of debtors’ prisons.

Like leeches clinging to a drowning victim, court systems impose these fees to ensure their survival. Louisiana reveals this parasitic relationship at its most absurd. The largest funding source for Louisiana’s public-defender system is a fee that courts collect from those convicted of crimes. Most of this money comes from traffic tickets. The fee

creates an untenable dynamic: public-defender clients know that, unless they are convicted, their lawyers will not be paid.

In 2015, Louisiana's public-defender system experienced a severe budget crisis due to a shortfall in conviction fees. Public defenders responded by placing clients, many of whom were incarcerated, on "waiting lists" for representation. At the ACLU, I led a legal team that sued Louisiana's public-defender system for this denial of counsel. During the investigation, we reviewed reports from local public defenders documenting their efforts to raise funds. What we found was startling. Public defenders in several districts described exhorting sheriffs and district attorneys to prosecute more traffic offenses. Public defenders also lamented the fact that prosecutors were diverting more traffic cases, resulting in fewer convictions and fees. These diversion programs are themselves enrichment schemes, allowing prosecutors to place a price on someone's liberty by conditioning diversion on the payment of a fee.

Louisiana is not alone. States like Oklahoma have effectively barred tax increases to fund their criminal-enforcement systems, in favor of fines and fees. Nationwide, state agencies, judges, and court personnel advocate aggressively against reducing court fees, explicitly invoking their reliance on these penalties for sustenance.

These officials represent the greatest threat to the growing movement to eradicate abusive court debt. Spurred by revelations such as the City of Ferguson's extortion of fines and fees from low-income Black communities through arrests and jailing, reformers have focused primarily on ending debtors' prisons. Their efforts have succeeded in requiring numerous jurisdictions to perform ability-to-pay determinations before incarcerating people for failing to pay court debts.

This year's Supreme Court decision in *Timbs v. Indiana* reinvigorated the debate over whether the Eighth Amendment offers a meaningful additional check on financial punishments. The Eighth Amendment states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Timbs* held for the first time that the amendment's Excessive Fines Clause applies to the states. However, enthusiasm for the decision may be misplaced, as *Timbs* has nothing to say about the Eighth Amendment's power to restrict financial penalties, whether in the form of fines, fees, forfeitures, or court costs.

In fact, the Supreme Court may have settled this issue over twenty years ago in *Bajakajian v. United States*, and in a manner that drains *Timbs* of its potential to reform fee practices. Borrowing the standard for whether a prison term violates the Eighth Amendment's protection against "cruel and unusual punishments," the Court held that a fine is excessive if it is "grossly disproportionate" to the offense. However, the Court provided scant guidance on how lower courts should apply this standard. In the sentencing

context, the Court has stressed that relief under the “grossly disproportionate” standard will be rare.

Thus, for *Timbs* to have any force, impact litigators must upend *Bajakajian*’s gross-disproportionality standard. While numerous scholars have proposed incorporating ability to pay as a factor in the gross-disproportionality inquiry, few have questioned the standard itself. This question is crucial, as merely considering ability to pay will be of limited import if the ultimate standard for relief remains draconian. Further, because determining ability to pay is often an intrusive process overseen by officials with a vested interest in extracting whatever funds a person can pay, overreliance on this approach risks perpetuating the current system.

To resuscitate the Excessive Fines Clause, this Essay argues for replacing gross disproportionality with the proportionality standard from the Excessive Bail Clause. The excessive-bail test sets out a reasonable-necessity standard, requiring all forms of financial penalties to be reasonably calculated to achieve a compelling penological goal. Adopting the reasonable-necessity standard for fines and fees would open a threshold inquiry into whether the government has a compelling interest in using fines and fees to generate revenue, as opposed to traditional goals like retribution. The standard then would demand interrogation of whether the fees actually serve the government’s compelling interests without causing undue harm. This heightened scrutiny would more strictly regulate the financial penalties the government imposes primarily for self-perpetuation. . . .

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### **The Present Crisis in American Bail (2019)**

Kellen Funk

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More than fifty years after a predicted coming federal courts crisis in bail, district courts have begun granting major systemic injunctions against money bail systems. This Essay surveys the constitutional theories and circuit splits that are forming through these litigations. The major point of controversy is the level of federal court scrutiny triggered by allegedly unconstitutional bail regimes, an inquiry complicated by ambiguous Supreme Court precedents on (1) post- conviction fines, (2) preventive detention at the federal level, and (3) the adequacy of probable cause hearings. The Essay argues that the application of strict scrutiny makes the best sense of these precedents while also taking account of the troubled history of American bail, particularly during the Reconstruction Era from which the right to sue state officials in federal court for violations of constitutional rights emerged.

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## Documenting the Inequalities and the Harms

### **Monetary Legal Sanctions: Legal Financial Obligations in US Systems of Justice (2018)**

Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards, and Alexes Harris  
ANNUAL REVIEW OF CRIMINOLOGY

#### IMPACTS OF MONETARY SANCTIONS

. . . Monetary sanctions have several defining characteristics. Monetary sanctions affect a person's ability to reintegrate into society post-incarceration and, in some states, can accrue indefinitely. Yet the person who receives the sanction does not necessarily have to be the person who pays it. As a result of these features, the impacts of monetary sanctions are extensive and substantial. The proceeding section reviews several of the most important effects of the current system of monetary sanctions in the United States, noting the limitations of data availability where applicable.

#### **Social Stratification**

Despite the lack of robust quantitative data to examine the effect of monetary sanctions on social stratification, a variety of factors strongly suggest their capacity for exacerbating economic and racial inequality. For instance, for every \$1 a typical African-American family owns, a typical Caucasian family owns \$15.63, and for every \$1 a typical Latino family owns, a typical Caucasian family owns \$13.33. American criminal justice is also characterized by deep racial and ethnic inequality. The nationwide arrest rate for African Americans is 2.5 times that for Caucasians. After arrest, the odds of being released after paying bail are twice as high for incarcerated Caucasians compared to Latinos and African Americans. There is also abundant evidence that race has a significant effect on sentencing outcomes.

[Bruce] Western, for example, shows that African-American and Latino men with low educational achievement, high unemployment, and low wages are more likely than equivalent Caucasian men to be ensnared in the criminal justice system. Overwhelmingly, felony defendants come from poverty-stricken neighborhoods and under- and unemployed contexts and have failed in their school systems. Given that monetary sanctions are usually imposed in addition to, rather than in lieu of, incarceration and other forms of punishment, it is likely that their effects are most pronounced among those who are already economically, socially, and politically disadvantaged. Taken together, the vast racial disparities in wealth combined with the significant racial disparities throughout the criminal justice system and the monetary

sanctions that accrue at each step of case processing create enormous potential for these sanctions to worsen racial disparities. Indeed, state-level analyses of monetary-sanction statutes show that the majority of felony defendants have had legal debt imposed at sentencing. Monetary sanctions are also imposed for a wide range of misdemeanor and traffic offenses, which significantly broadens their scope. Even relatively small fines assessed for minor offenses can trigger the accumulation of fees, costs, and surcharges. Thus, monetary sanctions both intensify the punishment of people with felony convictions by adding on to other punishments, e.g., incarceration, and widen the reach of the criminal justice system into the lives of people who would otherwise be unaffected but for their minor infraction citations like traffic or other low-level offenses.

### **Collateral Consequences**

People with outstanding monetary-sanction debt often experience numerous additional penalties that interfere with economic and social well-being, even for non-felony offenses. The baseline collateral consequence is simply prolonged contact and involvement with the criminal justice system. People are subject to the regular court summons, the issuance of warrants, and pursuit by private collection agencies. The repercussions of criminal justice debt ultimately touch on many aspects of life.

One of the most detrimental consequences of unpaid monetary sanctions is driver's license suspension. The practice is not only widespread but, insofar as it constrains employment and childcare options, directly undermines the goal of people successfully separating from the criminal justice system. A study of legal statutes in nine states reveals that all nine states allow for driver's licenses to be suspended for unpaid monetary sanctions in at least some cases. State laws in California, Minnesota, North Carolina, and Texas allow for the suspension of driver's licenses for any unpaid legal financial obligations (LFOs). In the remaining five states (Georgia, Illinois, Missouri, New York, and Washington), driver's licenses can be suspended only for unpaid monetary sanctions related to vehicle or traffic violations. Moreover, evidence in California suggests that this practice entails significant racial disparities. For example, in the City and County of San Francisco, African Americans are 5.8% of the population but are 48.7% of the arrestees for "failure to appear/pay" traffic court warrants. In contrast, Caucasians are 41.2% of the population but only 22.7% of those arrested for driving with a suspended license. This amounts to African Americans being overrepresented by a factor of 8.4, whereas Caucasian residents are underrepresented by a factor of 0.6.

Unpaid criminal justice debt can also lead to a loss of voting rights. Thirty states disenfranchise people either fully or conditionally (e.g., upon missing a payment) for debt related to a felony conviction, and eight states do so for misdemeanor convictions (Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, and South Carolina).



Nine states (Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, and Tennessee) explicitly list unpaid monetary sanctions in their disenfranchisement laws.

A consequence of potentially enormous impact is the practice of reporting unpaid criminal justice debt to credit agencies. This can compromise good credit scores needed to secure housing, automobiles, employment, and credit itself (e.g., credit cards, mortgages, loans). The reporting of criminal justice debt to credit bureaus can happen as a result of civil judgments (e.g., New York), which are publicly available information, or because jurisdictions have a policy of directly reporting all debt (e.g., Nevada). Moreover, unpaid monetary sanctions can prompt liens, wage garnishment, and tax rebate interception. In this way, monetary sanctions have the distinct ability to transgress the traditional boundary between civil and criminal law.

Perhaps the most troubling consequence of unpaid monetary sanctions is incarceration. Failure to pay monetary sanctions, including restitution, can be grounds for the revocation of parole or probation, which triggers incarceration. Parole and probation revocation happen as people are incarcerated not necessarily for new offenses but because not paying monetary sanctions often violates sentencing conditions. People do not even need to be on probation to become incarcerated for nonpayment. Some counties issue a court summons when someone misses payment and issue arrest warrants upon failure to appear in court. [Note that a warrant alone can lead to collateral consequences, such as the loss of federal or state welfare benefits or job loss, in addition to triggering incarceration for nonpayment and failure to appear]. In fact, the practice of incarcerating people for nonpayment has recently garnered a great deal of public attention over concerns about debtors' prisons. Evidence from around the country reveals that debtors' prisons do in fact exist, and advocacy groups have mounted legal challenges on the premise that incarceration is an acceptable consequence of unpaid monetary sanctions.

People are routinely incarcerated for failure to pay monetary sanctions, despite the Supreme Court ruling in *Bearden v. Georgia* (1983) that prohibits courts from doing so unless they find that a person "willfully" fails to pay. The language of court decisions, including *Bearden*, stipulates that if "reasonable," "sufficient bona fide," or "good faith" efforts to pay have been made, people cannot be held in contempt for nonpayment. In practice, judges have interpreted these legal concepts as requiring defendants, even those who are indigent and homeless, to go to great lengths to secure the means for payment, including seeking loans from friends, family members, and employers, or taking day-laborer jobs. In addition, some localities have institutionalized auto-jail, pay-or-stay or pay-and-sit, or sitting-out fines policies. The latter two policies entail sentencing people to a set number of days in jail in exchange for a certain amount of financial credit toward their debt.

## Law Enforcement

Deficits at every level of government put pressure on public institutions to cut costs or to produce revenue, prompting the Government Accountability Office to predict that state and local governments will “continue to face a gap between revenue and spending during the next 50 years.” The ensuing predicament is that, as a consequence, public institutions become both the originator and the beneficiary of monetary sanctions. To wit, payments for monetary sanctions do, in fact, generate revenue. For example, the California Legislature has been diverting money from the State Penalty Fund (the destination of fine and fee payments) to the General Fund for decades. Other jurisdictions, such as the court system in Nevada and probation departments in Texas, similarly rely on revenue from monetary sanctions. In the New York metropolitan area, fines generate 47% of criminal court revenue, which is split between New York City and New York State (each receives approximately \$14,000,000). The problem is that the pursuit of revenue makes debt collectors out of law enforcement officers, and police contact is the dominant entry point to the criminal justice system. The role of monetary sanctions in increasing the likelihood of interaction with law enforcement can take various forms. Police may inordinately act on warrants for nonpayment (which revokes parole or probation) or they may disproportionately pursue infractions that carry fines. Current policy creates these potentialities . . . and anecdotal evidence shows that they occur . . . . It is increasingly clear that criminal justice debt may be both a cause and effect of police contact . . . , which can undermine community policing efforts, detract from non-revenue-producing law enforcement, and generally disrupt the purposes of policing.

Evidence from jurisdictions around the country demonstrates how law enforcement participates in imposing and collecting monetary sanctions. Data from Hillsborough County, Florida, show that revenue from civil traffic fines dwarfs that of other types of courts (e.g., criminal, juvenile, and non-traffic civil). It is problematic when jurisdictions and agencies become dependent on revenue from monetary sanctions. For instance, the Nevada Supreme Court recently went broke because revenue from traffic tickets plummeted, and the city of San Jose, California, lamented the drop in traffic violation revenue.

The systemic pressure on law enforcement to assist with collecting criminal justice debt produces untenable situations like the warrant redemption program in Texas. The state legislature passed a bill in 2015 (H.B. 121) that allows for credit card readers to be installed in police patrol vehicles. At the same time, some counties have contracts for automatic license plate reading (ALPR) technology. The counties give all of their outstanding court fee data to the ALPR company, which then collects a 25% surcharge on the debt. Technically, people who are stopped under this program are given a choice of arrest or immediate payment. They can either pay the amount they

owe plus a \$125 processing fee or they can be arrested, go to jail, have their car towed and impounded, and miss work or any other obligations they may have. Clearly, this choice is a false one to people who cannot afford to pay the debt on the spot. Not only does this program create individual dilemmas, but it also creates an incentive to focus on revenue-producing warrants rather than traffic violations in real time. Moreover, it is a law enforcement model based on debt, with no incentive to reduce the number of warrants, which would put at risk both the free ALPR equipment and the revenue it helps produce.

### **Recidivism**

There is good reason to suspect that monetary sanctions might affect recidivism, although very few studies explore these effects. On the positive side, there is some evidence to suggest that monetary sanctions directed primarily at restitution contribute to lower recidivism rates. On the negative side, to the extent that people are unable to pay the monetary sanctions imposed, recidivism might be expected to increase. Indeed, there is some evidence to suggest that monetary sanctions increase the likelihood of probation revocation among adults. In a study of a sample of juveniles in Pennsylvania, owing restitution and other costs significantly increased the likelihood of subsequent adjudication and conviction. Overall, given the extent of the other collateral consequences of monetary sanctions, there is reason to expect a non-negligible criminogenic effect of unpaid criminal justice debt. . . .

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### **On Thin Ice: Bureaucratic Processes of Monetary Sanctions and Job Insecurity (2020)**

Michele Cadigan and Gabriela Kirk

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#### **. . . Monetary Sanctions and Employment**

Given that access to financial resources is critical to paying off LFO debt and exiting the court system, the ability of individuals of low socioeconomic status to repay court debts depends on job stability. The relationship between employment precarity and criminal justice contact has been widely found to contribute to accumulated disadvantage and inequality, particularly among poor and marginalized communities. Work examining this relationship provides powerful evidence demonstrating that contact with the justice system limits job prospects, lowers long-term earnings, and shapes labor market participation. Moreover, these effects are disproportionately concentrated and exacerbated among African American and Hispanic communities.

Monetary sanctions have an impact on a much wider population of individuals than these previous studies of employment and criminal justice contact have conceptualized. Monetary sanctions are imposed in nearly all cases, including felonies, traffic infractions, and those that include a suspended sentence without formal conviction. In 2011, 26.4 million adults reported being pulled over in a traffic stop; half of them received a citation. Combined with the roughly 4.5 million individuals under probation and parole each year and the 2.2 million incarcerated, monetary sanctions reflect a much larger reach of the system given that people in all three groups have likely been sentenced to monetary sanctions. Scholars have shown that this debt affects employment prospects in various ways—poor credit, wage garnishment, and the prevention of expungement among them. In addition, unpaid LFOs lead to limits on occupational licensing and driver's license suspension, creating additional barriers to accessing a range of employment possibilities. This work has not, however, focused on identifying the specific mechanisms within the court's collection process that reinforce poverty through employment strain. Thus, if LFO management impinges on people's ability to access and maintain stable employment, then this system may be trapping individuals in a cycle of poverty, court surveillance, and direct social control. . . .

. . . Focusing on procedural pressure points in the justice system's management of monetary sanctions illuminates how different post-sentencing practices work to further surveil and disadvantage the poor. Although the location of these points and the strain on individuals' employment status varied depending on the practices of court systems and individuals' access to resources, the way these pressure points destabilized the employment of those burdened with debt was largely the same. Hearings to review payment compliance were seen as helpful in avoiding additional sanctioning and punishment, but ultimately strained the ability of wage-workers and those with traditional work schedules to maintain steady employment and earnings essential to paying of LFOs. Failing to appear at these hearings was even more consequential for employment because it often resulted in bench warrants, subsequent arrest, and brief incarceration. Suspended driver licenses for failure to pay only exacerbated this strain given that it made attending court hearings and accessing labor markets more difficult. These mechanisms of compliance ultimately undermined the system's stated goals, in this case debt collection, and ensnared low-income individuals in a perpetual system of court surveillance.

Conceptualizing these procedural pressure points embedded in these court surveillance systems may have important implications for other outcomes of interest to criminal justice scholars and policymakers. The pressure to pay of LFOs to escape court surveillance or elude jail time coupled with the multitude of barriers straining access to formal labor markets may push some to illicit markets. Warrants have been shown to motivate some to exit the formal labor market, where risks of detection are heightened, and toward illegal forms of income. In addition, the frustrating and transactional nature of these hearings may speak to a perceived lack of procedural justice and undermine desistance

from crime. Finally, the strain of procedural pressure points may vary in important ways by race, ethnicity, gender, and family status. Further research is therefore needed to explore such variation in experiences with monetary sanctions.

Some scholars have argued that monetary sanctions can be a useful tool as an alternative to more severe sanctions such as incarceration or community supervision when LFO amounts are kept to a manageable level for indigent individuals. Using graduated sanctions or day fines, fines calculated based on an individual's income are one way, advocates argue, that courts can assess manageable LFO amounts that enable individuals to exit the court system in a reasonable amount of time. Further, when used appropriately, restitution in particular allows individuals to repair harm done to victims or their communities. Researchers have found a link between restitution completion and lower recidivism rates for both adults and juveniles, but only when the payment amounts were financially feasible. Additionally, scholars have called for the elimination of court fees that raise revenue for both the government and the court, instead funding the courts through taxes.

Broadly and locally, the landscape of the system of monetary sanctions is rapidly changing. In 2018, Illinois's state legislature passed the Criminal and Traffic Assessment Act to create a sliding scale waiver for individuals whose income is up to 400 percent of the poverty line to limit the burden of court costs and fees from criminal offenses. This waiver eliminates court costs for those below the poverty line. Within Washington State, as a result of the judicial outcomes in the *State of Washington v. Blazina* (2013) and *State of Washington v. Ramirez* (2018), courts are mandated to consider present and future ability to pay when assessing LFOs. In June 2018, the Washington State legislature implemented a new law barring courts from imposing any nonmandatory financial obligations on indigent defendants and discontinued the use of a 12 percent interest rate added to all delinquent fines and fees. These changes indicate a growing concern over the disproportionate burden monetary sanctions places on the poor, but these laws do not automatically apply to those holding outstanding debt prior to these changes. Even more, these efforts to more seriously consider ability to pay when imposing LFOs do not apply to restitution in either state, to punitive fines in Illinois, and mandatory fees in Washington State. Finally, such discussions and reform efforts rarely consider how the process of managing court debt itself can strain labor market participation and thus further impede individuals' ability to pay.

Although some may argue that holding more frequent payment review hearings enables courts to provide individuals with ample opportunity to make a case for their inability to pay and escape formal sanctioning, we find that these practices are counterproductive and affect people's future ability to pay by straining labor market participation. Advocates recently called for ending the practice of issuing warrants for those who fail to appear at nonpayment review hearings and even eliminating court

summons for payment notices and non-payment review hearings overall. Having an informal process or mechanism that allows individuals to check in about their payment compliance and request waivers when financial circumstances change could considerably lessen the strain on individuals who work during the court's operating hours or cannot get to court for other reasons. Further, providing access to attorneys to explain payment compliance can help individuals understand their legal options and advocate on their behalf. Finally, decoupling driver's license suspensions from unpaid LFOs could greatly reduce the cyclical and enduring nature of court debt.

This article highlights the important way courts manage people over time and create a cycle of criminal justice embeddedness. Moving forward, research examining how shifting policies around the system of monetary sanctions shapes the lives of individuals, particularly the poor, needs to pay particular attention to not just the amounts imposed, but also the method used to manage payments. This article also contributes to a larger conversation on court surveillance and labor market experiences of the justice-involved. Through the conceptualization of procedural pressure points, we suggest that there are a multitude of ways the justice system shapes the labor market experience of those entrenched in it; these can often be additive. Even with efforts to decarcerate and to destigmatize criminal records, embedment in inefficient systems laden with procedural pressure points would continue to strain the justice-involved.

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### **Speed Trap or Poverty Trap? Fines, Fees, and Financial Wellbeing (2018)**

Steven Mello  
(working paper)

. . . In this paper, I examine the impacts of fines for traffic infractions on financial wellbeing. Over forty million traffic citations are issued each year for speed limit violations alone, making traffic fines a common unplanned expense for the driving population. Further, policing activity disproportionately affects poor communities, whose residents may have an especially limited capacity to absorb fines. . . . [R]esidents of the most disadvantaged zip codes receive traffic citations at nearly twice the rate of residents of rich zip codes. While most traffic fines are nominally small, typically between \$100 and \$400, they could induce financial distress in several ways. For individuals lacking financial slack, coping mechanisms such as forgoing basic needs, missing bills, or borrowing at high interest rates may impact future financial stability. Nonpayment of fines results in the revocation of driving privileges, which may jeopardize employment arrangements or put individuals at risk of a misdemeanor charge for driving without a valid license.

An analysis of the impacts of fines is particularly interesting given the current public concern regarding the unintended consequences of criminal justice policies. While a large literature has examined the public safety benefits of policing in the spirit of deterrence models such as Becker (1968), the social costs of policing have historically received less attention. A host of recent events such as the 2014 riots in Ferguson, Missouri have vaulted the potential negative implications of policing to the forefront of public consciousness. Prompted by the Ferguson Report's findings that a focus on revenue generation shaped the city's policing practices and that nonwhite and low-income citizens disproportionately received citations, media outlets and advocates have offered accounts of individuals suffering cycles of debt and involvement with the criminal justice system stemming from fines and fees. While compelling, such evidence is both anecdotal and correlational. To date, there has been no rigorous empirical analysis of the causal effects of fines on economic wellbeing.

To estimate the impacts of fines, I link administrative data on the universe of traffic citations issued in Florida over 2011–2015 to monthly credit reports and payroll records for ticketed drivers. The citations data provide nearly complete coverage of the state's traffic offenders and my analysis sample represents about five percent of Florida's driving-age population. Credit reports offer a detailed account of an individual's financial situation, including information on delinquencies, adverse financial events such as charge-offs and repossessions, and unpaid bills in collection. The payroll records report monthly earnings for individuals working at large employers. About sixteen percent of the analysis sample is employed in a payroll-covered job in the year prior to receiving a citation. . . .

. . . Motivated both by the observation that the incidence of policing falls largely on disadvantaged communities and by a growing body of evidence suggesting that many low-income individuals may be unable to cope with unexpected expenses, this paper studies the effect of fines for traffic violations on financial wellbeing. To estimate causal effects, I link administrative traffic citation records to high frequency credit report and payroll data and leverage variation in the timing of traffic stops for identification.

The empirical analysis reveals that following the receipt of a traffic fine, individuals fare worse than would otherwise be predicted on a host of credit report outcomes. Citations increase unpaid bills, delinquencies, and adverse financial events, with the increases most pronounced for the poorest quartile of drivers. For the average driver, the short-run increases in measures of financial strain are about what would be predicted by a \$285 income loss. For the poorest drivers, the two-year increases in financial distress are observationally similar to an \$800–900, or about 5 percent, income reduction. I also find evidence of a decline in borrowing, measured by revolving accounts and balances, as well as the presence of home and auto loans on credit reports, following a traffic stop.

Traffic tickets reduce the likelihood that an individual appears as having any earnings in payroll data covering large employers by about 0.5 percentage points, or almost 5 percent relative to the mean. The employment effects are, again, most pronounced among the poorest drivers. Poor drivers experience an 8 percent drop in the probability of having payroll earnings in the one year following a traffic stop.

The findings offer several important takeaways. First, consistent with a growing literature documenting widespread financial fragility among U.S. households, the results imply that many individuals are not insured against even small financial shocks. When faced with a \$175 traffic fine, individuals accrue collections and delinquencies on their credit reports, suggesting an inability to cover the unexpected expense. Second, individuals exhibiting minimal distress at baseline are largely unaffected by nuisance fines, while those already facing several unpaid bills experience the most significant declines in financial wellbeing. This pattern of results is consistent with a poverty trap, whereby already distressed individuals are derailed by a new expense. Third, both the pure financial shock component of a traffic citation and the ensuing increases in driving costs, either through increases in insurance premiums or the revocation of driving privileges, appear to be important mechanisms. And fourth, a conservative estimate of the welfare loss associated with the average traffic ticket is more than two times the size of the revenue raised, suggesting that policies to reduce citations with low public safety benefits could be welfare enhancing.

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**Carceral Immobility and Financial Capture: A Framework for the Consequences of Racial Capitalism Penology and Monetary Sanctions (2020)**

Brittany Friedman

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. . . Carcerality exists on a continuum given a primary state function is to identify, capture, and render offenders immobile in order to efficiently create productive carceral subjects. Racial capitalism penology has a simultaneous permanence and fluidity in everyday American life that flows well beyond the prison walls. I argue racial capitalism penology's human toll should be understood as phenomena of carceral immobility and subjectivity in the form of financial capture.

In a sociolegal context, I refer to carceral immobility as the formal, informal, and extralegal regulation of physical movement through the use of carceral institutions to dictate how and when human beings *cannot* transverse across space, fostering feelings of both physical and cognitive containment. Carceral immobility is most visible as the dominant purpose of imprisonment, detention, and deportation, but it is also achieved



through extended surveillance such as probation, parole, community supervision, and electronic monitoring. Penal logics determine which practices guide carceral subjects' immobility. Whether their immobile status is fostered through the guise of deterrence, rehabilitation, or incapacitation, racial capitalism functions as the base penal logic applied in tandem within a particular historical iteration: chattel slavery, neoslavery, or neoliberalism. For example, though community service is seen as a modern rehabilitative practice, in the neoliberal era, people pay for community service programs and face heightened forms of immobility such as jail time for failure to pay such monetary sanctions. Once in jail, people are often charged again for 'services' such as commissary or telephone calls in addition to a daily room and board rate. Similarly, probation and electronic monitoring are for sale, often at a monthly rate, and failure to pay is a jailable offense. Racial capitalism penology renders everything a commodity and across all historical eras, immobility is a product that carceral institutions can sell to their captives without the privilege of consent.

Geographers in particular have long been concerned with the effect of the carceral state on movement and space, whether through the transfer of goods or people, contributing heavily to an interdisciplinary body of work known as mobilities research. Within this field, carceral *mobility* is largely understood as coercive and disciplined movement that occurs within and about carceral spaces. Carceral mobility successfully debunks "the illusion of carceral space as fixed space" by arguing mobility is not absent from carceral institutions but simply different than mobility beyond such spaces. The goal is to attend to the movement and agency that occurs within socially and materially constructed borders and trouble the mobility/immobility dichotomy.

Yet, if we examine the impact of the carceral state on movement in a sociolegal sense, we see that the state's objective is to legally and extralegally affix *immobility* upon classified offenders to create productive carceral subjects. Yes, the state achieves this at times through actively moving people, but the state's main goal is to *prevent* movement and *inscribe both physical and symbolic containment* onto the offender's physical and cognitive essence, forcing the offender to embody carcerality. Restricting movement delivers financial incentives to the carceral state by slowing down extractive revenue sources. People ensnared within carceral institutions experience this process as one of immobility, whether it be through physical movement, cognitive strain, poverty traps, or a lack of financial choice—punishment seeks to constrain movement in all forms and is understood as such by both criminal justice decisionmakers and those considered offenders. Therefore, it is more appropriate and theoretically useful for sociolegal scholars to focus on carceral immobility as a phenomenon of punishment because it allows us to see the human tolls that occur by systems' design, while still theoretically integrating the complex tension between agency and structures of state extraction.

Racial capitalism penology has defining implications for carceral immobility in the form of *financial capture*. Given such penology incentivizes the state to behave in a predatory

manner, the urge to immobilize increases alongside the state's need for both financial returns and symbolic returns in the form of degradation and docility. Market-based solutions translate into a steady historical progression of fine-tuning carceral institutions according to the latest high-tech laissez-faire scheme. This approach consistently uses monetary sanctions to hold carceral subjects individually responsible for their own immobility, producing financial capture at the material, symbolic, and embodied level. People come to accept such degradation as natural, unavoidable, and at times, the result of their own individual criminality, which ensures their compliance with the logic.

Racial capitalism penology long ago facilitated this desired outcome. Private interests have continued to significantly structure the state's decision-making and create an incentive for extraction from the populace. Because neoliberalism has fostered a rapid progression, the post 1980s state continues to reinvent technologies of force to constrain the decision-making of carceral subjects in an effort to force behavior that benefits the financial needs of the state, with expanding monetary sanctions regimes being but one of these technologies. . . .

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**Impact of Juvenile Justice Fines and Fees on Family Life:  
Case Study in Dane County, WI (2019)**

Leslie Paik & Chiara Packard  
JUVENILE LAW CENTER

This report presented findings from 51 interviews with parents, youths and victims in Dane County about their views of and experiences with legal financial obligations. Families reported LFOs ranging from \$180-4,500 for the youths' stays in detention, group homes, neighborhood supervision, public defender costs, competency evaluations and restitution. Victims asked for restitution ranging from \$25-\$3,800, of which the court granted restitution ranging from \$30-1,600. Six victims reported receiving some restitution between \$8.33-1,250, often months after the offense occurred.

Families all reported frustrations and challenges in dealing with these LFOs. The LFOs have significant negative impact on family life, in material and emotional ways. Parents discuss the psychological toll of these LFOs and the resulting impact on the quality of their relationships with their youths. They also talk about the overall impact on their household, including their other children. Financially, even if they are working in full-time professional jobs, the families report feeling too strapped to pay the amounts. Parents in two separate households also appeared to be charged twice for counsel on the same delinquency case. In addition to the impact of LFOs on their family, families discussed the financial and nonfinancial consequences for not paying LFOs. Those included the state

seizing their tax refunds, sending their bill to collections, suspending driver's licenses, as well as increased justice involvement for the youth and potential new court involvement for the parents.

In contrast, victims generally reported satisfaction with the communication from the Victim Witness Office, at least initially. Many victims praised that office, describing how they called them to discuss the issues. However, that communication appears to break down after the victim gets restitution as to where and how many hours the youth has performed community service. Moreover, many victims did not receive any restitution or if they did, it often came months or years after the offense.

The experiences of these families and victims lead to two larger implications: 1) The LFOs affect parents' relationship with their youths, often placing more stress on the very relationship that the courts and victims hope will prevent the youths' future delinquency; and 2) As victims wait for restitution that may or may not come, they begin to question how the youths are taking responsibility for their actions. The result is that many now see the system as 'broken' and youths and families get further propelled into the justice system as they are not able to pay the LFOs. The following two policy implications are designed to ameliorate the issues:

#### 1. Abolish all fines and fees

Our findings support other research that advocates for abolishing all fines and fees in the juvenile justice system. There is no therapeutic or meaningful deterrent effect of these fines and fees, nor do they teach youths responsibility. Moreover, the youths often have no reasonable way to pay these fines; their parents also are not able to do so either.

#### 2. Revise how community service is used as an alternative to restitution

Even with the caps to restitution amounts, the process of doing restitution can be quite complicated. The agencies monitoring the community service do not fund the entirety of this amount but rather just gets them started. Youths have no choice in what community service they can do in these agencies, nor the amount of hours, which could affect their motivation in completing the community service. As such, it would be wise to reconsider the ways that the youths can work off restitution. One victim mentioned the possibility of having the youths do some projects for the victims as a way to pay off the restitution. At the same time, we recognize that for victims, the financial amount is not the only harm done by the offense. There is also the psychological impact of the crime. For some whose cars were stolen, they described ongoing feelings of fear and uncertainty as their house keys, work ids and garage openers were in the cars. Two victims ended up selling their cars due to the fact that the youths had used drugs in the car and the victims

didn't want their young children exposed to any remnants of those drugs even after having the cars cleaned.

In closing, it would be worth reconsidering the goals of legal financial obligations. Our findings in Dane County show that imposing LFOs creates confusion, instead of clarity, in trying to fulfill multiple goals of teaching youths responsibility, helping to pay for the system, and teaching parents to be more in control over their youths. As such, it seems illogical to continue to impose fines, fees and restitution, especially if the consequence is that it alienates the parents and youths, and to some extent, victims, even more.

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### **Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles (2019)**

Lucero Herrera, Tia Koonse, Melanie Sonsteng-Person & Noah Zatz

UCLA LABOR CENTER & UCLA SCHOOL OF LAW

Each year in Los Angeles County, about 100,000 people are forced to work for free. We refer here not to wage theft or labor trafficking but to a formal government practice that uses the power of the criminal legal system to require people to work without pay. This practice is called “community service,” a euphemism for a fundamentally coercive system situated at the intersection of mass incarceration and economic inequality, with the most profound effects on communities of color. This report provides the first in-depth, empirical study of a large-scale system of court-ordered community service in the contemporary United States.

Court-ordered community service is typically understood as a progressive alternative to incarceration for people who would otherwise face jail time and/or court debt they cannot afford to pay. However, it also functions as a distinct system of labor that operates outside the rules and beneath the standards designed to protect workers from mistreatment and exploitation.

This report relies on a roster of about 5,000 individuals required by the Los Angeles Superior Court to perform community service in one part of the county during a one-year period from 2013 to 2014. We acquired more detailed information on about 600 of the underlying legal cases by identifying and coding court files from a representative sample of the roster. We complemented this data with documentation obtained through public records requests and by conducting 39 interviews with workers, public defenders, program administrators, work site supervisors, and others involved in the Los Angeles system. We also surveyed existing state laws and recent legislation in all 50 states.

Our focus on this form of labor complements the increasing public attention on court debt, which has attracted criticism for two broad reasons. First, it leads to further criminalization of people who cannot afford to pay; “poverty penalties” can lead to incarceration in what have been called the new debtors’ prisons, which violate constitutional protections. This criminalization of poverty predictably compounds racial and economic inequalities already exacerbated by a criminal legal system that disproportionately targets people of color in economically disadvantaged communities. Second, court debt has come to resemble a shadow state and local tax that feeds back into the criminal legal system.

Our data show that community service often replicates or exacerbates the problems of court debt, rather than providing a humane alternative. Many individuals face barriers to completing the assigned work, frequently resulting in arrest, incarceration, and deepening debt. When people are able to comply with mandatory community service, the result is the extraction of millions of hours of unpaid, unprotected labor from those most subject to unemployment and work instability. When the criminal legal system supplies a captive labor force to employers, work that would be otherwise decently compensated and often unionized, is replaced by a degraded form of labor, undermining the security of all workers and exacerbating the shortage of jobs that contributes to criminalization and unaffordable debt.

The following is a summary of our key findings:

1. Los Angeles County operates a large-scale system of court-ordered, unpaid, and unprotected labor outside of its jails that involves about 100,000 people and millions of hours of work each year. Court-ordered community service workers labor alongside paid employees who perform identical tasks. As “volunteers,” they receive neither wages nor labor protections from safety hazards, workplace injuries, discrimination, or harassment, let alone social security, child care assistance, or other supports for blue-collar workers.
2. Court-ordered community service extracts weeks and sometimes months of unpaid work.
  - a. In criminal court, community service orders imposed in lieu of jail required people to work a median 100 hours. In at least 25% of these cases, people were ordered to work 155 hours or more – about four weeks of full-time work.
  - b. Community service orders to absolve court debt required people to work a median 96 hours in lieu of an average \$1,778 in fines and fees.
  - c. Even for just a traffic ticket, the median work order was a week and a half (51 hours) to work off \$520.
3. Community service enables government agencies and private entities – nonprofit and for-profit alike – to avoid hiring thousands of workers.

- a. Extrapolating countywide from our data, mandatory community service required people in Los Angeles County to perform an estimated 8 million hours of unpaid work over the course of a year—the equivalent of 4,900 paid jobs.
  - b. Government agencies received an estimated 3 million hours of labor, the equivalent of 1,800 full-time jobs.
4. People face widespread barriers to completing mandatory community service, with serious consequences.
- a. About two-thirds (66%) of people from criminal court and two-fifths (38%) from traffic court did not complete their community service by the initial deadline.
  - b. The threat of jail is real. In criminal cases, nearly one in five (19%) in our study faced probation violation and revocation or a bench warrant for failure to complete court-ordered community service, and 12% were sent to collections.
  - c. Even in traffic court, where jail is rare, court-ordered community service workers feared incarceration for not completing their assignments. Ten percent were eventually sent to collections or otherwise sanctioned for failing to trade their fines and fees for work.
  - d. Mandatory community service is not a complete alternative to debt. People must pay a fee to a referral agency simply to obtain a community service placement. Further, not all court fees can be worked off, so even those who complete their hours may still face debt. In criminal court, the majority (86%) still made payments averaging \$323—a significant sum for many. Likewise, in traffic court, 40% of those assigned community service still made some payments.
5. Community service disproportionately affects marginalized communities.
- a. Of those sentenced to mandatory community service in criminal court, most (78%) could not hire a lawyer, even though they potentially faced jail time, and either went unrepresented or were represented by a public defender.
  - b. A substantial minority (16%) had sufficiently limited English proficiency that the court appointed an interpreter.
  - c. In traffic court, 89% of defendants were people of color.

Too often, court-ordered community service does not preclude jail or debt, and it is always a troubling form of economic extraction that seizes labor rather than money. This practice threatens job security and labor standards, as employers can substitute community service workers for paid employees.

Our goal is not to eliminate alternatives to jail and debt but to understand the limitations and risks of court-ordered community service and develop better alternatives. Our findings suggest several distinct but complementary paths that could address the problems inherent in mandatory community service without reverting to more punitive solutions. Most radically, we could reconceptualize community service as a jobs program.

We recommend three approaches:

1. Reduce the threat of jail and court debt that compels people into community service in the first place.
2. Expand sentencing alternatives that do not rely on forced labor.
3. Transform punitive mandatory community service into meaningful economic opportunity through decent, paid jobs. . . .

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### **Not Just a Ferguson Problem:**

#### **How Traffic Courts Drive Inequality in California (2015)**

Alex Bender, Stephan Bingham, Mari Castaldi, Elisa Della Piana, Meredith Desautels, Michael Herald, Endria Richardson, Jesse Stout, & Theresa Zhen

A recent report by the Civil Rights Division of the U.S. Department of Justice found that the courts and law enforcement agencies in Ferguson, Missouri, are systematically and purposefully taking money from the pockets of poor people—disproportionately African Americans—to put into court and city coffers. While the context may be different in California, many of the practices are chillingly similar. Here, as in Missouri, a litany of practices and policies turn a citation offense into a poverty sentence: the revenue incentives of fine collection lead to increased citation enforcement, add-on fees for minor offenses double or quadruple the original fine, and people who fail to pay because they don't have the money lose their driver's licenses. Once an initial deadline is missed, courts routinely deny people the right to a hearing unless they can afford the total amount owed up front, and payment in full becomes the sole means for having a license reinstated.

As a result of these policies and practices, millions of Californians do not have valid driver's licenses because they cannot afford to pay citation fines and fees. In fact, over 4 million people, or more than 17% of adult Californians, now have suspended licenses for a failure to appear or pay. These suspensions make it harder for people to get and keep jobs, further impeding their ability to pay their debt. Ultimately, they keep people in long cycles of poverty that are difficult, if not impossible to overcome. This report highlights the growing trend of driver's license suspensions, how the problem happens, the impact on families and communities, and what can and should be done about it.

#### **The Problem: Explosion of Debt and License Suspensions**

Over the past few decades, the fines and fees associated with traffic citations have steadily increased. What used to be a \$100 violation now costs nearly \$500, and jumps to over \$800 if a person misses the initial deadline to pay. As the fees have gone up, and with

the economic crisis, fewer people can afford to pay their tickets. In addition, instead of suspending driver's licenses only where public safety is at stake, courts now use license suspensions as a tool for collecting this unpaid traffic citation debt. This means that once a ticket goes to collections, the person cannot have a driver's license until every cent of a fee is paid, even if she is making monthly payments for years.

For many people, this collection system creates unjust results. While people who can afford to pay, do, many who cannot pay lose their jobs because they need a license to work. Parents cannot drive sick kids to medical appointments. Families must choose between food and traffic fines. Some, including identity theft victims, suffer these harms even when they did not commit the offense in the first place. The logical place to resolve these injustices is in court. However, missing a deadline to pay a traffic fine now bars entry for anyone who cannot pay up front: courts across California require the "total bail," or maximum fine amount, to be paid before a person can exercise the right to a hearing. This means you must pay or lose your license, even if you didn't violate the law.

Without the ability to pay or an opportunity to request a fair remedy in court, the number of people with license suspensions is at a record high: over four million Californians have suspended driver's licenses solely because they have not paid the full fines for minor infractions. Ironically, the system is starving itself of revenue. When people cannot work, they cannot pay traffic fines. When they know they cannot get a license even if they make monthly payments for years, they stop paying. The result: California now has over \$10 billion in uncollected court-ordered debt.

### **The Process: How an Unpaid Ticket Results in Huge Fines, Fees and License Suspensions**

The consequences of an unpaid citation are swift and severe. After the initial deadline to appear in court or pay the ticket is missed, regardless of the reason, the driver's license is suspended and an additional \$300 civil assessment is added to the total fine amount. This is true even if the citation had nothing to do with driving – for example, a citation for loitering or littering.

The result is a two-tiered system of justice in traffic courts across California, where only money grants access to the courts. Those who have the money to pay up front can contest the ticket in writing, and can schedule a court date that works with their schedule. In fact, they are often the only ones who can schedule a court date at all.

Yet, access to the courts is critical for those without money; a court hearing is often the only way to get relief from the amount owed. State law requires courts to take into account a person's ability to pay when assessing traffic fines and fees, but the imposed fines rarely reflect ability to pay. For example, under statute, the civil assessment fee for missing



a deadline is supposed to be “up to \$300,” but courts routinely impose the full amount. Much of the money from these fees goes to fund the courts, so the revenue incentives are at odds with the requirement to consider a person’s financial circumstances.

In addition, many—though not all—California courts allow payment plans or community service to resolve traffic fines, but those options usually are not explained or even mentioned in the courtesy notices mailed by the courts, nor are they available in most counties unless you are able to get a court hearing. After a person’s license is suspended for failure to pay a fine, the debt is usually referred to an outside collections agency. Court personnel claim “no jurisdiction” over the case, and refuse to reconsider it, even if the fine was assessed in error. A person without the money to pay the ticket is left with full payment as the only option to reinstate the license.

### **The Impact: The Disastrous Consequences of Court-Ordered Debt and License Suspensions**

The net result of high fees and limited due process is millions of suspended licenses in California. The impact on California’s families is significant. Low- and middle-income jobs increasingly require driver’s licenses. Taking public transportation to work can be onerous and time-consuming: one study found that job seekers in Alameda County had to make on average three to four transfers between home and areas where work was available. Data shows that a valid driver’s license is a more accurate predictor of sustained employment than a General Educational Development (GED) diploma. Many cannot find work without a license. For those who are employed, many cannot keep their jobs without a valid driver’s license. A New Jersey study found that 42% of people whose driver’s licenses were suspended lost their jobs as a result of the suspension.

As in Ferguson, these policies disproportionately impact people of color, beginning with who gets pulled over in the first place. Recent San Diego and Sacramento data show that African-American people were two to four times more likely to get pulled over for a traffic stop than white people; Hispanic people were also disproportionately stopped and searched. In San Francisco, over 70% of people seeking legal assistance for driver’s license suspensions were African American, though African Americans make up only 6% of the city as a whole. In the broader employment context, people with African-American sounding names are significantly less likely to get job interviews than white people with the same resume. Existing employment barriers based on race should not be exacerbated by court policies that further deprive people of jobs and employment prospects.

### **The Cost: How Fines and License Suspensions Impose a Hidden Tax on Government, Public Safety, and the Economy**

Using license suspensions to collect debt rather than to preserve public safety means that there are millions of Californians who are not a driving safety threat, but who cannot have valid driver's licenses. According to the American Association of Motor Vehicle Administrators, this type of license suspension is dangerous because it diverts police officer time and attention from public safety priorities. The police, DMV, and courts spend millions arresting, processing, administering, and adjudicating charges for driving on a suspended license. Add in the cost of jailing drivers whose primary fault was failing to pay, and we have a costly debtor's prison.

The current policies are counterproductive for employers as well: there is a cost to hiring and re-training a new person for a job being done well by someone else. It is an unnecessary expense to both employers and the state to pay unemployment insurance for an employee who would be retained if the person had a license.

Additional costs to the state include the fact that many more families have to rely on safety net public benefits because these millions of suspended licenses are a barrier to gainful employment. There are also the secondary impacts of unemployment on the economy and on families living in poverty; children often bear the brunt of the harms of poverty, and some of these costs will not be fully realized for decades.

Changing California's practices regarding license suspension would come with some implementation costs. However, by restoring driver's licenses and allowing people to work, more drivers would be able to pay traffic fines and fees, which would reduce uncollected court debt and increase revenue, as well as eliminate the hidden costs to California's families and economy.

### **Solutions: Stop the Cycle of Suspensions for Collections, Protect Jobs, and Collect More Revenue**

California should end the use of license suspensions as a collection tool for citation-related debt, allowing more people to work and pay their debts. An array of other collection tools is at the state's disposal. Additionally, California courts must ensure that access to the courts and fair due process do not depend on income; individuals should not have to pay up front to get a hearing.

The cost of paying a ticket is too high, for everyone. Current fees should be reduced by 50%. In assessing fines as punishment, courts should, as state law already contemplates, take into account ability to pay. Standardized payment plans and community service options could alleviate the financial burden of fines and fees, as well as reduce the number of delinquent accounts.

Finally, there are over four million drivers who need this relief now: make it retroactive. The right amnesty plan will release current license suspensions and forgive debt for the poorest Californians, as an investment in California's families and future.

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### **Pay Unto Caesar: Breaches of Justice in the Monetary Sanctions Regime (2020)**

Mary Pattillo & Gabriela Kirk

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... In his concurring opinion in the 2019 *Timbs v. Indiana* decision, Supreme Court Justice Clarence Thomas quoted a 1680 English House of Commons finding. "[T]he Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty's Protestant Subjects."<sup>2</sup> In other words, since the days of monarchy, courts administered by those in power have used monetary sanctions as an oppressive governing tool. Yet it required the *Timbs* ruling in 2019, to recognize that the prohibition against levying excessive fines expressed in the U.S. Constitution's Eighth Amendment also applied to the states.

That state authorities have been acting like kings of old would come as no surprise to a sixty-two-year-old man we interviewed in Illinois in 2017. "Give Caesar what's due," he told us, referring to the over \$5000 in court costs, fines, and fees that he estimated he had been sentenced to pay for various felonies and misdemeanors, all drug and traffic related. He continued, only somewhat sarcastically, "Why should we pay Caesar? Whose face is on the money? Caesar! Then you pay Caesar what's due." He was homeless and reported a total monthly income of \$192 in food stamps. Are his fines excessive? Is that justice?

The *Timbs* ruling was the first time in over twenty years that the Supreme Court took up the excessive fines clause within the Eighth Amendment, which reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Yet *Timbs* had a very narrow purview, only addressing the question of whether states are "incorporated" to the Eighth Amendment. The justices unanimously decided that they are. Given the single question, the opinions are relatively short, leaving many crucial details about what constitutes excessive fines yet to be clarified. We focus on the questions of proportionality and ability to pay as components of excessiveness. We also go beyond the constitutional justice that the Supreme Court metes out to explore retributive, procedural, and distributive justice, concepts that are of broad interest to social scientists, criminologists, and legal scholars, and that together offer a comprehensive appraisal of the justness of monetary sanctions from the perspective of those ordered to pay them. Such (il)legitimacy may affect the state's ability to collect on these debts.

Ideas of justice pervaded our qualitative interviews with sixty-eight people sentenced to pay court fines and fees in Illinois. We identified five primary themes in the data and discuss how each theme provides both evidence and theory regarding important domains of justice. Respondents expressed that monetary sanctions are: (1) justifiable punishment, (2) impossible to pay due to poverty, (3) double punishment, (4) extortion, (5) and collected by an opaque and greedy state. On the Eighth Amendment issues of proportionality and ability to pay (i.e., constitutional justice), we show how the seemingly small amounts of these monetary sanctions became disproportionate to the crimes committed because of the substantial financial burden they represented. Respondents saw greater alignment with retributive justice, although the addition of monetary sanctions to other punishments went too far. Monetary sanctions breached respondents' sense of procedural and distributive justice without qualification. In this Article, we first define the four types of justice and discuss the literature on monetary sanctions. We then describe our data and method and present our findings. We conclude by arguing that the purpose of monetary sanctions is the social control of disfavored groups, and we call for the elimination of monetary sanctions as a sentencing practice for poor and near poor defendants. . . .

. . . In this Article we asked the question: do monetary sanctions align with important forms of justice? Taking the perspective of the people involved in the criminal justice system who we interviewed, we find that the majority of monetary sanctions imposed on this population are excessive (disproportionate and beyond their ability to pay) and thus do not provide constitutional justice. Many of the people we interviewed owed in excess of their monthly income, mostly for nonviolent offenses. When they did pay, they did so by not paying other essential bills and costs. Their inability to pay made the punishment disproportionate to their crime and redistributed monies in a regressive fashion. In drawing this conclusion, we add empirical support to Colgan's doctrinal argument that an examination of the "five key principles [that] emerge from the proportionality cases of the Cruel and Unusual Punishments Clause from which the excessiveness test is borrowed . . . [supports] the conclusion that a defendant's financial condition is relevant to assessing the severity of punishment for use in weighing its proportionality."

To conclude, we turn to the question: What is the purpose of this excess? Garland offers a sophisticated analysis of southern lynchings of African Americans as *penal excess*. Why did southern lynch mobs engage in collective and public violence despite the fact that U.S. criminal law had dismissed such penalties centuries prior? The answer:

They did so to invoke a set of meanings and distinctions that America's increasingly egalitarian legal system had sought to leave behind. The lynchers' use of "cruel and unusual" punishments was a deliberate flouting of the norms of

modern law and civilized penology, a self-conscious choice, intended to degrade and defile black offenders and to refuse them the treatment afforded to convicted criminals by the criminal justice institutions of the time.

Of course the practice of monetary sanctions does not compare to the brutal and homicidal violence of lynchings. The important insight, however, is the role of penal excess in damaging and humiliating a marginalized population and doing so under the cover of law. Just as Garland shows that lynchings were not extralegal in the way often assumed, the extraction of monetary sanctions happens in plain sight and with the full participation of officers of the court. The threat (without a hearing) of jail for nonpayment is regularly used to extort payment (or to actually put people in jail). The ultimate purpose of the excess is social control, the social control of Black people in the case of lynchings, and the control of poor people – or, in seventeenth-century England, “his Majesty’s Protestant Subjects” – in the case of monetary sanctions. The Eighth Amendment is about curtailing the excesses to which penal power can be used against disfavored groups. A forty-nine-year-old Black man in Chicago expressed this clearly: “You know, sometimes laws are to protect people, but other times laws can be construed to keep people in line.”

Beyond constitutional justice, we also ask about how monetary sanctions accord with retributive, procedural, and distributive justice. Our data reveal serious breaches of each. While several respondents acknowledged guilt and accepted the idea of a monetary punishment, most did so with a caveat about it being “high and outrageous,” as one woman said. This disproportionate punishment violates retributive justice. The fact that many respondents had done jail and/or prison time, and were serving probation with requirements for community service, classes, or other court-mandated programs, made the financial punishment appear even more disproportionate to their offense, further violating retributive justice and perhaps also the constitutional consideration of excessiveness. Procedural justice was undermined because payments were extracted under the threat of force. They paid to avoid jail. They were “buying their freedom.” This extortionist regime not only felt procedurally wrong to respondents, it also flouted the law – another sphere of constitutional injustice. Finally, bewilderment about where the money went and impressions of the greedy state violated both procedural and distributive justice. Procedurally, respondents were not thoroughly informed about the destination or purpose of the fines, fees, and costs they paid, yet they were hounded for them in frequent court appearances. Regarding revenue and distributive justice, monetary sanctions are regressive. They are disproportionately exacted upon those least able to pay, and redirected to the state, which uses them on criminal justice systems that further defendants’ impoverishment.

These findings argue for the elimination of monetary sanctions as a sentencing practice for poor and near poor defendants. Several scholars, organizations and institutions have put forward such proposals. Harvard’s Criminal Justice Policy Program recommends

eliminating all fees and surcharges. Colgan argues for “graduated” economic sanctions along the lines of “day fines” in Europe, and McLean similarly argues for setting a penalty such “that it could reasonably be expected to be paid . . . while permitting an individual to maintain some minimal level of economic subsistence. For many people we interviewed, that amount is likely be \$0. The National Task Force on Fines, Fees, and Bail Practices—an entity created by the Conference of Chief Justices and the Conference of State Court Administrators—offers several principles, including: funding courts wholly from general revenue sources rather than from fees and costs, and admonishing states not to adopt mandatory fines, fees, and surcharges for “misdemeanors and traffic-related and other low-level offenses and infractions.” The American Law Institute’s Model Penal Code recommends similar reforms on the legislative side. These would all be welcome efforts to the respondents we interviewed who experienced monetary sanctions as violations of multiple forms of justice. A thirty-six-year-old Black man in downstate Illinois summarized the damage done as a result of such penal excesses “I don’t get this place down here as far as their judicial system. They wicked.” Kings, emperors, and wickedness—these symbols do not convey justice in a modern criminal justice system.

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**The Effects of Criminal Justice Debt: Evidence from a Field Experiment  
(forthcoming 2020)**

Rebecca Goldstein, Devah Pager, Bruce Western, & Helen Ho

Criminal courts can require defendants to pay thousands of dollars after a conviction. If an individual fails to pay these fees in short order, they can be charged significant interest and collections fees over time. In some cases, failure to pay (or the associated failure to appear in court when payment is due) can result in a warrant for arrest and jail time. While many states offer provisions to modify fees and fines based on ability to pay, judges have often proven unwilling or unable to extend such accommodation. As a result, the poor, disproportionately exposed to criminal justice contact, bear a disproportionate burden of legal debt. In this study, misdemeanor defendants in Oklahoma County, OK were randomly selected to receive debt relief for present and prior criminal cases in the county. We use this experiment to quantify the causal effect of criminal justice debt on social, economic, and legal outcomes. Very few control respondents pay appreciable amounts of their outstanding fees. Debt relief reduces new charges and convictions three months later, but has no effect on jail bookings. The effects on charges and convictions dissipate by the twelfth month, but the effect of debt relief on debt-related justice system responses persist. Twelve months after debt relief, treatment respondents were 26% less likely to have been issued a warrant and 26% less likely to have accumulated new legal debt, although no less likely to have been booked into jail. . . .

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**The Future of Felon Disenfranchisement Reform: How Partisanship and Poverty Shape the Restoration of Voting Rights in Florida (forthcoming 2021)**

Michael Morse

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. . . In 1974, on the eve of the era of mass incarceration, the Supreme Court held that the Fourteenth Amendment gave states an “affirmative sanction” to disenfranchise those convicted of a crime. In the years since *Richardson v. Ramirez* was decided, the number of people unable to vote because of a criminal conviction swelled from less than 2 million to more than 6 million. Felon disenfranchisement also became partisan. While Democratic states have liberalized their laws, Republican states, often in the South, remain bastions of disenfranchisement. By 2016, the Republican-led state of Florida accounted for more than a quarter of the entire country’s disenfranchised citizens.

Because “the facial validity of felon disenfranchisement may be absolute,” substantially reducing the scope of disenfranchisement in states like Florida depends on building bipartisan coalitions, including addressing the expectation that expanding the right to vote will dramatically benefit Democrats. Yet even if these coalitions can come together, efforts to expand the right to vote can be complicated by the many collateral consequences of a criminal conviction. As the number of people involved with the criminal justice system has grown, so has the court-ordered assessment of fines, fees, and restitution. In its wake, an emerging issue is whether the payment of outstanding fines and fees is required to vote, particularly when voting rights are restored upon the general requirement for an individual to complete the terms of their sentence.

This Article contributes to the symposium on democracy reform for the twenty-first century and its call to identify and evaluate key initiatives to strengthen our democracy by focusing specifically on a 2018 ballot initiative known as Amendment 4 to end lifetime disenfranchisement in Florida. It marshals hundreds of public information requests to introduce four novel datasets, covering the hundreds of thousands of petitions collected to put the initiative on the ballot; the millions of ballots cast for its victory; the voter registration records of people with felony convictions who were initially restored their right to vote; and the fines and fees owed by people with felony convictions that may cause them to remain disenfranchised.

The Article proceeds chronologically, from the ballot initiative to its partisan implementation and finally the ensuing (and ongoing) litigation. It makes three observations about the role of partisanship, poverty, and equality in the restoration of

voting rights. First, that the campaign won a remarkable bipartisan victory, drawing Republican support from poorer and more racially diverse neighborhoods. Second, that expanding the right to vote to people with felony convictions has smaller partisan consequences than the typical politics of reform would suggest. Third, that because the vast majority of people with felony convictions owe fines and fees, the vast majority still remain disenfranchised, likely too poor to restore their right to vote. Together, these empirical lessons from the campaign for Amendment 4 suggest that the debate around felon disenfranchisement should be fundamentally recast: first as a question of democratic engagement, rather than partisan consequences; and second as an issue of criminal justice, and not merely voting rights.

Part I tells the story of the ballot initiative to restore the right to vote to people previously convicted of a felony, detailing its support among Democrats and Republicans by identifying for the first time who contributed to the campaign, who signed the petition to put it on the ballot, and who cast a vote for it on Election Day. It begins by showing that, at least since Florida's contested 2000 election, efforts at felon disenfranchisement reform across the country have generally been centered around a set of expected partisan consequences: in short, that reform would be a boon to Democrats. Before the campaign for Amendment 4, Florida's clemency process had become so mired in this pattern of partisanship that a federal judge found it violated the First Amendment's ban on viewpoint discrimination. According to that judge, Florida's policy was an example of how the "spigot [of voting rights] is turned on or off depending on whether politicians perceive they will benefit from the expansion or contraction of the electorate."

The campaign for Amendment 4 promised to reorder the landscape of felon disenfranchisement by amending the state constitution to replace lifetime disenfranchisement with automatic restoration of the right to vote "upon completion of all terms of sentence." In some ways, the campaign was typical of recent reform efforts, drawing heavily on Democratic support. The campaign was financed almost entirely by civil rights activists and Democrats. In fact, half of its ultimate \$27 million-dollar fundraising haul was the result of just three donors: the ACLU; the Sixteen Thirty Fund, a liberal secret-money non-profit; and the Bonderman family, long-time donors to Democrats. Further, the campaign's early coalition of petitioners was distinctly Democratic and disproportionately African-American, though there were signs of Republican support in lower income and more racially diverse neighborhoods.

In order to amend the state constitution, though, the campaign needed to win the support of a super-majority of the electorate, including a substantial share of Republicans. These electoral constraints forced the campaign to chart a new path. The campaign recognized that the typical focus on racial disparities in disenfranchisement left little room for the white, more likely Republican, communities also impacted by felon disenfranchisement. The framework also likely inflated the public's sense of how many



people who are disenfranchised are African-Americans. This is critical because, as Part II will show, the partisan consequences of felon disenfranchisement are largely tied to the racial composition of who stands to regain the vote. The campaign instead evoked the work of the evangelical Prison Fellowship and focused on the concept of redemption to cultivate Republican support.

Remarkably, no political committee ever registered to oppose Amendment 4. Beyond the narrative choice, this lack of organized opposition was in large part because the campaign made a series of tradeoffs about the scope of reform. It took a cautious approach, evoking if not following the playbook set by former Republican governor Charlie Crist when he expanded the right to vote to certain people with felony convictions through an executive clemency reform about a decade before.

In fact, the campaign used nearly the same slogan, arguing that voting rights should be expanded because “when a debt is paid it’s paid,” and made the same strategic exclusions that those convicted of murder or sexual offenses or who owed restitution would not have their right to vote restored. Critically, the campaign also proposed restoring voting rights upon “completion of all terms of sentence” and did not define the term. One reason they did so is that the broader language polled better, even though it would reduce the number of people re-enfranchised. For example, during a research briefing before the ballot language was finalized, the campaign discussed the tradeoff between proposing to restore voting rights after the “full sentence” versus “post time served.” The campaign understood that the “full sentence” approach would “restore[] voting rights to less people” because there would be a “[d]isparate impact on the poor [who would be] unable to pay fines and restitution.” But with the “post time served” approach it would be a “[h]arder fight to win 60% + 1% approval,” particularly because the “opposition c[ould] use [the] ‘didn’t pay back full debt’ argument.” Although Amendment 4’s requirement to “complet[e] ... all terms of sentence” did not specifically mention fines and fees, the campaign told the Florida Supreme Court as part of the ballot approval process that payment of fines and fees would be required to restore voting rights too.

This strategy worked. Amendment 4 passed with the support of nearly 65% of voters, including 40% of Republicans. The campaign was particularly successful at getting the support of Republican voters in lower-income areas. And despite its deemphasis of race, the campaign did not lose its core Black support.

The passage of Amendment 4 offers a unique opportunity to assess the actual, rather than perceived, partisan consequences of reform. The canonical effort by the sociologists Chris Uggen and Jeff Manza to estimate the partisan consequences of reform used national survey data from the public and applied it to the demographic profile of those incarcerated. In contrast, Part II uses novel data on the actual political behavior of people with felony convictions who subsequently registered to vote.

Despite the initiative's watershed victory, partisan politics eventually engulfed the implementation of Amendment 4. Consistent with the expectation that reform would benefit Democrats, every Republican in the state legislature ultimately voted to limit the scope of Amendment 4 by requiring the full payment of fines, fees, and restitution as a term of sentence, even those that were later converted to civil liens. Every Democratic colleague was opposed.

However, for the first five months that Amendment 4 was in effect, people with felony convictions in Florida were encouraged to register to vote. The initial registrations from people with felony convictions make clear that the expected partisan consequences should be revised, for two reasons. First, the view that felon disenfranchisement reform would be a boon to Democrats is a distinctly racial one--while it captures the demographic reality that African-Americans are strong supporters of the Democratic party, it overstates the likely benefit to Democrats because it misses the fact that most ex-felons are not African-American. In fact, only about 64% of the people with felony convictions who initially registered to vote after Amendment 4 were likely Democrats; while 94% of Black registrants were likely Democrats, only 36% of other registrants likely were. Importantly, the partisan preferences of people who initially registered after Amendment 4 are consistent with the partisan preferences of the hundreds of thousands of Floridians who were restored the right to vote as part of former Governor Crist's earlier executive reform. Second, felon disenfranchisement reform has a smaller partisan impact than is often suggested because of particularly low turnout by people with felony convictions, despite what would be predicted by demographics alone. Ultimately, the administrative data underscore why felon disenfranchisement reform is best understood as a question of who gets to participate in our democracy instead of a question of the partisan realignment of the state.

While the campaign successfully persuaded Republican voters and moved beyond partisan politics, the campaign was arguably less successful in how it navigated the issue of legal financial obligations, or LFOs. The campaign at best underestimated and at worst was uninformed about the very different nature of the obstacle of outstanding fines, fees, and restitution. To the extent that the campaign for Amendment 4 discussed the impact of fines and fees on felon disenfranchisement, it noted that there was "no good estimate" of how many people would be affected. One reason that the growth and scope of these legal financial obligations (LFOs) has been difficult to document is because of the decentralized nature of the criminal justice system. Part III helps to fill that gap by making another series of public information requests to local court clerks.

The novel sentencing records, which identify how much people owe and how long they have struggled to pay it back, make clear that a requirement to pay outstanding fines and fees perpetuates disenfranchisement and exacerbates the disparate racial impact. The

median felony results in \$818 in fines and fees; but because one person can have multiple cases, the median person convicted of at least one felony faced a bill of at least \$1,141. Few people are able to meet these obligations. For example, there have been no payments at all in nearly half of the cases sentenced in 2010. As a result, one year after the passage of Amendment 4, at least 77% of people with felony convictions remain ineligible to vote because of an outstanding debt. Although the amount assessed by race is statistically indistinguishable, there is a distinct racial gap in who has a remaining balance, with African-Americans 11 percentage points more likely to remain disenfranchised.

Despite this, the campaign's decision to not explicitly tackle "wealth-based disenfranchisement" in the text of Amendment 4 should not be read as an endorsement of the practice. Instead, it reflects the tradeoffs, well-advised or ill-advised, that are a part of building political coalitions. Even if the resulting victories are piecemeal, they can open the door for further judicial intervention. That is because the restoration of voting rights should not be offered on discriminatory or otherwise unconstitutional grounds. . . .

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## **The Centrality of Race as a Variable**

### **Pocketbook Policing: How Race Shapes Municipal Reliance on Punitive Fines and Fees in the Chicago Suburbs (forthcoming 2020)**

Josh Pacewicz & John Robinson III

SOCIO-ECONOMIC REVIEW \_\_\_\_

This article investigates a trend in the Chicago region that defies conventional accounts of municipal politics and revenue-motivated policing: since the Great Recession, higher-income black suburbs have sharply increased collection of legal fines and fees. To explain this, we draw on a study of municipal officials to develop a racialization of municipal opportunity perspective, which highlights how racial segregation in the suburbs intersects with policies that encourage competition over tax revenue to produce fiscal inequalities that fall along racial lines. Officials across the region shared views about 'good' revenues like sales taxes paid mostly by nonresidents, but those in black suburbs were unable to access them and instead turned to 'bad' revenues like legal fines to manage fiscal crises—even where residents were fairly affluent and despite the absence of discriminatory intent at the local level. These findings invite inquiry into the racially uneven consequences of seemingly colorblind municipal fiscal practices in the USA and the distributional consequences of municipal governance in other national contexts. . . .

**Who Pays for Government?**  
**Descriptive Representation and Exploitative Revenue Sources (2017)**

Michael W. Sances & Hye Young You

79 JOURNAL OF POLITICS 1090

Much recent public discussion focuses on racial discrimination by local officials and not only in terms of police violence. According to a U.S. Justice Department report in the wake of the Michael Brown shooting in Ferguson, Missouri—a city with a majority black population but a majority white government—city officials urged the police chief to generate more revenue from traffic tickets and court fines to address a substantial sales tax shortfall. Indeed, about 20% of Ferguson’s revenues come from fines and related sources. Other observers note that the dependence on fines is not unique to Ferguson but also occurs in other Missouri communities.

Scholars have extensively documented racial bias in pedestrian stops by law enforcement, elected officials’ response to constituent requests, and public service delivery by bureaucrats. In contrast, bias in the form of local revenue generation is rarely discussed in this literature, perhaps because city officials are assumed to be limited in their policy discretion. Police spending, on the other hand, is one of the few areas where past work does find evidence of local discretion. We should therefore expect local governments to exercise discretion over law enforcement revenue as well.

In this paper, we examine city governments’ use of fines and court fees, a policy that disproportionately harms black voters. Using data on over 9,000 cities, we show that the use of fines as revenue is both commonplace and robustly connected to the proportion of residents who are black: 86% of the cities in our sample obtain at least some revenue through fines and fees, with an average of about \$8.00 per capita, and this is higher in cities with larger black populations—up to about \$20.00 higher per capita—when we compare cities with the lowest black populations to the highest.

We then show that the relationship between black population and fines is conditioned by black representation on the city council. Previous studies show that politicians are more likely to address issues relevant to constituents sharing similar descriptive traits and that constituents disproportionately communicate more to same-race representatives. If the presence of black representatives on city councils gives black citizens a channel to deliver complaints and concerns regarding unequal treatment, descriptive representation may reduce a city’s use of fines. Alternatively, a black councilor could monitor the degree to which the budget depends on exploitative sources. Consistent with past findings that descriptive representation matters for city policy, we find that the presence of black council members significantly reduces the relationship between race and fines.

## Data

To measure cities' use of fines, we use the Census of Governments (COG), a project of the U.S. Census Bureau that collects revenue and expenditure data for all local governments every five years. The COG asks cities how much revenue they collect from "penalties imposed for violation of law; civil penalties (e.g., for violating court orders); court fees if levied upon conviction of a crime or violation . . . and forfeits of deposits held for performance guarantees or against loss or damage (such as forfeited bail and collateral)." This variable only includes penalties related to matters of law, and it does not include "penalties relating to tax delinquency; library fines; and sale of confiscated property[.]" We use the COG data from 2012. Of the 35,000 city, town, and township governments in the COG, we focus on those with police and/or court systems only, as only these governments have the capacity to issue fines, and we also restrict the sample to cities with populations of at least 2,500. The resulting sample consists of 9,143 observations.

Because the raw amount of fine revenues is skewed, we divide by city population, and we then take the logarithm plus one. We present the distribution of this variable in figure 1A, which shows that the majority of cities collect at least some revenue from fines and fees. Although 1,252 of the cities in our sample report collecting zero revenue from fines, 7,891, or 86%, collect greater than zero revenues.

Among the full sample, the average collection is about \$8.00 per person (among cities with greater than zero fines revenue, the average is \$11.00). There is also substantial variation in the collection of fines: it varies from a few cents to a few hundred dollars.

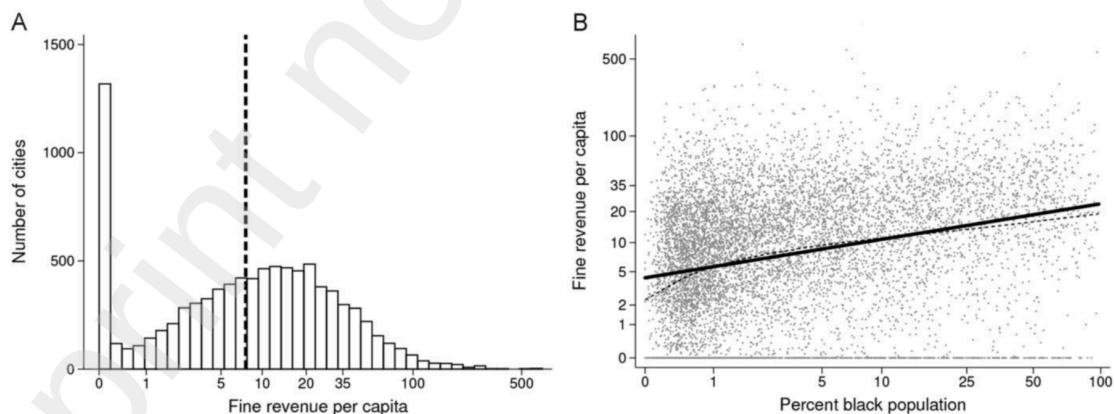


Figure 1. Distribution of fines per capita and relationship with black population. Sample is all US cities that spend more than zero on law enforcement. The dashed vertical line in panel A denotes the sample average, the solid line in panel B represents the regression line, and the dashed line in panel B is a lower bound. Both fines and black population are logged, with the scales exponentiated for readability. The number of observations in each figure is 9,143.

## Fines, Race, and Representation

We combine our fines data with population information from the 2010 U.S. Census. Figure 1B displays the relationship between fine revenue and the proportion of a city's population that is black (we log this variable as well, as it is similarly skewed). This figure shows a clear positive relationship between the two variables.

To account for potential confounding—cities with high black populations may also differ in other ways that impact fines use—we next conduct a series of linear regressions of (log) fines per capita on (log) percent black population; we scale black population such that zero is the sample minimum and one is the sample maximum. We include a set of municipal- and county-level variables meant to capture other determinants of fines that may also be related to percent black population: local finances (total local revenue, share of revenue from taxes, share of revenue from state and federal), demographics (log population, log population density, income per capita, share with a college degree, share over age 65), and county-level characteristics (crime per capita, police officers per capita, share Democratic vote in 2012, number of governments per capita, net migration). Notably, our set of demographic controls includes other measures of ethnic and racial diversity, including a Herfindahl index, Theil's measure of segregation, and the proportions Hispanic and foreign-born.

We summarize the results in Table 1 . . . . In all specifications, the point estimates on percent black population are statistically significant: the estimates range from 1.0 to 1.5, and the smallest t-statistic is 9. Because log-log coefficients are difficult to interpret (and more so when one of the un-transformed variables is a proportion), we translate the coefficients to dollar amounts in the footer (we describe the procedure for transforming the coefficients in the appendix). Substantively, the estimates imply that cities with the

Table 1. Revenue from Fines and Black Population in US Cities

|                                 | (1)              | (2)              | (3)              | (4)              |
|---------------------------------|------------------|------------------|------------------|------------------|
| Percent black population        | 1.47***<br>(.06) | 1.35***<br>(.06) | 1.16***<br>(.12) | 1.02***<br>(.12) |
| Effect size (\$)                | 18.91<br>(1.08)  | 16.79<br>(1.04)  | 13.65<br>(1.98)  | 11.59<br>(1.78)  |
| Controls:                       |                  |                  |                  |                  |
| Local finances                  |                  | Yes              | Yes              | Yes              |
| Demographics                    |                  |                  | Yes              | Yes              |
| Crime, fragmentation, mobility, |                  |                  |                  |                  |
| Democratic vote                 |                  |                  |                  | Yes              |

Note. The sample size is 8,665 for all specifications. Robust standard errors are in parentheses.

\*  $p < .05$ .

\*\*  $p < .01$ .

\*\*\*  $p < .001$ .

largest share of black residents collect between \$12.00 and \$19.00 more, per person, than cities with the smallest black share of residents.

While data limitations prevent us from ruling out unobservable city-level confounders—we lack enough panel variation to implement a difference-in-differences design and the city council election data for a discontinuity design are unavailable—in the appendix we re-estimate the regression in table 1 while including state-level and county-level fixed effects. This specification controls for all possible unobserved confounding variables,

provided that they vary at the state level or the county level. The relationship between race and fines is robust to these strategies. Thus, while strong conclusions regarding causality would be unwise here, we do demonstrate a strong, robust relationship that is consistent with a causal effect. Also in the appendix, we show that our estimates are robust to clustering errors at the county level, that the impact of race is seen in both large (above 10,000 persons) and small (less than 10,000 persons) cities, and that the results are unchanged when using a two-stage selection model to account for cities reporting zero fines revenue.

To explore the moderating effect of descriptive representation, we use data on city councilor races from the 2006 and 2011 International City/County Management Association (ICMA). Unlike the COG, not all cities respond to the ICMA surveys; those that do so tend to be larger, and our sample reduces to about 3,700 cities after merging with the ICMA. However, we are able to replicate the results from table 1 on this smaller subsample, which suggests that any patterns evident using this subset of cities would likely hold in the full sample. We estimate the impact of descriptive representation by interacting the share of the population that is black with the presence of at least one black city councilor, using the same set of control variables as before. The interaction represents how the relationship between fines and black population changes when moving from no black councilor to having at least one black councilor. If this interaction is negative, the presence of minority city council members reduces the relationship between fines and race.

In the first two columns of table 2, we report specifications where we exclude the interaction terms. The relationship between fines and black population holds in the relatively smaller subsample of cities for which we can obtain data on city council race. The lack of an unconditional effect for black councilor suggests that black representatives' own

preferences play only a limited role in revenue collection. In contrast, the third and fourth columns include the interaction between black population and an indicator for the presence of at least one black councilor. As predicted, the interactions are negative. Comparing the magnitudes of the coefficients, the relationship between race and fines is 50% less in cities with at least one black representative.

It is important to note that our results do not indicate that the presence of a black council member completely eliminates the relationship between race

Table 2. Revenue from Fines and Black Representation on City Councils

|                                      | (1)              | (2)              | (3)              | (4)              |
|--------------------------------------|------------------|------------------|------------------|------------------|
| Percent black population             | 1.26***<br>(.12) | 1.00***<br>(.19) | 1.50***<br>(.14) | 1.00***<br>(.19) |
| Any black council                    | -.13<br>(.07)    | -.09<br>(.07)    | .39**<br>(.14)   | .23<br>(.15)     |
| Black population × any black council |                  |                  | -.94***<br>(.25) | -.61*<br>(.28)   |
| Controls                             |                  | Yes              |                  | Yes              |

Note. The sample size is 3,764 in all specifications. Robust standard errors are in parentheses.

\*  $p < .05$ .

\*\*  $p < .01$ .

\*\*\*  $p < .001$ .

and fines. The baseline relationship between black population and reliance on fines holds, albeit at a substantially reduced magnitude, even when descriptive representation is achieved. Although local government officials may decide the overall portfolio of revenue sources, street-level bureaucrats also wield significant discretion, and their own biases could affect who receive traffic tickets and other penalties, as previous research suggests.

## Discussion

Assembling a new data set on fines use and using variation in descriptive representation, we find municipal governments with higher black populations rely more heavily on fines and fees for revenue. Further, we find that the presence of black city council members significantly reduces—though does not eliminate—this pattern. While data limitations prevent us from implementing more credible designs, the robust relationships we observe are consistent with race playing a crucial causal role in the degree to which cities rely on regressive revenue sources.

Aside from regressivity, policing for revenue may disenfranchise. Contact with law enforcement decreases democratic participation, and that fines and fees are often implemented in a racially biased fashion may help explain why turnout is lower among poor minority voters. While descriptive representation at the city council level decreases fine use, fines may make descriptive representation less likely by depressing minority turnout.

Future work should explore the mechanisms that produce these patterns. One interpretation of our results is that cash-strapped cities target poor and minority voters simply because they are less likely to complain and not due to any inherent bias. An alternative interpretation, however, is that fines and other law enforcement policies are intended as methods of social control. We encourage future studies that explicitly attempt to untangle these two explanations.

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### *Charging for Privatized Government Services*

#### **Justice “Cost Points”: Examination of Privatization within Public Systems of Justice (2019)**

Alexes Harris, Tyler Smith & Emmi Obara  
18 CRIME & PUBLIC POLICY 343

Discussion about “private corrections” has often been focused on the rising use of private prisons. Since the 1980s, federal and local governments have increasingly used



public money to hire private corporations to house and manage incarcerated populations. In 2016, 13% of people held in federal prisons, and 8% of people held in state facilities, were in privately operated institutions. These numbers increased by 165% and 24%, respectively, from the year 2000. This endeavor has been lucrative. CoreCivic (formerly known as Corrections Corporation of America), one of the largest private prison management firms in the United States, generated \$1.8 billion in total revenue in 2015, which was a 9% increase from 2014.

Although private prisons rightfully garner much scholarly and public attention, they are only one aspect of the private corrections industry. In addition to outsourcing the entire management of correctional facilities, many local and state authorities enter into contracts with private companies for a variety of services and processes within U.S. courthouses, jails, and prisons. Even though justice institutions primarily remain public entities, private corporations are running many key justice system programs and generating large profits from captive populations.

In this article, we explore the various “cost points” at which individuals who make contact with public systems of justice are charged by private entities. At times these costs are exchanged for actual services or products; at other times private entities are allowed by local governments to charge people for the forced management of their bodies and property. After reviewing these various cost points, we provide two case studies with in-depth examination of how private companies make money within U.S. justice systems. In the first, we explore how the city of Seattle contracts out services to monitor and control people who make contact with the courts. In the second example, we describe the relationship between the Washington State Department of Corrections (DOC) and a national prison-tech company called JPay. Companies like JPay regularly contract with local, state, and federal prisons across the nation to provide services and products to people who are incarcerated. . . .

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**Commercialized (In)justice:  
Consumer Abuses in the Bail and Corrections Industry (2019)**

Brian Highsmith  
NATIONAL CONSUMER LAW CENTER

This report discusses the growing problem of “commercialized injustice”—consumer abuses perpetuated by companies profiting from the criminal legal system and mass incarceration. Although not always visible to people who do not live in heavily-policed communities or who are protected by other forms of privilege, the scale of private industry’s involvement in the contemporary criminal legal system is staggering. These companies provide a wide range of products and services, and operate in various

relationships with the government. Some contract directly with governments (e.g., private probation and prison phone services). Others sell directly to consumers, but under specific authority to administer criminal legal functions (e.g., commercial bail and certain rehabilitation and diversion programs). And others simply profit from the contours of our modern criminal legal system (e.g., pre-arrest diversion programs that contract with private retailers).

The expanding reach of the modern corrections industry represents the intersection of two troubling trends: (1) the outsourcing of the criminal legal system to the private sector, exemplified by the growth of the private prison industry; and (2) the imposition of fines and fees on mostly low-income defendants to fund the criminal legal system. States and local governments are outsourcing various core functions of their criminal legal systems—traditionally public services—to private corporations operating to maximize profit for their owners. At the same time, they have sought to shift the cost of operating the criminal legal system onto those who have contact with the system and their loved ones, particularly through the assessment of fines and fees on those accused of criminal activity. The corrections industry's growth exacerbates these trends, combining the conflicts of interest endemic in so-called “user-funded” financing structures with the lack of public accountability that advocates have long criticized in the private prison context.

Every industry discussed in this report shares this common feature: each profits from financial extractions from individuals based on their exposure to the criminal legal system. The growth of the corrections industry accelerates the trend whereby the costs of our legal system are imposed on low-income, disadvantaged communities least able to shoulder such burdens, rather than shared as a collective public responsibility. The corrections industry operates for the primary purpose of maximizing profits for its owners—creating strong incentives to achieve *new* forms of monetary extraction in addition to shifting the burden of *existing* costs.

*The corrections industry pitches itself to states as way to relieve fiscal pressure (created in part through mass incarceration) – but increases costs for consumers.*

Due to the policy decisions that have driven mass incarceration, state and local governments have experienced sharp growth in costs associated with administering the criminal legal system in recent decades. At the same time, many local governments have seen an erosion of state financial support for municipal services and new limitations on their ability to finance their justice systems through taxes. It is in this context that states and local governments have acted so aggressively both to offload core functions of their legal systems to private companies and to find ways outside of tax revenues to pay for the costs of the system.

The private corrections industry has sought to take advantage of these trends. Many of the industries described in this report have adopted a so-called “offender-funded”

model, whereby the costs of administering criminal legal functions are shifted from public budgets to individuals who have contact with the legal system. Companies have aggressively marketed their services to states and localities as a way not only to achieve costs savings for existing corrections functions – but also, in many cases, to generate new revenue streams through kickback payments.

These arrangements almost inevitably have the effect of sharply increasing the financial costs that are imposed on economically fragile individuals processed through the criminal justice system. And while state agencies may indeed see budget savings from these arrangements, those “savings” are not achieved via efficiencies in service provision. The cost of those functions has instead simply shifted onto the individuals processed through the legal system and their loved ones. So while the corrections industry commonly represents itself to the public and to agencies as saving money, total costs to communities are likely to be significantly *higher* under commercialization, due to the combination of industry profit-seeking and contractual arrangements that share proceeds between the private company and the state.

*Common problems throughout the bail and corrections industry lead to consumer abuses.*

The corrections industry provides a wide range of products and services to vulnerable consumers facing impossible choices as a result of their contact with the criminal legal system. But common features across the industry create an operating environment ripe for consumer abuses and financial exploitation – undermining core goals of our criminal legal system.

- The corrections industry operates largely without consumer regulation or government enforcement. The industry is constructed to profit from an acute power imbalance – leveraging the threat of the state’s police powers while creating the terms of their services for consumers and their families. Given such imbalance, strong government regulation and oversight is needed to protect individuals from being taken advantage of. Unfortunately, that need has been ignored, and lax or non-existent regulatory regimes are common throughout the industry.
- Companies take advantage of the threat of criminal consequences and consumers’ lack of knowledge about their rights. People who have contact with the legal system face distinct uncertainty about what laws authorize and restrict these companies; what rights they have as consumers; and what the consequences are for non-payment or if they are otherwise unable to meet imposed demands. Some companies have used this uncertainty to their advantage when they seek to coerce payment.
- Corporate consolidation and weak competitive pressures have resulted in a handful of large conglomerates wielding market power across sectors. The corrections industry is increasingly characterized by a small number of large corporations

- contracting with government agencies to provide different types of services, and leveraging power in one market to increase share in another. This creates effective monopolies that contribute to high consumer prices and abusive practices.
- Companies face incentives to make decisions based on what is in their financial interest—which often directly conflicts with public policy goals. The corrections industry operates under perverse incentives to increase the number of consumers, and the revenues that can be extracted from each consumer, through excessive supervision, punishment, or fees. This is especially pernicious when companies exercise decision-making authority affecting the consumers’ criminal punishment at the same time as they stand to profit from extensions of such punishment.
  - In exchange for exclusive contracts, companies frequently offer kickback payments to cash-strapped corrections agencies. Companies’ arrangements with corrections agencies are commonly characterized by two unique features. First, companies compete for contracts by offering to make kickback payments to the corrections agency. These costs are passed directly to people who have contact with the criminal legal system. Second, companies require a promise that the state will limit consumer choices, so that the contracted service is provided by the company on exclusive terms—securing for them what is, in many cases, a literally “captive market.” This system encourages companies to compete on the basis of higher rates charged to consumers, even as the quality of the service is frequently poor.

*The commercialized criminal legal system imposes its costs on vulnerable people least able to pay.*

The inflated costs resulting from the exploitative practices in the corrections industry are borne by some of the most vulnerable people in our society. The burden of paying these higher costs is concentrated on a much smaller group (those who have contact with the legal system), compared to the broad group of taxpayers who pay for government operations under public financing models. And people in this smaller group are far more likely to be (1) people of color, due to discriminatory policing and sentencing practices, and (2) poor, in part because economically oppressed communities are frequently targeted by law enforcement, as well as the persistent racial wealth gap.

As a result, these financial obligations are more likely to turn into unaffordable debts, on which payment can be demanded under threat of criminal consequences. These excessive costs are imposed not only on those who are arrested or incarcerated, but also their loved ones and communities. Because so many low-income persons struggle to meet the most basic costs of living, the consequence of the exorbitant costs imposed by the corrections industry can be catastrophic, both individually and in the aggregate.

Further, commercialization can increase criminal involvement for individuals. Conflicts of interest can lead to longer supervision periods when, for example, private

probation companies profit from increased numbers. And consumers' inability to pay the exorbitant costs can result in criminal sanctions.

*Private companies extract wealth from communities at each step of our punishment continuum.*

The culmination of these trends is a system where few criminal legal functions have *not*, in some way or in some jurisdiction, been commercialized by private industry. Americans are subjected to costs imposed by private industry from the moment of arrest (and sometimes even before), through the trial and sentencing process, during incarceration, and extending to post-release supervision and reentry programs. Although the services and business models vary, all of these commercial transactions push families deeper into poverty and make it harder for people who have interactions with the criminal justice system to get back on their feet.

- Pre-arrest diversion programs. Over the past several years, companies have emerged to offer people who are suspected by retailers of criminal activity (typically shoplifting) the opportunity to avoid possible referral to law enforcement by paying hefty fees. In reality, people are paying the fee because they are threatened with possible arrest if they do not—despite the fact that many of these cases would not be pursued by law enforcement, either because the amount at issue is minor or there is insufficient evidence to support prosecution.
- Commercial bail. Fees paid by consumers in the \$2 billion commercial bail market are kept by bail bond companies and their corporate partners—even in cases of false arrest, where the charges are dropped or the individual facing charges is determined to be innocent. This industry profits from taking advantage of people at their most vulnerable: when they—or their child or loved one—face a choice between making payment under the offered terms, or staying in jail. As a result of this business model, heavily policed communities find themselves trapped in a cycle of debt and fees related to the cost of commercial bail—often long after the courts have resolved their charges.
- Post-arrest and pre-trial diversion programs. In many jurisdictions, prosecutors have the authority to give people accused of certain criminal violations the option of completing an alternative program of treatment or restitution, in lieu of incarceration. But the recent emphasis on diversion has obscured a troubling new pattern: the outsourcing of pretrial diversion programs to private companies that charge excessive participation fees and operate beyond public scrutiny.
- Electronic monitoring. Increasingly, people who have been arrested or are under other forms of supervision are being required to wear electronic monitoring devices—typically accompanied by onerous fees. Electronic monitoring may be ordered by a court, or imposed as a condition of a private company's services. Providers frequently charge a one-time installation fee, typically \$50 to \$150;

- afterwards, defendants must pay for monitoring, typically assessed at a rate of around \$300-\$500 every month.
- **Private probation.** At least ten states (most in the South) allow counties and municipalities to contract with private companies to administer their probation systems for misdemeanor and lower offenses. Under these arrangements, the government extends exclusive contracts to supervision companies, which are then allowed to enforce probation requirements against probationers. In Georgia alone, probation companies received at least \$40 million in revenue from fees charged to probationers.
  - Corrections contracting in telecommunications. The corrections telecommunications industry contracts with prison and jail systems (and immigration detention centers) to provide the exclusive means for prisoners to maintain contact with the outside world. The companies that provide these phone services charge rates many times higher than the rates outside of correctional facilities. The high cost of calls particularly burdens the families of the incarcerated, creating systematic transfers of wealth from already struggling families and communities to private companies.
  - Corrections contracting in financial services. In recent years, facilities have outsourced payment and money transfer systems to private companies that charge prisoners and their loved ones a range of high fees—including for financial services traditionally provided by the correctional facilities at no cost. For example, people newly released from correctional facilities may be given access to their funds only through a prepaid “debit release cards,” rather than as cash. The money on these cards is subject to steep usage and maintenance fees that eat into the balance.
  - Other corrections contracting: healthcare and commissary. Prisoners are increasingly being asked to bear costs for healthcare and basic amenities sold through commissaries. The prices charged for these basic necessities are often inflated above retail, exacerbating the financial burden on incarcerated people.
  - Reentry, rehabilitation, and treatment programs. The growing community corrections industry offers various “back-end” treatment and reentry programming, including residential halfway houses and work release centers. Over the past decade, the modern private prison industry has moved to take advantage of states’ newfound interest in rehabilitation and alternatives to incarceration by aggressively expanding into providing these services. They have profited from participation fees that sharply limit the availability of these services for economically distressed populations while also creating unaffordable debts for participants.
  - Private debt collection. Many states and local governments contract with private debt collection agencies—which are often authorized to charge significant collection costs—to try to collect from those with criminal justice debt. Collection firms are often paid through fees added on top of the original balance, to be paid by the debtor.

Advocates can work to address these abuses by raising awareness, strengthening oversight, enforcing existing laws, and pushing for new reforms. They should work to strengthen public and private accountability for the unfair and unlawful practices that are now widespread in the modern corrections industry – with the goal of ultimately moving toward eliminating exploitative profiteering and other economic injustices from our criminal legal system. . . .

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## **Rethinking the Utilities of Monetary Sanctions**

### **The Steep Costs of Criminal Justice Fees and Fines (2019)**

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The past decade has seen a troubling and well-documented increase in fees and fines imposed on defendants by criminal courts. Today, many states and localities rely on these fees and fines to fund their court systems or even basic government operations.

A wealth of evidence has already shown that this system works against the goal of rehabilitation and creates a major barrier to people reentering society after a conviction. They are often unable to pay hundreds or thousands of dollars in accumulated court debt. When debt leads to incarceration or license suspension, it becomes even harder to find a job or housing or to pay child support. There's also little evidence that imposing onerous fees and fines improves public safety.

Now, this first-of-its-kind analysis shows that in addition to thwarting rehabilitation and failing to improve public safety, criminal-court fees and fines also fail at efficiently raising revenue. The high costs of collection and enforcement are excluded from most assessments, meaning that actual revenues from fees and fines are far lower than what legislators expect. And because fees and fines are typically imposed without regard to a defendant's ability to pay, jurisdictions have billions of dollars in unpaid court debt on the books that they are unlikely to ever collect. This debt hangs over the heads of defendants and grows every year.

This study examines 10 counties across Texas, Florida, and New Mexico, as well as statewide data for those three states. The counties vary in their geographic, economic, political, and ethnic profiles, as well as in their practices for collecting and enforcing fees and fines.

### Key Findings:

- Fees and fines are an inefficient source of government revenue. The Texas and New Mexico counties studied here effectively spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone. That's 121 times what the Internal Revenue Service spends to collect taxes and many times what the states themselves spend to collect taxes. One New Mexico county spends at least \$1.17 to collect every dollar of revenue it raises through fees and fines, meaning that it loses money through this system.
- Resources devoted to collecting and enforcing fees and fines could be better spent on efforts that actually improve public safety. Collection and enforcement efforts divert police, sheriff's deputies, and courts from their core responsibilities.
- Judges rarely hold hearings to establish defendants' ability to pay. As a result, the burden of fees and fines falls largely on the poor, much like a regressive tax, and billions of dollars go unpaid each year. These mounting balances underscore our finding that fees and fines are an unreliable source of government revenue.
- Jailing those unable to pay fees and fines is especially costly — sometimes as much as 115 percent of the amount collected — and generates no revenue. The practice is not just unconstitutional but also irrational.
- The true costs are likely even higher than the estimates presented here, because many of the costs of imposing, collecting, and enforcing criminal fees and fines could not be ascertained. No one fully tracks these costs, a task complicated by the fact that they are spread across agencies and levels of government. Among the costs that often go unmeasured are those of jailing, time spent by police and sheriffs on warrant enforcement or driver's license suspensions, and probation and parole resources devoted to fee and fine enforcement. This makes it all but impossible for policymakers and the public to evaluate these systems as sources of revenue. . . .



**Monetary Myopia: An Examination of Institutional Response to  
Revenue from Monetary Sanctions for Misdemeanors (2018)**

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Introduction

Every state in the country has legislation concerning monetary sanctions. Dozens of state statutes, myriad municipal codes, and federal law guide all monetary sanction use. As these sanctions grow, evidence of their fraught nature is emerging from throughout the criminal justice system. Fines and the resulting debt can precipitate police contact and further involvement in the criminal justice system, including incarceration. In addition to the fines or restitution that judges order, courts can both set and collect their own fees. Meanwhile, state supervisory agencies (prison, jail, probation, parole) regularly charge a weekly or monthly fee to the indigent, unemployed, and those who work for extremely low-wages (e.g., US\$1/hr in prison).

Through all of these situations, a potentially problematic thread runs. Rather than the primary function of monetary sanctions being to achieve *bona fide* punishment goals (i.e., deterrence, retribution, restitution, or rehabilitation), they are instead used to generate money for the state. Given the difficulty, if not impossibility, of pursuing revenue and justice at the same time, this shift heralds an acute dilemma in criminal justice. At stake is the potential for money to undermine equity, efficiency, and even the fundamental aims of the criminal justice system.

Scholars have long argued for the efficiency of monetary penalties. The core assumption of this argument is that monetary sanctions are socially costless. In [Gary S.] Becker's 1968 . . . exposition of Optimal Penalty theory, [he] states, "the social cost of fines is about zero[.]" Indeed, this logic likely helped spur the 1980s impetus to expand monetary sanction use. During that time, the first incidents of prison over-crowding, reports that probation was failing in many urban areas, and the publication of [Joan Petersilia's] influential book arguing for options besides prison and probation provoked significant interest in nonprison punishments. Chief among these were monetary sanctions, which are considered "intermediate," "alternative," or "less restrictive" punishments.

In the early 1980s, the Vera Institute reviewed all extant research on fines[,] and soon thereafter, the Bureau of Justice Assistance (BJA) sponsored a series of demonstration projects on day fines. These projects were modeled on the European approach to fines, in which income factors into setting monetary penalties . . . . Indeed, fines are in widespread use internationally. Despite practitioners' long-standing interest in the topic, the empirical literature on monetary sanctions remains limited and almost exclusively focused on or after the sentencing stage.

The literature nevertheless reveals a few key findings. First, the adverse repercussions for failing to pay monetary sanctions are myriad. In their pioneering [2008] study of “legal debt” in Washington state, [Katherine] Beckett, [Alexes] Harris, and [Heather] Evans found that monetary sanctions have numerous negative consequences such as reducing family income and wealth; creating difficulties in securing housing, employment, and credit; and prolonged or additional involvement with the criminal justice system. These pivotal findings demonstrate that monetary sanctions have negative consequences that may exceed the intended level of punitiveness, with far-reaching consequences such as creating a “disincentive to work.”

[In a 2010 Brennan Center report,] [Alicia] Bannon et al. conducted an extensive review of debt on criminal justice “user fees” – or financial obligations that are explicitly *not* imposed for any of the traditional purposes of punishment. In an examination of these practices in 15 states with the highest prison populations, the authors find that unpaid monetary sanctions often prompt liens, wage garnishment, and tax rebate interception. Because debt is often reported to credit agencies (either directly or through civil judgments), a person’s credit score can also suffer with consequences for the ability to secure loans, mortgages, leases, and employment. Furthermore, evidence also shows that debtors are often confused about who they owe and why.

Other consequences for unpaid court-ordered debt range from driver’s license suspension to warrants. In 30 states, a person’s right to vote can be affected by unpaid court-ordered debt, including for misdemeanors. Unpaid debt can also lead to incarceration, despite a Supreme Court ruling, *Bearden v. Georgia* (1983), mandating that a court must find that a person has “willfully” failed to pay. For these reasons, [in her 2016 book, Alexes] Harris argued that monetary sanctions “serve as a punishment tool that permanently penalizes and marginalizes the vast majority of criminal defendants.”

The second key finding in the literature on monetary sanctions is that a variety of legal and extra-legal factors influence their use. For instance, analyses of sentencing data in Pennsylvania reveal that offender and offense characteristics affect the likelihood of monetary penalties, that there is a trade-off between types of sanctions (e.g., fines vs. restitution), and that there are significant differences across jurisdictions. [A 2004 study by R. Barry] Ruback specifically finds that race, age, and type of offense affect fines and restitution. Harris, Evans, and Beckett similarly find that Latinos receive higher monetary sanctions than non-Latinos in Washington state.

Other research on monetary sanctions finds that jurisdictions have significant variation in their monetary sanction policies and practices. Indeed, “no nationally consistent set of laws, policies, or principles . . . govern monetary sanctions[.]” These types of studies are essential for establishing a baseline understanding of how monetary penalties

function in criminal sentencing, but they leave unanswered the question at hand about the revenue-generating aspect of monetary sanctions.

The final main finding in the literature is that the type of monetary sanctions – fine, fee, restitution, or surcharge – matters enormously to both theory and practice. For example, Beckett and Harris argue for excluding direct restitution from the discussion of monetary sanction abolition because it is assessed when there is an identifiable victim who has suffered financial losses. As such, direct restitution does not produce the conflicts of interest inherent in courts charging fees to generate revenue. However, restitution does contribute to a debtor's overall debt burden. Fines stand out for being the one type of monetary sanction that a judge imposes expressly to punish. [Pat] O'Malley calls for expanding the use of fines in the United States, precisely because they are rarely used as an alternative (as opposed to a supplement) to incarceration. In contrast, scholars, practitioners, and advocates often specifically criticize surcharges and fees because of the questionable profit motive they introduce into criminal justice. Along these lines, one study finds a connection between the use of fines and court fees for local revenue and the size of a city's African American population. Although previous work raises the question of how government responds to the revenue incentive, the literature has yet to engage the topic in depth.

Outside of the academic literature, events such as those in Ferguson, Missouri, in addition to reports and lawsuits brought by legal advocates on behalf of people harmed by criminal justice debt are bringing the issues of monetary sanctions and criminal justice debt to national attention. The U.S. Department of Justice, Civil Rights Division found that Ferguson's leadership routinely exhorted police and court staff to generate revenue via traffic tickets. Other examples of the negative consequences of ticket-writing can be found across the country. Attention to criminal justice debt has led to practitioner-oriented policy reports and limited policy changes such as bench cards for judges, amnesty programs, or repeals of some types of monetary sanctions.

Taken together, the literature on monetary sanctions shows that they are ubiquitous and growing, that they produce significant social costs, and that it is important to distinguish between the types of monetary sanctions. Drawing on these insights, this article expands the scope to examine legislative response to the revenue incentive inherent in monetary sanctions for misdemeanor convictions. The central question is whether and how legislatures create problems as they seek revenue from monetary sanctions. Through an analysis of the present analysis examines relevant policies and practices in Nevada and Iowa, this analysis explores the idea of "monetary myopia" – or a short-sighted focus on revenue at the expense of considering other important, competing concerns. The article proceeds by reviewing modern monetary sanction policy and problems. It then provides baseline comparisons of the two states, followed by sections on each state's status quo. These segments review the history of relevant statutes to highlight the incentives monetary

sanctions produce and institutional responses to those incentives. By exploring the consequences of treating monetary sanctions as a source of state revenue—rather than as a punishment—the article exposes a particular aspect of the penal apparatus in two comparable states, highlighting an emerging and critically important aspect of misdemeanor justice.

### The Origins of Monetary Myopia

A focus on revenue potential in the short-term at the expense of other considerations (e.g., costs, efficiency, or fairness) in the criminal justice system has various origins. Monetary penalties were originally designed as an alternative to prison that was both punitive and less costly to the state. As [Sally T.] Hillsman noted, a fine “is unmistakably punitive and deterrent in its aim” and “it can be coupled with other noncustodial sanctions when multiple sentencing goals are sought[.]” She also notes that fines can be less expensive to administer, can produce revenue (such as for victim compensation) and can reflect the severity of the crime and a person’s ability to pay. This rationale helps explain why policy-makers came to see fines as an attractive option to prison: they were less expensive than incarceration, but still effective.

The most proximal source of monetary myopia is that public institutions such as courts, probation departments, Sheriff’s departments, and jails can be both the originator and the beneficiary of monetary sanctions. The power to do so is, in part, because legislators have been reluctant to pass the costs of a massive system of incarceration on to taxpayers; instead, the tendency is to shift more costs to justice-involved people. In short, “the structures in place foster a myopic focus on revenue, while largely shielding decision-makers from the short and long-term costs entailed in actually collecting this revenue[.]” In the two jurisdictions in question, Nevada and Iowa, policy-makers did ultimately come to see monetary sanctions as a way to shore up the general fund or court budgets. The following analysis will show how they each engaged in monetary myopia, although they did so in different ways. . . .

### Discussion . . .

#### *Toward a Theory of Monetary Myopia*

. . . [O]bservations of practice and policy in Nevada and Iowa . . . contribute to formulating the concept of monetary myopia. Each state exhibits a focus on revenue at the expense of other important, competing concerns. In Nevada, the origin of monetary myopia is a simple shift in budgeting. Revenue from the state’s administrative assessments went from exceeding what was budgeted to falling far short of budget expectations. In the process, the legislature increased the courts’ self-funding responsibility and emphasized funding from the unreliable source of administrative assessments. In Iowa, monetary myopia inhered in a lack of effective responses to early signs of substantial and growing

court-ordered debt. There, the focus on attempting to collect what it is legally owed eclipses other approaches to reducing the debt, such as reducing surcharges or court costs, expanding ability to pay considerations, or writing off debt sooner.

In both cases, budgetary reliance on citizens' involvement with the criminal justice system leads to practical and ethical problems, one aspect of which is prolonged involvement with the criminal justice system due to unpaid court-ordered debt. It follows that monetary myopia's persistent pursuit of revenue helps fuel a cycle of perpetual criminal justice contact, while fostering inequality in punishment. As Harris notes, poverty—instead of public safety—is often the dominant factor in determining who remains subject to scrutiny and punishment. On one hand, people who can afford to pay typically do so and move on with their lives. On the other hand, people who cannot afford to pay are subject to escalating enforcement mechanisms that tend to ensnare them in the criminal justice system far beyond what the precipitating offense warrants. A case in Benton County, Washington, exemplifies the issue (*Fuentes v. Benton County*, 2015). The county routinely assessed monetary sanctions upward of US\$1000, without considering ability to pay, and then jailed or forced manual labor on people who failed to pay. Cases like this demonstrate how, rather than holding people accountable for their offenses in a just and efficient manner, the pursuit of revenue distorts the integrity of the criminal justice system. Specifically, the pursuit of revenue via tax-like monetary sanctions compromises punishment as a policy goal.

The incentive to try to increase revenue is, nonetheless, perennial. States can respond to that incentive in any number of ways. Nevada and Iowa are two cases where misdemeanors play a central role in that response. In the conceptual framework laid out above, the central idea is that the needs of the criminal justice system prompt a connection between the enforcement of misdemeanors and revenue that the enforcement produces. Because the need and the potential for revenue are unending, they are also mutually reinforcing. Together, they tend to produce monetary myopia where revenue occupies the central focus. Such focus contributes to a few significant pitfalls.

The first potential peril relates to the addition of revenue to the goals of punishment. Jurisdictions that concentrate on generating revenue instead of generating justice risk undermining a core government function, the result of which is weakened government legitimacy with the attendant threats to an effective criminal justice system.

Another potentiality of monetary myopia is the lack of earnest consideration of other ways to achieve the goals of punishment. If a jurisdiction focuses on collections as a principal problem, then there is an incentive to devalue nonrevenue producing alternative sanctions. For example, community service can certainly help hold people accountable for their offenses, but it entails costs. [In 2013 rulemaking, t]he Supreme Court of Iowa expressed concern about the court resources necessary to administer community service

and ultimately settled on prohibiting community service for court-ordered debt less than US\$300 and for all delinquent debt. The example of Florida shows the validity of such concerns. That state estimates that if court collections decreased 15% due to more people choosing community service, then the clerks of the court would lose an estimated US\$24.7 million in revenues. Confronting the cost of community service versus the potential for revenue from fees highlights the impetus to focus on the latter.

The ultimate danger of monetary myopia is fostering bureaucratic inertia for maintaining the size and scope of the current penal apparatus. The alternative to seeking revenue to fund or expand functions is to reduce the need for revenue itself. A prime example of doing so can be found in New York's closing 13 prisons since 2011, saving an estimated US\$162 million in the process. An analogous shrinkage in the domain of misdemeanors would, however, necessitate more creativity than simple decriminalization, which can precipitate even more financial penalties for typically disadvantaged defendants.

### Conclusion

This article shows that legislative action could remedy some of the more problematic aspects of the status quo. In Iowa, for instance, currently uncollectible court debt cannot be written off until 65 years have passed (Chapter 602.8107(6)), even though debt remains more easily collectible closer to the date of assessment. Shortening this timeframe would free up resources to focus on more recent and tractable debt. State budgeting that fostered more assiduous removal of uncollectible debt would help slow the relentless growth in unpaid court-ordered debt. The Legislative Services Agency also recently recognized an incentive inherent in the County Attorney Program: people delaying payment until they can set up an installment plan with the County Attorney. In Nevada, the courts receive less than half the amount of the general fund appropriation as the courts in Iowa (1% vs. 2.5%). Statutorily protecting and guaranteeing judiciary funding would bolster its standing as an independent and coequal branch of government.

In both states, statutes that offer improved strategies for taking into account ability to pay would go a long way toward reducing debt and expenditures on collections. Day fines, which tailor a fine amount based on both ability to pay and offense severity and have been used for decades in Europe, are a promising option. These proportional fines had limited success in the United States in the 1980s and 1990s during a set of experiments and demonstration projects. [Beth] Colgan's recent assessment of day fines in the American context found that the earlier experiments reveal the pitfalls to avoid, offering useful lessons for a renewed effort. Specifically, day fine systems in the United States would need to be properly designed and implemented by avoiding alterations such as minimum fines, which inflate the ultimate graduated sanction beyond a person's ability to pay. They would also need to be explicit about how to account for family resources or unreported

income. With so much at stake in terms of fairness and efficiency in our current system of monetary sanctions, reconsidering a proportional approach may well be advantageous.

Given the dearth of research on monetary sanctions—particularly on the governmental context that gives rise to the system—there are a variety of directions for future research. The first is to expand this type of analysis to other states. Doing so would elucidate how the allure of potential for revenue has myriad implications for criminal justice policy. Another critically important issue to address is the cost side of the system. That is, the system of assessing, administering, collecting, and enforcing monetary sanctions entails quantifiable costs such as infrastructure, personnel, and materials. It also exacts significant social costs on people who do not have the means to readily pay what they owe: damaged credit (which can affect the ability to obtain housing, transportation, and employment), extended or revoked probation or parole, and incarceration, each with its own deleterious consequences. Despite abundant indications that these economic and social costs are significant, the actual sum remains unknown. As much as monetary sanctions seem like a way to generate revenue, it is unknown how much it is costing to acquire said revenue. Beckett and Harris summarized the concern by arguing that this dependence may not represent a net financial gain and create a series of conflict for government actors. This analysis provides additional impetus to assess net gain and it offers insight into the conflict of interest at the legislative level. Both concerns merit sustained inquiry in the future.

Monetary sanctions can take as many forms as there are states. This article has . . . has illuminated a largely unexplored aspect of monetary sanctions. Instead of focusing on individual sentencing, it emphasized institutional responses to the powerful incentive to treat monetary sanctions as a source of revenue rather than as a punishment. In [Nevada and Iowa], the collection apparatus reflects the destination of funds from misdemeanor convictions. It also found that misdemeanors can be a domain of conflicting interests in terms of the goals of punishment and fostering tension between public safety and revenue. Moreover, this analysis has described how these conflicting goals in misdemeanor sanctions violate tenets of proportionality and parsimony in punishment. The concept of monetary myopia was put forth as a way to understand the tendency to focus on the potential for revenue at the expense of other approaches or an earnest consideration of short- and long-term costs. The key conclusion to be drawn is that jurisdictions need to directly address the mounting pressures to produce revenue and for courts (or any other criminal justice concern) to be self-funding. Only in this way can justice truly be served.

**Exploitative Revenues, Law Enforcement, and the  
Quality of Government Service (2020)**

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Recent high-profile tensions between Black citizens and police officers in the United States have led to protests and calls for reforms. The ensuing popular and scholarly discussion of inequality in police practices has been focused, for the most part, on individual police officers' implicit bias or lack of appropriate training. Comparatively less attention has been paid to police departments' institutional structures and incentives, even though these characteristics have been shown to significantly influence police behavior.

One aspect of recent criticism of police departments has been centered on the aggressive imposition and collection of fees, fines, and civilly forfeited assets. The Department of Justice's (DOJ) investigation of the Ferguson, Missouri, police department revealed that a key driver of the behavior of the Ferguson police was the desire to generate municipal revenue by issuing traffic tickets and imposing fees. Scholarly evidence indicates the practices unearthed in Ferguson are by no means unique. Census of Governments data from 2012 show that about 80% of American cities with law enforcement institutions derive at least some revenue from fees, fines, and asset forfeitures, with about 6% of cities collecting more than 10% of their revenues this way in 2012. Implementing this practice requires close coordination between governing bodies, such as mayors and city councils, and local police forces, as the DOJ's Ferguson report vividly describes.

If police agencies keep a substantial fraction of revenues from fines and fees, they could be augmenting their own budgets through fee and fine enforcement. In practice, revenue from fines and fees is typically contributed directly to the municipal budget, not the police budget, meaning that direct financial incentives for police departments to collect revenue may be weak. But police forces are also the agents of local governments: Local police chiefs are appointed by the city executive (mayor or city manager), and must respond to city politicians. This means that the police in some cities are under significant pressure from city authorities to raise city funds. Given that local police offices have limited resources, and that police officers have broad discretion to focus on any of a wide variety of activities, a focus on revenue-generating activities may distract police departments from their primary duty of providing public safety. Although political scientists know little about how police departments respond to institutional incentives, a recent study [by Jonathan Mummolo] shows that police officers are highly responsive to managerial directives, which suggests that at least in some cases, political pressure on police leadership can translate into officer behavior.



In this article, we examine whether revenue-collection activities compromise the criminal investigation functions of local police departments. We do so by studying the relationship between police-generated local revenue and crime clearance rates (that is, the rate at which a person or persons are charged or otherwise identified by law enforcement as perpetrators of particular crimes). In cities where the proportion of local revenue coming from fines and fees is higher, there is presumably more pressure on the local police to raise revenue, and they might engage in revenue-generating activities instead of investigating crimes when such resource allocation decisions must be made on the margin. In addition, aggressive collection of fines and fees by police officers could affect local residents' trust in law enforcement officers. In turn, this may lead to less cooperation from citizens to solve crimes at the local level, which also could contribute to less effective police investigations.

Establishing a causal link between reliance on revenues from fees and fines and crime clearance is challenging because the allocation of police resources to revenue collection is not random. Municipalities may face different types of crime—such as prevalent gang activity—which could systematically affect the crime clearance rate. In addition, while we argue that reliance on fines is associated with lower clearance rates, we cannot rule out reverse causality or omitted variable bias using observational data. To address these concerns, we use two strategies.

First, we use county fixed effects to account for heterogeneity across municipalities that is constant within counties. This strategy leverages within-county, across-city variation in the use of fines to estimate the impact of fine revenue on clearance rates. By making the comparison within counties, we are able to rule out any omitted variables that vary at the county level such as county-level criminal justice policies.

Second, we also employ an instrumental-variables strategy to rule out municipal-level confounders and reverse causality. Specifically, we use the average commuting time as an instrument for fines and fees revenue. More than 86% of workers in the United States drive to work, and traffic-related violations and charges account for a significant share of fines and fees revenue. In 2011, among 62.9 million U.S. residents age 16 or older who had one or more contacts with police during the prior 12 months, 49% of contacts were involuntary or police-initiated. Among these involuntary contacts, in 2011, 86% involved traffic stops. Therefore, we argue, longer commuting times are related to fee and fine imposition, and are unrelated to crime clearance rates. Using American Community Survey (ACS) data on the average commuting time to work at the municipal level, we show that longer commuting times are strongly associated with increased local government reliance on fines and fees as revenue sources.

We find that, in cities where a relatively higher share of revenue is collected through fines, fees, and asset forfeitures, violent and property crimes are cleared at a relatively lower rate, conditional on the background crime rate, the overall police budget, and a host of

relevant sociodemographic variables. In particular, we find in our instrumental variables specifications that a 1% increase in the share of own-source revenues from fees, fines, and forfeitures is associated with a statistically and substantively significant 6.1 percentage point decrease in the violent crime clearance rate and 8.3 percentage point decrease in the property crime clearance rate.

Importantly, the effect on violent crime clearance is driven entirely by cities with populations less than 28,010 (the bottom 80% of the U.S. city population distribution). This is a crucial component of our results because large police departments tend to have many specialized divisions charged with performing specific functions. Therefore, in a large police department, it is unlikely that revenue pressure would affect a department's decisions to choose between different types of activities, because most officers are confined to specific functions. However, in small-town police departments, officers "function as generalists, performing a wide variety of problem-solving, administrative, public service and law enforcement tasks, as opposed to the big-city departments where specialization is highly valued[.]" Thus, our results are consistent with the hypothesis that officers devote time to revenue collection rather than investigation in departments where officers perform a wide variety of functions.

Research suggests that low clearance rates for violent crimes in disadvantaged neighborhoods both reflect and generate low levels of trust in the local police force. Studies also document that exposure to violent crimes is associated with many negative social outcomes, including lack of local employment opportunities and economic mobility. This article suggests that aggressive fee and fine enforcement can compound this vicious cycle by further diverting resources from investigations that might identify perpetrators. Both the institutional and the individual harms of aggressive fee and fine collection fall heavily on a city's most disadvantaged residents: Fees and fines are most frequently imposed on them, and they are most likely to become victims of crimes.

Our work contributes to political scientists' growing focus on the causes and consequences of local law enforcement practices. Recent research points to the unequal impacts of involuntary contacts with law enforcement officials on residents' political participation. Our results complement the existing research by documenting one of the institutional causes of unequal policing—the use of police officers as revenue generators—and one of its institutional consequences—compromising police departments' roles as public safety providers. The analysis we present here also has important implications for proposed criminal justice reforms, which mostly focus on officer-level changes such as body camera use or implicit bias reduction. Our results suggest that institutional reforms, such as decreasing municipal government reliance on fines and fees for revenue, may also be an important step for reforming criminal justice systems and providing higher levels of public safety.

#### Policing for Profit and Police as Bureaucrats

Whereas it is well known that cities have limited discretion in many policy areas, municipal governments have ample discretion over the collection of fines and fees because local police forces and municipal courts that oversee their collection are mainly controlled by city councils. In addition, policing and public safety are two policy areas over which local governments have strong influence compared with other policies.

Previous research has shown that when municipal governments experience financial stress, their reliance on fees and fines increases. Although property taxes are the main component of own-source revenue for local governments, real estate prices rarely change significantly or quickly enough for property tax revenue levels to change quickly. Therefore, local governments tend to rely on traffic tickets and other fines when other revenue sources are limited.

There is extensive academic study of the negative consequences of police- and court-imposed fees and fines on affected individuals. Scholars tend to focus on the function of these fees and fines as, effectively, forms of regressive taxation. Another stream of research focuses on the democratic consequences of involuntary contact with law enforcement. The issuance of fines and fees often occurs at traffic stops, which are the most common type of involuntary contact with law enforcement personnel. Studies document that individuals who have repeated unwanted interactions with the law enforcement system are likely to withdraw from civic and political life, further impeding their ability to influence police policy through their local elected officials.

When police forces play a role in generating revenue for their municipality, it is easy to imagine the police shifting some resources from patrol and criminal investigation functions to revenue generation in a resource-scarce environment. Such a shift in resources has been documented in the case of the collection of court and correctional fees. A New York University (NYU) Brennan Center study of legal debts in the 15 states with the largest prison populations concluded that “Overdependence on fee revenue compromises the traditional functions of courts and correctional agencies . . . When probation and parole officers must devote time to fee collection instead of public safety and rehabilitation, they too compromise their roles[.]”

All this suggests that institutional context matters in understanding the behavior of law enforcement agencies. Police officers are classic examples of street-level bureaucrats because of their discretion and autonomy in deciding whom to arrest and whom to overlook. Police departments, like schools and welfare agencies, have the special property that within the organization, discretion increases as one moves *down* the hierarchy. Existing research on police officer discretion mainly focuses on personal characteristics of police officers and environmental or circumstantial factors affecting decision-making. While institutional conditions have been considered one of the most important factors influencing

incentives of federal bureaucrats, questions of how institutions shape incentives for local bureaucrats, such as police officers, are relatively understudied.

Police agencies could face both financial and political incentives for revenue generation from fines and fees. There are a handful of existing studies that address the issue of how police activities might be redirected as a result of financial incentives. Studies find that when local governments allow police agencies to keep a substantial fraction of the assets that they seize in drug arrests, police respond to the real net incentives for seizures by increasing the drug offense arrest rate. If agencies can keep a substantial fraction of revenues from fines and fees, they could help increase their budgets or the municipal budget.

But, unlike asset forfeitures from arrests for drug offenses, revenues from fines and fees generally accrue to the city's general fund rather than to the police department's own budget. If this is the case, a direct monetary incentive to increase police departments' own revenue from issuing more tickets and citations would be weak. However, there is another mechanism – political incentives – that can explain the coordination of law enforcement for policing for city revenues. A chief of police is appointed by either the city council or the chief executive – the mayor or city manager. Given that city officials have some control over police budgets and the choice of a police chief, some scholars argue that municipal police departments have always been political institutions in the United States and that political control of police departments can, at times, explain police behavior.

Law enforcement agencies also often have a reputational incentive to participate in policing for profit, if their reputation in the eyes of city officials depends on their success in generating revenue. If pressure to generate revenue from fines and fees comes without additional resources (such as hiring more police officers or allocating more public funds for overtime pay), local police officers may need to divert resources from traditional activities, such as criminal investigation, in favor of revenue-generation activities. This effect would be more salient in police departments where police officers' work assignments are flexible rather than specialized.

Police officials are sometimes frank about the pressures they face. James Tignanelli, president of the Police Officers Association of Michigan union, told *Car and Driver* magazine in 2009 that, "When elected officials say, 'We need more money,' they can't look to the department of public works to raise revenues, so where do they find it? The police department" . . . .

## Templates for Reform

### Statement of Principles on Fines and Fees

ARNOLD VENTURES

#### . . . Problem 1

*Jurisdictions that rely on fines and fees have an incentive to maximize revenue, which comes at the expense of public safety and trust, and disproportionately harms Black and Latinx communities.*

Fines and fees create perverse incentives that lead to the imposition of significant legal burdens on the poorest people who are least able to defend themselves via legal representation or political power. The imperative to collect enough revenue to support critical functions and, in some cases, pay the salaries of officials within the system is a clear conflict of interest that has led to the abuse of power and the subordination of public safety to institutional considerations.

Externalizing public safety costs to people in the system can also lead to over-enforcement and misalignment of resources by system actors. Because some of the costs of the system are paid by the “users,” practitioners may be less likely to weigh the costs against the benefits of particular interventions, and jurisdictions may be less likely to analyze whether these practices should be funded at all. For instance, fees for electronic monitoring or drug testing borne by individuals on supervision could prompt probation officials to use more electronic monitoring or drug testing than necessary or beneficial. And when these functions are outsourced, they may enrich private actors, leading to further potential and incentive for abuse. Going one step further, fee-based funding for programs that have no nexus to a person’s involvement with the justice system defies logic. For example, in California, local jurisdictions are authorized to collect fees to support emergency medical services, emergency medical air transportation, and children’s health care.<sup>30</sup> These sorts of funding mechanisms subvert the ideal of a democratic and accountable budgeting process.

We believe that public safety and the fair administration of justice are public goods, and that the government agencies and officials who aim to increase safety – including police and the judiciary – should work for the benefit of all community members. These costs, therefore, should be shared by all.

There is a place for user fees in the provision of some public services – for example, business licenses or construction permits – where an individual or organization has chosen to incur a cost that can reasonably be allocated to their activities and where the benefit will accrue primarily to them. But governments are raising revenue via user fees to fund functions that broadly benefit society, like community safety, to avoid raising taxes.<sup>31</sup> This

is effectively a form of regressive taxation, where the burden is borne by those who are often unable to pay, instead of being distributed fairly across the community.

## Principles

- Courts, justice system functions, and other government functions should be funded adequately by the government from general revenue.
- Fees, surcharges, and costs imposed in connection with law violations should be eliminated.
- Money generated from fines should flow to the state's general fund, and agencies and jurisdictions should not be allowed to control expenditures deriving from fines or receive a proportional share of collections, reducing the incentive to maximize revenue.

### Problem 2

*Courts often order fines and fees without accounting for a person's financial circumstances, resulting in a "two-tiered" system of justice.*

Those with means are able to pay their bill and walk away, but those without bear an economic hardship out of proportion to the seriousness of the offense. State laws often mandate fines and fees and specify amounts to be imposed. This hampers a court's ability to tailor sanctions to an individual's financial circumstances, leading courts to impose unrealistic sums in some instances. When financial punishments are left to the discretion of a court, most state laws do not require judges to consider ability to pay when deciding fine and fee amounts. And even if they do, unclear procedures, biases, and lack of accountability mechanisms mean that courts often fail to conduct meaningful inquiries into ability to pay. This can and does result in unaffordable fines: many families live within a few hundred dollars of poverty, yet total amounts of court debt can easily reach thousands of dollars. This state of affairs arguably violates the constitutional protection against excessive fines, rooted historically in the principle of *salvo contentamento*—that no fine should be so severe that it prevents someone from earning a living or supporting a family. Courts rarely adopt this commonsense approach, however. The experiences of people involved in the system and their advocates show that fines that are proportional to the offense and affordable to the person are the exception.

In addition, fines that are excessive may undermine financial penalties as an effective accountability measure: people facing unaffordable court debt report feeling overwhelmed and a sense of futility, and may give up altogether on attempting to satisfy these judgments.

Some advocates and scholars propose abolishing fines, arguing that an ability-to-pay approach requires invasive inquiries into people's finances that will inevitably rely on

biased assumptions and reproduce the disproportionate harms of the legal system.<sup>37</sup> Further, fines can create the same incentives as fees to maximize revenue.<sup>38</sup> However, the pervasive use of fines and the current lack of scalable, non-carceral alternatives lead us to embrace proportional fines.

We believe fines can serve as a fair and just punishment if the amounts imposed do not undermine financial stability and if they are calibrated to the seriousness of the offense. We aim to support research and policy work that explores how to design and implement equitable fines and unpacks the individual, systems, and society-level outcomes of proportional approaches.

### Principles

- Fines can serve as an appropriate punishment if they are proportional to the offense's severity and take into consideration individual and family financial circumstances. Fines are proportional if they are affordable and time-limited (payable over a reasonable period of time).
- Fines should not be used as a means to generate revenue. Enacting this principle would call for careful consideration of which behaviors that we as a society deem worth the cost and burden of equal enforcement.
- Fines should not undermine a person's financial stability, and so courts should consider the reasonableness of the amount imposed at sentencing and throughout enforcement, ensuring that a person is able to retain resources to meet familial obligations and living expenses.
- Reasonable and proportional alternatives should be available in cases where a fine would undermine financial stability.
- Neither the amount nor whether to impose fines should be mandatory; courts should have discretion to waive them entirely, reduce them, or order an alternative sanction.

### Problem 3

*Efforts to collect fines and fees can increase interactions with the justice system, exacerbate racial disparities, deepen economic inequality, infringe on basic civil rights, and impose myriad other negative consequences.*

When people are unable to pay debts owed to courts and other justice agencies, they face a cascade of consequences that may include additional fees, driver's license suspension, arrest, jail (despite U.S. Supreme Court precedent to the contrary), extension of time on probation or parole, and voter disenfranchisement. These penalties can lead to other harms, like job loss, housing instability or homelessness, lost income, wage garnishment, and depressed credit ratings. These penalties can also increase the overall costs of the criminal justice system that result from extended incarceration and probation.

The economic burden for individuals goes beyond the cost of the sanctions themselves. Unaffordable economic sanctions can and do lead to perpetual punishment, forcing people into cycles of incarceration and poverty. One study found that the financial strain of traffic fines is magnified among the lowest earners due to increased delinquencies, collections, license suspensions that interfere with employment, and other consequences. The cumulative and compounding effect of sanctions is particularly pernicious for people on the lowest rung of the economic ladder. Penalties like the loss of voting rights or ability to successfully clear one's record can hinder the ability to participate fully in one's community, effectively marginalizing and further isolating those in poverty.

### **Principles**

- Inability to pay should not result in warrants, arrests, extension of probation and parole, or incarceration.
- Driver's licenses, occupational licenses, voting, and expungement should not be conditioned on payment of court debt.

### **Problem 4**

*Fines and fees are particularly harmful in the juvenile justice system.*

All 50 states authorize courts to impose monetary sanctions on children and/or their families for one or more of the following: confinement, treatment, counsel, diversion, court operation costs, expungement fees, court-ordered examinations or assessments, probation fees, fines, or restitution. Although the extent of the impact is unknown, the experience of California may be illustrative of some of the impacts on children and their families. In 2017, the California legislature passed Senate Bill 190 to eliminate juvenile fees, but did not require counties to end collection of previously assessed fees. The University of California, Berkeley Policy Advocacy Clinic estimated that hundreds of thousands of families were still being pursued for more than \$374 million in previously assessed juvenile fees. (Since the law's enactment, 36 of California's 58 counties have now discharged or ended collection of more than \$237 million – much of it unlikely to be collected – relieving this burden from hundreds of thousands of families.)

These sorts of burdens are inconsistent with the legal definition of childhood. Children are deemed legally incompetent to enter into contracts of any kind, including taking on debt, and are not permitted to work, with limited exceptions. Debt imposed on children and their families is also inconsistent with our societal notions of childhood and the developing capacities of children. Juvenile courts have moved away from punitive approaches to ones that support positive youth development, and fines and fees are counterproductive to those ends. And finally, holding youth responsible for court debt is in conflict with recent scientific findings that children are different from adults, and



undergo significant changes in emotional, physical, developmental, and cognitive capacities during their transition to adulthood.

More often than not, monetary obligations placed on juveniles are borne by their families—either as a practical or legal matter. This in turn can compound the harms to children, who rely on their families for stable and consistent support. Stories of families forced to make unconscionable choices between paying rent, forgoing legal representation, buying food, and paying a child’s legal debt highlight just how pernicious these fines and fees can be.

### **Principles**

- All fines and fees for juvenile offenses should be eliminated.
- Any alternative sanctions should be developmentally appropriate and designed to ensure that the involvement of youth in the juvenile justice system is not unduly prolonged and does not result in incarceration. . . .

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### **Best Practices: Reforming Fine Fee Policies in the Criminal Justice System (2020)**

PFM’S CENTER FOR JUSTICE & SAFETY FINANCE

Cities, counties, and states across the country face increasing scrutiny of their reliance on fines, fees, and penalties to fund governmental services, particularly in the public safety and criminal justice realm. While states and local governments recognize the many negative social consequences of relying on these revenues, many jurisdictions have struggled with the potential loss of revenues and resulting budget pressures. To assist selected counties across the United States with efforts to reduce their reliance on criminal justice fines and fees in fiscally responsible ways, Arnold Ventures has funded technical assistance provided to Ramsey County, Minnesota; Davidson County, Tennessee; and Dallas County, Texas by PFM’s Center for Justice & Safety Finance.

While governments regularly levy fines in efforts to punish and deter criminal behavior, levying fees on individuals who are arrested, tried, convicted and/or detained pre-trial or incarcerated post-trial raises many questions. These financial obligations create significant burdens on individuals and often bear no relation to the underlying offense committed. Yet states, counties, and cities use these revenues to essentially shift the cost of the criminal justice system from taxpayers to defendants, creating the potential for officials to prioritize revenue generation over the fair administration of justice.

Previous research and analysis have linked the growth in these fines and fees revenues to the expansion of the criminal justice system in the “get tough on crime” era of

the 1980s and 1990s. Facing growing expenditures amidst rising anti-tax sentiment, public officials increasingly tried to cover rising expenses by collecting fines and fees from system-involved individuals. Ultimately, Michael Brown's shooting in Ferguson, Missouri in the summer of 2014 proved to be an inflection point, as stakeholders came to understand that relying on people convicted of criminal violations to "pay for" the criminal justice system created unmanageable financial burdens, damaged disadvantaged communities, and represented a regressive way of raising revenues.

Counties wishing to limit or even eliminate completely their reliance on fines and fees revenues generated inside their criminal justice systems can take three specific steps to do so. First, by convening all key stakeholders, including community members directly affected by these policies and practices; gathering and sharing relevant data; and asking detailed questions about the nuts and bolts of these fines and fees – when they are imposed, what determines their amounts, how funds are collected, where the revenues go, how the revenues are ultimately spent, etc. – counties will develop a shared knowledge base and understanding among all stakeholders and partners. Second, counties must analyze the information and data at hand to assess the current impact of the system overall, and specific fines and fees in particular, on individuals, communities, and public bodies, with particular sensitivity to impacts on disadvantaged community members. Finally, counties must act. With analysis in hand, county officials must continue to work with affected community members and act decisively by passing needed legislation, developing implementation plans, and committing to ongoing benchmarking and measurement of progress. By focusing on process, analysis, and then action, counties can address long-standing inequities of race, ethnicity, and income and increase the sustainability and transparency of their fiscal choices, without damaging public safety outcomes.

San Francisco, Alameda, and Los Angeles Counties in California have each engaged in fines and fees reforms, applying these best practices in real-world settings. San Francisco's Financial Justice Project has led to significant policy change, including basing fine and fee amounts on ability to pay and ending the suspension of driver's licenses for failure to pay traffic citations, and the county is recognized as a national leader in this policy realm. Alameda County eliminated all juvenile justice administrative fees in 2016, following up in 2018 by removing adult fees levied for probation, public defender, and work release services – and forgiving unpaid fees to date. Los Angeles County, too, started by focusing on juvenile justice and then tackled its dysfunctional adult system featuring unaffordable fees levied without regard for ability to pay, low compliance rates, and limited net fiscal benefits once collections costs were factored in.

Aided by technical assistance from PFM's Center for Justice & Safety Finance, county leaders in Ramsey and Davidson Counties have also made significant progress in reducing the roles of fines and fees revenues in their criminal justice systems. Ramsey County found that it had significant discretion in setting certain fines and fees, which

provided nearly \$3 million in annual revenue, and has recently eliminated fees for a variety of supervision, electronic home monitoring, and patient health services. The County continues to explore options for reducing other fees in its system, with particular attention to potential revenue and expenditure offsets as described by the Center's report. Davidson County, too, has introduced targeted reforms to limit the negative effects of these revenues, for example eliminating its \$44 per day jail fee.

Reducing or eliminating the reliance on fine and fee revenues to fund criminal justice systems presents challenges to public sector officials entrusted with improving public safety in fiscally responsible and sustainable ways. Successful reform efforts to date suggest that net financial impacts of reform may be muted, since compliance rates are low and collections costs are high. County officials can and should act within their scopes of authority to reform their systems, even as they are only part of a larger system of states, cities, and courts. More recently, the urgency and value of pursuing these reforms have only increased of late, as the nation faces three interlocking challenges to public health, economic prosperity, and the fair administration of justice throughout our communities. The COVID-19 pandemic has led to unprecedented impacts on health and well-being; the resulting economic disruption has damaged the abilities of millions to pay their rent, buy food, and sustain themselves and their families; and the social unrest following George Floyd's murder has unleashed energies and intentions around public safety, criminal justice reforms, and systemic racial discrimination. All of these developments raise the urgency for addressing the disparate, regressive, and ultimately counterproductive structures of fines and fees in our criminal justice system.

On balance, we hope that the ideas and practices discussed in the present brief will assist states, counties, and municipalities across the country as they work to make their systems more equitable, more transparent, and more sustainable. . . .

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### **Fines, Fees, and Police Divestment: Statement and Policy Recommendations (2020)**

FINES & FEES JUSTICE CENTER

Across the country, people are demanding that the government divest from law enforcement and invest in communities of color that have been over-policed and under-served. Any discussion of shrinking the criminal legal system and investing in low-income communities of color must include fines and fees. When state and local policymakers use police and the criminal legal system to raise revenue, they systematically extract wealth from Black and Brown people — who not only are disproportionately stopped, cited and arrested, but more likely to face potentially violent encounters with law enforcement.

The Fines & Fees Justice Center supports efforts to redirect police funding to human and social services that better protect public safety and health. The current economic crisis, as well as community demands for reform, are forcing state and local governments to revisit and reassess their law enforcement budgets. Decisions made in the next few months will have long-lasting impacts.

Fines and fees serve as a common, yet counterproductive, revenue source. Eighty percent of convictions are punishable by fines, and every conviction carries additional fees – often hundreds of dollars and often exceeding the underlying fine. Due to over-policing in Black and Brown communities, these families are most likely to get trapped in a cycle of debt and criminalization simply because they can't afford something as minor as a traffic ticket.

Aggressive collection practices – like the widespread suspension of driver's licenses for nonpayment – increase police-civilian encounters and make it harder for people to pay what they owe. Reliance on this unreliable and inefficient source of government revenue is bad economic policy that can cost more money than it even generates.

To reduce policing, we ultimately must end reliance on fines and fees to raise revenue. Fines and fees are harmful, regressive taxes, imposed on the communities least able to afford them. Eliminating fees and making fines equitable would result in millions of dollars remaining in the communities that are demanding public investment. This would allow more individuals and families to meet their basic needs, while increasing economic prosperity for everyone.

Since the 2008 recession, state and local governments have increasingly used fines and fees to fill their budget shortfalls. Too often, police are incentivized to issue citations for traffic, municipal code, and other low-level violations instead of focusing on public safety. Policing-for-profit has no place in our communities. Government can, and must, do better.

Below are some recommendations for advocates and policymakers considering working toward defunding law enforcement and reinvesting in the communities most harmed by mass criminalization, racial injustice, and economic inequality.

1. State and local jurisdictions should stop assessing all court fees, surcharges and other costs, while ensuring that all fines are equitably imposed and enforced.
2. When jurisdictions do impose fines, they should identify ways to reduce enforcement that can lead to savings without harming public safety. Policymakers must take into account the full costs of collections and enforcement, as well as the long-term financial harms to individuals, families, and businesses.

3. Defund law enforcement that's geared toward revenue raising, while reinvesting that money in communities. Law enforcement should never impose a quota system requiring or suggesting that officers should write a set number of tickets, nor should police performance be evaluated based on the number of tickets an officer writes. Policing should never be tied to raising revenue because it creates perverse incentives.
4. Provide data transparency to disincentivize pretextual stops and policing-for-profit. Data on traffic stops would allow us to evaluate how police are being deployed and whether they are addressing serious public safety issues or merely raising revenue. Such data should detail where traffic stops occur, against whom, and for which violations. This data should also be publicly accessible.
5. No revenue from fines and fees should go directly or indirectly to law enforcement. If fines are imposed, the revenue should flow to general funding and not be required for government budgets to break even.

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### **Call for a Nationwide Moratorium on Juvenile Fees and Fines (2020)**

CAMPAIGN FOR DEBT-FREE JUSTICE

COVID-19 has created an unprecedented public health and economic crisis. Low-wage, hourly, and gig workers are losing income or risking their health working in close proximity to others. More and more families are struggling to pay rent, keep the lights on, feed their children, and get medical care in the midst of widespread fear and uncertainty. Families with youth in the juvenile legal system are among the most vulnerable during this crisis.

Juvenile fees and fines—monetary charges that courts and agencies impose on youth in the juvenile system and their families—are a regressive and racially discriminatory tax on low income communities and communities of color, the same communities who are more likely to lose income, experience housing and food insecurity, and lack access to medical care during this crisis.

Juvenile fees and fines can quickly add up to thousands of dollars, and state and local governments aggressively pursue collection against families, including by garnishing wages, levying bank accounts, placing liens on property, and intercepting tax refunds. A \$500 bill is a financial emergency for most families—in the midst of the COVID-19 crisis, it's a potential catastrophe.

State and local governments are rushing to ensure people stay housed and financially stable during the crisis. They are halting evictions, utility shut-offs, and foreclosures; encouraging businesses to provide paid sick leave; and urging debt collectors

to suspend activities. Some have suspended criminal and traffic fees and fines and diverted people from the legal system.

As many jurisdictions are beginning to realize, charging fees and fines to youth in the juvenile system and their families is counterproductive: it undermines youth rehabilitation, increases youth recidivism, and nets little or no government revenue. In this time of crisis, the focus should be on immediately suspending fines, fees, and negative consequences for nonpayment.

We call on state and local officials to reduce harm to youth and families by suspending the assessment and collection of all juvenile system fees and fines for at least the duration of this public health and economic crisis, including the following general policy recommendations and specific action steps for decision-makers.

### **1. General Policy Recommendations**

*States, counties, and juvenile courts should immediately take the following actions:*

- Suspend assessment and collection of juvenile fees and fines.
- Suspend all attachments, garnishments, levies, liens, redirects, and tax refund intercepts for unpaid juvenile fees and fines.
- Suspend all interest accrual, financial penalties, and other legal system consequences for nonpayment or late payment of juvenile fees and fines, including enforcement of arrest warrants for failure to pay fees and fines.
- Suspend and withdraw all referrals of unpaid juvenile fee and fine accounts to state taxing and collection authorities and private collection agencies.
- Prohibit private agencies from collecting unpaid juvenile fees and fines.
- Work to make these law and policy changes permanent.

### **2. Specific Action Steps for Decision-Makers**

#### **Governors**

*Use executive authority to do the following:*

- Suspend statutes and regulations authorizing state and local jurisdictions to assess and collect juvenile fees and fines.
- Order state taxing authorities and other relevant state collection agencies to:
  - Stop attachments, garnishments, levies, liens, redirects, and tax refund intercepts for unpaid juvenile fees and fines.
  - Suspend all interest accrual, financial penalties, and other legal system consequences for nonpayment or late payment of juvenile fees and fines.
- Promulgate rules or regulations to prohibit private agencies from collecting unpaid juvenile fees and fines.

- Encourage courts to stop juvenile fee assessment and collection activity and to suspend enforcement of arrest warrants for failure to pay fees and fines.

### **State Legislatures**

*Pass legislation to do the following:*

- Suspend the authority of courts and state and local agencies to assess or collect juvenile fees and fines, including their ability to issue attachments, garnishments, levies, liens, redirects, and tax refund intercepts and to impose interest accrual, financial penalties, or other legal system consequences for nonpayment or late payment.
- Suspend the authority of private agencies from collecting unpaid juvenile fees and fines.
- Suspend enforcement of arrest warrants for failure to pay fees and fines.

### **County and Local Governments**

*Enact ordinances, resolutions, or policies to do the following:*

- Suspend the assessment and collection of all juvenile fees and fines.
- Stop referrals of unpaid juvenile fees and fines to private collection agencies.
- Discharge, vacate, or waive all outstanding juvenile fees and fines.
- Notify youth and families of new policies and procedures suspending fees and fines.

### **Juvenile Probation Departments and Other State and Local Agencies**

*Instruct relevant staff to do the following:*

- Stop the assessment and collection of all juvenile fees and fines and provide all services, including medical care, free of charge.
- Ensure that probation is not extended and services or other requirements of probation are not denied for failure to pay fees and fines.
- Provide video and telephone calls free of charge to youth in custody so that they can communicate with their loved ones.
- Notify youth and families of new policies and procedures suspending fees and fines.

### **Juvenile Courts**

*Issue rules or policies directing court personnel (judges, clerks, etc.) to do the following:*

- Stop assessing juvenile fees and fines, including for the appointment and provision of counsel.
- Automatically appoint counsel for youth without requiring an assessment of indigence, or direct the local designee to do so.
- Stop collecting juvenile fees and fines and suspend all court-ordered attachments, garnishments, levies, liens, redirects, and tax refund intercepts.

- Stop and recall referrals of unpaid juvenile fees and fines to state taxing and collection authorities for garnishments, levies, liens, redirects, and tax refund intercepts.
- Stop and recall referrals of unpaid juvenile fees and fines to private collection agencies.
- Stop all interest accrual, financial penalties, and other legal system consequences for nonpayment or late payment of juvenile fees and fines.
- Write-off all outstanding juvenile fees and fines and discharge, vacate, or declare as satisfied all liens, fee agreements, and judgments.
- Vacate arrest warrants for failure to pay fees and fines.
- Notify youth and families of new policies and procedures suspending fees and fines.

### **Juvenile Public Defenders**

*Intercede on behalf of youth to do the following:*

- Petition the court to stop assessment and collection of all juvenile fees and fines.
- Oppose assessment of juvenile fees and costs related to the appointment and provision of counsel.
- Object on the record to the assessment of all mandatory fees and enter information into the record regarding the harms caused by fees and fines.
- Petition the court to vacate arrest warrants for failure to pay fees and fines.

### **District Attorneys**

*Cooperate with public defenders and courts to do the following:*

- Stop requesting juvenile fees and fines in new cases, and request waiver and discharge of fees and fines in existing cases.
- Decline to prosecute failure-to-pay cases, stop requesting legal sanctions as a result of unpaid juvenile fees and fines, and lift sanctions for failure to pay in existing cases, including arrest warrants.
- Never condition plea arrangements based on payment of juvenile fees and fines.

### **Law Enforcement**

*Engage in youth-centered approaches to do the following:*

- Avoid new low-level cases and fines by using discretion and tools other than arrest, ticketing, and/or citation of youth.
- Whenever possible, educate youth, send youth back home, or divert youth to another safe place.



## **Defund Our Punishment Bureaucracy (2020)**

Brian Highsmith  
AMERICAN PROSPECT

Local governments are struggling to respond to multiple urgent crises unfolding concurrently. Masses have taken to the streets to protest the lawless violence routinely inflicted upon black people by unaccountable police. A global pandemic has threatened to overwhelm our public-health infrastructure and necessitated disruptive changes to our daily lives. Those safety measures, combined with the absence of adequate federal support, have displaced tens of millions from their jobs and created an economic contraction that is already causing unprecedented revenue shortfalls.

One policy solution addresses each of these emergencies: significant, permanent reductions to existing policing and carceral infrastructures. It is time to start defunding our punishment bureaucracy.

When state and local finances were under similar strain during the Great Recession, policymakers had the opportunity to reassess our local budget priorities. But they got it wrong, on both sides of the ledger. Governments around the country enacted deep cuts to critical public investments – in schools and housing and social services and infrastructure – while opting to shield, and often increase, funding for bloated systems of punishment and social control. And they eschewed tax hikes on wealthy people and corporations – fearing political heat and capital flight – while dramatically scaling up financial extractions from disempowered poor people. As the Department of Justice documented in its investigation of the Ferguson, Missouri, police department, local governments’ reliance on revenue from criminal fines and fees has fueled the unconstitutional over-policing of segregated neighborhoods. All of these policy decisions have prevented human flourishing and entrenched unjust social and economic hierarchies.

We now approach a similar crossroads. This moment demands that we make a different set of choices. We must meet it by divesting from mass criminalization and punishment, replacing predatory fines and fees with progressive taxes on wealth, and protecting the public investments that help our communities thrive. . . .

In the aftermath of the killing of Michael Brown in Ferguson, President Obama tasked a high-level task force with developing recommendations to “strengthen community policing and trust among law enforcement officers and the communities they serve.” Policing scholar Alex Vitale recently argued that the federal reform efforts following this framework, which focused on procedural justice, “failed to show any signs of creating positive changes in policing.” Although evidence suggests that such reforms can indeed reduce complaints and even use of force, they largely avoid deeper questions about the role police should have in our society – the substance of their responsibilities and the extent of

their authority. Moreover, procedural justice and other institutional reforms (like implicit bias training and transparency requirements) need not conflict with divestment in the near term; stronger policies can be applied to a significantly reduced policing infrastructure.

Indeed, there is no justification for sparing police functions from – at minimum – the same scrutiny to which policymakers are now subjecting other critical public goods and services. Although policing is sometimes imagined to correlate directly with safety, there is evidence that the opposite can be true: In New York, measures of crime fell both after a court ended stop-and-frisk policing and when officers organized a work stoppage to protest attempted accountability for Eric Garner’s death. Confident that public safety is not undermined by divestment, cities could look immediately to pause hiring, eliminate new overtime, and cancel unnecessary equipment purchases. Other local school districts can follow the lead of Minneapolis Public Schools by acting immediately to end their contracts with police. And splintered municipalities could reduce the imprint of policing while saving money by merging agencies now separated across jurisdictional boundaries.

These direct funding cuts must be paired with aggressive decriminalization – unwinding the mess of misdemeanors, ordinance violations, and other small charges that consume so much of contemporary policing without making communities any safer. The goal in all this is not simply to dismantle existing systems – but to *replace* them with new supports and alternative interventions that help people thrive.

Advocates around the country are showing the way. Consider a proposal, from No New Jails NYC, demonstrating how the city could reroute \$11 billion “away from jail construction and towards the needs of our communities” – including unarmed medics and crisis workers as well as drop-in centers for people experiencing housing insecurity. In California, a statewide coalition organizing under the name Californians United for a Responsible Budget (CURB) has combined with JusticeLA to propose a “COVID-19 Public Health & Safety Budget,” with specific decarceral changes designed to protect public health, while also addressing persistent crises like chronic houselessness. California Assemblymember Sydney Kamlager has introduced legislation to support community organizations providing emergency response for vulnerable populations that face significant barriers to engaging with law enforcement. This sort of measure can help communities begin moving away from using policing as our primary response to all various problems.

In addition to being better social policy, these forms of reinvestment are almost certainly more cost-effective than using policing and arrests to handle social problems. Our current approach creates avoidable costs – from misconduct payouts to unnecessary incarceration – and economically destabilizes entire communities. Alternative responses to our social ills would be better targeted and more likely to succeed – and allow remaining

law enforcement resources to focus on problems that community members now feel are not taken seriously by police.

The revenue side should not be overlooked as well. As Joe Soss has noted, criminal punishment functions “that were paid for in the past through public taxes—often progressive taxes—have been turned into procedures that extract resources from poor communities, and disproportionately from poor communities of color.” Just as they were during the Great Recession, policymakers are going to face tremendous pressure to ramp up financial assessments from vulnerable people—whether through monetary sanctions (like court fines and fees), regressive “user fee” funding structures, or forms of cost-shifting privatization.

By contrast, our federal government can easily capture the tremendous wealth our economy has produced. Both to plug near-term budget gaps and as a catalyst for enduring reform, Congress must enact a robust program of federal fiscal support for states and municipalities. Instead of sending armored tanks to local police departments, the government could include money for alternative responses like (unarmed) public-health responders.

In addition to creating the economic conditions for reassessing budget priorities, the coronavirus pandemic is demonstrating important truths about our policing and punishment systems. Lacking other forms of support, many cities entrusted their police departments to enforce public-health measures like social distancing. What happened when we created this new pretext for police engagement? Wealthy white enclaves were largely left to their own, while enforcement seemed to target poor communities of color. (One video circulating on Twitter captured a squad of ten officers forcibly removing a black man from a public bus in Philadelphia for not having a mask.)

Somewhat more optimistically, jurisdictions around the country are taking meaningful steps to reduce jail populations in order to slow down the continued spread of the virus. Los Angeles’s jail population has now reached its lowest levels since 1990, while community pressure in San Francisco—along with the election of a new reformist district attorney—has propelled an approximately 40 percent decrease in the county jail population. These measures are rare and have not gone far enough. But they also demonstrate the promise of decarceration as a public-health response. Even after this pandemic recedes, there is no reason to return to the previous status quo.

Unfortunately, few elected officials are calling for structural reforms that would significantly reduce American policing and punishment. Indeed, this is one of many reasons why “Vote!” is an infuriatingly empty rejoinder to these protests. Those offering this slogan fail to acknowledge that enduring solutions to our policing crisis—policy responses commensurate to the scale of the problem—are not currently on the ballot, for

the simple reason that most of our leaders have lacked the courage to propose them. Even those who promised boldness have shied away from confrontation once in office with a powerful incumbent policing bureaucracy. Until they do better, they should expect entreaties for electoral engagement to fall flat.

The American system of unaccountable over-policing and mass punishment reflects deliberate policy choices; alternatives do exist. Abolitionist organizers that have long urged jurisdictions to unwind their punishment infrastructure are not simply shouting empty slogans; they have proposed specific steps – and alternative systems – that we could adopt today, if the political will existed. It is time to take seriously these demands, by reallocating public dollars toward productive investments in our communities and different systems for responding to human needs. We should fund what works to improve public health and safety – and shift resources away from the infrastructures that traumatize generations and present constant threats of lethal violence.

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**#DefundPolice #FundthePeople #DefendBlackLives:  
Concrete Steps Toward Divestment from Policing & Investment in Community Safety  
(2020)**

Interrupting Criminalization: Research in Action (an initiative of the Barnard Center for Research on Women Social Justice Institute) & M4BL

. . . #DefundPolice is a demand that has gained popularity in response to recent police killings of George Floyd, Breonna Taylor, and Tony McDade. It is rooted in the failure of decades of commissions, investigations, police reforms, and oversight to prevent their deaths.

It is also a response to the fact that, in the face of a pandemic and the most devastating economic crisis of a generation, in which cities, counties, and states are experiencing drastic losses in revenues, many life-saving programs are on the chopping block while officials increase or maintain police budgets.

It is a demand to #DefendBlackLives by shutting off resources to institutions that harm Black people and redirecting them to meeting Black communities' needs and increasing our collective safety.

#DefundPolice is a demand to cut funding and resources from police departments and other law enforcement and invest in things that actually make our communities safer: quality, affordable, and accessible housing, universal quality health care, including community-based mental health services, income support to stay safe during the pandemic,

safe living wage employment, education, and youth programming. It is rooted in a larger Invest/Divest framework articulated in the Movement for Black Lives' Vision for Black Lives.

#DefundPolice is a strategy that goes beyond dollars and cents—it is not just about decreasing police budgets, it is about reducing the power, scope, and size of police departments. It is about delegitimizing institutions of surveillance, policing and punishment, and these strategies, no matter who is deploying them, to produce safety. It is a strategy (part of the HOW) to advance a long-term vision of abolition of police through divestment from policing as a practice, dismantling policing institutions, and building community-based responses to harm, need, and conflict that do not rely on surveillance, policing and punishment.

And while #DefundPolice focuses on law enforcement agencies, we are also calling for defunding of jails, prisons, detention centers, immigration enforcement, sites of involuntary commitment and incarceration of disabled people. We are also calling for defunding the military-industrial complex—visit War Resisters, Dissenters and Jewish Voice for Peace to learn more about work to reduce military spending and military collaboration with police.

We also recognize the need to resist the expansion of policing—both in terms of the presence of officers, and of policing ideologies and technologies—into many institutions, including social services, health care provisions, and educational settings, and professions, including social workers, medical providers, and teachers. We need to be careful not to just transfer policing functions, practices, and technologies to different people and places.

Defunding is not just about cutting city budgets across the board as an austerity measure in the midst of an economic crisis—it is about reinvesting money cut from police departments into community-based services that meet basic needs and advance safety without using methods of policing, surveillance, punishment, and coercion. It is also about investing in cultural life, arts, recreation, and the things that make and strengthen community and our dreams for our future. . . .

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### **Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform (2019)**

Sharon Brett & Mitali Nagrecha

CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL

Eliminating the harms of exorbitant monetary sanctions on poor people in our civil and criminal legal systems requires wholesale change. In this paper, the Criminal Justice

Policy Program (CJPP) at Harvard Law School proposes a framework for one component of such reform: a complete reworking of how courts handle financial sanctions. The judicial branch has an independent responsibility to sentence and enforce fines fairly. In most jurisdictions, courts could implement these changes today without legislative reform. Although legislation is needed in many states—including to eliminate fees and surcharges and decriminalize low-level offenses—courts need not wait for such reforms to ease or even prevent the worst harms that excessive financial sanctions create for poor people, especially people of color.

Under our framework, courts would not require people to pay revenue-raising fees and costs, and would impose only a proportionate fine as a sentence for an offense and as an alternative to more punitive sentencing options. Judges would calculate fines based on concrete numerical criteria that would result in amounts tailored according to the severity of the offense and people's financial circumstances. And if people failed to pay, courts would send reminders and reassess the case to see whether adjustments could be made. Courts would promote open communication and facilitate trust. They would encourage people to notify the court whenever their financial circumstances change so that the court could provide relief from outstanding debt when appropriate. Courts would not use warrants, driver's license revocation, or incarceration to compel payment or punish nonpayment. Under this framework, sentences would be less punitive and more proportionate.

At the sentencing stage, CJPP recommends that jurisdictions do the following:

- Eliminate all revenue-raising fees and surcharges (including for municipal ordinance violations, traffic violations, misdemeanors, and felonies). Courts and other government operations should be funded through tax revenues.
- If fines are imposed as a sentence for an offense, set them at a level that people can afford.
  - Fines should be *proportionate to each person's financial circumstances*.
    - Evaluate whether certain *presumptions* are met that signal that a person is of limited financial means. Presumptions are thresholds that, once surpassed, signal to the court that ability to pay will likely be an issue.
    - Calculate a person's *net income* based on concrete numerical factors that account for a reasonable cost of living, support of dependents, and other relevant circumstances.
    - Multiply monthly net income by a *set percentage* that people can afford to pay toward fines.
  - Fines should be *proportionate to the nature of the offense*.
    - The severity of the offense should determine how long the person makes their monthly payment. Courts should impose more months of payment for more serious offenses.

- Consider alternatives to payment that are proportionate. Alternatives such as community service should be proportionate to the seriousness of the offense and should take into account other demands on the person's time, such as work and child care. Courts should provide an expansive definition of what qualifies as community service and ensure that options are accessible to everyone.
- Decouple probation and monitoring of fine payment. Courts should not sentence a person to probation supervision to monitor payment. Making payment a condition of probation subjects people to excessive correctional control and the disproportionate consequences of probation violations.

In most cases, setting fines according to a person's financial circumstances—and avoiding pitfalls such as probation or onerous alternatives—will result in timely payment. But when circumstances in a person's life change and result in nonpayment, the court's enforcement response must also be proportionate.

Thus, CJPP also recommends that courts better calibrate their responses to nonpayment so that they are proportionate. Our recommendations eschew punishment as the standard response to missed payments and instead encourage judges to adapt to changes in people's ability to pay and be responsive to those who are trying to make their payments. Jurisdictions should do the following:

- Facilitate open communication. Oversee payment plans without heavy intrusions into daily life (such as probation supervision or regular court check-ins) and create opportunities for adjustment of fines (including waivers) by phone or other accessible means of communication.
- Eliminate warrants for nonpayment or nonappearance. Rely instead on reminders to facilitate payment. Courts should rarely use summonses and orders to show cause.
- Review cases frequently with an eye toward reducing or waiving unpaid fines. At every point of contact, judges should update their assessment of a person's financial circumstances. Courts should review cases and waive or reduce fines whenever appropriate.
- Ensure that enforcement mechanisms are proportionate to the act of nonpayment. Jurisdictions should eliminate the use of harsh enforcement mechanisms and rely instead on proportionate responses to nonpayment. Specifically, jurisdictions should do the following:
  - Eliminate driver's license suspension and incarceration as responses to nonpayment.
  - Limit the use of civil debt collection mechanisms for nonpayment. . . .

## **An Abolitionist Horizon for (Police) Reform (forthcoming 2020)**

Amna A. Akbar

108 California Law Review 101

. . . “We used to think that if we improved policing we could escape its violence,” Rachel Herzing began.<sup>1</sup> It was November 2014, the fall that Darren Wilson killed Michael Brown and the people of Ferguson took to the streets. A cofounder of the prison abolitionist organization Critical Resistance, Herzing was addressing a packed room in Los Angeles on the subject of police. She began with its origins: slave patrols in the U.S. South. She explained the historic relationship between formalized policing and violence and went on to connect prisons and police as interdependent institutions. Contemporary attempts at reforming the police had failed, she argued. Despite efforts at diverse hiring, implicit bias trainings, civilian review boards, and criminal indictments of police, violence remained a core feature of the sprawling institution. “[T]he only way to stop the violence of policing is to make the cops obsolete,” Herzing concluded.<sup>2</sup>

I was sitting in that room. It was the first time that I had heard anyone argue that reforming police would not stop the violence, that the only way to decrease police violence was to decrease the number of police. For at least a decade, scholars had debated approaches to decarceration,<sup>3</sup> but few had considered the possibility of shrinking the police. In fact, many championed the reforms Herzing dismissed. But Herzing convinced me then that the violence and scale of police were fundamentally intertwined with that of incarceration. For those fundamentally opposed to the central role of mass criminalization in American political, economic, and social life, Herzing’s framework left only one option: to shrink both prisons and police.

For decades, law faculty have dismissed demands to divest from and dismantle the police as fringe and unworkable. Then came the uprisings following the police murder of George Floyd in Minneapolis, among the largest social movement mobilizations in U.S. history.<sup>4</sup> The nationwide protests catapulted abolition into the mainstream and, in the process, unsettled the intellectual foundations of police reform discourse.<sup>5</sup>

I, too, felt unsettled when I first heard Herzing’s message. Like many of the protestors in the streets in 2020, she was communicating a historically grounded account of police violence and its shifting forms. She offered a bold vision, grounded in the Black freedom struggle, for a radically different world. She spoke with a searing clarity about the stakes: the lives of millions of people defined in one way or another by the violence of prisons and police. She rejected the logic and scope of familiar police reforms and offered a practical reorientation for pursuing reform projects that held abolition in the horizon.



The turn to abolitionist horizons among today's left social movements and people committed to racial justice has emerged as one of the most significant political developments since the Ferguson and Baltimore rebellions.<sup>6</sup> Abolitionist organizers have shown how the state has invested in police and prisons over housing, health care, and school for poor, working-class, Black, and Brown communities. Their campaigns offer at last an approach to reform rooted in hope rather than cynicism: instead of giving more to police and the carceral state, they demand that resources be withdrawn from both and redistributed elsewhere as part of a larger strategy of transforming the state. That abolitionist organizers are running bold law reform campaigns at the local, state, and federal level should invite us to pay closer attention. That these campaigns are having real influence demands that we do.<sup>7</sup>

I have spent several years struggling with Herzing's remarks and the turn toward abolition.<sup>8</sup> As a result, I sympathize with where many law scholars find themselves now. I confess that early on, my instincts were to dismiss abolition as hopeless. I knew Herzing was right to argue that the police reforms that occupied the field of scholarly debate had not curbed police violence. But to admit as much out loud felt like failure. And it was beyond my imagination to conjure a world that does not rely on prisons and police or to believe we could muster the sustained mass political struggle needed to build that world.

I have come to understand that abolition offers a more honest assessment than conventional legal frameworks about the roots and persistence of police violence and the failures of reform. The scale, power, and violence of police and prisons – rooted in histories of enslavement and conquest – have become defining pieces of architecture within our political economy. Abolition charts a more radical and capacious path because ending our reliance on prisons and police requires it. . . .

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### **Toward a Demosprudence of Poverty**

Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori

69 DUKE LAW JOURNAL 1473 (2020)

In the waning days of his administration, President Barack Obama published a commentary in the *Harvard Law Review* outlining his vision of the president's role in criminal legal reform. In this essay, President Obama discussed a "sustained focus" of his administration: "Eliminating the Criminalization of Poverty" by "addressing excessive fines and fees, inadequate legal representation, the imposition of excessive bail, and other egregious abuses in too many state and local justice systems."

President Obama was not the only one to link the “criminalization of poverty” with issues of fines, fees, bail, and other “legal financial obligations.” For many, this conversation was spurred by the 2014 police shooting of Michael Brown in Ferguson, Missouri. Subsequent investigations by journalists and a U.S. Department of Justice report revealed the extortionary dynamics of criminal legal debt in Ferguson and other localities across the country. Indeed, President Obama himself tied the criminalization of poverty to Ferguson’s judicial policies, noting that the city’s practice of “us[ing] its justice system as a cash register” was “[t]he most glaring example, but by no means an outlier” among American localities.

But the criminal legal system’s entanglements with the lives of those living in poverty begin long before a defendant is first booked into jail or appears in court—when questions of bail, fines, and fees first arise. Rather, understanding the criminalization of poverty requires examining why someone is labeled a “criminal” in the first place. This requires scrutinizing what society chooses to criminalize and what structures are put in place to enforce those norms. American states and localities criminalize poverty by, among other things, prohibiting conduct engaged in largely by poor individuals, such as selling loose cigarettes; selectively enforcing vague quality-of-life laws—like anti-loitering ordinances—against poor individuals; and imposing additional obligations on and surveilling those who apply for or receive public benefits. In this way, the criminal legal system punishes and exerts control over poor individuals and communities, resulting in the reinforcement of multiple, interlocking social hierarchies.

Contemporary scholarship about and litigation over the constitutionality of the most abusive practices associated with legal– financial obligations (“LFOs”)—the fines, fees, and other costs imposed by courts—has been written against the backdrop of these social realities. But what we refer to as the “substantive” and “structural” elements of the criminalization of poverty have generally not been central to litigants’ claims against fines, fees, or bail systems, nor have courts extensively grappled with these issues in their discussions of the status quo.

Doctrinal path dependency is at least partially responsible for this focus. Much of the litigation around the criminalization of poverty focuses on LFOs; much of this in turn builds off of the Supreme Court’s central holding in *Bearden v. Georgia* that states may not “imprison a person solely because he lacked the resources to pay” a fine, fee, restitution, or bail. Though *Bearden* would appear to provide a broad *substantive* defense against the criminalization of the impoverished, in the realm of LFOs, the Court has instead adopted a *process*-oriented framing that places the problem of the criminalization of poverty within the court system at the level of an individual criminal or civil case. In essence, the Court demands that “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay” to ensure that an individual’s financial circumstances are not overlooked and thus lead to indiscriminate incarceration. It

is within this context that discussions about access to legal counsel, court fines and fees, pretrial detention, and bail are paramount. But these discussions only begin when the defendant passes through the courthouse doors.

However, there is a way for courts to recognize substantive and structural matters of poverty while staying within the ostensible confines of current doctrine. The concept of demosprudence, originally developed by Professors Lani Guinier and Gerald Torres, is a way to understand the interaction of law and social movements in ways beyond traditional rights claims-making in courts, in which marginalized people seek recognition of legal rights from judges, and judges either bless their legal claims or not. In a traditional civil rights framework, the audience for rights claims is ultimately the courts, and the propriety of a conversation about the existence or scope of a right is determined by how a court may rule or has ruled on it. Demosprudence, in contrast, sees rights as a marker for an iterative process that may include courts and legal elites but is not primarily defined by them. Demosprudence sees regular people as agentic co-laborers in a collective project of rights recognition and problem-solving. As Professors Guinier and Torres explain:

Whereas jurisprudence examines the extent to which the rights of discrete and insular minorities are protected by judges interpreting ordinary legal and constitutional doctrine, demosprudence explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems. Rather than turning over their agency to lawyers, they must find a way to integrate lawyers not as leaders but as fellow advocates.

Although the earliest version of the concept focused on the capacity of judges to behave demosprudentially, the degree to which judges can engage in demosprudence is currently unsettled. This Article reaffirms the capacity of judges to engage in “democracy-enhancing jurisprudence,” shoring up the idea that demosprudence is in part *a conversation* between the public and the courts. Judges are not the central actors or audience within a demosprudential framework—the people are. Yet, judges can play multiple roles in a demosprudential framework. . . .

## *Mapping and Changing Jurisdictions' Practices*

### **Highway Robbery: How Metro Detroit Cops and Courts Steer Segregation and Drive Incarceration (2020)**

Jade Chowning, Erin Keith, Geoffrey Leonard  
DETROIT JUSTICE CENTER

By piling excessive fines, fees, and costs onto drivers, courts rake in millions of dollars a year to fund themselves and their city government. The resulting tickets are expensive, and often far beyond what low-income drivers can afford. But . . . nonpayment is punished harshly with license suspensions, arrests, and even jail time. . . .

Fines in Metro Detroit courts are high even before fees and costs are tacked on. Some examples are listed in section 3(c). While fines are intended to be punitive, they are a disproportionately large punishment for poor people because they do not consider a person's ability to pay. The addition of fees makes traffic tickets even more unaffordable for low-income drivers. [T]here are a large number of fees that courts impose on drivers, and many of them are not waivable (meaning the court must impose them no matter what, and may not forgive them, even if the person cannot afford to pay them). These fees add up quickly, especially when a person cannot afford to pay the ticket immediately. Their goal is to raise revenue for state and city projects. Although they aren't intended to serve a punitive purpose and they have nothing to do with public safety, fees still financially punish all drivers and regressively penalize low-income people disproportionately. . . .

Finally, courts add on costs, using drivers to pay their employees' salaries and benefits, purchase goods and office supplies, and maintain and operate their facilities. Costs are limited to \$100 for civil infraction cases, but there is no limit on the costs that can be imposed for misdemeanor traffic offenses. There is also no requirement that the courts provide explanations for how they calculated these charges. Rather, courts are allowed to reverse engineer these costs to cover their budgets, calculating the costs imposed on people by dividing the cost of operating the court among the number of cases the court processes. This means that courts can charge drivers hundreds of additional dollars for minor traffic tickets such as for driving with a suspended license solely to produce revenue. . . .

Because Michigan law gives courts the power to fund themselves using these costs, judges face intense pressure to impose them. For many judges, the pressure comes from the city government. One judge from Southfield described how the city threatened to evict the district court from its courthouse because it hadn't generated more revenue, and threatened to eliminate court staff if judges could not collect enough money to pay for them. Similarly, a judge in Ingham County recounted that the city referred to the district court as "the cash cow of our local government."

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The 35<sup>th</sup> District Court in Plymouth sentences people convicted of driving with a suspended license to pay approximately \$850, almost \$500 of which is kept by the court. For not having a license on their person, drivers are charged \$550. When a DJC attorney asked the judge if he could waive fines and costs, which is allowed when a person is indigent, the Plymouth judge first said, off the record, that, “If we start waiving fines and costs, this court would financially implode.” On the record, he simply insisted he did not have the authority to waive fines and costs.

The 43<sup>rd</sup> District Court in Hazel Park is another example of just how dependent cities can be on their district courts for money. In the 2019 fiscal year, Hazel Park’s district court brought in a total revenue of \$3,268,846, despite having only \$1,308,846 in operating expenses. As a result, the court netted a profit of nearly 2 million dollars. If Hazel Park’s court budget is considered as a part of the city’s general fund budget, the court accounts for 20% of all revenue—one out of every five dollars made—but only 8% of all expenditures.

\* \* \*

City budget reports also reflect the cities’ demands of the courts to raise revenue. The City of Southfield’s budget report for 2019-2020 noted that because “District Court revenue and expenses continue to decline with reduced caseload[s],” the court’s revenue is “being propped up with increased fees” charged to individuals. Likewise, in Eastpointe’s 2015-2016 budget, the court reported working with the city prosecutors to charge people with civil infractions under local ordinances instead of state law so that the court could capture revenue that would otherwise go to the state.

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In a 2018 brief to the Michigan Supreme Court, the Michigan District Judges Association (MDJA) declared that the law allowing courts to charge costs (MCL § 769.1k(1)(b)(iii)) creates a conflict of interest by shifting the burden of court funding onto the courts themselves. As a result, the MDJA argued that the law violates the Fourteenth Amendment of the U.S. Constitution and should be struck down as unconstitutional.

“...The court funding system created by the Legislature unconstitutionally shifts the funding burden on to the courts, and creates an inherent conflict of interest in the judges who have to simultaneously determine guilt or innocence, while forcing those same judges to fund their courts by assessing costs against defendants who have pled guilty or been found guilty of a

criminal offense. 176...The constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge."

– Michigan District Judges Association Amicus Brief (2018)

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In many poorer jurisdictions, including cities like Lincoln Park, Eastpointe, Warren, and Allen Park, DJC attorneys regularly see judges impose \$400 in costs on offenses that carry only a \$100 fine. In Taylor, a full 18% of the city's general fund revenue comes from money raised by their district court. But wealthy cities lean heavily on their traffic courts as well. For example, in the 2018-2019 fiscal year, 15% of the general fund revenue for the City of Ferndale came from its municipal court.

Under state law and Michigan's court rules, judges have the ability to waive many fines and fees—including those that fund the court—if a person cannot afford to pay. However, likely because of the above incentives, judges take great pains to avoid doing so. First, it is almost unheard of for judges to ask about a person's ability to pay if they don't have an attorney, even at hearings specifically designed for this purpose (known as "show cause" hearings). Second, even when judges do inquire into a person's ability to pay, they frequently opt to extend the payment deadline or enter people in payment plans rather than waiving the charges, even if the person is unemployed and has no foreseeable way to make payments. Furthermore, Michigan court collections guidelines instruct judges not to offer payment plans longer than 30 days for civil infractions. Third, when DJC attorneys ask judges to waive outstanding traffic debt, judges regularly claim that they do not have the authority to waive discretionary fines and fees, even when presented with the statutes that explicitly outline their ability to do so. . . .

In addition to imposing steep fines, fees, and costs, courts also take money from drivers by imposing bonds for traffic offenses. . . .

At their core, monetary bonds are a significant form of wealth extraction. First, some monetary bonds are issued with built-in non-refundable fees, usually 10% of the amount posted. Second, any type of monetary bond is seized and kept by the court if a person misses a court date. There are a number of reasons outside of a person's control that can lead to them missing a court date, including the requirements of their job, the high costs of childcare, and insufficient public transit (which is especially a problem if the person has had their license suspended, their license plate revoked, and/or their car impounded). Research has shown that the vast majority of people who miss their court date are not trying to flee the court and evade justice; 94% appear in court within a year of their missed court date. Still, one failure to appear forces a person to forfeit any and all bond money they have scraped together in order to get out of jail. Third and finally, Michigan courts have the power to seize a person's bond to apply towards their fines/fees/costs. Getting out of

jail quickly is of the utmost importance for people with jobs or children. The threat of jail time coerces low-income people to pay bonds that will be taken for traffic tickets (which the court should have waived or reduced anyway on the basis of the person's inability to pay). In this system, a person living in poverty can be arrested on a warrant for not paying their traffic tickets, and then be forced to choose between sitting in jail or paying bond money that they won't get back—money they needed for rent, food, water, or vital medications. This is not money they would have willingly sacrificed for traffic debt, but it's the price they are forced to pay to walk free. . . .

Another way cities and suburbs pull money out of poor drivers is through impounding or otherwise seizing their vehicle and then charging them money to get it back. For many people, this happens after a traffic stop when the police discover their license is suspended for unpaid tickets. If the police choose to arrest the driver then and there, they have the authority to seize the vehicle under the justification that it is safer to impound the vehicle than leave it parked on the street. But just as often and especially in the suburbs, police will impound the car of a driver with a suspended license without arresting the person, on the pretext that they cannot legally drive away on a suspended license.

Police can also impound a vehicle they deem abandoned or damaged. Police often use this power to remove a car from the road after an accident. However, it can also be used to tow cars parked legally on residential streets or people's personal property that the police believe—correctly or incorrectly—to be abandoned. . . .

Finally, after courts and municipalities have done their best to extract money from poor drivers, the Secretary of State gets in on the action. Anyone with a suspended license who wants to have it restored is required to pay additional “clearance fees” to the Secretary of State first: \$45 for every infraction or offense. This is true even if the case that led to the license suspension was dismissed entirely. For example, a person might have all their cases dismissed on the day of their trial because the police officer who issued the ticket does not show up to court. Yet despite the fact that the cases were dismissed, the person must still pay \$45 for each infraction or offense written on the ticket in order to be eligible to regain their license. After the driver clears all suspensions at each district court in which they have license suspensions, they can finally go to the Secretary of State to regain their license. However, at that time, they must pay an additional \$125 license reinstatement fee. . . .

**Fiscal Pressures, the Great Recession, and Monetary Sanctions in Washington Courts  
of Limited jurisdiction (2020)**

Frank Edwards

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. . . When the Department of Justice investigated the Ferguson Police Department following the killing of Michael Brown, it found that the municipality had turned the criminal justice system into an engine of revenue generation. Many local and county governments around the country derive a substantial share of their revenues from criminal justice and the courts, but our understanding of this process is limited by the availability of high-quality data. In this study, I use comprehensive administrative data from all courts of limited jurisdiction in Washington State to evaluate how local government budgets relate to the sentencing of legal debt through the criminal justice system. I also evaluate whether sentencing and enforcement behaviors shifted during and after the Great Recession.

Courts of limited jurisdiction in Washington handle a variety of ordinance violations, traffic infractions, and misdemeanors. They include municipal courts, which hear violations of city ordinances, and county-level district courts, which hear nonfelony criminal and traffic cases. Washington municipalities and counties have flexibility in attaching fines and fees to violations of municipal or county law. The total revenue they can capture from these sources is governed by state law. District and municipal courts are tasked with collecting “all fees, costs, fines, forfeitures and other money imposed by any municipal court for the violation of any municipal or town ordinances”. Of these collections, 32 percent of noninterest revenues are owed to the state. In general, local governments are allowed to retain the remaining 68 percent, with the exception of some costs imposed by the state.

Given the flexibility to impose fines and fees, and the capacity to retain a majority of collected fines and fees at the local level, the Revised Code of Washington provides municipal and county governments with direct financial incentives to issue and collect debt through the criminal justice system. In this study, I use administrative court data to evaluate the following questions:

- Do fiscal pressures lead cities/counties to initiate more cases?
- Do fiscal pressures lead courts to issue higher financial penalties?
- Are these behaviors more likely in cities/counties with larger non-white populations?
- Did court behavior change during the Great Recession (2008– 2010)?



## **Advancing Financial Justice in San Francisco: The Experience and Lessons of the City's Financial Justice Project (2020)**

THE FINANCIAL JUSTICE PROJECT, CITY OF SAN FRANCISCO

In November of 2016, San Francisco became the first city and county in the nation to launch a Financial Justice Project to assess and reform how fees and fines impact our city's low-income residents and communities of color.

Since our launch, we have achieved significant reforms, learned a lot, and encountered challenges we did not anticipate. The goal of this paper is to share our experience with other localities that aim to pursue similar fine and fee reforms.

Government programs and courts have long levied fines and fees, either to discourage behaviors or to cover costs. But over the past several years, awareness has increased that using these tools can have an insidious unintended impact -- to push people into poverty. Fines and fees can knock people down so hard they cannot get back up. People with lower incomes and people of color are usually hit the hardest. These financial penalties can make government a driver of inequality, not an equalizer of opportunity.

San Francisco Treasurer José Cisneros launched The Financial Justice Project in November of 2016 with the publication of an op-ed in the San Francisco Chronicle. The Financial Justice Project is housed in the Office of the San Francisco Treasurer, the entity in charge of revenue collection for the City and County.

The Financial Justice Project has two main goals. First, to listen to community members to identify fines and fees that have a disproportionate adverse impact on low-income people and people of color. Our second goal is to develop and implement doable solutions with government departments and the courts that can make a difference in people's lives. Together we work with community organizations, advocates, city and county departments, and the courts to enact reforms that result in meaningful change for low-income San Franciscans.

We believe that fines, fees, and financial penalties can trap low-income people in a maze of poverty and punishment. They can widen racial disparities, since fines and fees are disproportionately imposed on communities of color. They can erode confidence in public institutions and undermine safety and prosperity in our communities.

We have found that fines and fees that exceed people's ability to pay them are often a lose-lose, for people and for government. We believe that better solutions exist that hold people accountable, but do not put people in financial distress. We think that the consequences should fit the person and the offense, and that budgets should not be balanced on the backs of those who can least afford it.

We have also found that fine and fee reforms do not automatically result in less revenue. For example, when the San Francisco Superior Court stopped suspending driver's licenses for Failure to Pay (FTP), they did not see a loss of revenue. In fact, even without the "hammer" of driver's license suspensions to compel payment, revenue per citation has increased over the last several years, as the court has implemented more effective collection practices, like sending monthly billing statements. Similarly, when the San Francisco Municipal Transit Agency created a low-income payment plan that reduced enrollment fees and allowed late fees to be waived, enrollment in the payment plans went up by 300% in the first three months, and revenue went up as well. Our experience aligns with national research that shows adjusting fines to a person's income can make it easier and more doable for people to pay, and ultimately stabilize, and even improve revenue.

By collaborating with community groups, the courts and city and county departments, we find that we can achieve reforms that make a difference in the lives of struggling San Franciscans, and are feasible and affordable for government to implement.

The Financial Justice Project has worked with more than ten city and county departments and the courts to propose and implement reforms to fines, fees, and financial penalties. We have eliminated and adjusted dozens of fines and fees, and lifted tens of millions of dollars in debt from these fees off tens of thousands of San Francisco residents.

Over the past three and a half years, we have collaborated with departments to eliminate all locally-controlled fees assessed from people exiting jail or the criminal justice system; make phone calls free from county jail, provide discounted tow and boot fees for low-income San Franciscans, and made it easier for lower-income people to pay off citations through payment plans, community service options, or receiving social services. Our reforms have benefited lower-income San Franciscans, at-risk youth, people struggling with homelessness, and people exiting the criminal justice system. Below is a list of the reforms we have pushed forward to date. These accomplishments are not ours alone; we achieved them through working in partnership with city and county department and court leaders as well as community groups.

We hope this paper is useful for people who want to advance reforms in their localities. . . .

#### . . . Top Ten Lessons from Advancing Fine and Fee Reforms

1. Relationships with government and court leaders and trust take time to build and are crucial to advance reforms

Over the past few years, we have brought together community advocates and city and county officials to discuss challenges and needed reforms. Throughout this process, we have realized that building trust and relationships with city and county departments is crucial to build toward effective reforms. Often, our recommendations require new ways of thinking, and can confront established practices and departmental cultures. Developing relationships with decision makers within city departments has been critical to establish credibility, to have honest conversations, and to keep the city policy goals top of mind while pursuing reforms.

The Financial Justice Project is often a facilitator between community group staff and government/ court staff. Our primary responsibilities are to: 1) listen to the perspective of individuals and front line staff at community organizations and legal service providers about the impacts of fines, fees, and financial penalties; 2) work with departments and the courts to find solutions that are doable to implement and will make a difference for people who are struggling; and 3) bring staff from community groups and government departments and courts together to develop solutions, implement them, and refine them. We are also always in dialogue with researchers, advocates and government staff across the country to ensure our work is based on best practices.

In many cases, it helped to have the Financial Justice Project serve as a neutral facilitator in these conversations, particularly in instances where departments and/or community groups had historically been at odds. By serving as a neutral, solutions-oriented facilitator, we were able to establish common goals, agreed upon by all parties from the beginning of the process.

2. It's critical to engage community organizations and local residents throughout every step of the process, from developing recommendations to implementing reforms.

Community groups and people impacted by fines and fees are important partners to develop and move forward reforms, and have deep expertise on what reforms would and would not work in the community. From identifying fines and fees that need reform, to identifying solutions that work in other jurisdictions, or that would work best for the community, impacted people and community groups should be engaged in every step of the process. We often partner with legal service providers, grassroots coalitions, organizations comprised of and serving formerly incarcerated people and people struggling with homelessness, and local anti-poverty nonprofits. They propose reforms, discuss potential implementation plans, and review draft promotional and application materials.

3. Fine and fee reforms do not necessarily lead to a loss in revenue.

Over the last three years, we have found that reforms to make fines and fees more equitable do not necessarily result in a loss of revenue. In some cases, proportioning fines

or fees to lower income people's ability to pay can lead to an increase in revenue. In other cases, steep fines and fees can be a "lose-lose," since they bring in little revenue, and elimination of these burdens makes more sense.

- If you make it easier and cheaper to meet their fine obligations, people will often pay more regularly, sometimes resulting in increased revenue. Reforms that make it easier and more doable for people to pay can spur them to pay fines or tickets more readily. For example, previously people had to pay \$62 to enroll in a payment plan to pay off parking or fare evasion citations. Under SFMTA's new low-income payment plan, the enrollment fee is \$5, people have a longer timeframe to pay off the ticket, and people can now make payments online, in addition to paying in person. If people successfully complete the payment plan, they can have all late fees waived, which can reduce the debt by more than half. After the SFMTA lowered fees for payment plan enrollment, they saw a 400% increase in people starting payment plans. In the first three months of offering these payment plans, SFMTA saw more than a 300% increase in revenue over the same three months of the previous year.

- Behavioral economics and consumer research confirm that the easier you make it for people to pay, the more likely it is that they'll pay. Research and collections best practices recommend sending timely reminders, providing clear messaging with the actions a person is required to take, and allowing a variety of ways to pay, including online and in person. There is also evidence that "right-sizing" fines and fees, basing them on people's ability to pay, and making the payment amounts realistic, can result in increased revenues. Beth Colgan, a professor at the University of California Los Angeles, examined several court systems that had piloted "day fines," where the penalties were proportioned to people's incomes and the offense. Several of these courts brought in more revenue when using this approach. "In short, graduation according to ability to pay can maintain and even improve revenue generation. The day-fines pilot projects suggest that for jurisdictions where ability to pay calculations result in a decrease in sanction amounts, revenue benefits may be obtained even without improved collections services," wrote Colgan in the Iowa Law Review.

- We often found that fees are "high pain," creating hardships for low-income people but "low gain," resulting in very little revenue for the city or county. For example, when we examined local criminal justice administrative fees, we found that the average collection rate over a six-year period was 17%, even with tools such as wage garnishment and bank account levies. In 2016, the collection rate for the largest local fee, the monthly probation fee, was only nine percent. More than half of the fees we eliminated did not have any revenue projected in the city's annual budget forecast. The amount of revenue they brought in was so minimal and unpredictable that departments did not track them. Our local experience mirrors research from across the country. A recent report by the Vera Institute found that the City of New Orleans lost money in its efforts to force city residents to pay

court fees or face jail time: the cost of jailing people who could not or would not pay far exceeded the revenue received. In Florida, clerk performance standards rely on the assumption that just 9 percent of fees imposed in felony cases can be collected. In Alabama, collection rates of court fines and fees in the largest counties are about 25%. Both the White House Council of Economic Advisors and the Conference of State Court Administrators have found these Legal Financial Obligations are often an ineffective and inefficient means of raising revenue.

- Sometimes the collections rates are so low for certain fees, primarily those charged almost exclusively to very low-income people, localities may spend more to collect these fees than they generate in revenue. The University of California at Berkeley conducted research that showed that many counties spend more to collect fees in the juvenile justice system than the revenue that comes in. For many of the fees eliminated in the criminal justice fees legislation, the revenue collected each year was so low, it was not included in the county's budget. In Alameda County, they found that to collect the county spent approximately \$1.6 million to collect \$285,000 in adult fines, fees and restitution, resulting in a net loss of \$1.3 million. Records from LA County showed that in fiscal year 2017-18, the County spent \$3.9 million to collect \$3.4 million in probation fees, resulting in a loss of half a million dollars.

A recent report by the Brennan Center for Justice reviewed fine and fee collections practices. The study examined 10 counties across Texas, Florida, and New Mexico, as well as statewide data for those three states. The counties vary in their geographic, economic, political, and ethnic profiles, as well as in their practices for collecting and enforcing fees and fines. The report finds that fees and fines are an inefficient source of government revenue.

“The Texas and New Mexico counties studied here effectively spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone. That's 121 times what the Internal Revenue Service spends to collect taxes and many times what the states themselves spend to collect taxes. One New Mexico County spends at least \$1.17 to collect every dollar of revenue it raises through fees and fines, meaning that it loses money through this system.”

4. Extreme penalties for nonpayment can push low-income people deeper into poverty and are often counterproductive collections tools

Sometimes our penalties for nonpayment were extreme and counterproductive to public policy goals. For example, thousands of San Franciscans, and 4 million Californian adults, had their driver's license suspended for failing to pay traffic fines and fees, making it very hard for people to work and support themselves, let alone pay their fines and fees. A New Jersey study found that forty-two percent of people lost their jobs after their licenses

were suspended. Nearly half of these people couldn't find new jobs. Nine in ten experienced income loss. One study found that for mothers with young children on welfare and in subsidized child care, having a driver's license was more important for finding steady work than a high school diploma. One social service provider we spoke with said that driver's license suspensions were among their clients' largest barriers to employment, and one of the main reasons they were receiving public benefits. In San Francisco, city and county departments were funding nonprofit organizations each year to help people get their licenses back and eliminate this barrier to employment.

Research on revenue collections in the years since the San Francisco Superior Court and the state of California stopped suspending driver's licenses for failure to pay shows there has been no significant impact. Our analysis of collections from the San Francisco Superior Court show no negative impacts on delinquent debt collection rates after eliminating driver's license holds for Failure to Pay. While the number of tickets filed has decreased over the last several years, delinquent revenue collected per filing has increased, indicating that license suspensions were not needed to coerce payments on delinquent debt. As stated by the national "Driven by Justice" campaign, "no amount of coercion can extract money from people who do not have it to give."

5. Government leaders are sometimes unaware of the downstream impacts of their fines, fees, and financial penalties.

In many of our conversations with department or court staff, they were unaware of downstream cascade of consequences for nonpayment. In almost every case, they were not the staff who created the fine, fee, or corresponding penalties (late fees, driver's license suspensions, etc.). The rules underlying the fine or fee and its collection were sometimes driven by state policy, not local policy. Other times, the collection of fines and fees was outsourced to a collection agency, or managed by a department's finance team, and challenges remained unknown to department leadership. Department staff were sometimes unaware that their fines and fees, if unpaid, could create further barriers for people through late fees, driver's license suspensions, lowered credit scores, or could hinder access to housing or employment. Sometimes simply providing officials with findings on these fines and fees, their impacts on people, and alternative solutions, was enough to begin the process of reform.

6. Interest is high, but some City and County department staff are concerned about the potential loss of revenue from reforms to fines or fees, and lack capacity to develop and enact effective reforms.

All City, County, and Court staff we interviewed expressed an openness to reforms, often saw the need for them, and sometimes believe that fines and fees inhibit their abilities to pursue their missions. That said, department staff were often concerned about

eliminating potential sources of revenue, at a time when San Francisco and other local governments are calling on departments to make cuts. These realities spurred further conversations about how we balance our need for revenue with our commitment to equity and inclusion for everyone in San Francisco, including lower-income San Franciscans. Often times when we made reforms, departments sought other funds to cover expenses, if there was an anticipated revenue loss. We also learned that departments and the courts often don't have the capacity or resources to implement reforms. We learned early on that we couldn't just develop recommendations in partnership with courts or departments and then walk away. Department and court staff often did not have the resources or time to develop the new forms, systems, web language, and tools needed to implement reforms. Most departments and the courts, we found, are stretched thin. We regularly bring together working groups of community advocates to meet with various stakeholders, on a monthly or bimonthly basis, including the courts, the SFMTA and the District Attorney, and other departments. In many cases, we jointly develop and draft promotional materials, forms, policies, procedures, etc. Our goal is to make it easier for departments to implement reforms, and to ensure the systems and tools are accessible for low-income people.

7. Better data is sorely needed on fines and fees but is often hard to access or does not exist.

The Financial Justice Project reaches out to the departments that are most likely to have fines and fees that disproportionately impact low-income San Franciscans and people of color. We ask questions to better understand how many people get a certain fine, fee or ticket; how much money from the fine or fee is collected, outstanding, and delinquent; their cost of collections; and what penalties or alternatives to payment exist. The data can be very hard to get from many departments, often because they have antiquated systems or lack staff to respond to requests like these. Through embedding a fine and fee review as part of the annual budget process, in partnership with the Mayor's Budget Office, we gained access to more comprehensive data. Better data on our practices has helped us better understand problems and craft the most effective solutions.

8. An analysis of San Francisco's fines, fees, tickets and financial penalties should be conducted on a regular basis through the City and County budget process.

We piloted a fine and fee inventory and review two years ago and are conducting another one this year in partnership with the Mayor's Budget Office, which we describe earlier in the report. Building on this process, we plan to propose a Fine and Fee Equity Test that could be a required component of a Department's budget submission on a biannual basis. It would provide the Board of Supervisors and the public with a tool to evaluate revenue collection mechanisms that may undermine larger policy goals of equity and fairness. The test would evaluate fees and fines, their potential for disparate negative impact on low-income communities, and/or communities of color, and present alternative solutions. The report would note any fee or fine where 1) collection and enforcement

appears to have a disparate impact on low-income communities or communities of color; 2) revenue collected does not justify the cost of collection and enforcement; or 3) delinquent revenue is greater than or equal to revenue collected.

9. Pursuing a fine and fee reform agenda can be well received by the broader community, rather than result in ill will or negative attention.

When we started the Financial Justice Project, we heard from some city officials that we were going to “make our city look bad” by uncovering fine and fee pain points and pursuing solutions. We have found the opposite to be true. We have by no means solved every problem. Far from it. But by working in a transparent and honest way with community stakeholders to address these problems, we have advanced reforms that have made a difference and been well received throughout San Francisco and in the media.

10. Local reforms can spur reforms in other counties and at the state level, which can lead to reforms across the country.

San Francisco has a history of initiating fines and fees reforms that can help spur changes in other counties, and at the state level too. For example, San Francisco was the first county to not charge fees to parents whose children were incarcerated in juvenile hall. Since then, several other counties have followed suit. And a bill, SB 190, was signed by Governor Brown in 2017 to eliminate these fees statewide. There is now legislation pending in several other states to eliminate fees in the juvenile justice system. Similarly, the San Francisco Superior Court was the first to stop suspending driver’s licenses when people were unable to pay traffic court fines. Other counties have since followed suit. Governor Jerry Brown ended this practice statewide in 2017. Similar legislation is advancing in states across the country. More recently, other counties are pursuing elimination of criminal justice administrative fees, similar to our work in San Francisco. Alameda passed legislation eliminating probation fees and public defender fees in 2018, and eliminated more than \$43 million in debt stemming from these fees. Contra Costa placed a moratorium on their criminal justice administrative fees in 2019. In 2020, Los Angeles County eliminated its local criminal justice fees. The Financial Justice Project is on the Steering Committee of Debt Free Justice California, a coalition of community group and government officials who are working to advance The Families Over Fees Act (SB 144 – Mitchell) to eliminate these fees across California. We also serve on the steering committee for SB 555, a bill which would significantly reduce the price of phone calls in California jails, after San Francisco made phone calls free from the county jail.



## **Statutory Inequality: The Logics of Monetary Sanctions in State Law (2019)**

Brittany Friedman and Mary Pattillo

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Section 3–7–6 of the Illinois Unified Code of Corrections reads, in part, “Committed persons shall be responsible to reimburse the Department for the expenses incurred by their incarceration at a rate to be determined by the Department in accordance with this Section” (730 ILCS 5/3–7–6). Backing up this obligation is the state’s ability to sue current and former inmates to recover the costs of their incarceration. Between 2000 and 2016, the Illinois attorney general brought 157 lawsuits against inmates under this statute (Madigan 2017). Between 2010 and 2015, these lawsuits recovered roughly \$500,000, most of which came from just two prisoners. In February 2016, Illinois Democratic state senator Daniel Biss introduced Senate Bill (SB) 2465 to repeal this section of the law, eliminating the ability of the attorney general to sue inmates on behalf of the Illinois Department of Corrections to recoup their costs. The bill passed the Senate (32 to 19), and more narrowly the House (60 to 54). Illinois Republican Governor Bruce Rauner vetoed it. His proposed amendments echoed the concerns raised in the Senate debates, namely, that eliminating the authority to sue meant that the state would forgo any possibility of recovering costs from wealthy defendants.

The debate over SB 2465 and its ultimate demise raises the central questions of this article about who pays for the institutions of the criminal justice system—police, jails, courts, prisons, and all of the actors in their employ—and how far the law reaches to make people “pay” for their crimes. These questions have taken on greater importance with the growth of all components of the criminal justice apparatus, from the hiring of more police officers, to more intensive prosecution of crimes), to the roughly sevenfold increase in the prison population since 1970. To pay for this growing system—and for other state costs—legislators have turned to additional sources of revenue: higher fines, fees, and other costs charged to the “users” of the criminal justice system. Convicted persons—whether sentenced to prison time or not—are often sentenced to these monetary sanctions that go to pay for the police cars that transport them, the computer systems that process them, the attorneys who prosecute them, the parole and probation officers who supervise them, and the collection and storage of their DNA, among dozens of other uses, many of which are far removed from the crime they committed, or any state dollars spent directly on their case. Beyond the official sentenced fines and fees are other financial obligations such as paying for required drug treatment or domestic violence counseling or reimbursing the relevant jurisdiction for the costs of incarceration.

Monetary sanctions, also referred to as legal financial obligations (LFOs), include fines, fees, restitution, surcharges, interest, assessments, and other court costs imposed on people convicted of crimes ranging from traffic violations to violent felonies. These sanctions are mandated in state statutes that define the amounts and ranges to be charged

as well as the funds into which the collected monies are to be deposited. We argue that these laws not only set out the specifics of the monetary sanctions system but also convey ideologies about crime, punishment, and offenders that build on two central scripts: the neoliberal trope of personal responsibility and the carceral logic of extended (in terms of reach) and prolonged (in terms of time) surveillance and monitoring. That these policies are disproportionately exacted on poor and working-class people who make up the majority of defendants in the courts, jails, and prisons constitutes what we call statutory inequality. The inability to pay monetary sanctions triggers increased financial and legal penalties such that poverty becomes a guilty sentence of its own, legitimizing people's continued subjection to criminal justice supervision and causing harm to their socio-economic and general well-being.

Illinois Governor Rauner posited a millionaire inmate who would reimburse the state for its costs. The reality of those involved in the criminal justice system, however, is quite the opposite. More than 80 percent of criminal defendants in the United States are found to be indigent and thus qualified to use the services of a public defender. In Cook County, which includes the city of Chicago, that figure is 89 percent. Roughly 40 percent of prison inmates nationally do not have a high school diploma. In Illinois, 30 percent of people on probation were unemployed, and just under half earned less than \$20,000 annually). It is difficult to discern what information lawmakers have at their disposal, but these facts should be no secret. Beyond the abundance of research that documents the lower socioeconomic status of those processed through the criminal justice system, the journalistic and popular portrayal of the accused and the convicted reinforces, if not overemphasizes, this reality. Thus, it is reasonable to assume that lawmakers recognize to whom they are shifting the burden when they look to defendants as sources of revenue.

In this article, we conduct a content analysis of legislative statutes regarding monetary sanctions in the State of Illinois and ask three questions: What are defendants expected to pay for and why? What accommodations are made (or not) for their ability to pay? What are the consequences for not paying? This analysis uncovers neoliberal ideas of personal responsibility and carceral logics that effectively create indebtedness to the state, especially for poor defendants, which furthers state supervision and punishment, and perpetuates and deepens the socioeconomic insecurity of already fragile populations, thereby exacerbating overall inequalities. We are careful to note, however, that this is a study of law on the books. This project is part of a larger study that includes courtroom observations and interviews with court actors and people with court debt (discussed in the methods section); this article, however, focuses on how what the law allows offers a window into the social, cultural, and political moods about criminals and punishment, which necessarily precedes the unequal outcomes. In important new developments, major organizing and advocacy work around this issue has set the foundation for significant changes toward greater fairness. . . .

. . . Conclusion

Punishment for lawbreaking is a core function of government. We have focused on the legislative domain in one state as a space that authorizes such punishment. The text of statutes, the debates that crafted them, and the case law that adjudicates them together make up a record and reflection of the kinds of ideologies that guide society's position on crime and those who commit them. Monetary sanctions are a particularly underexplored area of law, and the analysis of such laws uncovers the force of ideologies that emphasize personal responsibility and a carceral approach to managing poverty. In answering the questions of what defendants are expected to pay for, what accommodations are allowed, and what the consequences of nonpayment are, we find the repeated rhetoric that the debts defendants owe are of their own making due to their failing to prioritize and their shirking of responsibilities. We find a willingness to attach additional penalties, reinstate prosecution, extend supervision, and appease new stakeholders, but very little statutory guidance on a primary fact of the criminal justice system: the majority of people involved are poor or near poor. Poor state finances make poor defendants a clear and easy population upon which to foist the burden of monetary sanctions.

The core term *willful* (as well as *intentional*) is especially instructive because it both assumes an autonomous individual who is in full control of their circumstances and fixes the blame on the individual who acts with clear purpose. The literature on monetary sanctions to date paints quite another picture, however: namely, that of defendants who are barely making ends meet and who often prioritize rent, food, childcare, and health over paying the court that prosecuted them or the jail that imprisoned them (Harris et al. 2010; Harris 2016). Yet the law is clear that these debts are now their responsibility.

We argue that these contradictions constitute statutory inequality. Lawmakers rhetorically conjure a financially capable defendant in order to enact legislation that aims to recoup costs from them. A public defender in one Illinois county opined, "I do, generally, believe that very few of our judges have ever experienced the kind of poverty a majority of my clients live with, so they are often unrealistic about what is possible" That sentiment seems equally applicable to legislators. Laws that exact financial penalties without attention to the financial circumstances of the majority of defendants—and without primary attention to the ability to pay of individual defendants—in essence legislate inequality of impact. For someone earning \$1,000 a month, \$1,000 in court costs is an impossible debt to pay; whereas for someone earning \$6,000 a month, the same costs are challenging but not impossible. Even more important, cascading penalties—from delinquent charges to extended or revoked probation to incarceration—further separate the person who can pay from the person who cannot, making the latter even less able to go to work or school or pay for daily necessities. Scholars have characterized such laws and practices as constituting "predation," "stategraft," and outright "seizure" of the assets of poor people. All of these

terms highlight the additional impoverishment of already poor people, in this case through the workings of the law, the effect being larger gaps between poor and nonpoor defendants, which reverberate to poor and nonpoor families and communities.

The new Illinois law will correct some of the issues highlighted in this article. The provision for waivers of monetary sanctions for poor people is extraordinarily significant, and the definition of indigence offers clear guidance for judges and attorneys about who should be eligible for such waivers. However, the law goes only so far. The waivers are applicable only to assessments, not to fines or restitution. The mandatory fine for a first-time driving under the influence of alcohol or drugs offense, for example, is \$500, a payable sum for the affluent but not for the poor. Restitution in theft or damage to property cases can run in the thousands. Moreover, the defendant must apply for the waiver within thirty days of conviction; successful implementation of the law will rely heavily on public awareness, compliance with posting requirements, and the proactive counsel of public defenders. Also, the new law is not retroactive and thus offers no relief for people already sentenced to pay monetary sanctions. Neither does it offer relief for services that defendants must pay for as part of their sentence, such as probation fees or the costs of anger management classes or substance abuse treatment. Finally, the consequences for nonpayment are unchanged. Hence, if a person does not apply for the waiver in a timely fashion, the cascade of penalties from interest to collections to imprisonment is still available to the state.

Nonetheless, the new law raises the question of whether the neoliberal logics of responsibility and carceral expansion are crumbling. We argue that some evidence suggests that they are. Successful efforts in Washington, D.C., New Jersey, California, and large jurisdictions, including Cook County, to eliminate bail for many offenders, as well as general movements toward decarceration, reflect public opinion moving away from the harshly punitive policies of the 1980s and 1990s, even if only for fiscal reasons (on bail, Wiltz 2017; on decarceration, Pettus-Davis and Epperson 2015). Indeed and curiously, the waivers for LFOs in Illinois got very little attention in the House and Senate floor discussions. Much of the logic for the reformation was on efficiency grounds. As a task force report that preceded the statutory change noted, “A relatively small percentage of assessments imposed in criminal cases is ever collected. Compared to any revenue that they generate, the administrative burden that such assessments impose on court clerks is substantial because criminal cases are not closed if assessments have not been paid” (Statutory Court Fee Task Force 2016, 31). This may be a case of the technocratic logics of neoliberalism triumphing over the personal responsibility logics.

Yet, in addition to the limitations of the new law discussed, there are also reasons not to be too sanguine. Carceral logics effectively extend into community contexts outside prisons and courthouses. This extension suggests that a less concrete infrastructure of surveillance and control is already ensconced to take the place of prisons and jails; that

various decriminalization efforts (marijuana being the biggest example) rest on making such offenses “fine-only,” which leads back to the statutory inequality described; and that the rhetoric of personal responsibility, especially when applied to the poor, and related policy efforts to increase work and other requirements to access social safety net programs show no signs of abating. These realities play out just as strongly in Illinois, where the new law to revamp the system of monetary sanctions moves in the direction of reducing statutory inequality, but has much more room to go.

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**An Analysis of Court Imposed Monetary Sanctions in Seattle Municipal Courts,  
2000-2017 (2000)**

REPORT PREPARED FOR THE CITY OF SEATTLE, OFFICE FOR CIVIL RIGHTS  
Frank Edwards & Alexes Harris

While the laws, policies and court practices vary, each state in the United States imposes some sort of scheme to sentence law violators to justice system fees, fines related to specific offenses, and restitution to directly or indirectly reimburse victims, in addition to a host of costs related to non-full payment. Many states have legislatively established “mandatory” fines or fees, where judges have no discretion in whether or not to sentence people, even those deemed indigent. Over the past twelve years, research has emerged to outline local and state level practices, documenting the varying dimensions of court mechanisms used to assess the costs, monitor repayment and non-payment, and punish people who do not pay. This research has examined the consequences of court-imposed fines and fees on the lives and families of people who owe the debt, the practices by which local jurisdictions collect the penalties, and the disparate effects of monetary sanctions for youth, communities of color and people who are poor. Research has also begun to give attention to justice practices related to the imposition of fines and fees, such as the privatization of services and products within justice systems and state revenue generation foci and practices.

In this report, we use an expansive definition of legal financial obligations (LFO), which is inclusive of all financial debts imposed by a court because of a criminal charge or infraction. We use the term LFO interchangeably with the term of monetary sanctions. The definition we use is broader than typical definitions that narrowly focus on criminal cases only. However, in the eyes of debtors, debt arising from both traffic and non-traffic infractions can have similar consequences as can debt arising from criminal cases. Our goal in this report is to capture the total impacts of the broad system of monetary sanctions in Seattle. While our analysis focuses on data from the Seattle Municipal Court, this system depends on the actions wide range of institutions, including the court itself, the Seattle Police Department, the City Attorney's Office, and others. As such, our results and interpretations may differ from those that use more narrow criteria to define legal financial

obligations. Our analyses treat LFOs as inclusive of all monetary sanctions that individuals may incur because of cases processed in Seattle Municipal Court.

Legal Financial Obligations, as defined in Washington State statute include the fines, fees, costs imposed by the court as the result of a criminal convictions. Washington State's Legal Financial Obligations are mandated by RCW 9.94A.760.v Specific fines and fees are embedded throughout the RCW. The mandatory LFOs include: a Victim Penalty Assessment (VPA) which imposes \$500 for each felony or gross misdemeanor conviction and a \$250 fee for each misdemeanor conviction (RCW 7.68.035). The DNA Collection Fee imposes a one-time fee of \$100 for a crime specified in RCW 43.43.754 and must be sentenced (this is not mandatory for persons with mental health conditions). Furthermore, restitution shall be ordered when a person is convicted of a felony offense resulting in injury, damage or loss of property. Some LFOs are crime specific fines and are mandatory based on type of offense (e.g., sex offense). Other fees and costs such as, criminal filing fee, conviction fee or jury fee shall not be imposed if a person is deemed indigent or has a mental health condition. We have been asked by the Seattle Office for Civil Rights to conduct an analysis of the sentencing and collection of fines and fees by the Seattle Municipal Court (SMC).

It is important to note that as national, as well as Washington specific research, has shown, the sentencing and citation of fines and fees is just one discretionary point within the overall system of monetary sanctions. This punishment schema entails several discretion points, including, citations by police officers, sentencing by court officers, management of debt by court clerks and private collection agencies, judicial and probationary supervision and punishment of people who owe court debt. As our analyses illustrate, many of the cases that come before the SMC have been initiated not by Seattle Municipal Court judges, but instead via traffic violations issued by Seattle police and parking enforcement officers. As such, our concluding discussion of policy implications suggests a broad range of officials, including the Seattle Police Department and SMC, to collectively think broadly about this system of monetary sanctions and how best to alleviate the consequences for people who are unable to pay the debt and who are processed through multiple discretion points that lead to a cumulative negative effect. . . .

. . . Summary of Key Findings:

In what follows we provide a detailed analysis of the scope of fines and fees sentenced and collected by Seattle Municipal Court through 2000-2017. In sum, we present the following key findings from our data analysis:

1. There has been a remarkable decline in cases filed in Seattle Municipal Courts between 2000– 2017, even as the population size of Seattle increased during this time period.

2. People sentenced to criminal traffic cases tended to have their LFO accounts open (not fully paid) for longer periods of time relative to other types of traffic cases.
3. For each class of case, Black men and women are significantly more likely than their peers to be sentenced to incarceration through a Washington superior court following a paid Seattle Municipal Court legal financial obligation sentence (SMC LFO).
4. Black men and women are more likely to be incarcerated following an unpaid SMC LFO than are any other racial or ethnic group.
5. People of color have a higher likelihood than White people to be charged with a DWLS3 following a Seattle Municipal Court legal financial obligation sentence. This is especially pronounced for Black Seattle drivers. . . .

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**Probation and Monetary Sanctions in Georgia: Evidence from a Multi-Method Study  
(2020)**

Sarah Shannon

54 GEORGIA LAW REVIEW 1213

Georgia is well-known as the national leader in probation supervision, with a rate of 5,570 per 100,000 people on felony or misdemeanor probation supervision as of 2015 (the most recent data available). This “dubious distinction” means that Georgia’s probation supervision rate is nearly four times the national average. Georgia’s largely privatized misdemeanor probation system in particular has garnered widespread criticism and litigation in recent years due to lack of transparency and mistreatment of low-income probationers who cannot afford to pay fines and fees.

In 2015, the Georgia Council on Criminal Justice Reform (GCCJR) recognized adult probation supervision as an area for much-needed reform. After studying the high rate of probation supervision in Georgia, the GCCJR made several recommendations that ultimately led to Senate Bill 174 (SB 174), which passed unanimously by the Georgia General Assembly and was signed into law by Governor Nathan Deal in 2017. Among several measures intended to curtail Georgia’s probation supervision rate, SB 174 included provisions requiring judges to waive or convert to community service fines, fees, and surcharges for people on felony supervision if they are indigent or face significant financial hardship. To provide greater oversight of misdemeanor probation in Georgia, House Bill 310 (HB 310), which was passed in 2015, created the Board of Community Supervision (the Board) within the Georgia Department of Community Supervision (DCS). The Board

provides education and regulation for the state's misdemeanor probation system and collects quarterly data on misdemeanor probationers.

The Multi-State Study of Monetary Sanctions began collecting data on U.S. systems of LFOs in 2015. Georgia is one of eight states included in the study. The goal of the study was to examine how states' multi-tiered systems of monetary sanctions operate across representative regions of the United States. Monetary sanctions are comprised of a wide variety of financial penalties for criminal convictions. These sanctions have varying purposes and legal justifications. Fines are typically imposed as punishment and viewed as a potential deterrent to future crime, while restitution is used to compensate victims' losses. Court fees and surcharges are added on to base fines in order to recoup system costs, such as funding courts and other criminal justice system operations. In some cases, fees and surcharges are assessed in order to fund general government operations or funds that are seemingly far-flung from the criminal justice system.

Georgia's probation system is instrumental in monitoring and collecting LFOs, which is not the case in all states. This particular feature of Georgia's system of monetary sanctions has ongoing implications for Georgia's high rate of probation supervision and the reforms that have been enacted since 2015. This Article analyzes how monetary sanctions and probation supervision intersect in Georgia using quantitative data gathered from the DCS as well as interviews with probationers and probation officers gathered as part of the Multi-State Study of Monetary Sanctions between 2015 and 2018. Several key findings emerge from this analysis: (1) there is substantial variation between judicial districts in the amount of fines and fees ordered to felony probationers in Georgia, with fines and fees in rural areas much higher than those in urban areas; (2) probationers express fear of incarceration solely for lack of ability to pay; (3) probation officers consider collecting LFOs a distraction from their true mission of public safety; and (4) both probationers and probation officers question the purpose, effectiveness, and fairness of monetary sanctions in Georgia. This Article concludes with a discussion of reforms to date and further possibilities for reform based on the findings from this research. . . .

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**Juvenile Fee Abolition in California:  
Early Lessons and Challenges for the Debt-Free Justice Movement (2020)**

Jeffrey Selbin

98 NORTH CAROLINA LAW REVIEW 401

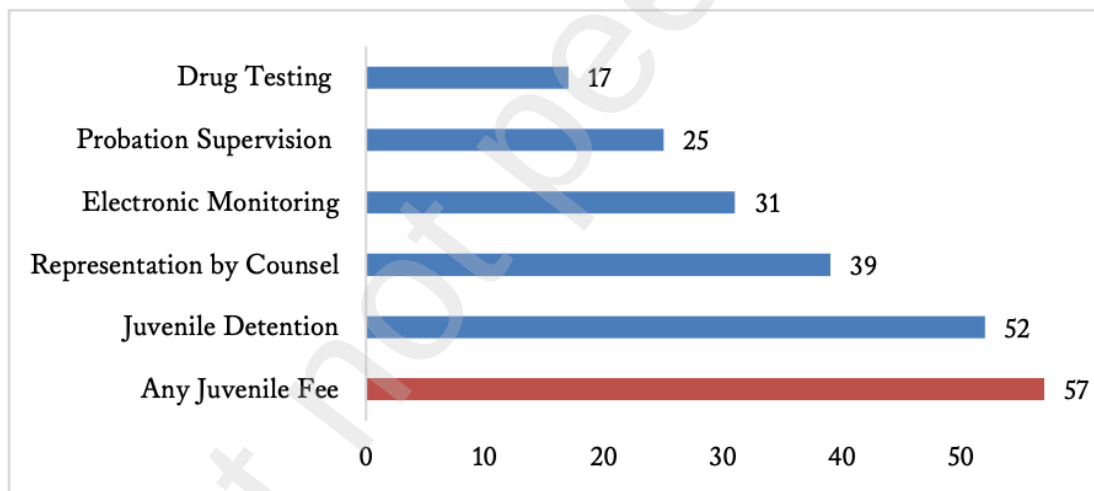
. . . We began researching juvenile fees in 2012 after lawyers and law students at the East Bay Community Law Center said their clients with youth in the juvenile delinquency system were receiving fee bills for thousands of dollars.<sup>18</sup> According to the



advocates, Alameda County charged parents and guardians \$25 for every day their child was detained, \$300 for a court-appointed public defender, \$15 a day for electronic monitoring, \$90 a month for probation supervision, and \$30 per drug test. We interviewed key stakeholders, including youth, families, advocates, and probation and collection officials. We surveyed the chief probation officers in every California county, and we sent California Public Records Act requests to selected others.

. . . First, juvenile fees were pervasive. As noted above, California law permitted counties to bill parents and guardians for a range of administrative costs associated with their child's involvement in the juvenile system. The state authorized the first juvenile fees in the 1960s for reasons that are unclear, but lawmakers approved additional fees during the 1980s and 1990s due to rising caseloads and fiscal concerns. Some counties increased local fee amounts significantly in response to the budget crisis of the Great Recession; for example, in 2009, Alameda County increased its juvenile fees tenfold. As recently as 2016, every California county except San Francisco charged one or more of these fees (see figure 1).

**Figure 1: California Counties (n=58) Charging Juvenile Fees (2016)**



As depicted in figure 1, in 2016, fifty-seven of fifty-eight counties charged one or more juvenile fees, including fees for juvenile detention (52), representation by counsel (39), electronic monitoring (31), probation supervision (25), and drug testing (17).

Second, counties often imposed juvenile fees unlawfully. We found counties that assessed fees in violation of state law, including charging fees not authorized by statute (e.g., fees for disposition and investigation reports) and charging fees to families of youth who were not adjudicated delinquent (not found guilty). Counties violated federal law by charging families for their children's meals while seeking reimbursement for those same

costs from national school lunch and breakfast programs. And we found counties engaged in a range of other fee practices that violated constitutional guarantees of equal protection and due process by charging families for costs related to public safety, not the care of youth, and by failing to assess families' ability to pay, as in Maria Rivera's case. . . .

#### Even When Counties Complied with State Law, Family and System Outcomes Were Poor

##### 1. Rehabilitation and Recidivism

We found that juvenile fees undermined rehabilitation by causing financial distress, disrupting family relationships, and incentivizing perverse outcomes. For example, we interviewed a grandmother on leave from the U.S. Army who was considering relinquishing the custody of a grandchild under her care to the state in the hopes that it would relieve her of his fee bills, which she was unable to pay. Criminologists have found that juvenile fees correlate with increased recidivism. In other words, the best evidence we have to date suggests that juvenile fees undermine both rehabilitation and public safety, the twin purposes of the juvenile system.

##### 2. Regressive and Racially Discriminatory

We found that juvenile fees disproportionately harmed low-income families of color. Because Black and Brown youth are punished more frequently and harshly in the juvenile legal system independent of their behavior relative to White youth—and most juvenile fees are assessed according to the severity and duration of sanctions—juvenile fees exacerbate racial disparities. Even as juvenile caseloads have dropped in California and elsewhere over the last two decades, racial disparities have increased, so families of color bore an even greater share of juvenile fees. In Alameda County, families of color were liable for significantly higher fees than White families based on average probation conditions for youth by race multiplied by fees assessed per probation condition (see table 1).

**Table 1: Juvenile Fees and Race in Alameda County, California (2013)**

| Race and Ethnicity | Total Fee Liability | Average Probation Conditions |                                |                              |                      |
|--------------------|---------------------|------------------------------|--------------------------------|------------------------------|----------------------|
|                    |                     | Juvenile Hall (days)         | Probation Supervision (months) | Electronic Monitoring (days) | Drug Testing (tests) |
|                    |                     | \$25.29/day                  | \$90.00/mo.                    | \$15.00/day                  | \$28.68/test         |
| Black              | \$3,438             | 25                           | 22                             | 34                           | 11                   |
| Latinx             | \$2,563             | 24                           | 14                             | 33                           | 7                    |
| Asian              | \$2,269             | 7                            | 12                             | 56                           | 6                    |
| White              | \$1,637             | 11                           | 10                             | 21                           | 5                    |
| Other              | \$1,192             | 4                            | 6                              | 31                           | 3                    |

As table 1 indicates, compared to White families (\$1637), Black families with a youth in the juvenile legal system were liable for more than double the fees (\$3438), Latinx families were liable for more than one and a half times the fees (\$2563), and Asian families were liable for almost forty percent more fees (\$2269).

### 3. Recovery and Revenue

In our fiscal analysis of sample California counties, we found that most jurisdictions collected fees at very low rates and did not recoup significant net revenue. In fact, because of the high cost and low return associated with trying to collect fees from low-income families, counties spent on average more than seventy cents of every dollar in fee revenue on collection activities (see table 2).

**Table 2: California Juvenile Fee Revenue and Collection Costs (2014–15)**

| County       | Revenue     | Collection Costs (% of Revenue) | Youth Support (% of Revenue) |
|--------------|-------------|---------------------------------|------------------------------|
| Alameda      | \$419,830   | 59.77%                          | 40.23%                       |
| Contra Costa | \$430,926   | 67.38%                          | 32.62%                       |
| Orange       | \$2,071,347 | 82.07%                          | 17.93%                       |
| Sacramento   | \$682,636   | 32.53%                          | 67.47%                       |
| Santa Clara  | \$399,228   | 112.72%                         | -12.72%                      |

As noted in table 2, in fiscal year 2014–15, Maria Rivera's Orange County spent more than eighty-two cents of every dollar in fee revenue on collection activity against other families, not for services to youth. Before it stopped charging juvenile fees in 2016, Santa Clara County lost money, spending more than \$450,000 to collect less than \$400,000 in juvenile fees.

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**Fee Abolition and the Promise of Debt-Free Justice for Young People and Their Families in California: A Status Report on the Implementation of Senate Bill 190 (2019)**

BERKELEY LAW POLICY ADVOCACY CLINIC

In October 2017, Governor Jerry Brown signed landmark bipartisan legislation making California the first state to abolish entire categories of monetary sanctions in the juvenile legal system and a subset of fees for young people in the criminal (adult) legal system. Starting January 1, 2018, Senate Bill 190 (SB 190) prohibits counties from charging fees to parents and guardians for their child's detention, representation by counsel, electronic monitoring, probation supervision, and drug testing in the juvenile legal system. SB 190 also repealed county authority to charge fees for home detention, electronic monitoring, and drug testing fees to young people ages 18–21 in the adult system.

The promise of SB 190 was to bring debt-free justice to young people and their families. Senators Holly J. Mitchell and Ricardo Lara authored SB 190 to “eliminate a source of financial harm to some of the state's most vulnerable families, support the reentry of youth back into their homes and communities, and reduce the likelihood that youth will recidivate.” Although we do not have outcome data for all of these goals, understanding the impact of SB 190 is critical for advocates and policymakers considering similar reforms in California and elsewhere.

This report presents key findings from county responses to Public Records Act requests and from interviews and follow up with state and local stakeholders regarding the implementation of SB 190 and the status of juvenile and young adult fee reform in California. It also includes recommendations to ensure full compliance with SB 190 and to realize the full benefit of fee abolition.

### Key Findings

Based on extensive research, we found that California counties have complied with most of the central provisions of SB 190, and many have undertaken further reforms in the spirit of SB 190. We also found important instances in which counties are not complying with SB 190.

#### SB 190 Fee Assessment (Prohibited by SB 190)

1. In compliance with SB 190, all counties stopped assessing new juvenile fees against families before January 1, 2018.

2. In violation of SB 190, some counties continue to assess prohibited fees against families through child support orders for out-of-home placements made as a condition of release or probation.
3. In violation of SB 190, some counties continue to assess prohibited fees against young people ages 18–21 in criminal court for home detention, electronic monitoring, and drug testing.

#### SB 190 Fee Collection (Not Addressed by SB 190)

1. Most counties have voluntarily stopped collecting juvenile fees assessed prior to January 1, 2018, relieving families of the burden of paying more than \$237 million in fees.
2. Some counties continue to collect juvenile fees assessed prior to January 1, 2018 totaling more than \$136 million.
3. San Diego, Orange, Riverside, Tulare, and Stanislaus account for more than 95% of the total still being collected from families.

#### SB 190 Fee Information (Not Required by SB 190)

1. Many counties have not notified young people and families of SB 190 fee relief.
2. Many counties have not updated internal- and external-facing SB 190 fee policies and procedures.

#### Other Fee Reforms (Not Required By SB 190)

1. One county refunded families for payments collected on unlawful juvenile fees.
2. Several counties stopped charging juvenile fees beyond those repealed by SB 190.
3. Several counties undertook additional fee reforms in the criminal (adult) legal system.

### Key Recommendations

Based on our findings regarding implementation and to relieve young people and families from the ongoing harm caused by currently and previously assessed fees, we make the following recommendations to county and state officials:

#### Recommendations to the Counties

1. Counties must stop assessing all SB 190-prohibited fees through child support orders and to young people ages 18–21 in criminal court.
2. Counties should voluntarily stop collecting and discharge all previously assessed SB 190 fees.
3. Counties should notify young people and families of all SB 190 fee relief and update all SB 190 related internal- and external-facing fee materials.

#### Recommendations to the State

1. The California Department of Social Services should require local child support agencies to comply with SB 190.
2. The California Legislature and Governor should enact a new law to make all previously assessed SB 190 fees unenforceable and uncollectable and to vacate all court judgments, stipulated agreements, and other instruments imposing SB 190 fees. . . .

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### **A 21<sup>st</sup> Century Criminal Justice System for the City of New Orleans (2012)**

THE PFM GROUP

#### Introduction: Moving toward a 21st Century Criminal Justice System in New Orleans

A University of New Orleans survey recently found that 61 percent of New Orleans residents cited crime as the most important issue in the city: the percentage of respondents citing crime as their primary concern was up from just 46 percent two years ago. Finding solutions to this problem is the top priority for Mayor Landrieu and the rest of the city's leadership.

Many factors go into the problem of crime in the United States and New Orleans. Decades of studies have demonstrated that certain individuals—based on socio-economic factors—are both more likely to commit crime and more likely to be victims of crime. Nationally, violent crime rates in the U.S. are higher than in other nations and scholars have noted that one difference may go to the availability of firearms.

For years, law enforcement officials have argued that so much of what goes into defining a place's crime problem is beyond their responsibility. Police are not responsible for school dropout rates. Prosecutors are not responsible for poverty rates. And judges are not responsible for the incidence of mental health problems in a community.

Nevertheless, in most communities, we charge those who comprise “the criminal justice system” with the responsibility for keeping streets and neighborhoods safe. At the same time, there are bounds set by law—by statute, by state constitution and by the federal constitution—as to what steps these officials may take to fulfill that responsibility.

Overall, we want to have a community where both civil rights and civil order are maintained. Meeting these twin goals—civil rights and civil order—is made more complicated by the fragmented nature of the criminal justice system. It has been noted that:

“[I]f a system is thought of as a smoothly operating set of arrangements and institutions directed toward the achievement of common goals, one is hard pressed to call the operation of criminal justice nonsystem.”

The New Orleans criminal justice system is highly fragmented—with the Mayor having direct control over some agencies (e.g. Police, Human Services), but with independently elected officials (e.g. Sheriff, District Attorney, judges, clerks) controlling the rest. The fragmentation in authority is matched by a fragmented process of funding—including funds from the City, state and federal governments, as well as outside grants and a significant amount of funding derived through fees and fines collected from defendants.

### Opportunities for Change

Over the last several years, the city and various parts of the criminal justice system have launched a series of reforms.

- In July, the city entered into a consent decree with the Department of Justice that addresses a wide variety of issues at the New Orleans Police Department from community policing practices and training to internal investigations and paid police details. The Mayor has already implemented many of the requirements in the decree and in the next four years it will serve as a detailed, comprehensive road map for reform.
- NOLA for Life is a strategy to reduce homicides. Prevention is at the core of this plan—jobs, opportunity, rebuilding neighborhoods and improving the police department. But it all starts with one goal: stop the shooting.
- The Mayor’s Strategic Command to Reduce Murders regularly brings together representatives of the criminal justice system, schools, community and civic organizations to review and analyze each homicide so as to develop prevention strategies.
- After his appointment in May 2010, Police Superintendent Ronal Serpas announced a 65 point plan to reform the New Orleans Police Department and implementation of the plan began late that year.
- The New Orleans Police Department has significantly reduced the number of individuals stopped for committing a crime who are arrested. Instead, the Department now routinely issues summonses to offenders for lower level offenses.
- With the support of the Mayor and the City Council, a pre-trial services program was launched in the Criminal District Court under the guidance of the Vera Institute of Justice and with the cooperation of the Orleans Criminal Sheriff. The program is designed to help judges who set bond better assess the threat criminal defendants pose to the public. The result is that many low level offenders who are not a threat to public safety are released on their own recognizance rather than being held in jail awaiting trial.

- The Mayor convened a Criminal Justice Working Group that included the Sheriff, Judges, District Attorney, and other community leaders to consider a variety of topics relating to the Orleans Parish Prison.
- Greater cooperation between the New Orleans Police Department and the District Attorney has significantly reduced screening time for felony arrests.
- The District Attorney now brings misdemeanor charges under provisions of municipal ordinance. The DA has also shifted nearly all state misdemeanor cases to Municipal Court. This has significantly reduced the workload at the Criminal District Court.
- The New Orleans Police and Justice Foundation with funding from the federal government, and partners across the criminal justice system are working collaboratively to upgrade the system's technological capabilities through the Orleans Parish Information Sharing and Information System (OPISIS).
- The City Council has also actively supported efforts for reform across the criminal justice system and its Criminal Justice Committee has frequently served as a forum for discussion of new and innovative approaches to public safety. . . .

### The Need to Do More

Despite these significant developments, our report finds that there is a need to do more. Interviews with leadership across the criminal justice system—and with organizations outside of the criminal justice system—indicate a consensus on the need to do more and to do more in a collaborative and coordinated manner.

As detailed below, the cost of the criminal justice system is significant—with approximately \$300 million annually expended in local, state, federal, grant and self generated dollars on a system that employs more than 3,200 full time employees or equivalents. This system includes police, prosecutors, public defenders, investigators, coroner's staff, judges and clerks and their judicial support staff. In addition, because of the disproportionate number of state prisoners, probationers and parolees who come from New Orleans, the state—independent of funds expended through local agencies—also spends an estimated additional \$75 million on the criminal justice system and these estimates of spending do not account for costs in the education, health and human services agencies that are directly related to the operations and policies of the criminal justice system.

As will be discussed in great detail below, virtually every non-mayoral agency involved in the criminal justice system—courts, prosecutor, public defender, clerks—has and exercises control over its own budget.

It is hard to link spending to results when data on the actual operation of the criminal justice system is scarce and often unreliable. As part of our research, we sought



data from multiple agencies across the criminal justice system. Virtually every agency provided at least a partial response to our data requests. But, in many cases, different agencies responded by indicating that they did not have the data requested. Still, in other cases, there were instances where leaders of different agencies indicated that the data might be available but was likely unreliable.

In part, the lack of data is due to gaps in technology. A fair amount of the operations of the criminal justice system remain based on hand-written summonses and notes. In many cases, data is largely used for individual case management – and it is either difficult or impossible to access that individual case data and use it for aggregate analysis.

In other cases, data may exist but it is rarely used in decision-making. With the exception of the Police Department, there is no sign that any of the other components of the criminal justice system regularly review data to measure or manage performance. In part this may be because data critical to assessing the operation of one or more agencies may be held by a different agency. So, for example, to the extent that courts wish to understand case processing time, they need to be aware of annual length of stay data from the Sheriff.

Performance metrics that are used internally or to inform the City budget development process are limited. They frequently measure inputs or outputs, with little emphasis on outcomes. There is little use of benchmarks to assess the adequacy of staffing of different parts of the criminal justice system. In fact, there is no consistent means of assessing the management of the overall workload of the criminal justice system and, therefore, assessing the staffing capacity of individual components of the system.

Perhaps most importantly, there is no system-wide assessment of performance. Even if individual components of the criminal justice system were performing – from a narrow perspective – optimally in terms of efficiency and effectiveness, there is no way to determine whether the system as a whole is doing so. In the case of the criminal justice system, the whole may truly equal something other than the sum of all parts. Because there is no centralized entity charged with measuring the overall performance of the system, there is no single Criminal Justice Dashboard for the system.

Given the fragmented nature of the current system, opportunities for reform exist that would produce savings for the system as a whole without affecting the effectiveness of overall crime reduction efforts. Moreover, some – if not all – of those savings could be reinvested in meeting system-wide needs. In addition to coordination within the criminal justice system, there are “win-win” opportunities for greater cooperation between different funders – especially local and state government – to better achieve the goals of civil order and civil rights, public safety and justice.

## Framework and Principles for Reform

The remainder of this report will outline the details of our findings—our detailed assessment of current levels of funding for the New Orleans criminal justice system and an analysis of the current measures of workflow and workload within the criminal justice system. We will outline recommendations for reform—both in terms of performance measures and policy changes. These recommendations are guided by the framework and principles detailed herein.

Our framework starts with the notion that while different parts of the criminal justice system play different roles in its operation, all components of the system should work toward the goals of civil rights and civil order—public safety and justice. The very design of the criminal justice system often calls for its different components to act as checks on one and other—police, prosecutors and judges all have varying levels of discretion that limit powers of the other—if not to sometimes act as adversaries—as in the relationship between prosecutors and public defenders.

Nevertheless, more often than not, there need not be a tradeoff between civil order and civil rights. An effective and efficient criminal justice system requires both.

Some have suggested that a drive toward efficiency is inherently inconsistent with a goal of justice—that speed and limited resources can have the effect of limiting the rights of defendants or limit the ability of police or prosecutors to fully investigate a crime. In fact, efficiency in the operation of the criminal justice system is essential to justice. For a crime victim—and for the community as a whole—swift and certain punishment of crime is at least as important as its severity. And little justice is done for the innocent defendant who sits in a jail cell awaiting trial.

At a higher level, efficient utilization of scarce resources is also critical to achieving public safety and justice. To the extent that funds or other resources are deployed inefficiently—to the extent that the system fails to achieve its goals of protection of civil rights and civil order at the lowest cost—the waste of limited resources reduces their availability for programs that offer the best hope of achieving the twin goals of the system.

Collaboration and coordination within the criminal justice is not always possible but it is almost always desirable. Very few decisions that take place within the criminal justice system have effects limited to one component of that system. For example, an increase in arrest activity by the police can drive an increase in workload for prosecutors, public defenders and the courts, and can increase the number of offenders spending time in Orleans Parish Prison—and ultimately in the state system as well.

Given this framework, we offer a series of principles that should guide systemic efforts and reform – and that guide our recommendations below.

Prevention can be the most effective and efficient way to achieve desired outcomes: it is better to place a guardrail at the top of a cliff than to station an ambulance at the bottom. This focus on prevention, reflected in the Mayor's approach to homicide through NOLA for Life, needs to be extended to crime in general.

Efficient and effective approaches to problem solving involve a targeted approach. Not all neighborhoods or communities are equally affected or impacted by crime or the criminal justice system. As a result, the most effective and efficient solutions to the problem of crime should be targeted and community-based.

Targeted efforts require data to target with. Moreover, data driven solutions to the crime problem require accurate and timely data and analysis across the entirety of the criminal justice system. Data is important as well to constantly measure and manage programmatic performance. In other words, data is key to both policy planning and management.

A fragmented system will lead to a fragmented inefficient and ineffective result. Just as the Mayor has recognized the need for a high level focus on the specific problem of homicide, all parties in the criminal justice system need to recognize the need for a focus on coordination and collaboration.

### The Role of City Government

Some suggest that the role of city government in achieving reform in the criminal justice system is limited. After all, statutory and other legal barriers that are a function of state law often drive the fragmentation that produces the limits on efficiency and effectiveness discussed above and throughout this report.

Regardless, the city must lead – no matter the limits of its powers.

Ideally, this would be a collaborative effort – and that is the course that we would initially recommend for the Mayor and for the other entities within city government. Absent cooperation, however, the Mayor and the city should use the full force of their authority to effect the changes outlined in the recommendations of this report.

Many of these recommendations will require the support of other parts of the criminal justice system. To win these reforms, the city should be willing to exercise its considerable authority over the budgets of different parts of the criminal justice system – including a willingness to litigate that authority. Moreover, where necessary, the city

should be willing to win changes that allow reform from the state—which, as we will discuss, also bears the cost of inefficiencies and ineffectiveness in the criminal justice system.

Absent city leadership and strong executive sponsorship, it will be hard to achieve the changes needed to bring New Orleans' criminal justice system into the 21st century. The cost of failure—both fiscal and in the safety of New Orleans' residents—is too high not to try.

### Project Methodology

In March 2012 the City of New Orleans Chief Administrative Office (CAO) engaged Public Financial Management (PFM) to conduct an operational assessment of the Orleans Parish Criminal Justice system. The project work plan included the following four objectives:

- Identify the current budget of the criminal justice system in New Orleans, including all sources of spending and revenue
- Document and measure the current process of criminal cases in New Orleans
- Determine best practices in measurement of performance of criminal justice system and its individual component agencies
- Outline best practices that could achieve system wide improvements in the effectiveness and efficiency of the overall criminal justice system

To accomplish all of these objectives, the project team conducted more than 30 meetings with key stakeholders in the Orleans Parish criminal justice system. The project team also thoroughly reviewed metrics identified in the City budget, as well as other metrics utilized by the criminal justice system and then reviewed best practices in performance measurement and performance standards. The project team also determined what data was available for the New Orleans criminal justice system, a critical component to improving the ability of managers to make operational changes to the system.

Finally, based on our observations and data collected, we have outlined our findings and recommendations that should guide ongoing discussion of the operations and budget of the New Orleans criminal justice system. . . .

## **Paid in Full: A Plan to End Money Injustice in New Orleans (2019)**

Jon Wool, Alison Shih & Melody Chang

VERA INSTITUTE OF JUSTICE

The role that money plays in criminal justice systems across the country has come under increased focus in recent years. Steep costs are levied early in the process in the form of money bail, which becomes a requirement for release pretrial, and later through the imposition of fines and fees that accumulate as debt. People who cannot pay are jailed while their cases proceed, as are those who make the difficult choice to support their families rather than pay what the system demands. The result is a de facto system of money injustice.

These practices have long plagued New Orleans, driving unnecessary and harmful jail incarceration, pulling millions of dollars out of the pockets of struggling families, grounding the legal system in fundamental unfairness, and costing the city's taxpayers more than if the system were funded directly through general tax dollars. Despite huge reductions in the past few years, New Orleans still puts people in jail at a rate 30 percent higher than the national average. This burden falls disproportionately on black New Orleanians: of the more than one third of people in jail who are incarcerated because they can't afford to pay money bail, eight in 10 are black. And black families pay 88 percent of the dollars extracted through money bail.

In August 2018, two federal courts ruled that judges cannot lawfully impose money bail or enforce conviction fees because their own institution stands to benefit financially from these same decisions. These rulings command the end to money injustice. To its credit, New Orleans has been taking the initiative. In 2017, the city council passed an ordinance that virtually eliminated the use of money bail for people arrested for municipal offenses. Later that same year, the Criminal District Court launched an initiative to increase the number of lower-risk arrestees released without money bail. In 2018, the Juvenile Court eliminated money bail and all discretionary conviction fees. Finally, following the federal court rulings, the city took the significant first step of replacing all revenues the Criminal District Court would lose by eliminating money bail and conviction fees. The system is now paid in full. The next step is to align court practices with this new system of funding to end money injustice and replace it with a fairer and safer system. This report sets out a blueprint to achieve that reality.

### **Blueprint for Ending Money Injustice**

To bring about necessary reform, the city will need to commit to continually funding the court, Orleans Public Defenders, and Orleans Parish District Attorney by reinvesting some of the cost savings from reducing the jail population. The court must transition to a model of presumptive release or carefully limited detention – rather than a

model based on payment—and eliminate conviction fees, prospectively and retroactively. The new model for determining pretrial release will restrict the possible use of preventive detention to those individuals arrested for a violent felony for which state law requires a prison sentence if convicted or individuals who are assessed at the highest risk level on the Public Safety Assessment (PSA), the risk assessment instrument used by the New Orleans court. All others would be released with varying levels of support and supervision, without imposing any conditions of release that require the payment of money.

For those individuals considered for detention, judges would conduct a full evidentiary hearing to determine the likelihood, nature, and degree of danger posed and potential ways to mitigate that danger with support. A person could only be detained pretrial if a judge made a finding by clear and convincing evidence that no conditions of release exist that would mitigate the risk of serious and imminent danger to a particular individual or the community. Moreover, judges would use their authority to release all individuals who, but for their status of being on probation, would otherwise be released pretrial.

Replacing money bail with the court practices outlined in this blueprint is projected to reduce the number of New Orleanians in jail on any given day by 304 to 687 people—a reduction of between 25 and 56 percent, and possibly even more. Thousands of New Orleanians would no longer live under the threat of arrest because of their inability to pay their conviction fees. New Orleans families will be able to keep the nearly \$9 million they now spend each year to buy their freedom and spend that money on basic necessities instead. The city will save \$5.5 million in taxpayer money from unnecessarily jailing people and will be able to reinvest it in ways that will help support the community.

By taking these actions, Criminal District Court judges, the mayor, and city council members will make New Orleans the first city in the country to replace money bail and conviction fees—the twin pillars on which money injustice stands—with a fair, safety-promoting, and financially stable system of justice.

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### **The Limits of Fairer Fines: Lessons from Germany (2020)**

Mitali Nagrecha

CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL

Over the last few decades, advocates in the United States have exposed the injustices of high fines and fees that courts charge people sentenced to criminal and civil violations. Courts impose fines as punishment for offenses—often in addition to other punishment such as probation or jail—and they charge fees (also referred to as costs or surcharges) to

fund the court and other government services. The number of fees and the amounts assessed have been increasing over the last decades, in part because fees are being used to generate revenue for local and state governments. Rarely, if ever, do U.S. courts consider people's ability to pay before imposing these sanctions. When people are unable to pay, they can become trapped in the system, facing a cycle of consequences including additional fees, court hearings, warrants, arrest, and incarceration.

In response to advocacy exposing how these punitive practices harm people and communities, jurisdictions have begun to reform. The most direct efforts seek to repeal revenue-raising fines and fees. More common, however, is the adoption of requirements that courts assess people's ability to pay at the sentencing hearing, and/or before punishing people for nonpayment. Though high monetary sanctions are prevalent in all courts, much of this reform attention has focused on misdemeanor courts that sentence ordinance violations and misdemeanor crimes. This is because fines are a common component of misdemeanor criminal sentences, and because there are clearer conflicts of interest inherent in the structure of some lower level courts that rely on fines and fees to fund their operations.

It is in this reform context that academics, advocates, and government leaders have considered day fines as a potential model for the United States. Day fines are used in over 30 countries in Europe and Latin America to calculate fine amounts that are tailored to people's ability to pay. Day fines are set using a two-part inquiry. Courts first consider the nature and seriousness of the offense, measured in units or days. For example, a common low-level misdemeanor may receive 20 units. Courts then calculate how much the person can pay per day/unit based on their individual financial circumstances. The amount a person must pay per day is called the daily rate. Someone earning very little may be required to pay \$5 per unit for a total fine of \$100, while someone earning more may be required to pay \$20 per unit for a total fine of \$400. Day fines provide a framework for setting a fine based not just on the nature of the offense, but also on how much a fine will impact the person given their financial circumstances. The resulting fines are theoretically more fair because people of different means experience the fines similarly. A \$400 fine affects a person earning that amount per week differently than a person who earns that amount in one day. In the United States, day fines hold the promise not only of making fines more fair, but also of making fines affordable to avoid the spiral of negative consequences that people face upon nonpayment.

Despite the theoretical resonance of day fines as a potential solution, there has been very limited information available about how this model works in practice. This project fills this knowledge gap.

This Project

To understand how day fines are implemented in practice, we chose to study Germany's system. . . .

### Summary of CJPP's Findings and Analysis

Below is a summary of our assessment of Germany's system and how the United States might learn from it. We discuss three key issues: how ability to pay is defined, how financial information is gathered and used to set the daily rate, and how day fines might fit into misdemeanor courts.

1. Policies for calculating the daily rate and broad judicial discretion can make it difficult for ability-to-pay reforms such as day fines to achieve equality and fairness.

The extent to which a day fines system achieves tailored, payable fines hinges considerably on the jurisdiction's policies for calculating the daily rate. This is because the daily rate is the mechanism for tailoring fines to people's individual financial realities. The effectiveness of day fines depends on the standards jurisdictions adopt for calculating the daily rate.

- In Germany, the starting place for calculating the daily rate is a person's net income, which is their daily take-home pay after common payroll deductions such as income tax and contributions to social security. Courts ask how much income a person receives in a month and divide that by 30 days to arrive at net income. Judges and prosecutors may also consider "other relevant assessment factors" and the person's "personal and financial circumstances" to increase or decrease net income.
- In practice, German judges usually make a few deductions from net income to arrive at the daily rate, such as a 15% deduction for each child. But these deductions are not standardized and vary greatly depending on the decision maker. Nor are these deductions sufficient. German law does not require – and judges do not regularly make – deductions for basic living expenses like rent, healthcare, and food. In short, the daily rate in Germany does not fully reflect people's financial realities.
- As the fare evasion case study illustrates, in absolute terms, German fine totals are quite high, even in the best-case scenario. A person receiving public benefits totaling 424 euro per month, who could not afford to pay 2.90 euro train fare and therefore evaded the charge, must pay between 35% and 70% of one month's income as punishment. The wide range is the function of the differences in approach among decision makers: some deduct for rent and other debts, some add on poor people's non-cash housing subsidies as a source of income, and some give "discounts" to low-income people.
- Evidence suggests that many people fined in Germany are unable to pay their fines. A significant number of people incarcerated for nonpayment in Germany have low incomes or are facing employment insecurity.



The fact that Germany considers ability to pay, therefore, does not guarantee that the resulting fines will be payable. Day fines are more likely to achieve greater equality if the jurisdiction's standards for calculating the daily rate require and guide courts to deduct from people's net income their reasonable living expenses. For example, if German courts deducted people's subsistence expenses, recipients of public benefits could be charged only up to 30% of their monthly benefit amount, reserving for themselves the remaining 70%, which is the amount the German government has determined they need for basic living expenses. The daily rate in that case would be between one and five euro (not the more common 10 and 15 euro currently assessed).

But Germany's experience also shows that it is not just a harsh daily rate standard that generates fines that are too high. Judges and prosecutors must exercise their discretion to set payable fines. Germany's fines are high even though decision makers support day fines and recognize that most people sentenced to fines are lower-income. Judges and prosecutors that we interviewed believe in the necessity of considering ability to pay before sentencing fines. As one interviewee said about day fines: "Everyone . . . is treated the same according to their economic circumstances. That's the beauty of the system." Judges and prosecutors also acknowledge that day fines amounts disproportionately impact people living in poverty who must forego basic necessities to pay fines. Yet despite their support for day fines and their understanding of the burden of fines for people with lower incomes, they do not use their discretion to set fines that are affordable for people with lower incomes.

Our research suggests two reasons why decision makers fail to exercise their discretion to set lower fines:

- Too often, German decision makers assess ability to pay based on a misunderstanding of poverty. One judge insisted, "no one in Germany has so little money left that they are forced to evade fares." In reality, a large percentage of people sentenced to day fines for fare evasion are poor and are ultimately incarcerated because they cannot pay high fines. Several interviewees did not believe that anyone truly could not afford to pay, and they attributed nonpayment to people simply not trying hard enough. One prosecutor commented, "I've never seen anyone go to jail [for nonpayment], as long as he's willing"; another stated, "Well, I always assume that people aren't stupid enough to go to prison for – yes, nonpayment of a fine. . . . I do assume anyone can manage [paying]." Decision makers' assessments about what amounts are affordable and their lack of understanding of people's barriers to payment influence how they approach calculating the daily rate.
- Germany's history adopting day fines also illustrates the need for strong institutional support for change or else system actors will revert to past practices.

Germany's weak standards for calculating ability to pay—standards that do not require courts to deduct people's living expenses—arose out of institutional and political resistance to lowering fines below pre-reform amounts. Decision makers and legislators anchored their understanding of fair monetary sanctions to their intuitions about what people could or should pay, which were based on their past practices.

System actors in the United States are just as likely as their German counterparts to be influenced by their misunderstanding of the realities of poverty and the draw of past practice. This creates challenges for the robust adoption and implementation of fairer fines. There are multiple levers by which judges and prosecutors can influence the final fine amount. They can adjust the criminal charges to affect the unit ranges and they can set the number of units via an open-ended inquiry. Both of these decisions will impact the total fine amount. They can also use their discretion when setting the daily rate. Even when the daily rate must be calculated according to a formula or some other specific method, there is still room for individualized determinations by the court. Experience in other countries shows that even after day fines systems are adopted, decision makers often revert back to fine amounts that were imposed before day fines were implemented.

Jurisdictions in the United States should evaluate whether they can pass a sufficiently robust standard for determining ability to pay, and whether decision makers will change their attitudes and practices with respect to fines. Strong standards and system actor buy-in are necessary for day fines to be effective. Otherwise, past practices will prevail. A weak daily rate formula or poor implementation that results in unaffordable fines will not accomplish change. Indeed, such half measures could provide a false veneer of reform that could prevent or delay further meaningful changes. In short, decision makers in the United States must be prepared to impose substantially lower fines on people with lower incomes.

In more challenging political or institutional climates, advocates may want to first focus on educating the public and stakeholders about the need for meaningful change, to make sure that any day fines system that is ultimately implemented actually reduces the fines of those who have more limited means. This process of advocacy and education should be in partnership with communities and impacted people to ensure that the realities of living in poverty are adequately understood by advocates and system actors alike.

## 2. Germany's system provides a model for how to determine a person's financial resources

Germany's day fines system also sheds light on how to fairly assess people's financial situation for purposes of day fines calculation. In Germany, judges rely on people's self-reporting and do not require documentation—a process that can be both accurate and efficient. . . .

But additional basic procedural protections are necessary so that people know how their financial information is going to be used and have assistance in representing themselves. To be fair to the people being sentenced, U.S. courts will have to heed the lessons from Germany and increase procedural protections. People should have access to counsel and sufficient notice and information so that they are able to prepare for their cases. Jurisdictions will have to be especially attuned to providing people facing barriers such as mental illness adequate support in representing their financial circumstances. Otherwise, the system risks failing to help those that need it the most.

### 3. Day fines may not be the right solution for fixing misdemeanor systems

Our research in Germany suggests that U.S. jurisdictions contemplating day fines should consider whether day fines will truly solve entrenched problems in their misdemeanor courts.

In Germany, day fines are used to sentence a high volume of low-level cases. Of all the cases sentenced to day fines in 2018, 42% received less than 30 units – suggesting that the severity of the offenses were quite low. Another 49% were sentenced to between 31 and 90 units. Two crimes of poverty, fare evasion and low-level theft, accounted for one quarter of Germany's day fines sentences in 2018.

German courts process thousands of these low-level cases each day, relying on the summary proceeding process to swiftly move cases from arrest to punishment. Decision makers see fines sentences as less serious, and take procedural shortcuts – and in some cases flout basic procedural protections.

This raises concerns for day fines in U.S. misdemeanor courts, which also prosecute high volumes of low-level cases. In the United States, many misdemeanor cases are the result of policing practices that target low-income, black and brown communities. Many of the misdemeanors prosecuted are crimes of poverty or offenses that criminalize common behaviors such as jaywalking. Misdemeanor convictions are also the result of lax procedural protections in low-level cases. These problems are inextricable from the problem of disproportionate monetary sanctions.

Our research in Germany suggests that a jurisdiction's efforts may, in some cases, be better spent on advocacy that will address structural problems in the misdemeanor system, rather than on trying to right-size misdemeanor sentences using day fines. Consider prosecution of fare evasion. A person who cannot pay a \$3 fare surely cannot pay even a low fine. Right-sizing fines for this offense does not solve the underlying issue that many people charged with fare evasion cannot afford to pay for the public transportation that they need to get to school, work, and medical appointments. Criminalizing fare

evasion does not solve this problem, it just creates additional problems. Jurisdictions should instead work towards solutions that will actually help people access transportation, such as providing fare discounts or free passes.

For many cases prosecuted in U.S. misdemeanor courts, day fines may not be a solution, but instead may obscure the structural problem with criminalizing certain behavior, or even entrench bad practices. Jurisdictions may accept that they must impose lower sanctions, but nevertheless continue processing many—or even more—cases to generate sufficient revenue.

In some jurisdictions, day fines may help tackle disproportionate and harmful monetary sanctions practices. In others, focusing on day fines may distract advocates and lawmakers from attempting more effective changes, such as reducing the misdemeanor docket, addressing policing disparities in low-income and minority neighborhoods, and eliminating the conflicts of interest inherent in funding courts through fines and fees. Advocates should consider this broader context as they decide whether day fines make sense in their jurisdictions.

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#### IV. In the Courts and Legislatures, Circa 2020, and Shadowed by COVID-19

Excerpted below are materials that provide a partial account of the many lawsuits and legislative initiatives within the last two years and, in the last half year, in light of COVID-19. As the judicial opinions reflect, some federal appellate courts are proffering limited readings of the 1980s precedents and narrowing the scope of constitutional protection for the intersection of poverty and of the “use” (voluntary or not) of courts.

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##### Judicial Decisions

##### *Judges, the Scope of Their Authority, and Conflicts of Interest*

###### **Cain v. White**

United States Court of Appeals for the Fifth Circuit  
937 F.3d 446 (5th Cir. 2019)

James E. Graves, Jr., Circuit Judge:

Plaintiff-Appellees are former criminal defendants in Orleans Parish, Louisiana who sued Defendant-Appellants, Judges of the Orleans Parish Criminal District Court (“OPCDC”), under 42 U.S.C. § 1983. Plaintiffs alleged the Judges’ practices in collecting criminal fines and fees violated the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment in Plaintiffs’ favor. We affirm, although we emphasize at the outset that the resolution of this case is dictated by the particular facts before us.

##### I. Background

###### A. The Parties

Plaintiff-Appellees are Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell, former criminal defendants in OPCDC who pleaded guilty to various criminal offenses between 2011 and 2014. All but Reynaud Variste qualified for and were appointed public defenders. At sentencing, Plaintiffs were assessed fines and fees ranging from \$148 to \$901.50. All were arrested for failure to pay their assessed fines and fees, given a \$20,000 bond, and spent anywhere from six days to two weeks in jail.

###### B. The Judicial Expense Fund (“JEF”)

The JEF is established pursuant to La. Rev. Stat. § 13:1381.4 and consists of OPCDC revenue that is not designated or restricted for a specific purpose. Accordingly, it is also known as the General Fund. The JEF receives funding from a variety of sources, including the City of New Orleans and bail bond fees, but approximately one quarter of the monies it receives comes from the court's collection of fines and fees.

The Judges have exclusive control over how the JEF is spent, and generally use it for the following:

salaries and related-employment benefits (excluding the judges), CLE travel, legislative expenses, conferences and legal education, ceremonies, office supplies, cleaning supplies, law books, bottled water, jury expenses, telephone, postage, pest control, dues and subscriptions, paper supplies, advertising, building maintenance and repairs, cleaning services, capital outlay, equipment maintenance and repairs, lease payments, equipment rentals, professional and contractual expenses, the drug testing supplies, coffee, transcripts, insurance, and miscellaneous.

Money from the fund may not be used to supplement the Judges' own salaries, although, as noted above, it can be used to pay the salaries of court personnel. La. Rev. Stat. § 13:1381.4(D). Each judge is allocated \$250,000 per annum for personnel salaries and \$1,000 for court costs from the JEF. The fund also covers the cost of professional liability insurance coverage as authorized by the Louisiana Supreme Court. "For some time prior to 2011, some judges received supplemental benefits" from the JEF in the form of supplemental health insurance policies and reimbursement for out-of-pocket medical expenses; however, this practice fully ended by 2012 following an investigation by the Louisiana Legislative Auditor.

When collection of the fines and fees is reduced, the OPCDC can have a difficult time meeting its operational needs, leading to cuts in services, reduction of staff salaries, and leaving some positions unfilled. During these times, the Judges have attempted to increase their collection efforts and have also requested assistance from other sources of funding, including the City of New Orleans.

### C. The Fines and Fees

Several Louisiana statutes and codes permit the Judges to assess fines and fees to criminal defendants at sentencing. Some fines and fees have specific purposes and are collected to be distributed for specific statutory purposes, while others are collected and then split between the court and other agencies. However, some fines and fees go directly into the JEF. The statutory requirements of yet other fines and fees is ambiguous.

#### D. OPCDC's Debt Collection Practices

Prior to this lawsuit, the Judges delegated collection authority to the Collections Department, established by the OPCDC judges in the late 1980s “to (1) facilitate the collection of costs and fines [and] (2) to minimize the administrative and logistical burden on” the OPCDC’s dockets. The Collections Department, supervised by both Mr. Kazik and the Judges, worked with criminal defendants in creating payment plans, accepting payments, and granting extensions. . . .

Before issuing a warrant for a defendant’s arrest for failure to pay a court debt, the Collections Department would send two form letters to the defendant warning them of their overdue fines and fees and the possibility of arrest for failure to pay. If checking the court dockets or probation and jail records did not reveal a reason for nonpayment, the Collections Department issued an alias capias warrant for contempt of court and generally set surety bail at \$20,000. A person imprisoned on one of these warrants would usually remain “in jail until their family or friends could make a payment on their court debt, or until a judge released them.”

After Plaintiffs filed the instant suit, the Judges withdrew the Collections Department’s authority to issue warrants, recalled all active fines and fees warrants issued prior to September 18, 2015 (except those where restitution remained unpaid or the individual had not appeared in court), and wrote off approximately \$1,000,000 in court debts. The Judges now handle collection issues on their own dockets, although they still issue alias capias warrants for failure to pay fines and fees. At the time of the district court’s summary judgment ruling, there was no evidence that the Judges had ever instituted a practice of considering a defendant’s ability to pay before jailing them for failure to pay their court debts.

#### E. Procedural Background

Plaintiffs brought this action under 42 U.S.C. § 1983, alleging that the Judges’ collection practices violated their Fourth and Fourteenth Amendment rights, as well as Louisiana tort law. The only one of their seven claims at issue on appeal is Count Five, summarized by the district court as follows:

Defendants’ policy of jailing indigent debtors for nonpayment of court debts without any inquiry into their ability to pay is unconstitutional under the Due Process clause and the Equal Protection Clause of the Fourteenth Amendment, *and the Judge’s authority over both fines and fees revenue and ability-to-pay determinations violates the Due Process Clause.*

*Cain v. City of New Orleans*, 281 F. Supp. 3d. 624, 633 (E.D. La. 2017) (emphasis added). The district court granted summary judgment to Plaintiffs on both portions of Count Five. The district court then certified a class and issued a declaratory judgment.

The Judges only challenge the portion of the district court's declaratory judgment which declared that "with respect to all persons who owe or will incur court debts arising from cases adjudicated in OPCDC, and whose debts are at least partly owed to the OPCDC Judicial Expense Fund, the Judges' failure to provide a neutral forum for determination of such persons' ability to pay is unconstitutional." They do not challenge the district court's judgment stating that "the Judges' policy or practice of not inquiring into the ability to pay of such persons before they are imprisoned for nonpayment of court debts is unconstitutional." . . .

### III. Discussion

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927). However, "[a]ll questions of judicial qualification may not involve constitutional validity." *Id.* at 523. The issue here is whether the Judges' administrative supervision over the JEF, while simultaneously overseeing the collection of fines and fees making up a substantial portion of the JEF, crosses the constitutional line.

#### A. "Average Man as Judge" versus "Average . . . Judge"

The Judges primary argument is that the district court improperly applied the "average man as judge" standard rather than the "average judge" standard when determining whether the Judges' interest in the JEF violated due process. According to the Judges, the "average man as judge" standard is applied in situations where "the impartiality of non-judges acting as judges" is called into question, not cases where the "average judge's" impartiality is under debate. Essentially, the Judges argue that an average *man* might be swayed by the institutional interest at play here, but not an average *judge*. The caselaw simply does not support such a distinction.

#### 1. Legal Background

In *Tumey*, the mayor of an Ohio village presided over a "liquor court," which allowed him to try and convict individuals alleged to unlawfully possess intoxicating liquor within the county. *Tumey*, 273 U.S. at 515. The Ohio statutes . . . allowed the mayor to impose a fine on those convicted and to order the person sentenced to remain in prison until the fine was paid. *Id.* at 516. As remuneration for his troubles, the mayor could retain



the amount of his costs in each case . . . . In addition, the village over which the mayor presided received half the funds from the imposed fines (the other half went to the state). *Id.* at 534–35.

Eventually, a defendant challenged the mayor's qualifications to hear his case and the Court found the defendant "was entitled to halt the trial because of the disqualification of the judge, which existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535. The Court observed,

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law. *Id.* at 532.

While *Tumey* was generally thought to focus on a judge's financial interest, both personal and institutional, *In re Murchison*, 349 U.S. 133 (1955) established a separate line of Supreme Court cases focusing on a judge's possible "conflict arising from his participation in an earlier proceeding." *Caperton*, 556 U.S. at 880. In *Murchison*, the unconstitutional conflict came from a judge who, as allowed by statute, had been examining witnesses as a "one-man judge-grand jury" in deciding whether criminal charges should be brought. *Murchison*, 349 U.S. at 133–34. . . . The Court concluded this dual-role violated due process, and quoted *Tumey* in saying that "[e]very procedure which would offer a possible temptation to the average man as a judge \* \* \* not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Murchison*, 349 U.S. at 136.

In a case fairly similar to *Tumey*, the Supreme Court again addressed the possible institutional biases inherent in another mayor's court. *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57 (1972). In *Ward*, an Ohio statute allowed "mayors to sit as judges in cases of ordinance violations and certain traffic offenses" and the "fines, forfeitures, costs, and fees imposed by" the mayor in these courts formed a major part of the village's funding. *Ward*, 409 U.S. at 57–58. . . .

. . . [T]he Court found the mayor's court in *Ward* presented "a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'" *Id.* at 60.

Over a decade later, the Supreme Court again had occasion to discuss what level of financial interest might render "the average . . . judge" unable "to hold the balance nice,

clear and true.” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986). In *Aetna*, a justice on the Alabama Supreme Court participated in a decision regarding punitive damages in bad faith insurance claims while he was simultaneously a lead plaintiff in a class action suit seeking punitive damages on a bad faith claim. *Id.* at 817. . . .

While it was possible that the justice was not influenced by his participation in the state court case, under the principles laid out in *Tumey*, *Murchison*, and *Ward*, actual influence was not necessary – it only mattered whether the situation “would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.” *Aetna*, 475 U.S. at 825. Because of Justice Embry’s participation in the case, the Court found the “appearance of justice” best “served by vacating the decision and remanding for further proceedings.” *Id.* at 828.

## 2. Judges’ Argument

Disregarding the principles undergirding *Aetna*, the Judges argue that *Aetna* essentially came along and established a new standard by shortening *Tumey* and *Ward*’s “average man as judge” to “average . . . judge.” *Aetna*, 475 U.S. at 822, 825. While the Court did alter “average man as judge,” the Court applied the exact same principles discussed in *Ward*, *Murchison*, and *Tumey* to the Alabama Supreme Court justice. There was no articulation of a higher standard for judges, much less an explanation as to how such a standard might differ from that applied to mayors acting as judges. *Aetna*, 475 U.S. at 825. Furthermore, reading *Aetna* as the Judges suggest would mean reading *Aetna* to overrule *Murchison*, which applied the “average man as judge” standard to a sitting judge. *Murchison*, 349 U.S. at 136. We find it hard to believe that the Court overruled one of its cases with an ellipsis. Finally, the recent Supreme Court case of *Caperton* reinforces the idea that the standards announced, and the situations presented, in *Tumey* and *Ward* apply equally to judges and non-judges acting as judges. *Caperton*, 556 U.S. at 877–82.

The district court did not err in applying the principles from *Tumey* and *Ward* to the facts of this case.

### B. The Judges’ Institutional Interest in the JEF

#### 1. The District Court’s Reliance on *Ward*

The Judges next contest the district court’s reliance on *Ward* to find that the Judges’ pecuniary interest in the JEF “crosses the constitutional line.” They allege “[t]he district court erred in its blanket comparison of the Judges’ institutional interest here to the mayor’s institutional interest in *Ward*.” The Judges distinguish *Ward* by noting the mayor there had broad executive power over all the village finances and he was politically responsible for the town’s funds, whereas here the Judges only directly manage a portion

of the revenue from the fines and fees. Plaintiffs argue that the Judges' interest here is almost exactly like that in *Ward* because the Judges impose the fines and fees and exercise complete control over how the revenue generated from the fines and fees is spent.

The district court very thoroughly examined the ways in which the Judges have an institutional interest in the JEF. It observed that the "[f]ines and fees revenue goes into the Judicial Expense Fund," over which "the Judges exercise total control." *Cain*, 281 F. Supp. 3d at 654. It noted that while the money does not support the Judges' personal salaries, it largely goes to support the salaries of each Judges' staff. In addition, the district court noted that while some of the money collected from fees is earmarked for specific purposes, the revenue all goes to the JEF and makes up approximately one-fourth of the OPCDC's budget.

In *Ward*, "[a] major part of village income [was] derived from the fines, forfeitures, costs, and fees imposed" by the mayor in his court, and the mayor had "wide executive powers" . . . . *Ward*, 409 U.S. at 58. Here, the Judges have exclusive authority over how the JEF is spent, they must account for the OPCDC budget to the New Orleans City Council and New Orleans Mayor, and the fines and fees make up a significant portion of their annual budget. We agree with the district court that the situation here falls within the ambit of *Ward*. In doing so, we emphasize it is the totality of this situation, not any individual piece, that leads us to this conclusion. In sum, when everything involved in this case is put together, the "temptation" is too great.

Given this constitutional infirmity, we find the Judges' remaining arguments unavailing.

#### IV. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court. The Judges' motion to supplement the record is DENIED.

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**Caliste v. Cantrell**

United States Court of Appeals for the Fifth Circuit  
937 F.3d 525 (5th Cir. 2019)

Gregg Costa, Circuit Judge:

"No man can be judge in his own case." Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND, § 212, 141 (1628). That centuries-old maxim comes from Lord

Coke's ruling that a judge could not be paid with the fines he imposed. Almost a century ago, the Supreme Court recognized that principle as part of the due process requirement of an impartial tribunal. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

This case does not involve a judge who receives money based on the decisions he makes. But the magistrate in the Orleans Parish Criminal District Court receives something almost as important: funding for various judicial expenses, most notably money to help pay for court reporters, judicial secretaries, and law clerks. What does this court funding depend on? The bail decisions the magistrate makes that determine whether a defendant obtains pretrial release. When a defendant has to buy a commercial surety bond, a portion of the bond's value goes to a fund for judges' expenses. So the more often the magistrate requires a secured money bond as a condition of release, the more money the court has to cover expenses. And the magistrate is a member of the committee that allocates those funds.

Arrestees argue that the magistrate's dual role—generator and administrator of court fees—creates a conflict of interest when the judge sets their bail. We decide whether this dual role violates due process.

#### I.

Judge Henry Cantrell is the magistrate for the Orleans Parish Criminal District Court. He presides over the initial appearances of all defendants in the parish, which encompasses New Orleans. At those hearings, there are typically 100–150 a week, Judge Cantrell appoints counsel for indigent defendants and sets conditions of pretrial release. One option for ensuring a defendant's appearance is requiring a secured money bond. Just about every defendant who meets that financial condition does so by purchasing a bond from a commercial surety, as that requires paying only a fraction of the bond amount.

When a defendant buys a commercial bail bond, the Criminal District Court makes money. Under Louisiana law, 1.8% of a commercial surety bond's value is deposited in the court's Judicial Expense Fund. That fund does not pay judges' salaries, but it pays salaries of staff, including secretaries, law clerks, and court reporters. It also pays for office supplies, travel, and other costs. The covered expenses are substantial, totaling more than a quarter million dollars per judge in recent years. The bond fees are a major funding source for the Judicial Expense Fund, contributing between 20–25% of the amount spent in recent years. All 13 judges of the district court, including Judge Cantrell, administer the fund. . . .

The lawsuit challenges . . . Cantrell's "dual role as a judge determining conditions of pretrial release and as an executive in charge of managing the Court's finances." To plaintiffs, the financial incentive to require secured money bonds is a conflict of interest that deprives arrestees of their due process right to an impartial tribunal. . . . [T]he plaintiffs sought only declaratory relief.

## II.

Unlike some of its legal ancestors, English common law assumed that judges could maintain impartiality in the face of most connections to a case. . . .

But the common law view that judges were incorruptible had a notable exception—when judges might benefit financially. *See Tumey v. Ohio*, 273 U.S. 510, 525 (1927) . . . . Lord Coke’s famous line reflected that view, as did his ruling that a judge could not issue a judgment while also taking a portion of the fine to pay his salary. *Dr. Bonham’s Case*, 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610). . . . The common law thus distinguished between “bias,” which did not disqualify the judge, and “interest,” which did. *Id.* at 611–12. . . .

These principles, including the significance of the interest, inform the constitutional rules governing judge’s financial conflicts. As is true for other areas of criminal procedure, it was not until the increased law enforcement Prohibition brought that the Supreme Court addressed a due process challenge to a judge’s financial conflicts. The first case involved a mayor’s court used in Ohio villages to prosecute violations of the state Prohibition Act. *Tumey v. Ohio*, 273 U.S. 510 (1927). On this “liquor court,” the mayor was the judge and could convict without a jury. *Id.* at 516–17, 521. If the mayor found the defendant guilty, some of the fine the defendant paid would go towards the mayor’s “costs in each case, in addition to his regular salary.” *Id.* at 519 . . . .

Relying on the legal tradition just outlined, the Court held that the liquor court judge’s interest in the outcome violated due process. *Id.* at 531–32. It did not require a showing that the mayor was favoring the prosecution; the financial incentive itself was enough:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law.

*Id.* at 532 . . . .

This “average man as judge” standard—focusing on the strength of the temptation rather than an actual showing of impartiality—has guided the due process inquiry ever since. . . .

The cases applying the *Tumey* standard can be sorted into two groups. A few address one-off situations when the financial incentive is unique to the facts of the case. Examples are cases when the judge had a substantially similar case pending against one of the parties, *Aetna*, 475 U.S. at 821–25, or when a party had contributed more to the judge’s election campaign than all other donors combined, *Caperton v. A.T. Massey Coal*

Co., 556 U.S. 868, 881–87 (2009). This case is not like those.

Instead, the challenge to Judge Cantrell’s dual role fits into the line of cases addressing incentives that a court’s structure creates in every case. *Tumey*, 273 U.S. 510; *Dugan v. Ohio*, 277 U.S. 61 (1928); *Ward v. Monroeville*, 409 U.S. 57 (1972). The incentives that most obviously violate the right to an impartial magistrate are those that, like *Tumey* and its English predecessors, put money directly into a judge’s pocket. . . . It also violates due process when rulings indirectly funnel money into a judge’s bank account. See *Brown v. Vance*, 637 F.2d 272, 284–86 (5th Cir. 1981). We thus held unconstitutional the statutory fee system for compensating Mississippi justices of the peace because those judges’ compensation depended on the number of cases filed in their courts. As a result, they were incentivized to rule for plaintiffs in civil cases and the prosecution in criminal ones to encourage more filings. *Id.* at 274. Again, it was the mere threat of impartiality that violated due process. As Judge Wisdom explained, it did not matter that “there must be many, many judges in Mississippi, as in any other state, pure in heart and resistant to the effect their actions may have on arresting officers and litigating creditors,” because “the temptation exists to take a biased view that will find favor in the minds of arresting officers and litigating creditors. This vice inheres in the fee system. It is a fatal constitutional flaw.” *Id.* at 276.

Unlike the *Tumey* or *Brown* judges, Judge Cantrell does not receive a penny, either directly or indirectly, from his bail decisions. But requiring a secured money bond provides him with substantial nonmonetary benefits. Most significantly, money from commercial surety bond fees helps pay the judge’s staff. Without support staff, a judge must spend more time performing administrative tasks. Time is money. And some important tasks cannot be done without staff. Judge Cantrell cannot simultaneously preside as judge and court reporter (he employs two). Office supplies also promote efficiency. The fees the Orleans Parish Criminal District Court receives from commercial sureties thus help fund critical pieces of a well-functioning chambers. And if an elected judge is unable to perform the duties of the job, the job may be at risk. So we do not think it makes much difference that the benefits Judge Cantrell and his colleagues receive from bail bonds are not monetary.

Having decided that the “average man as judge” standard applies and that significant nonmonetary benefits can create a conflict, we turn to the crux of the dispute: Does Judge Cantrell’s dual role violate due process? In addition to *Tumey*, two other Supreme Court cases that again looked at Ohio mayors’ courts flesh out when the structural temptation of a dual role creates an unconstitutional conflict. The first, decided the term after *Tumey*, considered another liquor court. See *Dugan v. State*, 277 U.S. 61 (1928). Dugan was the mayor of a small town, empowered to run a mayor’s court and convict those who possessed liquor. *Id.* at 62. Unlike the *Tumey* mayor, he did not receive an additional fee for convictions; the fines went to the town’s general fund which paid his fixed salary.

*Id.* at 62–63. And despite the “mayor” title, Dugan was not the chief executive of the city; a city manager was. *Id.* at 63. Dugan was, however, one of five members of the city commission, a legislative body with power to decide how city funds were spent, but he could not vote on his own salary. *Id.* at 62–63. The Court held that although a judge might be tempted to rule in a way that would increase fines were he also a “chief executive . . . responsible for the financial condition of the village,” that was not Dugan’s situation. *Id.* at 65. His role as a nonexecutive, and as only one of five votes on financial policy, meant any benefit he received from the fines he levied was “remote.” *Id.*

Forty-five years later, an Ohio mayor’s court returned to the Supreme Court’s docket. See *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). With Prohibition long ended, this mayor’s court assessed traffic fines. *Id.* The traffic court provided about 40% of the village’s revenue. *Id.* at 58. That created a constitutional problem because, unlike the *Dugan* mayor, the *Ward* mayor was the city’s chief executive, tasked with “general overall supervision of village affairs.” *Id.* The “temptation” resulting from this executive responsibility for village finances created an unconstitutional conflict when he presided over the fine-generating traffic court. *Id.* at 60.

The parties focus on the differences between Judge Cantrell’s roles and those of the mayors in *Dugan* and *Ward*. Both sides can point to certain features that help them. The *Dugan* mayor was one of five officials making spending decisions, while Judge Cantrell has an even less influential 1/13 vote on decisions about the Judicial Expense Fund. But the *Dugan* mayor, despite his title, had no executive responsibilities. As a result, maintaining the financial health of the village provided only a “remote” benefit to Dugan. *Ward*, 409 U.S. at 61. In contrast, because the *Ward* mayor ran the town, he had a direct and personal interest in the finances of the civic institution. *Id.* at 60–61.

We conclude that Judge Cantrell is more like the *Ward* mayor than the *Dugan* mayor. Because he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate. And the bond fees impact the bottom line of the court to a similar degree that the fines did in *Ward*, where they were 37–51% of the town’s budget. *Ward*, 409 U.S. at 58. The 20–25% of the Expense Fund that comes from bond fees is a bit below that percentage but still sizeable enough that it makes a meaningful difference in the staffing and supplies judges receive. The dual role thus may make the magistrate “partisan to maintain the high level of contribution” from the bond fees. *Id.* at 60.

Our holding that this uncommon arrangement violates due process does not imperil more typical court fee systems. Our reasoning depends on the dual role combined with the “direct, personal, [and] substantial” interest the magistrate has in generating bond fees. *Tumey*, 273 U.S. at 523. To take one example, none of these features are present for

finances in federal criminal cases. Judges do not have a say in how those funds are spent. The amount of the fines – which is supposed to take into account the costs of incarceration and thus, if anything, fund the Bureau of Prisons rather than the judiciary, U.S.S.G. § 5E1.2(d)(7) – are not set aside for judicial operations even on a national level, let alone for the handful of federal judges who sit on a local district court. The benefits are so diffuse that a single judge sees no noticeable impact on her chambers from the fines she imposes and thus feels no temptation from them.

The temptation facing the Orleans Parish magistrate is far greater. His dual role – the sole source of essential court funds and an appropriator of them – creates a direct, personal, and substantial interest in the outcome of decisions that would make the average judge vulnerable to the “temptation ... not to hold the balance nice, clear, and true.” *Tumey*, 273 U.S. at 532. The current arrangement pushes beyond what due process allows. *Cf. Cain*, 2019 WL 3982560, at \*6 (holding that Orleans Parish judges’ role in both imposing and administering court fees and fines violated due process).

### III.

After recognizing this due process violation, the district court issued the following declaration: “Judge Cantrell’s institutional incentives create a substantial and unconstitutional conflict of interest when he determines [the class’s] ability to pay bail and sets the amount of that bail.”

That declaratory relief was all plaintiffs sought. They believed that section 1983 prevents them from seeking injunctive relief as an initial remedy in this action brought against a state court judge. *See* 42 U.S.C. § 1983 (“[I]n any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable ....”).

That statutory requirement reflects that declaratory relief is “a less harsh and abrasive remedy than the injunction.” *Steffel v. Thompson*, 415 U.S. 452, 463 (1974) . . . . Principal among its advantages is giving state and local officials, like Judge Cantrell, the first crack at reforming their practices to conform to the Constitution. *Id.* at 470.

One response to the declaratory judgment would be eliminating Judge Cantrell’s dual role, a role that is not mandated by Louisiana law. In contrast, because Louisiana law does require that the bond fees be sent to the Judicial Expense Fund, LA. R.S. 13:1381.5(B)(2)(a), the declaratory judgment cannot undo that mandate. Challengers did not seek to enjoin that statute, instead arguing only that the dual role violated due process. But given today’s ruling and last week’s in *Cain*, it may well turn out that the only way to eliminate the unconstitutional temptation is to sever the direct link between the



money the criminal court generates and the Judicial Expense Fund that supports its operations. . . .

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**Justice Network Inc. v. Craighead County**  
United States Court of Appeals for the Eighth Circuit  
931 F.3d 753 (8th Cir. 2019)

Chief Judge Lavenski R. Smith:

The Justice Network Inc. (TJN) appeals from the district court's dismissal of its 42 U.S.C. § 1983 suit against Judge David Boling, in his individual and official capacity; Judge Tommy Fowler, in his individual and official capacity; Craighead County, Arkansas; the City of Jonesboro; and the Cities of Bay, Bono, Brookland, Caraway, Cash, Egypt, Lake City, and Monette. The suit arises from Craighead County District Judges Boling and Fowler's implementation of an Amnesty Program forgiving all fees that probationers owed to TJN for probation services. We hold that Judges Boling and Fowler are entitled to judicial immunity on TJN's claims. Additionally, we hold that Judges Boling and Fowler are state government officials whose actions are not attributable to Craighead County or the City Defendants. Accordingly, we affirm the district court's dismissal of TJN's § 1983 suit.

I. Background

TJN is a private probation company, and it offers services to probation clients in Craighead County. Services offered to the probation clients include program and counseling coordination, public service work, random drug screening, curfew monitoring, or any other condition of probation ordered by the court. TJN also offers a variety of classes to its probation clients, including life skills, parenting skills, anger management, alcohol safety school, and drug offender school.

From 1997 until February 3, 2017, all misdemeanor offenders who had been charged in Craighead County District Court ("District Court") or the City Courts, and who required probation services, were placed under TJN's supervision. TJN contracted individually with each probation client. The Probation Fee Agreement set forth a \$35 monthly fee for probation services and included a \$15 monthly fee for the supervision of public service work (a typical condition of probation). A court order issued in conjunction with the Probation Fee Agreement directed each probation client to pay all probation supervision fees to TJN for each month of supervised probation.

If the probation client failed to abide by the probation order and failed to complete his or her court-ordered special conditions, TJN would file an affidavit with the court indicating what conditions were not completed. The Craighead County prosecutor and the judge would then countersign the affidavit. The judge of the District Court would order the probationer to pay restitution for all outstanding fees owed to TJN. . . .

In early 2016, Judges Boling and Fowler were elected Craighead County District Judges. During the election, Judge Boling stated that if he were elected, he would end the use of TJN's probation services in his court. Likewise, Judge Fowler stated during his campaign that he opposed the privatization of probation services. . . .

On December 7, 2016, the local newspaper reported that Judges "Fowler and Boling planned to implement an 'Amnesty Program' in January and February 2017." "As part of that program, [Judges] Fowler and Boling met with probation offenders who had outstanding fines that were due, to discuss payment options." . . .

On January 26, 2017, the local newspaper reported that Judges Fowler and Boling had implemented a "temporary amnesty program," which "allow[ed] offenders who were delinquent on their payments to reset their payment plan." The fees owed to TJN were summarily stricken from each new order of probation. Judges Boling and Fowler forgave the fees owed to TJN as part of the "Amnesty Program." Judges Fowler and Boling also instituted a "Jail Credit" program. This program forgave the costs owed to the court and fees owed to TJN in lieu of time served in prison. "[M]any of the probation clients given 'Jail Credit' were never incarcerated."

As a result of the Amnesty Program, and the consequent loss of revenue, TJN has ceased all operations in Craighead County and has been forced to terminate its 12 employees. TJN has suffered significant economic loss and will continue to sustain that loss in the future if the Amnesty Program continues.

TJN brought suit against Judges Boling and Fowler; Craighead County; and the City Defendants pursuant to 42 U.S.C. § 1983 for violations of the Contracts Clause, U.S. Const. art. I, § 10, and the Takings Clause, U.S. Const. amend. V. TJN also alleged violations of the Arkansas Constitution's Takings Clause. *See* Ark. Const. art. II, § 22. TJN sought a declaratory judgment that the defendants effectuated a custom and policy of annulling fees owed by probation clients to TJN, in violation of Article 1, Section 10 and the Fifth Amendment to the United States Constitution and Article 2, Section 17 and Article 2, Section 22 of the Arkansas Constitution. It also sought injunctive relief enjoining the defendants from executing a custom and policy of annulling fees owed by probation clients to TJN.

The defendants moved to dismiss the complaint for failure to state a claim. *See* Fed.

R. Civ. P. 12(b)(6).

The district court granted the defendants' motions to dismiss.

## II. Discussion

On appeal, TJN argues that the district court erred in dismissing its claims against Judges Boling and Fowler using judicial immunity. . . . JN also argues that Judges Boling and Fowler were authorized policymakers whose actions are attributable to Craighead County and the City Defendants; therefore, the district court erred in dismissing TJN's claims against the municipal defendants. . . .

### A. Judicial Immunity

We first consider TJN's argument that Judges Boling and Fowler are not entitled to judicial immunity.

"[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam). It "is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial." *Id.* "A judge is immune from suit, including suits brought under section 1983 to recover for alleged deprivation of civil rights, in all but two narrow sets of circumstances." *Schottel v. Young*, 687 F.3d 370, 373 (8th Cir. 2012) (citing *Mireles*, 502 U.S. at 11–12). "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11–12 (internal citations omitted).

#### 1. Judicial Capacity

"[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). . . . "[T]he relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Mireles*, 502 U.S. at 13 (quoting *Stump*, 435 U.S. at 362). This means that to determine whether an act is judicial, courts "look to the particular act's relation to a general function normally performed by a judge." *Id.*

Arkansas statutory law creates and circumscribes the judicial sentencing power of district courts and city courts.

- A district court or city court may:
- (A) Place a defendant on probation or sentence him or her to public service work;
- and
- (B) As a condition of its order, require the defendant to pay a:
    - (i) Fine in one (1) or several sums; and
    - (ii) Probation fee or a public service work supervisory fee in an amount to be established by the district court or city court.

Ark. Code Ann. § 5-4-322(a)(1). In addition, “[t]he court may discharge the defendant from probation at any time.” *Id.* § 16-93-314(a)(1). And, district courts and city courts possess the “authority to suspend the imposition of sentences or the imposition of fines, or both, in all criminal cases pending before the courts unless specifically prohibited by law.” *Id.* § 16-90-115(a). Finally, “upon the court’s own motion, a court may . . . [m]odify a condition [of probation] imposed on the defendant.” *Id.* § 16-93-312(a)(1).

Did Judge Boling’s and Judge Fowler’s dismissal of probationers’ cases, “purging” of fees that probationers owed, and resetting payment plans for delinquent probations via court order sufficiently relate to these general functions? We conclude that they did. The judges’ reviewing of individual probationers’ cases and amending of probation orders are related to the district court’s authorized functions of placing a defendant on probation, requiring a defendant to pay a probation fee, discharging a defendant from probation at the court’s discretion, suspending the imposition of a defendant’s fine, and modifying a defendant’s condition of probation. . . .

## 2. Jurisdiction

In examining whether a judge acted “in the complete absence of all jurisdiction,” “[t]he Supreme Court has instructed us to construe broadly ‘the scope of the judge’s jurisdiction . . . where the issue is the immunity of a judge.’” *Schottel*, 687 F.3d at 373 (ellipsis in original) (quoting *Stump*, 435 U.S. at 356). “[A]n action—taken in the very aid of the judge’s jurisdiction over a matter before him—cannot be said to have been taken in the absence of jurisdiction.” *Mireles*, 502 U.S. at 13.

TJN argues that Arkansas law makes the Department of Corrections the entity responsible for the administration of probation services. *See* Ark. Code Ann. § 12-27-124(a) (“The purpose of this act is to establish a Division of Community Correction that shall assume the management of all community correction facilities and services, execute the orders of the criminal courts of the State of Arkansas, and provide for the supervision, treatment, rehabilitation, and restoration of adult offenders as useful law-abiding citizens within the community.”). While this statute places the Department of Corrections in supervision of offenders, it does not authorize the Department of Corrections to alter the terms of supervision for offenders. Instead, the Arkansas Constitution grants state district

courts “original jurisdiction, concurrent with [state] Circuit Courts, of misdemeanors” and any criminal jurisdiction as provided by the Arkansas General Assembly. Ark. Const. amend. 80, §§ 7(B), 10; *see also* Ark. Code Ann. § 16-88-101 (same). State district courts also enjoy “original [and exclusive] jurisdiction . . . for the trial of violations of ordinances of any town, city, or county within the territorial jurisdiction of the district court.” Ark. Code Ann. § 16-88-101(a)(4). . . .

Based on these statutory provisions, we hold that Judges Boling and Fowler did not act in a clear absence of their jurisdiction because Arkansas law provides that the state district court and city courts have jurisdiction to modify or dismiss probation sentences and conditions of the misdemeanor offenders. . . .

### B. Injunctive and Declaratory Relief

Our conclusion that Judges Boling and Fowler are entitled to judicial immunity does not resolve whether TJN may seek injunctive and declaratory relief. In addition to monetary damages, TJN sought: (1) a declaratory judgment that the defendant judges created a custom and policy with the Amnesty Program; and (2) an injunction prohibiting the defendant judges from implementing their custom and policy using the Amnesty Program.

On appeal, TJN argues that it is entitled to injunctive relief because the judges’ conduct was not a judicial act. Appellant’s Br. at 54 (citing 42 U.S.C. § 1983; *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) (injunctive relief not barred when judges act in enforcement capacity)). It also argues that declaratory relief is available in actions brought against judicial officials. *Id.* at 55–56 (citing *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 197 (3d Cir. 2000); *Ward v. City of Norwalk*, 640 F. App’x 462, 467 (6th Cir. 2016); *Francis v. Pellegrino*, 224 F. App’x 107, 108 (2d Cir. 2007) (summary order)).

Judge Boling and Judge Fowler respond that judicial immunity prohibits TJN’s claims for declaratory and injunctive relief. Specifically, they argue that their absolute judicial immunity bars all relief.

In *Pulliam v. Allen*, the Supreme Court held that a judicial officer acting in his or her judicial capacity is not immune from actions under § 1983 seeking prospective injunctive relief. 466 U.S. 522, 541–42 (1984). Congress responded to *Pulliam* in 1996 by amending § 1983 to abrogate its holding. Section 1983 provides that “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983. In other words, “judicial immunity typically bars claims for prospective injunctive relief against judicial officials acting in their judicial capacity. Only when a declaratory decree is violated or declaratory relief is

unavailable would plaintiffs have an end-run around judicial immunity.” *Ray v. Judicial Corr. Servs., Inc.*, No. 2:12-cv-02819-RDP, 2014 WL 5090723, at \*3 (N.D. Ala. Oct. 9, 2014).

In this case, TJN has not alleged that declaratory relief was unavailable or that a declaratory decree was violated; thus, § 1983 bars TJN’s claim for injunctive relief. See *Lawrence v. Kuenhold*, 271 F. App’x 763, 766 n.6 (10th Cir. 2008) (“[T]he doctrine of judicial immunity now extends to suits against judges where a plaintiff seeks not only monetary relief, but injunctive relief as well.”). The question then becomes whether TJN is entitled to declaratory relief post-*Pulliam* and Congress’s amendment to § 1983.

Currently, most courts hold that the amendment to § 1983 does not bar declaratory relief against judges. . . .

The Tenth Circuit has concluded that “[t]he only type of relief available to a plaintiff who sues a judge is declaratory relief, *but not every plaintiff is entitled to this remedy.*” *Lawrence*, 271 F. App’x at 766 (emphasis added) (internal citation omitted). “A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of *some future conduct*, not simply to proclaim liability for a past act.” *Id.* (emphasis added). A complaint “seeking . . . a declaration of past liability” against a judge instead of “future rights” does not satisfy the definition of “declaratory judgment” and renders declaratory relief unavailable. *Id.* “Furthermore,” retrospective declaratory relief cannot “be granted as ‘[t]he Eleventh Amendment does not permit judgments against state officers declaring that they violated federal law in the past.’” *Id.* at 766 n.7 (quoting *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir. 1995)).

Thus, declaratory relief is limited to *prospective* declaratory relief. . . .

Having reviewed the complaint, we conclude that TJN’s request for declaratory relief is *retrospective*; as a result, TJN is not entitled to such relief under § 1983. “Although [TJN] . . . refers to the judges’ actions as ‘policies,’ essentially, . . . [it] is asking the court to *invalidate* the actions of [Judges Boling and Fowler].” . . .

### C. Municipal Defendants

TJN next argues that the district court erred in dismissing its claims against Craighead County and the City Defendants because “Judge Boling and Judge Fowler’s actions were done pursuant to an official municipal policy and their conduct caused a constitutional tort.”

. . . [W]e hold that Judges Boling and Fowler are employees of the State of Arkansas, *not* Craighead County or the City Defendants. Arkansas Code Annotated § 16-

17-1111(a)(2) (2011) makes clear that the district judgeships in Craighead County became “state district court judgeships” as of January 1, 2013, before the events in this case. It also makes clear that these judges are “state” judges despite the cost-sharing requirements of § 16-17-1106(b)(1)(A). *Id.*

Because Judges Boling and Fowler are not employees of Craighead County or the City Defendants, their actions cannot be imputed to them. Therefore, the district court correctly dismissed the claims against them.

### III. Conclusion

Accordingly, we affirm the judgment of the district court.

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#### ***Private Companies and Criminal System Costs***

##### **Briggs v. Montgomery**

United States District Court, District of Arizona

No. CV-18-02684-PHX-EJM, 2019 WL 2515950 (D. Ariz. June 18, 2019)

*In Briggs, attorneys brought suit on behalf of individual participants in a marijuana deferred prosecution program operated by a private entity on behalf of the Maricopa County Attorney’s Office. The plaintiffs allege that the program’s mandatory fee structure “penalizes the poor because of their poverty,” in violation of the Fourth and Fourteenth Amendments of the U.S. Constitution. In June 2019, the district court denied the defendants’ motions to dismiss the complaint. Given the prevalence of private entities in the operation of criminal programs, we here excerpt portions of the district court opinion denying the Treatment Assessment Screening Center’s motion to dismiss.*

Eric J. Markovich, United States Magistrate Judge:

#### I. Factual and Procedural Background

Plaintiffs filed their first amended class action complaint (“FAC”) on October 12, 2018. (Doc. 20). Plaintiffs allege civil rights claims pursuant to 28 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution and seek monetary damages and injunctive relief. Plaintiffs are four named individuals who represent themselves and a class of similarly situated people. *Id.* at 6–7. Plaintiffs’ allegations concern a marijuana deferred prosecution program (“MDPP” or “the program”) operated by the

Maricopa County Attorney's Office ("MCAO") and Treatment Assessment Screening Center ("TASC"). *Id.* ¶ 47. . . .

Plaintiffs allege that Defendants "jointly operate a possession of marijuana diversion program that penalizes the poor because of their poverty." *Id.* ¶ 1. Specifically, Plaintiffs' complaint alleges that:

7. The length of time a person spends in the diversion program and whether the person ultimately completes the program and avoids felony criminal prosecution depends on whether she can pay the program's required fees.

8. In order to complete the program and avoid felony criminal prosecution, participants in the marijuana diversion program must pay a fee of \$ 950 or \$ 1000.

9. Participants must also pay \$ 15 or \$ 17 for each drug and alcohol test; they may be required to take as many as three or four tests each week.

10. The program is two-tiered: people who meet program requirements—completing a three-hour drug education seminar and routine drug and alcohol testing—and are wealthy enough to pay the \$ 950 or \$ 1000 program fee complete the program in 90 days and are no longer subject to felony criminal prosecution.

11. But participants who cannot pay the program fees are forced to stay in the program for at least six months and until they can pay off the money owed to MCAO and TASC, even if they have satisfied every program requirement other than payment. . . .

A. Defendant Treatment Assessment Screening Center, Inc.'s Motion to Dismiss

i. Policy, Decision, or Custom

TASC first argues that it cannot be liable as an entity because it has not established any policies that Plaintiffs may be challenging. TASC further states that Plaintiffs have failed to allege any facts regarding policies that TASC adopted, or any custom that TASC had the discretion to implement, that is so persistent and widespread that it became a permanent and well-settled entity policy. (Doc. 36 at 7).

In *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), the Supreme Court held that local governments and local government officials sued in their official capacity are "persons" for purposes of § 1983 and may be held liable for constitutional violations



arising from a government policy or custom. In *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128 (9th Cir. 2012), the Ninth Circuit held that *Monell* also applies to suits against private entities. “To create liability under § 1983, the constitutional violation must be caused by a policy, practice, or custom of the entity, or be the result of an order by a policy-making officer.” *Id.* at 1139 (internal quotations and citations omitted) . . . .

Thus, to state a claim against TASC under *Monell* and *Tsao*, Plaintiffs must show that (1) TASC acted under color of state law, and (2) that the alleged constitutional violation was caused by a policy or custom. *Tsao*, 698 F.3d at 1139. The Court finds that Plaintiffs have pled enough facts to state a claim for entity liability against TASC sufficient to survive a motion to dismiss.

First, Plaintiffs have sufficiently pled that TASC acted under color of state law via its agreement with MCAO to operate the MDPP. The FAC alleges that MCAO and TASC jointly operate the MDPP, that TASC has a contract with MCAO to operate, administer, and supervise the program, and that TASC supervises all people whose prosecutions for simple possession of marijuana have been diverted. (Doc. 20 ¶¶ 1, 47, 67).

The second thing that Plaintiffs must show is that TASC had a policy, custom, or pattern that was the actionable cause of Plaintiffs’ injuries. *Tsao*, 698 F.3d at 1143. A policy may be either formal or informal: “Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” *Monell*, 436 U.S. at 691 (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167–168 (1970)). . . . [E]ven if TASC does not have an official policy, liability may be established “by acquiescence in a longstanding practice or custom which constitutes the ‘standard operating procedure’ of the local governmental entity.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

Here, the FAC alleges both formal and informal policies. Plaintiffs specifically reference the MDPP client contract, which includes a provision stating that program participants may be terminated and referred for prosecution for failure to pay the program fees or failure to test as scheduled. (Doc. 20 ¶¶ 139, 140). The FAC also alleges informal policies or practices: no one at TASC assesses a person’s ability to pay before referring the person back for prosecution because they could not pay for urine tests; no one at MCAO assesses ability to pay before prosecuting people who have failed diversion solely because of their inability to pay; Defendants do not waive the program fee for anyone regardless of financial circumstances; and Defendants contend that they allow for reduced fees for urine screens, but in practice these reductions are almost never granted. (Doc. 20 at ¶¶ 151–154).

Accordingly, the Court rejects TASC's argument that Plaintiffs have failed to plead a persistent and widespread custom or practice such that it constitutes a permanent and well-settled entity policy. (Doc. 36 at 8–9). TASC notes that neither Briggs nor Stephens have alleged that they made any statements to TASC regarding their alleged inability to pay; Pascale states that TASC deferred payment for his orientation fee and found him ineligible for a reduction in testing fees; and Collier is the only plaintiff who alleges she told TASC she could not pay and was not invited to apply for a reduction or waiver. TASC contends that these allegations are insufficient to establish a persistent and widespread practice. However, Plaintiffs state that they are not arguing that the indigent are entitled to fee waivers; they are challenging TASC's policies of requiring program participants to remain on the program longer when they cannot afford to pay the program fee, and the requirement that pay-only participants must also continue to pay for additional urine screenings as long as they do remain on the program. Further, Plaintiffs are seeking to have this matter certified as a class action. While the existence of a persistent and widespread practice, policy, or custom will require discovery for Plaintiffs to prove their claims and to establish a class, at this early stage in the proceedings, the FAC states sufficient allegations to survive a motion to dismiss. . . .

Accordingly, accepting Plaintiffs' allegations as true, as the Court must on a motion to dismiss, Plaintiffs have sufficiently pled a § 1983 claim for entity liability against TASC based on the three challenged policies.

## ii. Qualified Immunity

TASC alternatively argues that because Plaintiffs cannot bring a claim for entity liability against it, to the extent Plaintiffs assert an individual claim against it, TASC is shielded by qualified immunity. Plaintiffs contend that qualified immunity does not apply because qualified immunity only protects individual employees, not corporate entities like TASC.

“Qualified immunity is an immunity from suit.” *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996). It “shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” *Reichle v. Howards*, 566 U.S. 658, 664 (2012); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has “described the doctrine’s purposes as protecting government’s ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.” *Richardson v. McKnight*, 521 U.S. 399, 407–08 (1997) (internal quotations and citation omitted).

Here, TASC relies on the Supreme Court’s decision in *Filarsky v. Delia*, 566 U.S.

377 (2012) for its argument that qualified immunity extends to non-government employees working in close proximation with public employees. In *Filarsky*, the Court held that a private attorney temporarily retained by the city was entitled to seek qualified immunity. 566 U.S. 377. The Court found that “immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis[,]” and noted that “[a]ffording immunity not only to public employees but also to others acting on behalf of the government similarly serves to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.” *Id.* at 389–90 (internal quotations and citations omitted). The Court also distinguished its prior decision in *Richardson*, 521 U.S. 399, where it held that guards employed by a privately-run prison facility were not entitled to seek qualified immunity. The Court explained that “*Richardson* was a self-consciously ‘narrow[.]’ decision” and “was not meant to foreclose all claims of immunity by private individuals.” *Filarsky*, 566 U.S. at 393. Rather, “the particular circumstances of that case—‘a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms’—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983.” *Id.* (quoting *Richardson*, 521 U.S. at 413).

The Court finds that this case is more like *Richardson* than *Filarsky*. Here, like in *Richardson*, “the most important special government immunity-producing concern—unwarranted timidity—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a [deferred prosecution program].” *Richardson*, 521 U.S. at 409. “In other words, marketplace pressures provide [TASC] with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or ‘nonarduous’ employee job performance.” *Id.* at 410. Further, TASC is a private entity that entered into a contract with Maricopa County to “assume a major lengthy administrative task . . . with limited direct supervision by the government” and undertook that task for profit and likely in competition with other providers of drug rehabilitation services. . . . This case is clearly unlike *Filarsky*, where the Supreme Court found qualified immunity for a private attorney retained by the city for a limited period of time to assist with one aspect of an investigation.

The Court also notes that Plaintiffs’ claims are against TASC as an entity, not individual TASC employees. The Ninth Circuit has specifically rejected an expansion of *Filarsky* to include immunity for all service contractors. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *aff’d*, 136 S. Ct. 663 (2016), *as revised* (Feb. 9, 2016). In *Gomez*, the court noted that *Filarsky* “did not establish any new theory,” and although it provided a broad reading of qualified immunity, it was “applicable only in the context of § 1983 qualified immunity from personal tort liability[,]” and thus was not available for Telephone Consumer Protection Act claims against the defendant company. *Id.* at 881.

The court emphasized that “[w]here immunity lies, an injured party with an otherwise meritorious tort claim is denied compensation, which contravenes the basic tenet that individuals be held accountable for their wrongful conduct. Accordingly, immunity must be extended with the utmost care.” *Id.* at 882 (internal quotations and citation omitted).

The Court also finds the other cases TASC relies upon distinguishable. In *Young v. Cty. of Hawaii*, 947 F. Supp. 2d 1087 (D. Haw. 2013), *aff’d*, 578 F. App’x 728 (9th Cir. 2014), the court held that a humane society officer qualified for qualified immunity where the humane society was an independent contractor hired by the county to carry out its animal control program. The court noted that “private defendants are not covered by immunity unless ‘firmly rooted tradition’ and ‘special policy concerns involved in suing government officials’ warrant immunity.” *Id.* (quoting *Richardson*, 521 U.S. at 404). In *Young*, the officer was “duly appointed by law to execute search warrants and perform law enforcement functions like those of the police.” *Id.* at 1108. Further, special policy concerns supported granting immunity because “[a]nimal control officers, like police officers, should be encouraged to perform their public duties without ‘unwarranted timidity’ that may decrease their effectiveness in responding to public danger.” *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). The court also distinguished the special policy concerns at issue in *Richardson*, noting that there, “the prison performed its task ‘independently, with relatively less ongoing direct state supervision[,]’ . . . [and s]uch freedom allowed the private contractor prison to respond to market pressures to adjust employee behavior.” *Id.* at 1109. In contrast, in *Young*, there was “close government collaboration and supervision that restrict[ed] [the humane society’s] ability to respond as a private firm to market pressures.” *Id.* Accordingly, the court concluded that the officer was protected by qualified immunity because of the police department’s collaboration with the humane society and its supervision over the humane society’s work. *Id.*

In the present case, there is no “firmly rooted tradition” that would support extending qualified immunity to TASC as a private entity operating a diversion program – TASC is not performing a traditional prosecutorial function of determining who to prosecute; it is carrying out the day to day operations of the program. Further, there is no evidence of “close government collaboration and supervision” by the county defendants over TASC’s work. TASC’s main argument in its motion is that none of the three policies that Plaintiffs challenge exist, and if they do, the responsibility falls on the shoulders of the CA. But there is no evidence before the Court at this time suggesting that the CA closely supervises TASC in its day to day operations, such as meeting with program participants, collecting payments, or administering urine screens.

In sum, the Court finds that the FAC states claims against TASC as a private entity, not individual TASC employees, making qualified immunity inapplicable here. Further, the principles that supported an extension of qualified immunity in *Filarsky* and *Young* are not present here. . . .

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**Jackson v. Leaders in Community Alternatives, Inc.**  
United States District Court, Northern District of California  
No. C 18-04609 WHA, 2019 WL 6911634 (N.D. Cal. Dec. 19, 2019)

William Alsup, United States District Judge:

Introduction

In this civil RICO action, defendant moves for summary judgment. To the extent stated below, the motion is GRANTED.

Statement

The County of Alameda contracted with defendant Leaders in Community Alternatives, Inc. to provide an electronic-monitoring program, including GPS and alcohol monitoring, for criminal defendants on pre-trial release or home detention. LCA tracked down participants, provided the necessary equipment, and reported any non-compliance. Plaintiffs were among those referred to LCA's program. LCA required plaintiffs to sign a "Supervision Fee Agreement" that imposed an enrollment fee and a commitment to pay an additional amount per day. Plaintiffs allege that they both paid LCA amounts they could not afford because they feared LCA would "violate" them so that they would return to jail if they failed to pay LCA's fee.

Class certification was denied. At this stage, the only remaining claim is plaintiffs Robert Jackson and Kyser Wilson's RICO claim against LCA.

Analysis

... To prove a RICO claim, plaintiffs must demonstrate (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir. 2004). To prove a pattern of racketeering activity, plaintiffs must show that LCA committed at least two predicate offenses within ten years of each other. *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004). Plaintiffs allege that LCA committed predicate offenses of extortion under the Hobbs Act, 18 U.S.C. § 1951, and Section 518 of the California Penal Code.

Extortion is defined in the Hobbs Act and the California Penal Code as obtaining property from another, with his consent, induced by wrongful use of actual or threatened

force or fear. 18 U.S.C. § 1951(a). The only possible predicate crimes of extortion here would be LCA's statements to plaintiffs Wilson and Jackson that they would be remanded into custody if they failed to make their payments.

In recounting the alleged threats he received, plaintiff Wilson stated the following:

A: She told me if I didn't make a payment, I was gonna go to jail.

Q: Those were her exact words?

A: Yes. . . .

Plaintiff Jackson made the following statements regarding his conversations with his case manager:

A: That's exactly—I never forget this. She said, "If you don't bring us \$800 by the end of the day, then you unsuccessfully complete your ankle monitor.

Q: But she didn't specifically say, "And you'll have another four months in Santa Rita Jail"?

A: Well, I already knew that was, 'cause she had already been telling me that for four months.

[. . .]

Q: And that threat was?

A: "Pay me or go to jail."

Q: Those were their exact words?

A: Yes.

[. . .]

Q: Do you understand that if you didn't pay, LCA would just be writing a report to the court?

A: Yes.

Q: Okay. *Did you understand that it would be a judge who's ultimately making the decision of whether you go back to jail or not?*

A: Yes.

Regardless of whether the LCA employees believed they were making threats or if plaintiffs felt threatened by the employees' statements and feared going to jail, such use of those threats are only considered extortionate under the Hobbs Act and California Penal Code if the employees made them wrongfully. Nonviolent threats made outside the labor context are not inherently wrongful. It is the circumstances of the threat, not the property demanded in the threat that makes the threat wrongful. *United States v. Villalobos*, 748 F.3d 953, 957 (9th Cir. 2014). . . .

Plaintiffs Wilson and Jackson both stated that they felt threatened when their case managers told them they would go back to jail if they did not make the payments. It is

possible this conduct could have been extortionate if the employees had, for example, only stated without providing further context or making further statements that LCA itself would ensure plaintiffs would go to jail if they failed to pay. Such conduct could be wrongful because LCA did not have the ability to directly send plaintiffs to jail. It is clear, however, from examining the context of the employees' statements, even if not explicitly stated in every instance, that plaintiffs knew failure to pay at all would result in LCA reporting such failure to the court, which could then likely lead to a court remand of plaintiffs into custody. There is no dispute that LCA may write such reports.

At oral argument, plaintiffs' counsel likened this situation to a child support agent telling a parent, "Pay me a thousand dollars or I'm going to make sure your kids are taken away from you." What would make this threat extortionate would be the fact that the agent had no right to the parent's money. That is, not, however, the case here. Plaintiffs agreed to pay fees as part of their respective ankle monitoring programs. It is true that plaintiffs' inability to pay does not allow LCA to deny participation in the electronic monitoring program altogether. LCA did not threaten to end plaintiffs' participation in the program upon nonpayment though. Rather, based on LCA's statements, plaintiffs were made aware that the outcome of failing to pay at all would be a violation report with the likely possibility of being remanded to jail. Unlike the child support agent in the example above, LCA's conduct was not wrongful because LCA had a right to at least some of plaintiffs' payments.

Plaintiff Wilson signed an agreement recognizing his obligation to pay and LCA's right to submit an incident report if he failed to pay . . . .

Similarly, although defendant has failed to find a similar agreement for plaintiff Jackson, . . . LCA includes the supervision fee agreement in its electronic monitoring enrollment forms, which is submitted before the participant can begin electronic monitoring. Plaintiff Jackson has also not denied that he signed a fee agreement.

The main issue for summary judgment in this case is whether defendant's conduct was wrongful. Here, there is no genuine dispute as to any material fact that plaintiffs both agreed to pay fees as part of their respective electronic monitoring programs and that defendant was thus entitled to payments from plaintiffs, regardless of the amount. In stating that nonpayment could result in being remanded to jail, defendant did not commit the predicate act of extortion necessary for a violation of RICO. This order thus need not and will not address the remaining elements for a RICO violation. Summary judgment is GRANTED for defendant as to plaintiffs Jackson and Wilson's only remaining claim of a RICO violation.

**Pearson v. Hodgson**  
United States District Court, District of Massachusetts  
2020 WL 3420633 (D. Mass. June 22, 2020)

Indira Talwani, United States District Judge:

Plaintiffs allege that Thomas Hodgson, the Sheriff of Bristol County, Massachusetts (“Sheriff Hodgson” or “Sheriff”), has acted outside of the authority granted to him by the Massachusetts Legislature by procuring an inmate calling service that was deployed, in part, to raise revenues for the office of the Sheriff. Plaintiffs have also brought suit against Securus Technologies, Inc. (“Securus”), the inmate calling service vendor, alleging that Securus engaged in unfair and deceptive practices under Massachusetts law. . . .

The lynchpin of Plaintiffs’ claims . . . is that Sheriff Hodgson used the inmate calling contract with Securus to generate revenues in violation of Massachusetts law as set forth by the Massachusetts Supreme Judicial Court (“SJC”) in *Souza v. Sheriff of Bristol Cty.*, 455 Mass. 573 (2010). Defendants argue that the Massachusetts Legislature *has*, in fact, authorized inmate calling as a source of revenue in a 2009 Session Law. Plaintiffs counter that Defendants are misinterpreting and overextending the 2009 law and that the Legislature never endorsed the Sheriff’s practices. . . . For the reasons set forth below, the court concludes that the Massachusetts Legislature authorized the county sheriffs’ use of inmate calling to generate revenue. Accordingly, Defendants’ Motions for Judgment on the Pleadings are ALLOWED, and Plaintiffs’ Motion for Partial Summary Judgment on Count I and Motion for Class Certification are DENIED.

I. PROCEDURAL BACKGROUND . . .

Plaintiffs sought both injunctive and monetary relief on behalf of themselves as well as on behalf of a class of plaintiffs similarly situated. . . .

The complaint alleged six causes of action. Counts I through IV are brought against Sheriff Hodgson. Count I seeks a declaratory judgment that the revenues generated from the Sheriff’s inmate calling service contracts with Securus are contrary to Massachusetts law as set forth by the SJC in *Souza*. Count II seeks a declaratory judgment that, to the extent Plaintiffs were charged amounts that went to the Sheriff as commissions, the Sheriff was charging unlawful taxes or fees. Count III alleges that the Sheriff engaged in *ultra vires* taxation for which it does not have statutory authority in violation of Part I, Article XXIII of the Massachusetts Constitution. Count IV alleges that, in the alternative to Count III, the Sheriff extracted unlawful fees from Plaintiffs beyond its statutory authority in violation of Mass. Gen. Laws ch. 126, § 29.



Counts V and VI are brought against Securus. Count V alleges that Securus committed the tort of conversion by taking the class members' money through coercion and without legal authority to do so. Count VI alleges that Securus engaged in unfair and deceptive trade practices in violation of Mass. Gen. Laws ch. 93A, § 2.

Both Sheriff Hodgson and Securus moved to dismiss all claims. The court found that the alleged conduct fell outside of the Sheriff's authority, consistent with the SJC's holding in *Souza* that the Sheriff could not impose fees without the Legislature's approval where he had not identified legislative authority that authorized the collection of commissions. Accordingly, the court denied these motions except as to Plaintiffs' claim against Securus for conversion and, on Plaintiffs' stipulation, claims for monetary relief against Sheriff Hodgson in both his individual and official capacity. . . .

Several months into discovery, Defendants filed the present Motions for Judgment on the Pleadings. These motions cite legislation from 2009 concerning the Sheriff's authority to collect revenues from inmate telephone systems that was not previously before the court. . . .

### III. FACTUAL BACKGROUND

In May 2011, Sheriff Hodgson solicited bids for an inmate calling service at several of Bristol County's correctional facilities through a Request for Responses ("RFR"). The RFR required each bidder to include in its bid "commissions" that the bidder would pay to the Sheriff based on gross revenues that the bidder received from operating the inmate calling service, including both "collect and direct dial (debit) modes."

On August 8, 2011, the Sheriff awarded Securus a five-year contract to serve as the vendor for the Bristol County Correctional Facilities' inmate calling service. The contract provided that the Sheriff would receive annual funding for two on-site administrator positions at \$65,000 each, a \$75,000 annual technology fee, and "commission" in the amount of 48% of Securus's gross revenues from the inmate calling service. Between August 2011 and June 2013, Securus paid the Sheriff an aggregate of \$1,172,748.76.

On October 21, 2015, the Sheriff and Securus entered into a new contract for a four-year term. The new contract discontinued commissions paid to the Sheriff based on revenue but continued to fund the on-site administrator positions and annual technology fee. Furthermore, the new contract provided that these amounts would be paid by Securus through a one-time upfront payment of \$820,000 instead of \$205,000 annually over the course of the four-year contract.

### IV. DISCUSSION

## A. Cross-Motions on Count I (Declaratory Judgment)

Count I of Plaintiffs' complaint seeks a declaration that the manner in which the Sheriff has contracted with Securus to provide for inmate calling in county jails is prohibited by Massachusetts law. Hodgson's motion argues that, through the 2009 Session Law, "the Massachusetts Legislature expressly authorized the [Sheriff], along with other Massachusetts sheriffs' offices, to engage in the specific acts and practices that plaintiffs now allege were outside the scope of their authority." Plaintiffs' motion for partial summary judgment, in turn, argues that the 2009 Session Law does not change the conclusion reached by the court on the motion to dismiss . . . .

### 1. The Limits of the Sheriffs' Authority as Set Forth in *Souza*

In Massachusetts, correctional facilities are operated both by the state, through the Massachusetts Department of Corrections, and by elected county sheriffs. . . . Custody and control of inmates in county facilities rests with each county's elected sheriff, as "jailer, superintendent or keeper." Mass. Gen. Laws ch. 126, § 16. *Souza* challenged the authority of an elected sheriff in this role.

*Souza* arose from a claim filed against Sheriff Hodgson in July 2002. In that case, the plaintiffs challenged Sheriff Hodgson's imposition of two different types of fees on inmates: a daily, five dollar "cost of care" fee that was assessed to all inmates "for administrative services rendered and to assist in defraying the costs of incarceration," and various fee-for-service charges for medical care, haircut services, and GED testing. See *Souza*, 455 Mass. at 575. . . .

In finding that the Sheriff did not have the authority to charge the challenged fees, the SJC rejected the Sheriff's argument that he had an inherent right under the common law to charge fees to inmates. *Id.* at 577–80. . . .

Consistent with the SJC's determination that the Sheriff's authority is not inherent, but rather is created and bounded by statute, the SJC ruled that the Sheriff exceeded his authority when he acted beyond the parameters of the Legislature's statutory scheme. *Id.* at 584 . . . .

### 2. The 2009 Session Law

All sheriffs' offices in the commonwealth were originally part of county government. That changed between 1997 and 2000 when the Massachusetts Legislature transferred seven of the fourteen sheriffs' offices to the commonwealth as part of the abolishment of their respective county governments. When *Souza* was filed in 2002, the remaining seven sheriffs' offices, including Bristol County's, were still operating within the county governments.

While *Souza* was making its way through the courts, this changed. . . .

. . . “An Act Transferring County Sheriffs to the Commonwealth” (the “2009 Session Law” or “Act”), including additional language in Section 22, also discussed below, was enacted on August 6, 2009, as “an emergency law, necessary for the immediate preservation of the public convenience.” 2009 Mass. Legis. Serv. ch. 61. . . .

Sections 3–5 of the 2009 Session Law transferred the offices, duties, and authority of the Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth, and Suffolk county sheriffs to the commonwealth. This included “operation and management of the county jail and house of correction.” . . . The Session Law provided further “all valid liabilities and debts of the office of the transferred sheriff” and “all assets of the office of a transferred sheriff . . . shall become assets of the commonwealth, except as otherwise provided in this act.” Included in this conveyance were all rights, title, and interest in “all correctional facilities,” “all leases and contracts,” and “county correctional funds and other sources of income and revenue, to the credit of the office of a transferred sheriff on June 30, 2009.”

Section 12(a) of the 2009 Session Law provided that “[n]otwithstanding any general or special law to the contrary . . . revenues of the office of sheriff [of the affected counties] for civil process, inmate telephone and commissary funds shall remain with the office of sheriff.” . . . Section 12(c) provided that “[a]ny sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county.” . . .

### 3. Does the 2009 Session Law Authorize County Sheriffs to Generate Revenue Using Inmate Calling Service Systems?

The court now turns to the question posed by the pending motions: Did the 2009 Session Law provide the Sheriff with authority to generate revenue from inmate calling services? For the reasons set forth below, the court concludes that the 2009 Session Law confirmed the Legislatures’ grant of authority to Sheriffs to derive revenue in this way, and that the Sheriff therefore did not act outside his authority.

The critical question is the meaning of § 12(a)’s provision that “revenues of the office of sheriff [of the affected counties] for civil process, inmate telephone and commissary funds shall remain with the office of sheriff.” The court does not find the reference to “revenue . . . for . . . inmate telephone and commissary funds” plain on its face. The court reads this provision, however, in harmony with another provision relating to inmate funds. In both state and county correctional facilities, the superintendent or jailer is required to be the custodian of an inmate’s money and property. *See* Mass. Gen. Laws. ch. 127, § 3. . . . In 1994, the Legislature recognized a further source of revenue relating to these funds, amending the statute to provide that “[a]ny monies derived from interest

earned upon the deposit of such money *and revenue generated by the sale or purchase of goods or services* to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent.” 1994 Mass. Legis. Serv. ch. 60, § 125 (emphasis added) . . . . The court reads Section 12(a) of the 2009 Legislation in harmony with Mass. Gen. Laws. ch. 127 § 3, understanding “revenue . . . for . . . inmate telephone and commissary funds” to include both the interest on these inmate funds and “revenue generated by the sale or purchase of goods [at the commissary] or [telephone] services to persons in the correctional facilities.” In other words, at the time the 2009 Session Law was enacted, the Massachusetts Legislature was aware that superintendents of correctional facilities, including the seven county sheriffs, were generating revenue from inmate telephone calls and canteen purchases, and it was the Legislature’s intent to have such revenues “remain with the office of the sheriff” for these seven sheriffs’ offices.

Plaintiffs present several contrary arguments. Plaintiffs argue first that the relevant portions of the 2009 Session Law are no more than “accounting instructions” setting forth how revenues from commissions should be handled during the one-time transfer of sheriffs’ offices from the counties to the commonwealth. Plaintiffs contend that “Section 12(a) states that revenues a sheriff obtains from ‘inmate telephone and commissary funds shall remain with the office of the sheriff’ *during the transition*” and that “any funds previously collected should ‘remain’ with the sheriff *during the one-time transfer*.” The qualifiers “during the transition” and “during the one-time transfer” do not appear in the statute, and Plaintiffs’ construction would require the court to conclude that the Legislature also intended that the sheriffs’ civil process revenues would also only remain with the sheriff “during the one-time transfer.” This interpretation is explicitly contradicted by Section 22 of the Act, which establishes a commission tasked with studying possible ongoing operations of the sheriffs’ offices, including “the amount of civil process funds collected by each county sheriff and the actual disposition of said funds currently and, in the event of consolidation, realignment, elimination or reorganization, the collection and use of civil process fees in the future.” Where the Legislature made apparent that the sheriffs’ offices would continue to collect and use civil process funds after the 2009 consolidation in Section 22, the court cannot contort the language of Section 12 to say the opposite.

Plaintiffs’ second and third argument are that the Legislature cannot grant authority by “vague implication” but must use language that constitutes an “express authorization,” and that the court should not read Section 12(a) in isolation, but rather should consider the confines of the cited provision and the broader purposes of the Act. Specifically, Plaintiffs argue that the 2009 Session Law does not use explicit language authorizing the revenue and was carefully crafted so as to *not* provide the county sheriffs any new authority, and thus the court should similarly constrain its reading of Section 12(a) so as to not grant the county sheriffs new authority. As noted earlier, however, in 1994 the Legislature authorized correctional facility superintendents to generate revenue

from the sale of goods and services to inmates. Whether this provision included authority to generate revenue from inmate telephone services or canteen is not readily apparent and would require the court to engage in the same analysis the SJC performed in *Souza*: would charging inmates for telephone and canteen services frustrate the Legislature's broader statutory scheme? The 2009 Session Law effectively answered that question by making apparent that as to revenue derived from telephone and commissary accounts, the Legislature knew of the revenue and that, until the Legislature further amends the statutory scheme, the revenue would remain with the offices of the county sheriffs.

Fourth, Plaintiffs argue that Defendants' interpretation of the 2009 Session Law "make[s] no sense" insofar as it would authorize the sheriffs of these seven counties to charge telephone fees while failing to address the authority of sheriffs of the previously transferred counties to do the same. Plaintiffs' argument is not persuasive considering that the 2009 Session Law was directed specifically towards these seven sheriffs' offices and, presumably, arose from negotiations between these seven sheriffs' offices and the Legislature.

Fifth, Plaintiffs argue that Defendants' interpretation of the 2009 Session Law would have the effect of sanctioning the fees found invalid by the SJC in *Souza* . . . .

But there is no conflict between the 2009 Session Law and *Souza*. . . . Section 12(a) . . . removes any ambiguity as to whether collecting revenue through inmate telephone and canteen sales is consistent with the Legislature's statutory scheme. Since Section 12(a) only references revenues from civil process, inmate telephone, and commissary, it cannot be used as authorization for the fees at issue in *Souza*, which concerned cost-of-care, medical care, haircut services, and GED testing. 455 Mass. at 574. Indeed, in this way, the 2009 Session Law affirms the SJC's conclusion in *Souza*, since the fees challenged in *Souza* are not enumerated in section 12(a).

Accordingly, the court concludes that the revenues challenged in this petition are collected under authority granted to the county sheriffs by the Massachusetts Legislature . . . .

#### B. Count VI Against Securus and Motion for Class Certification

Throughout this litigation, Plaintiffs have rooted their argument that Securus is liable under ch. 93A solely on the allegation that Securus entered into an arrangement with the Sheriff to provide kickbacks in contravention of state law. . . . Accordingly, in light of the court's determination on Count I that the generation of revenue from inmate telephone was within the county sheriffs' authority, Securus is entitled to judgment on the pleadings. Plaintiffs' Motion for Class Certification, which only requests certification of a class as to Count VI against Securus, is consequently denied.

## V. CONCLUSION

Plaintiffs' concern that the Sheriff is generating revenue through charges paid by inmates' families and attorneys for phone service is timely as our communities consider how the criminal justice system may best achieve its stated goals. However, these policy questions are for the Legislature not the court. The court is tasked instead with determining the legal question of whether the Massachusetts Legislature granted the Sheriffs authority to generate revenues from inmate telephone services. On that question, the court finds that the Legislature has granted the Sheriff that authority and, accordingly, the claims brought against him and Securus must be dismissed. Thus, Sheriff Hodgson's Motion for Judgment on the Pleadings and Securus's Motion for Judgment on the Pleadings are **ALLOWED**. Plaintiffs' Motion for Partial Summary Judgment on Count I and Motion for Class Certification are **DENIED**.

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### ***Who Pays? Ability-to-Pay Determinations and Who Bears the Costs***

#### **Feenstra v. Sigler**

United States District Court, Northern District of Oklahoma  
No. 19-CV-00234-GKF-FHM, 2019 WL 6040401 (N.D. Okl. Nov. 13, 2019)

Gregory K. Frizzell, United States District Judge:

#### **I. Background and Procedural History**

Since at least Magna Carta in 1215, Anglo-American law has reflected a deeply rooted concern regarding the imposition of penal fines. *See generally Timbs v. Indiana*, 139 S. Ct. 682 (2019) . . . Although painted against the backdrop of that jurisprudence, this motion requires the court to contend only with a single, discrete issue: the procedures employed by three judges of Washington County, Oklahoma with regard to fines, fees, and costs arising from criminal charges filed against the three individual plaintiffs – Amanda Feenstra, Sharonica Carter, and Lonnie Feenstra. . . .

#### **II. Allegations of the Complaint**

The Complaint's factual allegations arise from three separate, but related, courses of conduct: (1) the imposition of fines, fees, and costs at sentencing, (2) appearances at the "cost docket," and (3) incarceration for failure to pay outstanding fines, fees, and costs.

*First*, with respect to sentencing, plaintiffs allege that, in Washington County, no

ability-to-pay inquiry is made as to a criminal defendant's ability to pay fines, fees, and costs at the time of sentencing as required by Oklahoma Rule of Criminal Procedure Rule 8.1. Instead, plaintiffs allege that, *after sentencing*, while setting up a payment plan as to those fines and fees *already imposed*, Washington County criminal defendants are required to complete a "Rule 8" Form. The form contains no questions about the defendants' income, expenses, or ability to pay.

*Second*, after sentencing, criminal defendants in Washington County are ordered to appear at the "cost docket," in which a judge is supposed to oversee the payment of fines, fees, and costs in a manner consistent with the federal and Oklahoma Constitutions, as well as the governing rules of the court. . . . At the cost docket, debtors do not receive any "meaningful inquiry" into their ability to pay. Instead, requests to reduce monthly payments are often denied, and Special Judge Sigler allegedly instructs debtors to make same-day payments or be sent to jail.

*Third*, at the "cost docket," Special Judge Sigler allegedly uses a form document, entitled "Order Remanding Defendant to Jail for Failure to Pay Fines and Costs," that contains a predetermined conclusion that "the Defendant has willfully refused or neglected to pay the amounts . . . previously ordered." . . .

#### IV. Analysis

The Judicial Defendants seek dismissal of all of plaintiffs' claims against them . . . .

##### *B. Standing*

The Judicial Defendants next contend that plaintiffs lack standing. The parties agree that constitutional standing requires three elements: (1) injury in fact, (2) causation, and (3) redressability. . . .

*First, injury-in-fact.* The U.S. Supreme Court defines an "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) . . . .

Relying on the U.S. Supreme Court's decision in *O'Shea v. Littleton*, 414 U.S. 488 (1974), the Judicial Defendants argue plaintiffs' allegations constitute mere speculation of a potential injury. In *O'Shea*, plaintiffs brought a civil rights action against various state court judges in Alexander County, Illinois, among others . . . . *Id.* at 490. Plaintiffs alleged three patterns of unconstitutional conduct against the county, magistrate, and associate county judge defendants: (1) setting bond in criminal cases according to an "unofficial bond schedule" without regard to the criminal defendants' individual circumstances; (2)

setting higher sentences and imposing harsher conditions on black defendants than white defendants; and (3) requiring black defendants to pay for a jury trial when charged with violations of city ordinances that carry fines and possible jail time if the fine is not paid. *Id.* at 492.

With respect to plaintiffs' standing, the Supreme Court noted that, although some of the named plaintiffs had previously appeared before the judicial defendants, at the time the complaint was filed, none of the named plaintiffs were serving an allegedly illegal sentence or awaiting trial before the judicial defendants. *Id.* at 495-96. Further, while recognizing that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," the Court reasoned that, under the facts of that case, the prospect of future injury "rests on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." *Id.* at 496. The Court concluded that whether plaintiffs would again be brought before the judicial defendants required the court to speculate and therefore, under the circumstances, the threatened injury was "too remote" to satisfy the injury-in-fact requirement. *Id.* at 498.

*O'Shea* dictates that this court dismiss count seven, plaintiffs' claim arising from the Judicial Defendants' alleged failure to inquire as to ability to pay at judgment and sentencing. . . . [A]s in *O'Shea*, the prospective future injury – the denial of an ability-to-pay inquiry at the time of judgment and sentencing – requires the court to speculate as to the likelihood that plaintiffs will again be arrested for and charged with a violation of criminal law, and then sentenced again before the Judicial Defendants. . . .

However, as to plaintiffs' remaining claims (counts one through six), *O'Shea* is factually distinguishable and therefore unpersuasive. Unlike in *O'Shea*, plaintiffs allege that they each owe outstanding fines and fees, but have an inability to pay. . . . Further, plaintiffs allege that, in separate "cost docket" appearances, each plaintiff has informed the Washington County court of their respective inability to pay, but that the court failed to provide meaningful relief. Rather, the court threatened plaintiffs with imprisonment. Although not determinative, these allegations of past conduct inform the immediacy of plaintiffs' alleged potential injury. Under the circumstances and viewing the allegations of the Complaint in the light most favorable to plaintiffs, plaintiffs' allegations of potential future injury are "certainly impending" and therefore sufficiently allege a concrete and particularized injury-in-fact. . . .

*Second, causation.* To satisfy the causation criteria for Article III standing, "a plaintiff must show that his or her injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) . . . .



The Judicial Defendants argue that, pursuant to a recent decision of the Oklahoma Court of Criminal Appeals in *Winbush v. State*, 433 P.3d 1275 (Okla. Crim. App. 2018), plaintiffs bear the burden to show inability to pay and their own failure to do so does not confer them standing.

The Judicial Defendants read *Winbush* too broadly. In *Winbush*, the Oklahoma Court of Criminal Appeals held that “once the State proves that the probationer has failed to make restitution payments, the burden shifts to the probationer to prove that his failure to pay was not willful or that he has made sufficient bona fide efforts to pay.” *Winbush*, 433 P.3d at 1278 . . . . In reaching its conclusion, the court interpreted the U.S. Supreme Court’s decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), to require a sentencing court to consider the explanatory reasons offered by a defendant for the failure to pay.

Here, plaintiffs allege that they each informed the Judicial Defendants of their inability to pay the imposed fines, fees, and costs at various “cost docket” appearances, but the defendants failed to “meaningfully inquire” or permit plaintiffs to present evidence of their inability to pay. . . . Because plaintiffs allege that they raised their inability to pay but that the Judicial Defendants failed to meaningfully inquire or permit plaintiffs to present evidence, plaintiffs establish the causation criteria for standing as to their remaining claims.

*Third, redressability.* The Judicial Defendants contend plaintiffs fail to satisfy this element because “[i]t will not have any effect on Plaintiffs’ underlying criminal cases – their cases will remain open pending satisfaction of costs, fines and fees, unless those obligations are later waived by the court following the proper procedure, which Plaintiffs have not alleged they have participated in properly.” The Judicial Defendants’ argument presumes that plaintiffs have not sufficiently alleged participation in the Oklahoma procedural process, but, as discussed above, plaintiffs have sufficiently alleged that they raised their inability to pay at cost docket appearances, but were not provided a meaningful inquiry or the opportunity to present evidence. Further, a judgment in this matter would affect plaintiffs’ obligations to the extent it would require Washington County to make findings of fact and conclusions of law with respect to plaintiffs’ ability to pay at “cost docket” appearance. Thus, the redressability element is satisfied . . . .

### *C. Entitlement to a Declaratory Judgment*

The Judicial Defendants next argue that plaintiffs are not entitled to a declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. Pursuant to that Act[,] . . . “a declaratory judgment plaintiff must present the court with a suit based on an ‘actual controversy,’ a requirement the Supreme Court has repeatedly equated to the Constitution’s case-or-controversy requirement.” *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1240 (10th Cir. 2008). . . .

To argue declaratory relief is unavailable, the Judicial Defendants first raise similar arguments as those raised with respect to standing. Because the court concludes that plaintiffs have standing to pursue the claims asserted in counts one through six, an actual controversy exists between the parties as to those claims. . . .

The Judicial Defendants also argue that a declaratory judgment is inappropriate because plaintiffs seek redress only for past conduct. The Tenth Circuit has recognized that an actual case or controversy exists “where the district court must determine whether a past constitutional violation occurred which will in turn affect the parties’ current rights or future behavior.” *Lippoldt v. Cole*, 468 F.3d 1204, 1217 (10th Cir. 2006) . . . . As set forth above, in counts one through six, plaintiffs allege that they each owe outstanding fines and fees, which they are unable to pay, and, in the past, Special Judge Sigler and former Judge DeLapp either jailed plaintiffs or refused to modify their payment obligations without making the requisite findings of fact and conclusions of law as to plaintiffs’ ability to pay. Thus, plaintiffs allege a prior constitutional violation which may affect their future rights, as well as Sigler’s future behavior. . . .

Finally, the Judicial Defendants contend that a declaratory judgment is inappropriate because more suitable remedies exist—specifically, the state appellate process or appearance and presentation of evidence of inability to pay at the Washington County cost docket. However, as discussed above, plaintiffs allege that they have appeared and asserted an inability to pay at the Washington County cost docket, but that Special Judge Sigler failed to provide a “meaningful review” or permit plaintiffs to present evidence. With respect to the appellate procedure, the Oklahoma Procedures Relating to District and Municipal Courts Relating to Imprisonment for Nonpayment of Fines and Costs is limited to an appeal from an order of detention, and does not include a district court’s decision as to whether to reduce or stay monthly payments. *See* OKLA. STAT. tit. 22, ch. 18, R. 8.8. Further, plaintiffs contend the procedure would require plaintiffs to submit to incarceration.

Regardless, whether an alternative remedy exists relates to the court’s discretionary decision as to whether or not to hear a declaratory action rather than whether or not the controversy is justiciable. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994) (availability of alternative remedies is one of five factors for district court to consider). The Judicial Defendants do not explicitly ask the court to exercise its discretion to decline to hear the declaratory judgment claim, nor do the briefs include any argument directed to the other four *Mhoon* factors. Thus, the court cannot properly weigh the *Mhoon* factors, and the court therefore declines to exercise its discretion to refrain from hearing the declaratory action.

#### *D. Injunction*

The Judicial Defendants next argue that plaintiffs are not entitled to the permanent injunction sought. The Judicial Defendants first argue that plaintiffs' request for relief with respect to the federal § 1983 claims is barred by the Federal Courts Improvement Act, pursuant to which "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." . . . Plaintiffs do not allege that the Judicial Defendants violated a declaratory decree or that declaratory relief is unavailable. In fact, plaintiffs seek a declaratory judgment in this case. Thus, plaintiffs' request for injunctive relief with respect to the federal claims fails. . . .

With respect to plaintiffs' state law claims, to obtain a permanent injunction, plaintiffs must establish: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009) . . . . The Judicial Defendants challenge plaintiffs' ability to satisfy the second, third, and fourth elements.

First, the Judicial Defendants argue that plaintiffs have not established the danger of irreparable harm absent issuance of an injunction and state, "[t]he proper mechanism for challenging or seeking waiver is to appear on the cost docket and present evidence of disability or poverty or to seek appellate review from the Court of Criminal Appeals if necessary." However, the Judicial Defendants' argument fundamentally mischaracterizes the nature of plaintiffs' claims. Plaintiffs explicitly allege that they appeared at the cost docket and attempted to raise their inability to pay, but were denied meaningful review. . . . Thus, plaintiffs allege that appearance at the Washington County cost docket is not a proper mechanism for relief. Nor would review of the Court of Criminal Appeals provide relief, as the review is limited to an order of detention, and would require plaintiffs to either submit to imprisonment or pay fines and fees as ordered by the court without any requested reductions. Taking plaintiffs' allegations as true, the court concludes that the Complaint includes sufficient allegations of a great and immediate threat of harm absent injunctive relief.

Second, the Judicial Defendants argue an injunction would substantially harm defendants and adversely affect the public interest due to disruption of ongoing state court proceedings. However, injunctive suits against a state official are permissible to provide prospective relief from an ongoing constitutional violation. *See Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs have plausibly alleged an ongoing constitutional violation and therefore the Judicial Defendants' argument fails.

#### *E. Oklahoma Governmental Tort Claims Act*

Finally, the Judicial Defendants argue that the Oklahoma Governmental Tort Claims Act precludes plaintiffs' state constitutional and statutory claims. Through the Oklahoma Governmental Tort Claims Act, the State of Oklahoma has adopted the doctrine of sovereign immunity and therefore "[t]he state, its political subdivisions, and all of their employees acting within the scope of their employment ... shall be immune from liability for torts." OKLA. STAT. tit. 51, § 152.1(A). . . . [A]s recognized by the Oklahoma Supreme Court, "'constitutional' torts are . . . clearly 'torts' governed by the GTCA." *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 432 P.3d 233, 239 (Okla. 2018).

However, plaintiffs also contend that their claims do not fall within the scope of the OGTCA because plaintiffs "have [not] sued for damages (*i.e.*, 'loss')." Plaintiffs raise an interesting issue but, unfortunately, neither they nor defendants have adequately briefed the issue.

Most significantly, the Judicial Defendants fail to identify a case or specific provision of the OGTCA supporting the proposition that the Act encompasses claims for equitable relief. Rather, the Judicial Defendants assert that plaintiffs' requested vacatur of outstanding fines, fees, and costs would function as a financial award. But, vacatur is an equitable remedy. See *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1117 (10th Cir. 2016); See generally *United States v. Throckmorton*, 98 U.S. 61 (1878). Thus, this argument fails. . . . [B]ased on the briefing received to date, it does not appear that the OGTCA applies to suits seeking only equitable relief. Thus, the Judicial Defendants' motion to dismiss plaintiffs' state law claims based on the OGTCA is denied.

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**Hiskett v. Lambert (2019)**  
Court of Appeals of Arizona  
247 Ariz. 432 (App. 2019)

Winthrop, Judge:

Arizona Revised Statutes ("A.R.S.") section 13-3967(E)(1) mandates that persons charged with certain bailable sex offenses be subject to electronic monitoring "where available." In this special action, we address a question raised but not directly answered by § 13-3967(E)(1): Must the defendant pay the cost of that pretrial electronic monitoring? We answer that question in the negative, and we also address other issues raised by the parties. . . .

## Facts and Procedural History

Petitioner is facing three counts of sexual conduct with a minor under fifteen years of age, each a class two felony and a dangerous crime against children.

In December 2018, the superior court released Petitioner on his own recognizance pending trial. Given the nature of the charges, A.R.S. § 13-3967(E)(1) required the court to impose “[e]lectronic monitoring where available.” The court ordered Petitioner “to wear a GPS monitoring device within 48 hours of [his release] and [be] responsible for all costs associated with it.”

Petitioner began wearing an electronic location monitoring device from a monitoring service provider that contracted with the Mohave County probation department. Petitioner was required to make a \$150 down payment and pay a charge of more than \$10 per day or approximately \$400 per month for the monitoring device. Because he was released on his own recognizance, Petitioner was able to maintain his job, and the court approved his travel to California for work.

In April 2019, contending he could not afford the continued monthly cost of the electronic monitoring, Petitioner moved to modify his release conditions. Petitioner argued Mohave County must bear the cost of pretrial electronic monitoring services ordered under A.R.S. § 13-3967(E)(1), and that the county could not pass that cost onto him. He also argued that subsection (E)(1) is unconstitutional, facially and as applied, under both the United States and Arizona constitutions.

At the May 16, 2019 hearing on the motion, Petitioner . . . argued that (1) the categorical requirement of electronic monitoring as a pretrial condition for individuals charged with specified sexual offenses violates the state and federal constitutional protections against unreasonable searches, excessive bail, and the guaranteed protection of due process, and (2) even if the statute is constitutional, Mohave County is required to pay for the monitoring because the statute does not expressly authorize the county to impose that cost onto a pretrial defendant. The State took no position and offered no argument or evidence related to the motion.

Despite receiving no evidence to support its subsequent ruling, the superior court determined that, under subsection (E)(1), electronic location monitoring was not “available” in Mohave County because the county was unable and/or unwilling to bear that expense, and it was impractical for the county to seek reimbursement as part of sentencing if Petitioner is convicted. The court also determined the unavailability of government-paid monitoring constituted a “change in circumstances,” revoked the own-recognizance release order, and imposed a \$100,000 secured bond. Because Petitioner could not post that bond, the court took him into custody, and he then filed this petition for special action

asserting the court had abused its discretion by changing his release status and/or by not addressing his constitutional arguments.

After Petitioner filed his petition in this court, the superior court issued a May 30, 2019 order staying the entire criminal prosecution pending resolution of the petition. On June 7, we issued an order vacating the requirement that Petitioner post a \$100,000 bond and vacating the superior court's order removing Petitioner from electronic monitoring status. This effectively returned Petitioner to own-recognition release with monitoring status and required Petitioner to pay the cost of the monitoring service pending resolution of the special action. We also vacated the superior court's May 30 order, noting that the trial proceedings may continue unabated by the special action proceedings. . . .

## Analysis

### I. The Cost Burden of A.R.S. § 13-3967(E)

We first address whether the cost of pretrial electronic location monitoring may be imposed upon a defendant. Subsection € of A.R.S. § 13-3967 provides that, in addition to other conditions of release,

the judicial officer shall impose . . . the following condition[] on a person who is charged with a felony violation of [A.R.S. § 13-3551 et seq.] . . . and who is released on his own recognizance or on bail:

#### 1. Electronic monitoring where available.

Whether subsection €(1) permits a court to impose pretrial electronic monitoring costs on a defendant is a matter of statutory interpretation, which we review *de novo*. *State v. Kearney ex rel. Pima Cty.*, 206 Ariz. 547, 549 (App. 2003). . . .

Subsection €(1), and indeed all of Title 13, is silent as to who should bear the cost of pretrial electronic monitoring. When a statute is silent regarding an issue, “we must look beyond the statutory language and consider the statute’s effects and consequences, as well as its spirit and purpose.” *Calmat of Ariz. V. State ex rel. Miller*, 176 Ariz. 190, 193 (1993) (citing *Kriz*, 145 Ariz. At 377).

Here, the superior court believed the cost should be borne by Petitioner. Mohave County has taken no position, and the Arizona Attorney General agrees with Petitioner that the financial burden should be borne by the county. We agree with Petitioner and the Attorney General that *State v. Reyes*, 232 Ariz. 468 (App. 2013), supports the proposition that counties are not authorized to shift the costs of pretrial electronic monitoring to defendants under § 13-3967€(1).

In *Reyes*, the superior court ordered the defendant, a convicted felon, to submit to DNA testing and pay the applicable fee for the cost of the testing . . . 232 Ariz. At 471. Reyes objected, arguing the order violated his due process rights because the statute does not authorize the court to impose a fee. *Id.* This court held that the legislature's failure to "specifically state that a convicted felon has to pay" the costs associated with statutorily mandated DNA testing left "no basis" for a court to order that he do so. *Id.* at 472. As this court noted, if the legislature wanted convicted felons to pay the cost of mandatory DNA testing, "we presume it would say so expressly, as it has done so in other statutes." *Id.* . . .

Here, as in *Reyes*, the statute at issue imposes a mandatory release condition but does not identify who must pay the cost of implementing this condition. *See id.* at 471. If the superior court in *Reyes* could not order a convicted felon to pay for mandatory DNA testing where the statute was silent about cost shifting, the same reasoning applies here—and with greater force—where Petitioner is accused of certain crimes but has not yet been tried, much less convicted. Thus, the superior court here lacked the statutory authority to order that Petitioner bear the cost of electronic location monitoring during his pretrial release.

The legislative history of A.R.S. § 13-3967€(1) also supports our conclusion. Committee minutes taken during consideration of subsection € indicate that legislators added the "where available" language "so counties in which [electronic monitoring] is not available would not have an additional incurred cost." Minutes of the House Appropriations Committee, 45<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. At 4 (April 8, 2002), *quoted in Haag v. Steinle*, 227 Ariz. At 215. The issue in *Haag* was whether the superior court had the discretion to allow an out-of-state defendant to be released to a location beyond the coverage of the local monitoring system. 227 Ariz. At 213, 216. This court relied in part on the committee minutes to reject the State's argument that the phrase "where available" required the defendant to be released in Maricopa County rather than in his home city in which electronic monitoring was unavailable. *Id.* at 214-15. Instead, we determined "that the 'where available' language came about in recognition of the fiscal reality that not all counties have electronic monitoring capabilities." *Id.* at 215. *Haag's* analysis of the legislative history of subsection € further demonstrates that, although counties are not necessarily required to invest in location monitoring devices, counties that utilize such devices may not require accused defendants such as Petitioner to pay the cost.

## II. The Superior Court's Determination of "Where Available"

Petitioner maintains the superior court abused its discretion and denied him due process when it concluded that electronic location monitoring is not available in Mohave County and then imposed a secured bond of \$100,000 on him. . . .

As we have recognized, the phrase “where available” in subsection €(1) derived from a legislative recognition that some counties may not have electronic monitoring “capabilities.” *Haag*, 227 Ariz. At 215. In *Haag*, this court remanded the matter to the superior court to “exercise its discretion and decide whether to release Haag to his [out-of-state] home . . . without electronic monitoring,” and further advised that the court could “consider the unavailability of electronic monitoring in [Haag’s hometown] as a factor relevant to the release determination.” *Id.* at 216.

Relying in part on this language from *Haag*, we interpret the phrase “where available” in A.R.S. § 13-3967€(1) as encompassing actual availability of the service as well as the financial ability of the county to pay the costs . . . .

Here, the practical availability of electronic location monitoring in Mohave County cannot reasonably be disputed: monitoring is available at a cost. But no evidence was presented at the May 16 hearing regarding the county’s ability to pay for monitoring, and the record otherwise contains no such evidence. With no evidence regarding Mohave County’s electronic monitoring capabilities, the superior court abused its discretion in reaching the unsupported conclusion that such monitoring was not available in Mohave County. Accordingly, that determination must be vacated, and the superior court is directed to hold a hearing and develop a record on the availability of electronic monitoring in Mohave County. The hearing must address (1) the county’s ability to bear the expense, either on an in-house basis or through contractual arrangement with a private provider, and (2) the cost (and possible cost savings) of electronic monitoring versus pretrial incarceration, both incrementally and as a whole. If the superior court determines that electronic location monitoring is “available” in Mohave County, then Petitioner must remain reinstated on such monitoring, at the county’s expense . . . .

### III. Other Considerations

If the superior court determines that electronic location monitoring is not “available” in Mohave County, then such condition cannot be imposed, and the superior court may consider that a change in circumstances allows the court to redetermine “the method of release or the amount of bail.” *See* A.R.S. § 13-3967(B). In making such a redetermination, however, the superior court must make an individualized assessment of what release conditions and/or bail are appropriate based on a factual record developed at an evidentiary hearing. . . .



**Fowler v. Benson**  
United States Court of Appeals for the Sixth Circuit  
924 F.3d 247 (6th Cir. 2019)

Alice M. Batchelder, Circuit Judge:

This is a case about the constitutionality of Michigan’s driver’s-license suspension scheme, as applied to indigent drivers. Plaintiffs claim that the Michigan Secretary of State’s suspension of an indigent person’s driver’s license, on the basis of unpaid court debt, violates the Fourteenth Amendment. Plaintiffs contend that suspending the driver’s licenses of the poor is irrational because license suspension makes their commuting to and from work, for instance, much harder, and therefore reduces the chances that they will pay the debt. Whatever merit Plaintiffs’ argument might have as a matter of policy, its merit as a constitutional argument is diminished by the fact that our review of state legislative choices in this arena is markedly deferential. Because Plaintiffs have not shown that Michigan’s legal scheme is devoid of a rational basis, we decline Plaintiffs’ invitation to etch their preferred driver’s-license policy into constitutional bedrock. . . .

I.

Adrian Fowler and Kitia Harris (“Plaintiffs”) are Michigan residents who claim that their driver’s licenses were suspended due to their inability to pay court debt. . . .

Plaintiffs brought a putative class action under 42 U.S.C. § 1983 against Secretary Benson for unlawfully suspending their driver’s licenses. Plaintiffs sought injunctive relief, claiming that Secretary Benson’s suspension of the driver’s licenses of the indigent who are unable to make payments violates the Equal Protection and Due Process Clauses of the Constitution. The district court found only one of Plaintiffs’ constitutional claims likely to succeed on the merits—Plaintiffs’ procedural due process claim that they were constitutionally entitled to an “ability to pay” hearing prior to the deprivation of their driver’s licenses. . . .

A.

We begin by reviewing the district court’s legal conclusion that Plaintiffs were likely to succeed on the merits of their procedural due process claim. The Fourteenth Amendment prohibits “any State” from depriving “any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. Plaintiffs claim that they have been deprived of a property interest—their driver’s licenses—without due process of law. “Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

As a threshold matter we must acknowledge that Plaintiffs do not claim merely a general property interest in a driver's license; their specific claim is to a property interest, as indigent individuals, in maintaining their driver's licenses when state law requires they be suspended due to unpaid court debt. Identifying with specificity the nature of the claimed property interest makes a difference, as shown in *Roth*. There, a college professor's one-year teaching contract expired and was not renewed. He claimed that the university's failure to provide him with any notice or opportunity for a hearing concerning its decision not to retain him violated his right to procedural due process. . . . The *Roth* Court . . . reversed the district court, explaining that the "[professor]'s 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment." *Id.* at 578. The terms of the professor's contract with the state university were akin to a property interest created by a statutory entitlement. *Id.* Looking to those terms, the Court concluded they did not create a property interest protected by the Fourteenth Amendment. . . .

Similarly here. Supreme Court case law recognizes a protectible property interest in a driver's license under state law. *Mackey v. Montrym*, 443 U.S. 1, 10 n.7 (1979). And indeed, Michigan's license-suspension scheme recognizes such an interest by providing notice and an opportunity to be heard if a license holder wants to challenge his underlying liability for a traffic violation or the misapplication of a fine. Mich. Comp. Laws § 257.321a(1)-(3). But the mere fact that a driver has a property interest in his license (or an interest in continued employment as a professor) under the Fourteenth Amendment does not answer the more particular question of whether Michigan law creates the specific property entitlement Plaintiffs claim. *Roth* illustrates the point because its holding depended on examining the nature of the claimed property interest (in continued employment) and seeing if the professor enjoyed an entitlement to that interest under the relevant law. . . .

State law was likewise dispositive in *Bell v. Burson*, where the Court held that because Georgia's statutory scheme made "liability [for an accident] an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." 402 U.S. 535, 541 (1971). The Court also made clear that if "fault and liability [were] irrelevant to [Georgia's] statutory scheme," then the absence of any hearing on liability "would be appropriate to the nature of the case." *Id.* (citation omitted); see also *Memphis Light, Gas, and Water Div. v. Craft*, 436 U.S. 1 (1978) (holding that Tennessee law established a right not to have utility services terminated except for good cause and therefore that the absence of any pre-termination opportunity for a hearing violated procedural due process).

Here, as in *Roth*, *Bell*, and *Memphis Light*, we must ask whether state law establishes

the entitlement that Plaintiffs' claim in this case—a right of the indigent, who cannot pay court debt, to be exempt from driver's-license suspension on the basis of unpaid court debt. The answer is it has not.

Neither the district court nor Plaintiffs identify any legal authority showing that Michigan law directs anyone to consider a license holder's indigency as part of the process of suspending his driver's license for failure to pay court debt. On the contrary, Plaintiffs' central argument throughout this litigation has been that "[Michigan] law—enforced by the Secretary—that mandates suspensions for failure to pay court debt *with no exception for indigence or non-willfulness*." Plaintiffs' whole point is that Michigan's statutory scheme does *not* create such an entitlement.

And that reading of Michigan law appears to be right. Michigan's statutory scheme for license suspension makes no reference to the indigency status of those whose licenses are subject to suspension. *See e.g.*, Mich. Comp. Laws § 257.321a(2) ("If the person fails to appear or fails to comply with the order or judgment within the 14-day period, the court shall, within 14 days, inform the secretary of state, who shall immediately suspend the license of the person."). . . .

If Plaintiffs' indigency is not relevant to the state's underlying decision to suspend their licenses, then giving them a hearing—or any other procedural opportunity—where they can raise their indigency would be pointless. Such a procedure would do nothing to prevent the "the risk of erroneous deprivation." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court's driver's-license-due-process cases recognize this basic truth. For instance, as explained above, *Bell's* conclusion specifically hinged on whether state law made the factor at issue relevant to the license-suspension decision. 402 U.S. at 541. Likewise, *Dixon* rejected a due process challenge because the plaintiff conceded that he had no substantive basis to contest the license-suspension decision. *Dixon v. Lowe*, 431 U.S. 105, 113–14 (1977). That concession meant plaintiff's requested hearing "might make [him] feel that he has received more personal attention, but it would not serve to protect any substantive rights." *Id.* at 114. The Due Process Clause "does not protect procedure for procedure's sake." *Rector v. City and County of Denver*, 348 F.3d 935, 943–44 (10th Cir. 2003). Here, Plaintiffs' requested indigency hearing would be exactly that, absent a showing that indigency is relevant to the license-suspension decision under Michigan law. . . .

#### B.

Plaintiffs have two more arrows in their quiver, both aimed at showing that Michigan's driver's-license-suspension scheme violates their Fourteenth Amendment rights to equal protection of the law. They argue that Secretary Benson's suspension of their licenses constitutes impermissible wealth discrimination under *Griffin v. Illinois* and its progeny. They also claim a violation of their rights against extraordinary debt collection,

as established under *James v. Strange*. The district court found Plaintiffs' arguments unlikely to succeed. As do we.

*The Griffin Framework.* Plaintiffs argue that Michigan's driver's-license-suspension scheme violates the Fourteenth Amendment as interpreted under *Griffin v. Illinois*, 351 U.S. 12 (1956), and the cases following it: *Williams v. Illinois*, 399 U.S. 235 (1970), *Tate v. Short*, 401 U.S. 395 (1971), *Mayer v. City of Chicago*, 404 U.S. 189 (1971), and *Bearden v. Georgia*, 461 U.S. 660 (1983). Plaintiffs argue that, under these cases, the challenged law is subject to something more than rational basis review. Alternatively, they argue that Michigan's laws cannot survive even rational basis review as they are manifestly "irrational and counterproductive when applied to indigent drivers." Both arguments are unavailing.

First, the district court correctly distinguished the *Griffin* cases from Plaintiffs' claims because none of the *Griffin* cases concerned a property interest. Those cases dealt with basic features of the criminal justice system – imprisonment, probation, and appeals. Property interests are not due the same degree of legal protection as the fundamental liberty interests implicated in the *Griffin* line of cases. . . .

Plaintiffs' reliance on *Bearden* is likewise misplaced. They cite *Bearden* for the proposition that Secretary Benson's refusal to exempt those who are *willing* but *unable* to pay violates "the fundamental fairness required by the Fourteenth Amendment." . . . *Bearden* . . . concerns what kind of process is due before a probationer is subject to confinement, not what kind of process is due before a driver's license is subject to suspension.

Second, contrary to Plaintiffs' claims, their challenge to Michigan's driver's-license-suspension scheme is subject to rational basis review. . . . We explained in *Johnson v. Bredesen* that equal protection challenges to laws that "neither implicate[ ] a fundamental right nor target a suspect class" are subject to rational basis review. 624 F.3d 742, 746 (6th Cir. 2010). Michigan's challenged statute is such a law.

Third, Michigan's driver's-license-suspension scheme passes rational basis review. . . .

It is no struggle to conceive of the legitimate government interests pursued by a law suspending driver's licenses for nonpayment of court debt. The state has a general interest in compliance with traffic laws. By imposing greater consequences for violating traffic laws, the state increases deterrence for would-be violators. The state also has legitimate interests in promoting compliance with court orders and in collecting traffic debt. *See id.* at 747; *see also Blackhawk Mining Co., Inc., v. Andrus*, 711 F.2d 753, 757 (6th Cir. 1983) (holding that a law requiring prepayment of fines before an adequate hearing was justified because

“the government’s interest in prompt assessment and collection of civil penalties to ensure compliance with the Act is substantial”).

Plaintiffs maintain that suspending the driver’s license of an indigent license holder for nonpayment is patently irrational because doing so makes it harder for him to obtain and hold a job, which in turn makes him less likely to pay his court debt. Perhaps Plaintiffs are right that the policy is unwise, even counterproductive. But under rational basis review we ask only whether Michigan’s statutes are “rationally related to legitimate government interests.” *Johnson*, 624 F.3d at 746. Michigan’s choice to wield the cudgel of driver’s-license suspension for nonpayment of court debt dramatically heightens the incentive to pay. Such a policy is rationally related to “the government’s interest in prompt assessment and collection of civil penalties.” *Blackhawk Mining*, 711 F.2d at 757. That this policy may in many cases make that—now more highly incentivized—payment harder to accomplish does not show that the law lacks a rational basis. “Misguided laws may nonetheless be constitutional. . . . Our task . . . is not to weigh this statute’s effectiveness but its constitutionality.” *James v. Strange*, 407 U.S. 128, 133-34 (1972). . . .

Bernice Bouie Donald, Circuit Judge, dissenting:

The question before us is whether Michigan may, in accord with due process, impose an automatic license-suspension-scheme on indigent drivers for failure to pay court fines without regard to their ability to pay and without affording them reasonable payment alternatives. In my view, it may not.

The Supreme Court has long recognized a protected property interest in the continued possession of a driver’s license. See *Bell v. Burson*, 402 U.S. 535, 539 (1971). . . . Yet, on its own account and without the benefit of briefing by the parties, the majority recasts the Plaintiffs’ claims as seeking “a [new] property interest” in an indigency exception, one the majority concludes Plaintiffs have “no claim of legal entitlement.” . . .

The majority commits two critical errors. First, it ignores age-old Supreme Court precedent that squarely recognizes a protected property interest in the continued possession of a driver’s license and proceeds as if Plaintiffs must establish a more specific property interest. Second, and relatedly, it relies solely on Michigan’s deprivation procedures to define the extent of Plaintiffs’ property interests. . . . This puts the cart before the horse. Indeed, the Supreme Court has repeatedly admonished courts not to define a property interest by its deprivation procedures. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) . . . .

Under the proper due process framework, I believe Plaintiffs have an uncontroverted property interest in the continued possession of their driver’s licenses. . . .

The Due Process clause safeguards against a state's impermissible deprivation of a protected property interest. Under the due process analysis, we consider two primary questions: whether the plaintiff has a liberty or property interest entitled to due process protection; and if so, whether the plaintiff was provided sufficient notice and afforded an opportunity to present objections. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) . . . .

The first question under the due process framework is forthright: The Supreme Court has long recognized that “[o]nce [driver’s] licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood . . . [and they] are not to be taken away without that procedural due process required by the Fourteenth Amendment.” *Bell*, 402 U.S. at 539 . . . . There is—without question—a property interest in the continued possession of a driver’s license. . . .

Despite clearly established law, the majority concludes that Plaintiffs have no entitlement right at all to challenge their license suspensions on the basis that they are indigent. . . . The majority’s analysis rests entirely on its misapprehension of the Supreme Court’s decision in *Roth*.

The Supreme Court in *Roth* held that a professor who was hired on a fixed term of one academic year did not have a protected property interest in continued employment after his contract ended. *Roth*, 408 U.S. at 578. The majority reads *Roth* to suggest that the specific “nature of the claimed property interest” by Plaintiffs’ here is an indigency exception, not in continued possession their driver’s licenses. This misreads *Roth*.

The majority observes correctly that *Roth* looked to the “nature of the interest at stake” to determine whether the Plaintiff had a protected property interest. *Id.* at 570–71. Missed by the majority, however, is that *Roth* looked to the professor’s employment contract—the “rules or understanding” that conferred the underlying property interest—to determine the nature of the interest. *Id.* at 577–78. According to *those* terms, the Court explained that “the important fact” was that the plaintiff’s employment contract “specifically provided that . . . [his] employment was to terminate on June 30” and that “they made no provision for renewal whatsoever.” *Id.* at 578. Only then did the Court in *Roth* find that no property interest existed. . . .

The majority likens the one-year teaching contract in *Roth* to the Plaintiffs’ property interest in continued possession of their driver’s licenses. This comparison falls short. Central to *Roth*’s holding was that the plaintiff had no “no tenure rights to continued employment.” *Id.* at 566, 576–77 . . . . Whereas here, the Supreme Court has held that there is a property interest in the “continued possession” of a driver’s license and that it may “not to be taken away without that procedural due process.” *Bell*, 402 U.S. at 539 (citation omitted). Employing *Roth*, there is no question that the nature of the property

interest at stake here is the continued possession of Plaintiffs' driver's license. . . .

Compounding its foundational misapprehension of *Roth*, the majority then misreads the Supreme Court's decision in *Bell*, taking it to stand for the proposition that this Court should look to Michigan's license-suspension statute to determine whether "Michigan law" creates a claim of entitlement in an indigency exception. However, *Bell* does not support such an approach. In *Bell*, the plaintiff challenged Georgia's Motor Vehicle Safety Responsibility Act, which provided that the driver's license of an uninsured motorist involved in an accident would be suspended unless that motorist could post a security bond for the amount of damages claimed by a party to the accident. *Bell*, 402 U.S. at 536. The pre-suspension procedures under the Georgia statute excluded any consideration of fault or responsibility for the accident. *Id.* The Supreme Court held that the law's failure to afford an uninsured motorist a pre-suspension hearing on fault was constitutionally deficient. *Id.* at 543.

Although *Bell* canvassed the state's deprivation statute to determine whether the statutory scheme made "liability an important factor in the State's determination to deprive an individual of his licenses," it did so only to determine *what process was due*, not to define the plaintiff's property interest, as the majority does here. . . . Despite the majority's averment to the contrary, the Court's examination of the state's license-suspension statute was of no consequence to its determination of whether the plaintiff had a claim of entitlement to continued possession of his driver's license.

Having established that Plaintiffs have a protected property interest in the continued possession of their driver's licenses, "the question remain[ing] [is] what process is due." *Morrissey [v. Brewer]*, 408 U.S. 471, 481 (1972)]. At a minimum, due process requires that Michigan provide notice "reasonably calculated, under all the circumstances, to apprise [Plaintiffs] of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314 (citation omitted).

Michigan did not provide Plaintiffs sufficient notice before it deprived them of their driver's licenses. Even assuming that the Secretary is correct in the assertion that Plaintiffs were provided alternatives to payment in full before having their licenses suspended, it sets forth no basis for its failure to provide Plaintiffs with "adequate notice" of the available alternatives in the statute, the citations, or through the court's website. See *Mathews [v. Eldridge]*, 424 U.S. 319 325 n.4 (1976)] . . . .

Because, "unlike some legal rules," due process is "flexible" and "calls for such procedures as the particular situation demands," we weigh the factors set forth in *Mathews* to determine the scope of the hearing required:

[f]irst, the private interest that will be affected by the official action; second,

the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Mathews*, 424 U.S. at 334–35. Applying the balancing approach outlined in *Mathews*, Michigan's law violates procedural due process. . . .

Because I would affirm the district court on the basis that Michigan's license-suspension statute violates Plaintiffs' procedural due process rights, I would not reach the equal protection issue. However, because I also part ways with the majority's equal protection analysis, I write separately to express my divergent views.

At the outset, the fundamental principle pronounced in *Griffin v. Illinois*, 351 U.S. 12 (1956) and its progeny, guides our equal protection analysis. Namely, that a state may not subject an indigent person "who, by definition, is without funds," to a harsher punishment "solely because [they are] unable to pay." *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

In *Griffin*, the Supreme Court invalidated an Illinois statute that required all defendants to purchase transcripts in order to appeal their convictions. *Griffin*, 351 U.S. at 13. Though facially neutral, it failed to "afford[ ] every convicted person, financially competent or not, the opportunity to take an appeal," because indigent persons were not provided an alternative mechanism to receive an adequate transcript. *Id.* at 23 . . . . Extending *Griffin's* principle, the Court in *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1983) held that, absent evidence that the defendant "willfully refused" to pay or that "alternative methods of punish[ment]" are inadequate to meet the state's interest, the state could not constitutionally revoke the defendant's probation for failure to pay.

As its sole basis for distinguishing *Griffin*, the majority – relying on a single Seventh Circuit concurrence in *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 554 (7th Cir. 2014) (Easterbrook, J., concurring) – contends that "property receives . . . less[ ] protection" than liberty interests. On this faulty foundation, the majority presumes that *Griffin* is inapplicable here. Such sparse reasoning begs the question rather than answers it. That liberty interests receive a higher degree of protection than property is nearly inapposite to the more particular question of whether *Griffin* applies here. Certainly, when a state deprives an indigent person of their liberty, they are entitled to the full panoply of constitutional protections. But the majority does not explain why that means it must draw an arbitrary line between liberty and property here. In my view, when a state deprives a person of an essential source of livelihood, "solely because [they are] indigent and cannot immediately pay the fine in full," *Georgia*, 461 U.S. at 664, the principle set forth in *Griffin*



is implicated.

To be sure, later cases reveal that *Griffin*'s principle cannot be so easily cabined to instances where imprisonment is at stake. Indeed, in *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971), the Court rejected the state's argument that *Griffin* was distinguishable because the defendant sought a fee exemption to obtain his transcript to appeal a judgment that resulted in only a civil fine. *Mayer* underscored *Griffin*'s holding that the refusal to allow an exception for the indigent was, as a constitutional matter, no different from adopting an "unreasoned distinction," punishing indigent individuals more severely than non-indigent individuals for reasons unrelated to their culpability. *Id.* at 196 . . . . Certainly, depriving a person of the means to a "basic, pervasive, and often necessary mode of transportation to and from one's home [and] workplace" implicates a basic and fundamental necessity for which *Griffin* should apply. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

The majority concludes that Michigan's license-suspension scheme withstands rational basis review because Michigan "has legitimate interests in promoting compliance with court orders and in collecting traffic debt." Like the Courts in *Griffin*, *Bearden*, and *Mayer*, I find Michigan's license-suspension scheme problematic. It is difficult to rationalize—and, notably, the Secretary does not even attempt to do so—how suspending the driver's license of a person who is truly unable to pay makes it any more likely that Michigan will recover the costs it seeks to collect. Surely, suspending the driver's license of "someone who through no fault of his own is unable to [pay]" will not "make [payment] suddenly forthcoming." *Bearden*, 461 U.S. at 670. Indeed, the "reasons for non-payment [are] of critical importance here." *Id.* at 668. Thus, like *Bearden*, the high interests at stake warrant that Michigan "inquire into the reasons for [Plaintiffs'] failure to pay" and "consider alterna[tives]" to payment in full before it imposes an automatic suspension of licenses. *Id.* at 673. . . .

Michigan's license-suspension scheme imposes a harsher sanction on indigent drivers than their non-indigent peers. Given the great degree of deprivation at stake, Michigan's failure to inquire into a driver's ability to pay and afford alternatives violates due process and equal protection. Because the majority's decision today erodes essential constitutional promises, I dissent!

## Civil Forfeiture

### Sutton v. Marshall

United States District Court, Northern District of Alabama  
– F.Supp.3d –, 2019 WL 5810313 (N.D. Ala. 2019)

Karon Owen Bowdre, Chief United States District Judge:

In one of the most enduring songs from the 1960s, Aretha Franklin sang, “R-E-S-P-E-C-T find out what it means to me.” ARETHA FRANKLIN, *Respect*, I NEVER LOVED A MAN THE WAY I LOVE YOU (Atlantic Records 1967). To federal courts, respect – as memorialized in the *Younger* abstention doctrine – means refraining from interfering with ongoing state court proceedings that implicate important state interests. See *Younger v. Harris*, 401 U.S. 37, 43–45 (1971) . . . . In this case, respect means abstaining from interfering with state forfeiture proceedings about which Ms. Sutton complains. . . .

### Factual Background

On February 20, 2019, Ms. Sutton loaned her car to a friend of hers, Roger Maze; police pulled Mr. Maze over while he was driving Ms. Sutton’s car. During the traffic stop, law enforcement found a trafficking amount of methamphetamine in Ms. Sutton’s car. Ms. Sutton had no knowledge of the methamphetamine and faces no criminal charges. Nevertheless, the state seized Ms. Sutton’s car because it was used to transport drugs and then instituted a civil forfeiture action pursuant to Alabama’s Civil Forfeiture Act, Ala. Code § 20-2-93.

State court records show that the state served Ms. Sutton with a complaint in the civil forfeiture action on March 12, 2019. After Ms. Sutton failed to adequately respond to the complaint, the state entered a default judgement in April of 2019. Ms. Sutton then filed a motion to set aside the default judgment, in which she stated that she was not accused of any crime and that the seizure of her car was unconstitutional. . . . The state court set aside the default and Ms. Sutton filed an answer in July 2019, raising claims that the seizure of her car violated the Eighth and Fourteenth Amendments. She did not raise her claims regarding the constitutionality of the retention of her vehicle. The forfeiture proceedings have yet to go to trial.

In her amended complaint in this court, Ms. Sutton asserts that Alabama’s seizure of her car and the subsequent civil forfeiture proceedings deprive her – and other similarly situated putative class members – of her rights. Ms. Sutton seeks to bring a class action under 42 U.S.C. § 1983. She argues that the state’s failure to provide a prompt post-deprivation hearing after it seizes property violates the Due Process Clause of the Fifth and

Fourteenth Amendments. She further asserts that Alabama's procedures do not provide defendants in civil forfeiture proceedings with an opportunity to contest the deprivation of their property during the pendency of the forfeiture litigation, in violation of the Fourth, Fifth, and Fourteenth Amendments. Ms. Sutton also argues that Alabama's civil forfeiture proceedings violate the Eighth Amendment.

Ms. Sutton requests multiple forms of relief. She requests that the court certify this action as a class action, enter a declaratory judgment stating that Alabama's civil forfeiture proceedings are unconstitutional, hold the state liable for unconstitutional practices, enter injunctions prohibiting the state from engaging in unconstitutional forfeiture practices, enter a judgment requiring the state to immediately institute hearings in all similar civil forfeiture proceedings, and award attorney's fees.

### Discussion

. . . Under Alabama law, a conveyance used to transport drugs is subject to forfeiture. Ala. Code § 20-2-93(a)(5). The state can seize property subject to forfeiture without process where the seizure is instant to arrest. *Id.* § 20-2-93(b)(1). Where property is seized without process, civil forfeiture proceedings must be instituted "promptly." *Id.* § 20-2-93(c), (d). Owners can reclaim their property if they can show that they did not know about and could not have prevented the acts or omissions that led to the seizure of the property. *Id.* § 20-2-93(h). An owner can also execute a bond to reclaim her vehicle during the pendency of the forfeiture action. *Id.* § 20-2-93(h), 28-4-287.

Federal courts act circumspectly when dealing with state court proceedings. . . . While abstention is the exception rather than the rule when determining whether a federal court should exercise jurisdiction, federal courts "may and should withhold equitable relief to avoid interference in state proceedings" out of respect for the principle of comity between state and federal governments. *31 Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003).

Although *Younger* itself dealt with state criminal proceedings, "its principles are 'fully applicable to noncriminal judicial proceedings when important state interests are involved.'" *Id.* (quoting *Middlesex Ct. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). . . .

In determining whether to apply the *Younger* doctrine, a court must ask three questions: "first, do the proceedings constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *31 Foster Children*, 329 F.3d at 1274 (citing *Middlesex*, 457 U.S. at 432).

Ms. Sutton argues that *Younger* abstention does not apply because her federal proceedings would not interfere with an ongoing state court proceeding, as no ongoing state proceeding exists regarding the specific issue of whether the state can retain her car during the pendency of her forfeiture proceeding. She also argues that relief in this case will not interfere with an ongoing state court proceeding, in part because the relief she requests would not terminate the state forfeiture proceeding. In support of her argument that her case would not interfere with an ongoing state court proceeding, Ms. Sutton cites *Belevich v. Thomas*, No. 2:17-CV-01193-AKK, 2018 WL 1244493 (N.D. Ala. Mar. 9, 2018).

Ms. Sutton's arguments fail to persuade the court. As an initial matter, the court finds unconvincing Ms. Sutton's argument that no ongoing state proceedings exist dealing with the continued retention of her car during her forfeiture proceedings. Ms. Sutton construes the issue too narrowly. While neither Ms. Sutton nor the state has instigated proceedings dealing explicitly and solely with the issue of whether the state can retain her car during her forfeiture proceedings without certain procedural measures, the forfeiture proceedings completely encompass the issue of whether the state has a right to hold Ms. Sutton's car, either permanently or temporarily. Further, Ms. Sutton could take advantage of available methods within the state court proceeding to challenge the state's retention of her vehicle. Accordingly, she has not shown that no ongoing state court proceeding exists.

Ms. Sutton also fails to show that federal relief will not interfere with the ongoing state court proceeding. To assess whether a federal proceeding will interfere with an ongoing state proceeding, the court must look at the effect that the relief requested would have on the state proceeding. 31 *Foster Children*, 329 F.3d at 1274. . . . [D]isruption of the state court proceedings can suffice to show interference. *Id.* at 1276. . . . Ms. Sutton's requested relief—which includes a request that this court compel the state court to conduct hearings in cases like Ms. Sutton's—would change the course of state forfeiture proceedings, and, thus, would interfere. *See id.*

Additionally, *Belevich* does not preclude the application of *Younger* in this case. In *Belevich*, the court determined that *Younger* abstention did not apply to a contract dispute where relief could potentially have affected alimony in an ongoing state divorce proceeding because the contract dispute was only “tangentially related” to the divorce proceeding. *Belevich*, No. 2:17-CV-01193-AKK, 2018 WL 1244493, at \*5. . . .

This court has no difficulty distinguishing Ms. Sutton's case from *Belevich*. Unlike the “tangentially related” proceedings in *Belevich*, this case directly involves the seizure and retention of Ms. Sutton's car at issue in state court. . . . The seizure of her car, the subsequent forfeiture proceeding, and the continued retention of the car—all at issue in state court—have far more than a tangential connection with the case she seeks to bring in federal court.

Further, the relief that Ms. Sutton requests would require precisely the kind of oversight of the state courts that *Belevich* conscientiously avoided. . . . Ms. Sutton requests that the court require the state to immediately institute hearings in her own and all similar civil forfeiture proceedings. Issuing and enforcing that sort of injunctive relief would “result in meticulous and burdensome federal oversight of state court or court-like functions” or force the federal courts to become a “grand overseer” of state court proceedings, both of which the Eleventh Circuit has proscribed. *Wexler v. Lepore*, 385 F.3d 1336, 1340–41 (11th Cir. 2004). . . .

Ms. Sutton also argues that *Younger* abstention does not apply because she does not have an opportunity to raise her constitutional issues in the state court. *See Middlesex*, 457 U.S. at 432. A plaintiff bears the burden of showing that state procedural law bars the presentation of her claims. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Further, “when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.” *Id.* at 15. In this case, Ms. Sutton only raised her claims regarding the retention of her car as potential defenses in her motion to set aside default; she has not actually presented those claims in state court. Further, she cannot overcome the assumption of an adequate state remedy. *See id.*

In this case, no unambiguous authority suggests that state procedures would not afford Ms. Sutton an adequate remedy. To the contrary, . . . “Alabama case law shows that the proper avenue for seeking redress for alleged constitutional injuries is in the state civil-forfeiture proceeding.” *Fairfield Cmty. Clean Up Crew Inc. v. Hale*, 735 F. App’x 602, 606 (11th Cir. 2018). . . .

Ms. Sutton argues that she cannot raise her claims because of a lack of prompt post-deprivation process. In support of her position, Ms. Sutton relies almost exclusively on the Southern District of New York’s decision in *Krimstock*. That case is not binding upon this court and the court does not find it persuasive.

In *Krimstock*, the Southern District of New York found that *Younger* did not apply in a case challenging the seizure of cars after DWI arrests in New York. *Krimstock v. Safir*, No. 99 CIV. 12041 MBM, 2000 WL 1702035, at \*1. . . . Relying on *Gerstein v. Pugh*, 420 U.S. 103 (1975), the *Krimstock* court found that the forfeiture proceedings at issue did not “provide an adequate opportunity for plaintiffs to claim a due process right to a prompt probable cause hearing” because the forfeiture proceedings were not instituted until 25 days later – after the time for a prompt probable cause hearing had passed. *Id.* at \*3. . . .

This court finds *Krimstock*’s reliance on *Gerstein* unconvincing. In *Gerstein*, the

Supreme Court held that a prompt determination of probable cause is a constitutionally required prerequisite for pretrial detention. *Gerstein*, 420 U.S. at 126. The Supreme Court also affirmed the lower court's holding that *Younger* abstention did not apply because the only issue in the case was "the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* at 108 n.9.

Similarly, the Eleventh Circuit recently applied *Gerstein* and held . . . that a district court did not abuse its discretion in finding that *Younger* abstention did not apply where a class of plaintiffs did not seek to enjoin a criminal prosecution, but, rather, only sought prompt bail determinations. *Walker v. City of Calhoun*, 901 F.3d 1245, 1254–55 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun*, 139 S. Ct. 1446 (2019). . . .

The facts in *Gerstein* and *Walker* differ from the type of facts involved in *Krimstock* and in Ms. Sutton's case. *Gerstein* and *Walker* dealt with the plaintiffs' challenges to their pretrial detention and bail. Bail and pretrial detention challenges fall under the purview of habeas corpus proceedings, not criminal prosecutions. See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) . . . . The issues were so distinct from the ongoing prosecutions that they would have required separate proceedings. Accordingly, a federal court hearing the bail or pretrial detention issues could not interfere with the ongoing criminal prosecution.

But, unlike in *Gerstein* and *Walker*, no indication exists in this case that Ms. Sutton cannot challenge the continued retention of her car within her state forfeiture proceedings without instituting a separate action. . . .

Moreover, the court sees key differences between the Alabama legal framework at issue in this case and the legal framework in *Krimstock*. Unlike the New York regulation in *Krimstock*, Alabama law *requires* that civil forfeiture actions be instituted "promptly" and provides defendants in forfeiture proceedings with the opportunity to post bond for their vehicle. Ala. Code §§ 20-2-93(c), (h). Ms. Sutton argues that the bond provision does not comport with due process because it does not require the state to show that it has a continued right to retain her property and because the arbitrary amount of the required bond violates the Eighth Amendment. However, Ms. Sutton fails to show why she cannot file a motion challenging the retention of her car and/or challenge the statutory bail provision in state court. In fact, the law suggests that the forfeiture proceedings are *exactly* the proper venue for such a challenge. See *Fairfield Cmty. Clean Up Crew Inc.*, 735 F. App'x at 606.

Finally, in light of the lack of factually similar caselaw from the Eleventh Circuit, the court finds a case from the Sixth Circuit illuminating. In *Loch v. Watkins*, the Sixth Circuit held that *Younger* foreclosed consideration of a suit about the constitutionality of a forfeiture while the state proceedings were ongoing. 337 F.3d 574, 579 (6th Cir. 2003). . . . Although the plaintiff in *Loch* did not specifically raise the issue of the lack of a prompt

hearing, she did argue that, based on the specific law at issue, she was being deprived of a forfeiture hearing and extorted for a settlement in violation of her due process rights. *Id.* The Sixth Circuit found “no impediment to Loch raising the constitutional issues of this case in the state proceedings,” which rendered *Younger* abstention appropriate. *Id.* at 579.

Ms. Sutton’s complaint is similar to the plaintiff’s complaint in *Loch*; they both raise an issue about the lack of an adequate hearing. Like the plaintiff in *Loch*, Ms. Sutton has not shown any actual impediment to raising her constitutional issues in her state forfeiture proceedings. In fact, she *has* raised some constitutional claims challenging the seizure of her vehicle in her state court proceedings. Thus, she has not met her burden of showing that she cannot effectively raise her constitutional claims in state court. See *Pennzoil Co.*, 481 U.S. at 14. Accordingly, the court finds that all three *Middlesex* factors exist in this case and that *Younger* abstention applies. See *31 Foster Children*, 329 F.3d at 1274.

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***Ability to Pay, Ability to Vote***

**Jones v. Governor of Florida**

United States Court of Appeals for the Eleventh Circuit  
– F.3d –, 2020 WL 5493770 (11th Cir. 2020)

Florida has long followed the common practice of excluding those who commit serious crimes from voting. But in 2018, the people of Florida approved a historic amendment to their state constitution to restore the voting rights of thousands of convicted felons. They imposed only one condition: before regaining the right to vote, felons must complete *all* the terms of their criminal sentences, including imprisonment, probation, and payment of any fines, fees, costs, and restitution. We must decide whether the financial terms of that condition violate the Constitution.

Several felons sued to challenge the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. They complained that this requirement violates the Equal Protection Clause of the Fourteenth Amendment as applied to felons who cannot afford to pay the required amounts and that it imposes a tax on voting in violation of the Twenty-Fourth Amendment; that the laws governing felon reenfranchisement and voter fraud are void for vagueness; and that Florida has denied them procedural due process by adopting requirements that make it difficult for them to determine whether they are eligible to vote. The district court entered a permanent injunction that allows any felon who is unable to pay his fines or restitution or who has failed for any reason to pay his court fees and costs to register and vote. Because the felons failed to prove a violation of the Constitution, we reverse the judgment of the district court and vacate the challenged portions of its injunction.

## I. BACKGROUND

Like many other States, Florida has long prohibited convicted felons from voting. The first Constitution of Florida gave the legislature the power “to exclude ... from the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime.” Fla. Const. art. VI, § 4 (1838). The legislature exercised this power to disenfranchise those convicted of an “infamous crime” shortly after the Union admitted Florida in 1845. 1845 Fla. Laws 78. And until late 2018, the Constitution of Florida provided without qualification that “[n]o person convicted of a felony ... shall be qualified to vote or hold office until restoration of civil rights.” Fla. Const. art. VI, § 4(a) (2018).

In 2018, the people of Florida amended their constitution to restore the voting rights of some felons. Amendment 4 began as a voter initiative that appeared on the general election ballot in November 2018. The amendment provides that “any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.” Fla. Const. art. VI, § 4(a). It does not apply to felons convicted of murder or a felony sexual offense. *Id.* § 4(a)–(b). The amendment passed with about 65 percent of the vote, just over the required 60-percent threshold. *See id.* art. XI, § 5(e).

Shortly after Amendment 4 took effect, the Florida Legislature enacted a statute, Senate Bill 7066, to implement the amendment. This statute defined the phrase “[c]ompletion of all terms of sentence” in Amendment 4 to mean any portion of a sentence contained in the sentencing document, including imprisonment, probation, restitution, fines, fees, and costs. Fla. Stat. § 98.0751(2)(a). The Supreme Court of Florida later agreed with that interpretation and ruled that the phrase “all terms of sentence” includes all financial obligations imposed as part of a criminal sentence. *Advisory Opinion to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1084 (Fla. 2020).

To vote in Florida, a person must submit a registration form. The form requires registrants to affirm that they are not a convicted felon or that, if they are, their right to vote has been restored. Florida does not require felons to prove that they have completed their sentences during the registration process. The State allows felons to request an advisory opinion on eligibility before registration, and any felon who registers in reliance on an opinion is immune from prosecution. If the registration form is complete and the Division of Elections determines that the registrant is a real person, it adds the person to the voter registration system. If the State later obtains “credible and reliable” information establishing that the person has a felony conviction and has not completed all the terms of his sentence, the person is subject to removal from the voter rolls. *See* Fla. Stat. § 98.075(5). But any such felon is considered a registered voter, and before removal from the voter registration system, he is entitled to notice—including “a copy of any



documentation upon which [his] potential ineligibility is based” – and a hearing, as well as *de novo* judicial review of an adverse eligibility determination. *Id.* §§ 98.075(7), 98.0755.

At the time of trial, Florida had received 85,000 registrations from felons who believe they were reenfranchised by Amendment 4. State law requires that those registrations be screened for, among other things, the voters’ failure to complete the terms of their sentences including financial obligations. *Id.* § 98.0751. Florida has yet to complete its screening of any of the registrations. Until it does, it will not have credible and reliable information supporting anyone’s removal from the voter rolls, and all 85,000 felons will be entitled to vote. *See id.* §§ 98.075(5) and (7).

Several felons sued Florida officials to challenge the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. Among other provisions, they alleged that the reenfranchisement laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Twenty-Fourth Amendment. . . .

We first explain that Amendment 4 and Senate Bill 7066 do not violate the Equal Protection Clause. Next, we explain why the laws do not impose a tax on voting in violation of the Twenty-Fourth Amendment. Finally, we reject the arguments that the challenged laws are void for vagueness and that Florida has denied the felons due process.

*A. Amendment 4 and Senate Bill 7066 Do Not Violate the Equal Protection Clause.*

. . . Although States enjoy significant discretion in distributing the franchise to felons, it is not unfettered. A State may not rely on suspect classifications in this area any more than in other areas of legislation. But absent a suspect classification that independently warrants heightened scrutiny, laws that govern felon disenfranchisement and reenfranchisement are subject to rational basis review. . . . Every other Circuit to consider the question has reached the same conclusion. . . .

The only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class: the requirement that felons complete their sentences applies regardless of race, religion, or national origin. Because this classification is not suspect, we review it for a rational basis only.

In the earlier appeal from the preliminary injunction, the panel elided this analysis and applied “some form of heightened scrutiny” on the ground that Amendment 4 and Senate Bill 7066 invidiously discriminate based on wealth. *Jones*, 950 F.3d at 817. That decision was wrong. To reiterate, Florida withholds the franchise from any felon,

regardless of wealth, who has failed to complete any term of his criminal sentence—financial or otherwise. It does not single out the failure to complete financial terms for special treatment. And in any event, wealth is not a suspect classification. *See, e.g., Maher v. Roe*, 432 U.S. 464, 470–71 (1977). Outside of narrow circumstances, laws that burden the indigent are subject only to rational basis review. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 123–24 (1996).

To justify its application of heightened scrutiny, the panel relied on Supreme Court precedents governing poll taxes, *Harper*, 383 U.S. 663; poverty-based imprisonment, *e.g., Bearden v. Georgia*, 461 U.S. 660 (1983); and access to judicial proceedings, *e.g., Griffin v. Illinois*, 351 U.S. 12 (1956). The felons ask us to affirm the permanent injunction based on these same decisions. But none of these precedents, alone or in combination, requires heightened scrutiny for the decision to condition reenfranchisement on the full completion of a criminal sentence. . . .

A classification survives rational basis review if it is rationally related to some legitimate government interest, . . . and two interests are relevant here. Florida unquestionably has an interest in disenfranchising convicted felons, even those who have completed their sentences. *See Richardson*, 418 U.S. at 56. But Amendment 4 and Senate Bill 7066 also reflect a different, related interest. They advance Florida’s interest in restoring felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system. The policy Florida has adopted reflects the “more modern view” described in *Richardson* that “it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term.” *Id.* at 55. The twin interests in disenfranchising those who disregard the law and restoring those who satisfy the demands of justice are both legitimate goals for a State to advance. *See id.* at 55–56. . . .

The dissenters suggest that Florida’s only possible interests are in punishment and debt collection, *Jordan Dissent* at 145–49, and that narrow view leads them to conclude that Senate Bill 7066 is irrational, *id.* at 149. The dissenters dismiss our view that Florida also has an interest in restoring rehabilitated felons to the electorate as “an *ipse dixit* . . . [that] merely restates what the law does.” *Id.* at 141. But it is not unusual for a policy to directly achieve an objective itself. . . .

*B. Amendment 4 and Senate Bill 7066 Do Not Violate the Twenty-Fourth Amendment.*

Ratified in 1964, the Twenty-Fourth Amendment to the Constitution forbids taxes on voting in federal elections:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for

Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. U.S. Const. amend. XXIV, § 1.

The felons argue that Florida has denied them the right to vote by reason of their failure to pay court fees and costs imposed in their criminal sentences, which they contend are an “other tax” under the Twenty-Fourth Amendment. They do not argue that fines and restitution are taxes, and for good reason. Fines, which are paid to the government as punishment for a crime, and restitution, which compensates victims of crime, are not taxes under any fair reading of that term. . . .

The term “tax” is a broad one, but it does not cover all monetary exactions imposed by the government. The Supreme Court has long distinguished taxes from penalties in a variety of contexts. *See, e.g., United States v. Constantine*, 296 U.S. 287, 293–94 (1935); *United States v. La Franca*, 282 U.S. 568, 572 (1931). This distinction was well established when the Twenty-Fourth Amendment was adopted, and it continues to define the outer limits of the term “tax” today. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563, 567–70 (2012) (holding, under the canon of constitutional avoidance, that a federal law levied a tax because it could reasonably be read not to impose a penalty). In short, if a government exaction is a penalty, it is not a tax.

“The difference between a tax and a penalty is sometimes difficult to define,” *Child Labor Tax Case*, 259 U.S. 20, 38 (1922), but at least one principle is clear. The Supreme Court has explained in multiple contexts that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 567 (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)); *see also La Franca*, 282 U.S. at 572. Court fees and costs imposed in a criminal sentence fall within this definition: they are part of the State’s punishment for a crime. They are not taxes. . . .

To be sure, one purpose of fees and costs is to raise revenue, but that does not transform them from criminal punishment into a tax. Every financial penalty raises revenue for the government, sometimes considerable revenue. In addition to costs and fees, Florida uses criminal fines to fund both its courts and general government operations, but that additional purpose does not make them taxes. . . .

#### *C. Florida Has Not Violated the Due Process Clause.*

. . . The district court declared Amendment 4 and Senate Bill 7066 unconstitutional as applied to felons who cannot determine the amount of their outstanding financial obligations with diligence, and it created a process under which felons could request an opinion from the Division of Elections stating their total amount of outstanding fines and

restitution. The injunction allowed any felon who did not receive an answer within 21 days to register and vote, and it prohibited the defendants from causing or assisting in the prosecution of any persons who registered or voted under this process. The felons ask us to affirm these aspects of the injunction on the grounds that the relevant Florida laws are void for vagueness and deny them procedural due process. . . .

Under the Due Process Clause, a law is void for vagueness if it “fails to give ordinary people fair notice of the conduct it punishes” or is “so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). But a law “is not vague because it may at times be difficult to prove an incriminating fact.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Instead, a law is vague when “it is unclear as to what fact must be proved.” *Id.* (emphasis added). And even laws that are “in some respects uncertain” may be upheld against a vagueness challenge if they contain a scienter requirement. *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995); see also *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (“The Court has made clear that scienter requirements alleviate vagueness concerns.”).

The challenged laws are not vague. Felons and law enforcement can discern from the relevant statutes exactly what conduct is prohibited: a felon may not vote or register to vote if he knows that he has failed to complete all terms of his criminal sentence. . . .

WILLIAM PRYOR, Chief Judge, joined by LAGOA, Circuit Judge, concurring:

I write separately to explain a difficult truth about the nature of the judicial role. Our dissenting colleagues predict that our decision will not be “viewed as kindly by history” as the voting-rights decisions of our heroic predecessors. *Jordan Dissent* at 189 (citing Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court’s Brown Decision Into a Revolution for Equality* (1981)). But the “heroism” that the Constitution demands of judges—modeled so well by our predecessors—is that of “devotion to the rule of law and basic morality.” . . .

LAGOA, Circuit Judge, concurring:

I concur fully with the majority opinion. There is nothing unconstitutional about Florida’s reenfranchisement scheme. I write separately to express an additional reason why, in my judgment, heightened scrutiny does not apply here. . . . I agree that heightened scrutiny is inappropriate for the reasons laid out in the majority opinion. In my judgment, heightened scrutiny is also inappropriate because Florida provides indigent felons alternative avenues to attain reenfranchisement. . . .

MARTIN, Circuit Judge, joined by WILSON, JORDAN, and JILL PRYOR, Circuit Judges, dissenting:

I am pleased to join Judge Jordan's dissent in full. I write separately to elaborate on the due process problems that stem from Florida's actions here and exist separately from the other constitutional deficiencies discussed in Judge Jordan's dissent. In particular, I take issue with the position accepted by the majority that Florida's constitutional amendment imposes no obligation, or even any responsibility, on the State to provide its citizens with the information required in order for them to register to vote. . . .

JORDAN, Circuit Judge, joined by WILSON, MARTIN, and JILL PRYOR, Circuit Judges, dissenting.

"Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote."

AMERICAN BAR ASSOCIATION, RESOLUTION: TEN GUIDELINES ON COURT FINES AND FEES, GUIDELINE 5 (AUG. 2018).

. . . The evidence [at trial] showed, and the district court found, that since the passage of Amendment 4 Florida has demonstrated a "staggering inability to administer" its LFO requirement. . . . That is an understatement. Florida cannot tell felons—the great majority of whom are indigent—how much they owe, has not completed screening a single felon registrant for unpaid LFOs, has processed 0 out of 85,000 pending registrations of felons (that's not a misprint—it really is 0), and has come up with conflicting (and uncodified) methods for determining how LFO payments by felons should be credited. *See id.* at \*24. To demonstrate the magnitude of the problem, Florida has not even been able to tell the 17 named plaintiffs in this case what their outstanding LFOs are. *See id.* So felons who want to satisfy the LFO requirement are unable to do so, and will be prevented from voting in the 2020 elections and far beyond. Had Florida wanted to create a system to obstruct, impede, and impair the ability of felons to vote under Amendment 4, it could not have come up with a better one.

. . . So much is profoundly wrong with the majority opinion that it is difficult to know where to begin. . . .

The majority proceeds as though the reality on the ground does not matter, but the record tells a different story. After an eight-day bench trial, the district court issued a 125-page opinion containing the following findings of fact—none of which Florida challenges on appeal.

1. "[T]he overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount, and thus, under Florida's pay-to-vote system, will be barred from voting solely because they lack sufficient funds." . . .

2. “[M]any felons do not know, and some have no way to find out, the amount of LFOs included in a judgment.” . . .

3. Even if a felon knows that he owes LFOs, “[d]etermining the amount that has been paid on an LFO presents an even greater difficulty” and “is often impossible.” . . .

4. In many cases, “probably most,” felons cannot pay their outstanding balance without being required to pay additional fees that were not included in their sentence. . . .

5. In the 18 months since Amendment 4 was adopted by Florida voters, Florida has not completed screening even a single registrant for unpaid LFOs, and it has processed 0 out of 85,000 pending registrations of felons. . . .

6. “It is likely that if the State’s pay-to-vote system remains in place, some citizens who are eligible to vote, based on the Constitution or even on the state’s own view of the law, will choose not to risk prosecution and thus will not vote.” . . .

7. “Fees and costs are imposed in all cases, with few if any exceptions. . . . Each type of fee or cost is authorized, indeed usually required, by statute. These are not traditional court costs of a kind usually awarded in favor of a prevailing litigant; they are instead a means of funding the government in general or specific government functions.” . . .

In my view, we correctly ruled in *Jones I*, 950 F.3d at 817–25, that heightened scrutiny should apply to the plaintiffs’ equal protection claim. But even if heightened scrutiny does not apply, the district court properly concluded that Florida’s LFO scheme fails rational basis review. See *Jones II*, 2020 WL 2618062, at \*15–26. . . .

We held in *Jones I* that “heightened scrutiny applies . . . because we are faced with a narrow exception to traditional rational basis review: the creation of a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box.” *Jones I*, 950 F.3d at 809. I wholeheartedly agree. . . .

The Supreme Court’s opinions in *Griffin v. Illinois*, 351 U.S. 12 (1956), *Bearden v. Georgia*, 461 U.S. 660 (1983), and their progeny establish that “the state may not treat criminal defendants more harshly on account of their poverty.” *Jones I*, 950 F.3d at 818. . . .

Heightened scrutiny also applies for another reason—the right to vote is indisputably fundamental. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)

(voting “is regarded as a fundamental political right . . . preservative of all rights”); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”). And even if voting is not fundamental for felons who are re-enfranchised, it is certainly a critically important right that demands a searching analysis. . . .

[T]o summarize, “[t]he form heightened scrutiny took in *Bearden* was comprised of four considerations: (1) the nature of the individual interest affected; (2) the extent to which it is affected; (3) the rationality of the connection between legislative means and purpose; and (4) the existence of alternative means for effectuating the purpose.” *Id.* at 825 (citations and internal quotation marks admitted). Voting is an important and weighty interest, even if not deemed fundamental in this context. See *id.* at 825–26. That interest is “profoundly affected” here because the LFO requirement completely denies indigent felons the right to vote, at least in any election that occurs while they are indigent. See *id.* at 826. And, as I will discuss shortly, the LFO requirement does not rationally serve any conceivable legitimate state interest, and Florida has far better ways to collect felons’ debts. . . .

If Florida’s interest is in felons repaying their full debts to society, requiring indigent felons to pay LFOs before regaining the right to vote does not actually aid in collections. See *id.* at 811 (“The problem with the incentive-collections theory is that it relies on the notion that the destitute would only, with the prospect of being able to vote, begin to scratch and claw for every penny, ignoring the far more powerful incentives that already exist for them—like putting food on the table, a roof over their heads, and clothes on their backs.”); *Jones II*, 2020 WL 2618062, at \*26 (“[O]ne cannot get blood from a turnip or money from a person unable to pay.”). The LFO requirement thus erects a barrier to voting for the indigent, “without delivering any money [to the state or to victims] at all[.]” *Zablocki v. Redhail*, 434 U.S. 374, 389–91 (1978) . . .

Moreover, “in practical effect” the LFO requirement does not rationally further Florida’s asserted goal. See *Moreno*, 413 U.S. at 537. The district court’s undisputed factual findings show that Florida often cannot tell felons how much they owe. If Florida cannot inform felons about the amount of LFOs they have outstanding—information which they must have in order to satisfy their obligations—how can this system possibly encourage or incentivize felons to complete the terms of their sentences? There is no answer, because no answer is possible. . . .

In my view, the district court concluded that the LFO requirement violates due process: “The requirement to pay, as a condition of voting, amounts that are unknown and cannot be determined with diligence is unconstitutional.” *Jones II*, 2020 WL 2618062, at \*44. This is a due process holding—not an equal protection holding—as it does not rest on differential treatment of those who are unable to pay, but on Florida’s failure to give felons adequate notice or information on how to satisfy the terms of their sentences. . . .

The district court got it right. The LFO requirement violates due process because Florida does not provide felons with adequate notice of their eligibility to vote. . . .

A Florida statute, § 98.075(7), outlines the procedures for removal from the voter rolls, including notice of the registered voter's ineligibility and an opportunity to request a hearing. But these procedures fall constitutionally short for several reasons.

First, the procedures set forth in § 98.075(7) do not come into play until after the Division of Elections begins to screen registrants, determines that they are ineligible to vote, and seeks to remove them from the voter rolls. As the district court found, and Florida does not contest, the Division of Elections has processed 0 out of 85,000 pending registrations of felons. So, for those 85,000 registrants—and all those who will surely follow—the statutory requirement of notice and a hearing is completely illusory. Those appalling numbers, unfortunately, mean nothing to Florida or to the majority.

Second, should any of these 85,000 registrants choose to vote in the upcoming election—as they may believe, in good faith, they have a right to do—they risk criminal prosecution if they turn out to be wrong about their eligibility. . . .

Third, there is no procedure for a felon to determine his eligibility to vote before registering—even though the voter registration form requires registrants to sign an oath affirming that they are qualified to vote. . . .

Fourth, if a felon registers based on the belief that he is eligible to vote, and then turns out to be wrong, he may be prosecuted for making a false affirmation in connection with voting. Florida downplays this risk, proclaiming that felons should rest assured that they will not be convicted if they registered in good faith because willfulness must be shown to prove a violation of Fla. Stat. § 104.011. But that comforting assurance—tactically made for an advantage in litigation—is useless, as it does not tell us how the state's prosecutors will choose to prosecute possible or alleged violations of the law. . . .

The district court concluded that fees and costs routinely imposed by Florida on criminal defendants are “other tax[es]” prohibited by the Twenty-Fourth Amendment, as they are “assessed regardless of whether a defendant is adjudged guilty, bear no relation to culpability, and are assessed for the sole or at least primary purpose of raising revenue to pay for government operations. . . . A tax by any other name.” . . .

When the Twenty-Fourth Amendment was ratified, a “tax” was commonly understood as a “[c]ontribution levied on persons, property, or business, *for support of government.*” Concise Oxford Dictionary of Current English 1328 (5th ed. 1964) (emphasis added). . . .



Most importantly, the primary purpose of these fees and costs is to raise revenue for the operation of Florida's government. As mentioned earlier, Florida funds its criminal-justice system in large part through fees routinely assessed against criminal defendants. *See* Fla. Const., art. V, § 14 (providing that, with limited exceptions, all funding for clerks of court and county courts must come from fees and costs). Florida law therefore requires that payments of fees and costs be retained in various trust funds to generate revenue for court-related functions, and that the excess be remitted to the Florida Department of Revenue to fund other areas of state government. *See* Fla. Stat. §§ 28.37(3), 213.131, 215.20, 142.01, 960.21. . . .

But even if there is some incidental punitive purpose for these fees and costs, that does not change the undeniable fact that their primary purpose is the raising of revenue. And Supreme Court precedent tell us that it is the primary purpose that matters. . . . [T]he fees and costs here do not aim to outlaw any behavior. Nor are they the principal consequence for committing a felony offense—imprisonment, fines, and restitution serve that purpose. The fees and costs here serve primarily to raise revenue for the state, and therefore are taxes. . . .

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### ***Ability to Pay and the COVID Crisis***

#### **Russell v. Harris County, Texas**

United States District Court, Southern District of Texas

— F. Supp. 3d. —, 2020 WL 1866835 (S.D. Tex. Apr. 14, 2020)

Lee H. Rosenthal, Chief United States District Judge:

Individuals arrested in Harris County, Texas, for felony charges are usually brought to the Harris County Jail to wait for hearings and trials. Those who can post the money bond usually imposed under a preset bail schedule do so. Those who cannot, because they are too poor to post the bond premium, wait. First, they wait for counsel to be appointed, then for opportunities to seek release on a personal bond with no upfront payment. In this lawsuit, three plaintiffs allege that many indigent arrestees are in jail because they were denied a pretrial personal bond and cannot make the upfront payment on a financial bond. They would, they argue, be released without delay if they could make the bond payment. They argue that Harris County provides an inadequate process for individually assessing who can meet the requirements for safe release on a personal bond. They claim due process and equal protection violations from wealth-based detention before formal bail hearings.

The plaintiffs asserted these claims before the coronavirus and pandemic produced the national emergency now facing the country.

The plaintiffs urge that approximately 4,000 felony arrestees, not convicted of the charged offense, are kept in the densely packed Harris County Jail for weeks or months longer than those able to post a bond. They incur the costs of prolonged pretrial detention, including job loss, eviction, a greater likelihood of pleading guilty, and a higher chance of receiving a harsher sentence. Now they face a greater risk of exposure to, or exposing others to, the coronavirus. COVID-19 raised and changed the stakes.

In the crowded Jail, social distancing and adequate sanitation are hard to maintain. There are daily arrivals of new arrestees with a variety of underlying health and medical issues, likely including COVID-19. Those with the disease risk infecting other arrestees, as well as the deputies and employees who guard them, feed and care for them, and who then go home, potentially to infect their own families and communities.

These motions and opinion are not directly about prison conditions or whether public health is best served by releasing which arrestees. They are instead about the process and timing of individualized hearings to determine whether a particular pretrial felony arrestee can be dismissed on a personal bond. The plaintiffs ask this court to authorize the Harris County Sheriff to release many felony arrestees, who have not had a trial or been convicted, and cannot post the upfront payment based on bail-schedule amounts, if they do not promptly get formal, individualized, evidentiary hearings to determine whether they could be safely released on a personal bond. The plaintiffs also ask this court to overturn as unconstitutional part of Governor Greg Abbott's Executive Order GA-13, which limits state district judges' discretion to issue personal bonds during the COVID-19 crisis. That Order was one of several issuing from those with authority to set and implement policies to meet the COVID-19 crisis in our state's jails and prisons. The Harris County Commissioners Court Judge and the State Administrative Judge both issued orders that attempt, in different ways, to expedite the release of pretrial, not convicted, low-level, nonviolent felony arrestees from the Harris County Jail on personal bonds to safely reduce the Jail population.

State and local policymakers agree that the Harris County Jail population must be reduced, but they disagree on how to safely do so. A federal district court asked to wade into policy and political disagreements among State and County elected officials is in risky territory. There is no good, clearly safe, constitutionally, and jurisdictionally right solution to many of the short-term problems and disagreements the pandemic has made so acute. And when, as here, these disagreements appear to have been somewhat resolved, at least to the extent necessary to achieve a workable, voluntary process for the safe release of appropriate pretrial, not convicted, arrestees within the present pandemic constraints, that

is a powerful reason for a federal court to decline to intervene through the blunt instrument of a temporary restraining order.

After careful consideration of the motions, the State intervenors' responses, the parties' arguments in the many teleconferences, the applicable law, the views of the interested nonparties, the sparse record, and the court's limited authority, the court denies the plaintiffs' motions for temporary restraining orders. The court is not issuing any definitive ruling on the merits. That comes later, on a fuller record.

This is neither an easy nor good solution. It is simply the best one this court can devise from the law and the facts that constrain its authority. The good news, however, is that it reflects the commendable, though still halting, progress made by the parties and interested nonparties in safely reducing the Harris County Jail population during this dangerous time. . . .

## I. Background

When this lawsuit was filed in January 2019 to challenge Harris County's bail procedures for pretrial felony arrestees, the world was different. The three plaintiffs, Dwight Russell, Johnnie Pierson, and Joseph Ortuno claimed that they and others felony arrestees not yet convicted of a crime were detained pending trial because they were too poor to post any financial bond, while those presenting the same kind and degree of risk factors but who were able to pay were routinely promptly released.

The plaintiffs brought a class action suit against Harris County and Sheriff Ed Gonzalez under 42 U.S.C. § 1983. They alleged that the County's system of setting bail for indigent felony arrestees violated their equal protection and due process rights under the Fourteenth Amendment of the United States Constitution. The plaintiffs advised the court that the suit raised issues similar to *ODonnell v. Harris County*, 227 F.Supp.3d 706 (S.D. Tex. 2016), which challenged bail policies and practices for misdemeanor arrestees. The parties in *Russell* moved to stay, first pending the resolution of *ODonnell*, and then to try to have the responsible policymakers resolve this case. The efforts continued until they were upended by the COVID-19 pandemic and national emergency.

As the Fifth Circuit recently recognized, "our nation faces a public health emergency caused by the exponential spread of COVID-19, the respiratory disease caused by the novel coronavirus SARS-CoV-2." *In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020). On March 13, 2020, the President of the United States declared a national state of emergency and the Governor of Texas declared a state of disaster. *Id.* . . . Less than a week later, the Texas Health and Human Services Executive Commissioner declared a public health disaster because the virus "poses a high risk of death to a large number of people and creates a substantial risk of public exposure because of the disease's method of transmission and evidence that there is community spread in Texas." *Id.* . . .

This lawsuit is one of a growing number around the country challenging whether due process guarantees are met in this unprecedented intersection of the pandemic with mass incarceration. As the coronavirus spread, public health officials warned that the Harris County Jail, the third largest in the nation, threatened to become a hotbed of contagion. The densely packed Jail and shortage of supplies make social distancing and hygienic practices impractical. The predicted result is widespread infection, not only among arrestees and inmates, but also for the deputies and police officers who arrest and guard them, and the employees and contractors who care for them. These deputies, officers, and employees leave the jail every day and, if infected, will unwittingly infect their own families and others. The public health officials urged Harris County promptly to identify and implement ways to reduce the Jail population to protect the entire community.

. . . [O]n March 20, Harris County Administrative Judge Herb Ritchie, who oversees the State Criminal District Courts in Harris County, ordered the Sheriff to process the immediate release of anyone currently detained or booked into the Harris County Joint Processing Center for one of 20 felony charges if the person was not already on felony probation and felony deferred adjudication, or did not have another warrant, hold, or pending felony charge.

On March 27, the plaintiffs moved for the first of two temporary restraining orders in light of the emergency. The plaintiffs asked for a 14-day “emergency order . . . requiring Defendants not to enforce pretrial detention orders against Plaintiff class members unless they provide constitutionally adequate bail proceedings.” Counsel for the plaintiffs informed the court that there were approximately 4,400 pretrial felony arrestees currently detained because they could not pay the financial conditions of their release. Of those arrestees, approximately 1,000 allegedly remained in the Jail only because they could not afford to pay a bondsman \$350 or less. The parties alleged that only 38 arrestees were eligible for release under Judge Ritchie’s March 20, 2020, Order. . . .

The Governor issued Executive Order GA-13 on March 29, prohibiting the release on a personal bond of any individual currently arrested or previously convicted of a felony involving physical violence or a threat of physical violence. The only exception is for an arrestee who, after an individualized hearing, is able to show that he or she is particularly vulnerable because of underlying health or medical conditions and issues.

On April 1, the plaintiffs asked this court for a second temporary restraining order against enforcement of Executive Order GA-13’s provisions that bar state judges from making individualized determinations that nonfinancial conditions of release are appropriate for pretrial arrestees accused or previously convicted of violent offenses who do not have particular health or medical reasons for release. . . .

#### IV. The Case Law

The case law responding to the pandemic is scant and conflicting. Courts around the country have taken different approaches to, and reached different conclusions on, challenges to detention in the face of this crisis. The facts are unusual and as a result, the case law is of limited help.

This case does not, like many, involve a federal-court challenge to a federal jail or prison facility, on either the conditions of confinement (including medical care) or on the duration of confinement and conditions of pretrial release. . . .

Nor does this case pose a direct federal-court challenge to the conditions of confinement in a state or local facility, such as the medical and health steps in the jail or prison to reduce and address infection and illness. . . .

Given how this case differs from other COVID-19 litigation, the court is operating on uncertain legal terrain with limited guidance. . . .

This court also looks to the guidance from the Fifth Circuit in *In re Abbott*, 954 F.3d 772, 783-84 (5th Cir. 2020), which directs courts to defer to state actions taken in times of emergency, even if they infringe on individual constitutional rights. The Fifth Circuit affirmed the standard laid out in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905), which provides that judicial review is only available:

if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law. *Id.* at 784.

The court recognizes that the plaintiffs' March 27 motion for a temporary restraining order does not involve a statute, order, or other decision that was enacted to combat the COVID-19 crisis, and therefore *Jacobson* is not clearly implicated. But the court takes note of the deference required to state and local actors in the face of the crisis, and examines the Harris County stakeholders' responses to the crisis with that in mind. . . .

#### V. Putting It Together, For Now

The plaintiffs argued that in light of COVID-19, they and other poor pretrial felony arrestees are denied an adequate opportunity to challenge their potentially unconstitutional wealth-based detentions, but the current record evidence is not enough to support granting either of the temporary restraining orders they seek. Yes, there have been delays between when an arrestee: (1) is denied release on a personal bond; (2) then is denied release in an

informal hearing with a hearing officer that the district judges have stated, and the plaintiffs have acknowledged, are provided within a few days after arrest; and when the arrestee (3) actually has a formal individualized hearing after counsel requests one. Yet despite the numbers of people involved, and the impact of the virus and stay-at-home orders on the bar, the bench, the District Attorney and Public Defender's Offices, the Sheriff's Office, and Harris County, new processes to consider eligible arrestees for expedited release have been hammered out, put in place, and are slowly but surely being implemented.

The district judges are working hard under post-Hurricane Harvey courtroom space constraints that predated, but are made much worse by, the pandemic. This court cannot safely order judges to have more hearings with more in-person participants than social distancing limits permit. The judges are also operating under constraints of resources and personnel made much worse by the pandemic. They are working on getting the technology – much of which is available – in place to hold remote hearings, and ensure that the judges and others are trained in its use. This court cannot devise relief that would fairly and safely result in more technology being put into place faster for more judges, or for them to become adept in using it on a specific schedule. The record shows that all stakeholders are working to have the necessary formal, individualized evidentiary hearings on releasing pretrial arrestees on personal bonds to take place within days after defense counsel requests them, in an adequate and safe manner, in keeping with the County's emergency operations order and the risks of the COVID-19 pandemic.

According to Judge Ritchie's April 9, 2020, letter, "[i]n the Harris County State District Courts, hearings can be set generally within days of request, *even under the current conditions*, depending on the complexity of coordinating witnesses, the availability of courtroom space, and the ability to comply with public health measures to avoid spreading COVID-19."

The court does not find that the record disproves the plaintiffs' claims, but rather that the sparse, conflicting accounts do not support awarding the extraordinary relief the plaintiffs seek. To prevail, the plaintiffs must satisfy all four temporary-restraining-order factors: a substantial likelihood of success on the merits, irreparable harm, the balance of equities, and the public interest. . . . The court assumes, but does not decide, that the plaintiffs have shown a substantial likelihood of success on the merits of the claim that, in the circumstances of the pandemic and with the added risks of detention that result, the delay in getting formal individualized hearings for indigent arrestees – a delay that those able to post bond can avoid – is unconstitutional. It is undisputed that arrestees who must wait in jail for a bail hearing for as long as the plaintiffs allege face irreparable harm from contracting the coronavirus. But the court less easily assumes that the plaintiffs have met their burden of showing that the relief sought is in the public interest. Granting temporary relief and allowing the alleged lengthy detention both present risks. There is the threat of

releasing on a personal bond those who should not be released because of risks such as not only failure to appear, but also of new offenses. On the other hand, there is the risk that if they are detained in tight jail conditions, they may have a greater likelihood of being infected or infecting others, as well as the risks of the collateral consequences of prolonged wealth-based detention (e.g., job loss and an increased sentence) and constitutional violations.

The court cannot find that the present record, sparse and fast-changing as it is, meets the plaintiffs' burden to show that it is in the public interest to grant the relief sought, or that denying it will disserve the public interest. This is particularly true because it is not clear that local officials could implement any remedy more effective than the current processes they are trying to execute and improve. A temporary restraining order backed by the threat of contempt might even create confusion and fear that would disrupt current efforts and make matters worse. These concerns apply not only to the public interest factor, but also to the balance of equities. Both factors weigh against granting a temporary restraining order.

The recent support for releasing pretrial felony arrestees accused of nonviolent offenses in Harris County supports the court's conclusion. In the few weeks since the plaintiffs first moved for a temporary restraining order, the County stakeholders have devised and executed a process to ensure that those who might safely be released on personal bonds are identified for the District Attorney to review. Those whose release the District Attorney does not oppose (or initially opposed but then agrees to) are slated for release and are being released, although it needs to be faster. This process has resulted in 372 releases as of April 13. Those whose release is opposed can request a formal evidentiary hearing before a Harris County district judge for an individualized bail determination. The judges are working hard to provide this formal hearing quickly. They have informed the court that these hearings will proceed, even during the current state of emergency. The court cannot find on this record that in this time of crisis, federal-court intervention in fraught and rapidly evolving County affairs is required, safe, or would at this time materially improve the processes under way. . . .

#### VI. The April 1, 2020, Motion for a Temporary Restraining Order

Nor have the plaintiffs shown a sufficient likelihood of success on the merits of their challenge to the Governor's Executive Order GA-13. A key issue is abstention. "[U]nder the *Pullman* doctrine, a federal court should abstain from exercising its jurisdiction 'when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.'" *Nationwide Mut. Ins. Co. v. Unauthorized Prac. of Law Comm.*, 283 F.3d 650, 652 (5th Cir. 2002) . . . . *Pullman* abstention is appropriate when a case involves "(1) a federal constitutional challenge to state action and (2) an

unclear issue of state law that, if resolved, would make it unnecessary for [the court] to rule on the federal constitutional question.” *Id.* at 653. . . .

The court finds that *Pullman* abstention is appropriate. To begin, there is a pending state-court lawsuit challenging the Executive Order that raises questions about novel, uncertain issues of state law. . . . The state-court plaintiffs include the Harris County misdemeanor court judges and several civil rights and criminal defense organizations. They argue that the Executive Order exceeds the Governor’s authority under the Texas Constitution and the Texas Disaster Act of 1975. . . .

The plaintiffs in this case respond that this court need not abstain because the Executive Order’s violation of federal rights is clear no matter how the state litigation turns out. This contention does not refute that the relevant state law is uncertain and will impact any argument in this court.

A better argument against abstention may be that “the costs of delay pending state court adjudication” are intolerable given the risk that, as the plaintiffs argue, the Executive Order violates federal rights, threatens indigent arrestees’ lives, and jeopardizes efforts to prevent COVID-19 from engulfing the Harris County Jail and spreading throughout the Houston region. *See Baran, [v. Port of Beaumont Navigation Dist., 57 F.3d 436, 442 (5th Cir. 1995)]*. The court takes this concern seriously, and recognizes the critical constitutional, health, and public safety interests the plaintiffs invoke as reasons for swift federal action.

But delicate considerations of federalism and separation of powers support abstention in this complex, rapidly evolving situation. The Executive Order is not permanent. This dispute involves a dizzying array of government actors with different interests, policies, and legal positions. This court is in the middle of, as Sheriff Gonzalez puts it, “turf wars” between the State of Texas, America’s third-largest county, the County Sheriff, the District Attorney, the Chief Public Defender, state felony judges, and the state-court plaintiffs, including the Harris County misdemeanor judges, who are challenging the same Executive Order that the plaintiffs in this case seek to enjoin. Because the state courts are well positioned to provide expedited review of the Executive Order, this court should, and will, stay out of the fray for now.

Moreover, on the current, limited record, in the emergency circumstances presented, it is best to leave sensitive policy and political decisions on crafting procedures to accomplish the shared goal of safely reducing the Jail population to elected and appointed officials. “Turf wars” allow different interests and views to be heard and addressed on the ground, by those who must actually implement the policies and procedures. The court does not want to disrupt the laudable existing efforts to address the crisis. Disrupting a process that strives to recognize the different interests and concerns is



an added risk of intruding with a temporary restraining order that is backed by the threat of contempt. . . .

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## **Legislative and Executive Initiatives**

### ***California: A Growing Movement Toward Abolition***

#### **California Senate Bill 190**

2017-2018 Regular Session, Legislative Counsel's Digest (enacted October 2017)  
(prohibits court-imposed costs on juveniles and parents or guardians of juveniles)

*In 2017, California enacted a law repealing counties' authority to charge fees to parents, guardians, and youth for a youth's involvement in the juvenile delinquency system. Below is an excerpt from the legislative counsel's digest prepared summarizing the law.*  
SB 190, Mitchell. Juveniles.

(1) Existing law provides that the board of supervisors of any county may authorize the correctional administrator to offer a program under which inmates committed to a county jail or other county correctional facility or granted probation, or inmates participating in a work furlough program, may voluntarily participate or involuntarily be placed in a home detention program during their sentence in lieu of confinement in a county jail or other county correctional facility or program. Existing law authorizes the board of supervisors to prescribe a program administrative fee and an application fee for this program.

This bill would make those fees payable only by adult participants of that home detention program who are over 21 years of age and under the jurisdiction of the criminal court.

(2) Existing law provides that upon conviction of certain offenses involving controlled substances, or upon a finding that a minor is subject to the jurisdiction of the juvenile court by reason of committing one of those certain offenses, the court, when recommended by the probation officer, shall require, as a condition of probation, that the defendant or the minor not use or be under the influence of any controlled substance and submit to drug and substance abuse testing as directed by the probation officer, unless the court makes a finding that this condition would not serve the interests of justice. Existing law requires the court to order the defendant or the minor to pay a reasonable fee, not to exceed the actual cost of the testing, if the defendant or the minor is required to submit to testing and has the financial ability to pay all or part of those costs.

This bill would instead require the court to order a defendant to pay that reasonable fee only if the defendant is an adult who is over 21 years of age and under the jurisdiction of the criminal court. The bill would also delete the provision requiring the court to charge the minor that reasonable fee.

(3) Existing law requires specified orders providing for the care and custody of a ward, dependent child, or other minor person, as specified, to direct that the whole expense of support and maintenance of the minor, up to the amount of \$20 per month, be paid from the county treasury. Existing law authorizes the board of supervisors of each county to establish a maximum amount that the court may order the county to pay for that support and maintenance and authorizes the court to direct that an amount up to that maximum amount be paid.

This bill, for purposes of a ward, a minor person concerning whom a petition has been filed to declare the person a ward of the juvenile court, or a minor who is the subject of a certain program of supervision undertaken by the probation department and who is temporarily placed out of his or her home, as specified, would delete the \$20 maximum on support and maintenance payments and delete the authorization of the county board of supervisors to establish a maximum amount that the court may order the county to pay.

(4) Existing law generally imposes liability on a parent, spouse, or other person liable for the support of a ward, dependent child, or other minor person, as applicable, for certain costs, including the reasonable costs of transporting the minor to a juvenile facility and for the costs of the minor's food, shelter, and care at the juvenile facility when the minor has been held in temporary custody, as specified, and certain other circumstances are applicable; the reasonable costs of supporting the minor when he or she is placed, detained in, or committed to, any institution or other place pursuant to specified provisions of law or pursuant to an order of the juvenile court; the cost of an alcohol or drug education program as designated by the court; the cost, to the county or the court, of the legal services rendered to the minor by an attorney pursuant to an order of the juvenile court; the cost of probation supervision, home supervision, or electronic surveillance of the minor, pursuant to the order of the juvenile court; the cost of a service program administered by an agency upon delivery or referral of the minor by an officer; the cost of specified services rendered to the minor in lieu of a petition being filed to adjudge the minor a ward of the juvenile court; and other related costs.

Existing law authorizes the probation department and the child welfare services department in a county to create a jointly written protocol, as specified, to allow the 2 departments to jointly assess and produce a recommendation that the child be designated as a dual status child, allowing the child to be simultaneously a dependent child and a ward of the court.

This bill, for purposes of a minor who is adjudged a ward of the juvenile court, who is placed on probation without being adjudged a ward, who is the subject of a petition that has been filed to adjudge the minor a ward, or who is the subject of a certain program of supervision undertaken by the probation department, as applicable, would repeal the above-described provisions imposing liability for the specified costs and would make other conforming changes. The bill would specify that those provisions apply to a minor who is designated as a dual status child, for purposes of the dependency jurisdiction only and not for purposes of the delinquency jurisdiction.

(5) Existing law makes it a misdemeanor for a minor who, while under the supervision of a probation officer, removes his or her electronic monitor without authority and who, for more than 48 hours, violates the terms and conditions of his or her probation relating to the proper use of the electronic monitor. Existing law provides, if an electronic monitor is damaged or discarded while in the possession of the minor, that restitution for the cost of replacing the unit may be ordered as part of the punishment. Existing law requires that this liability be limited by the financial ability of the person or persons ordered to pay the restitution and requires that the person or persons, upon request, be entitled to an evaluation and determination of ability to pay under specified provisions.

This bill would remove the requirement that a request be made in order for the person or persons to be entitled to the evaluation and determination described above. . . .

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**Memo on Implementation of Senate Bill 190 (Ending Juvenile Fees) to County Boards of Supervisors (2017)**

**SB 190 IMPLEMENTATION WORKING GROUP**

We write regarding the implementation of Senate Bill 190, authored by Senators Holly J. Mitchell and Ricardo Lara and signed into law by Governor Jerry Brown on October 11, 2017. Effective January 1, 2018, SB 190 repeals county authority to charge specified fees to parents, guardians, and youth for a youth's involvement in the juvenile delinquency system. We encourage you and your colleagues to implement SB 190 quickly and robustly.

SB 190 was enacted to end regressive and racially discriminatory juvenile fee practices, which undermine youth rehabilitation and public safety. For these reasons – and to reduce the liability facing counties that continue such practices – we are urging counties to:

- (1) Stop all juvenile fees assessments immediately,
- (2) End all juvenile fee collection activity,
- (3) Discharge all previously assessed juvenile fees, and
- (4) Refund families who paid unlawfully assessed juvenile fees. . . .

(1) Stop All Juvenile Fee Assessments Immediately

SB 190 repeals county authority to assess all juvenile fees in the delinquency system, including fees related to:

- (a) detention (Cal. Welf. & Inst. Code § 903),
- (b) legal representation (Cal. Welf. & Inst. Code §§ 903.1, 903.15),
- (c) electronic monitoring (Cal. Welf. & Inst. Code § 903.2),
- (d) probation or home supervision (Cal. Welf. & Inst. Code § 903.2), and
- (e) drug testing (Cal. Welf. & Inst. Code § 729.9).

Although the prohibition does not go into effect until January 1, 2018, the legal basis and public policy rationale for ending the assessment of these fees are as strong today as they will be in January.

Alameda, Contra Costa, Los Angeles, Sacramento, Santa Clara, and Sonoma Counties stopped assessing juvenile fees before the enactment of SB 190. Solano County stopped assessing fees after SB 190 was signed. San Francisco County has never charged such fees.

As noted in more detail below, juvenile fees frequently are being imposed unlawfully, which exposes counties to legal liability.

*To implement SB 190's public policy purpose and to comply with state and federal law, all counties should stop all juvenile fee assessments immediately.*

(2) End All Juvenile Fee Collection Activity

SB 190 requires counties to end the assessment of all juvenile fees, but it does not prohibit the collection of previously assessed juvenile fees, some of which date back to the 1970s.

UC Berkeley researchers found that juvenile fee assessment and collection practices harm some of California's most vulnerable families, perpetuating cycles of poverty, exacerbating racial injustice, and undermining youth rehabilitation and family reunification. The researchers also found that counties often charge and collect fees in violation of state and federal law. The fees are costly to collect, with little or no net revenue, since most families cannot afford to pay them. Finally, the fees correlate with higher recidivism, which undermines public safety.

All California counties that have stopped assessing juvenile fees since 2016 have also ended fee collection, without reporting any negative consequences (Alameda, Contra Costa, Sacramento, Santa Clara, Solano, and Sonoma). Most recently, on October 24, 2017, the Solano County Board of Supervisors adopted a resolution that authorized the discharge of all juvenile fee accounts receivable balances in the amount of approximately \$3.9 million.

*To reduce their harmful, unlawful, and costly impacts, counties should end the collection of all juvenile fees immediately.*

### (3) Discharge All Previously Assessed Juvenile Fees

Previously assessed juvenile fees are memorialized in fee agreements and stipulations and are entered against parents and guardians in the form of civil judgments. Such judgments can impair a family's ability to secure housing, jobs, and credit. Ending fee assessment and collection alone, therefore, will not relieve families of the collateral consequences of juvenile fees.

In many cases, counties that ended fee assessments and collections have discharged all outstanding juvenile fees. For example, the October 2017 Solano County Board of Supervisors resolution noted above authorized the satisfaction and release of liens and stipulated judgments for juvenile fees in the amount of approximately \$1.7 million.

*To foster rehabilitation, enhance public safety, and ensure compliance with state and federal law, counties should discharge all juvenile fee judgments against families, including agreements and stipulations.*

### (4) Refund Families Who Paid Unlawfully Assessed Juvenile Fees

SB 190 does not address the harm to families who made payments on juvenile fees that were unlawfully assessed or collected. As described in the UC Berkeley study, such unlawful practices may have included collecting payment from families:

- a. for fees related to petitions that are not sustained (i.e., where youth have not been found to violate any law) (violates due process and state law),
- b. that include meals provided to youth for which the county receives reimbursement from national nutrition programs (violates federal law),
- c. without conducting a proper ability-to-pay evaluation (violates due process and state law),
- d. for services that benefit society as a whole, such as probation supervision, home supervision, or electronic monitoring (violates equal protection),
- e. for a juvenile investigation report (violates state law), and
- f. for detention fees that exceed \$31.69 per day (violates state law).

Contra Costa County has already taken the lead in refunding families for fees that were unlawfully assessed and collected. The county has identified hundreds of cases during a six-year period prior to its fee repeal in which families made payments for youth whose petitions were not sustained, and is contacting families to make refunds.

*To remedy unlawful practices, counties should refund families who made payments on juvenile fees that should not have been charged.*

Thank you for everything you are doing to help young people succeed. Please do not hesitate to contact us if we can assist you in implementing SB 190, which will foster youth rehabilitation and public safety.

Sincerely,

Jessica Bartholow  
Policy Advocate  
Western Center on Law & Poverty

Elisa Della-Piana  
Legal Director  
Lawyers' Committee for Civil Rights  
Stephanie Campos-Bui  
Supervising Attorney  
UC Berkeley Policy Advocacy Clinic

Kate Weisburd  
Director, Youth Defender Clinic  
East Bay Community Law Center

Kim McGill  
Organizer  
Youth Justice Coalition

Mark Rosenbaum  
Director, Opportunity Under Law  
Public Counsel

## **California Senate Bill 1290**

2019-2020 Regular Session, Legislative Counsel's Digest (enacted August 2020)  
(vacating certain previously-assessed costs for parents or guardians of juveniles)

Existing law, since January 1, 2018, prohibits the imposition of financial liability on the parents or guardians of a minor who has been adjudged a ward of the juvenile court for certain county-assessed or court-ordered costs, such as transportation to a juvenile facility, legal assistance, and home supervision. Existing law, since January 1, 2018, does not require minors who are required to submit to drug and substance abuse testing to pay for the costs associated with testing. Finally, existing law, since January 1, 2018, only requires adults over 21 years of age to pay an administrative fee associated with a home detention program.

This bill would vacate certain county-assessed or court-ordered costs imposed before January 1, 2018, for the parents or guardians of wards in specified circumstances, minors who were ordered to participate in drug and substance abuse testing, and adults who were 21 years of age and under at the time of their home detention.

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## **Eliminating Los Angeles County Criminal System Administrative Fees (adopted February 18, 2020)**

Motion by L.A. County Supervisors Hilda L. Solis & Sheila Kuehl

California law currently allows counties to charge administrative fees to people in the criminal justice system, which are imposed by judges upon conviction of a defendant. While the fees are not supposed to be punitive or restorative but are simply supposed to help counties recoup costs without being excessive or unfair, they can quickly add up to thousands of dollars for a single person, and become due while a person is incarcerated and upon their release. The vast majority of people against whom these fees are levied qualify as indigent to obtain representation by the public defender system, and as such individuals are often forced to exhaust all of their resources to pay these fees, at a critical point in time when individuals are attempting to secure housing, employment, education, and support their families, therefore negatively impacting public safety and stability for all communities.

A 2019 Brennan Center report found, however, that these fees are an ineffective source of government revenue because counties are spending a high proportion of their fee and fine revenue on collection and enforcement costs, rather than on efforts to improve public safety. Consistent with these findings, in Los Angeles County, these fines and fees also present a burden to the County. The County expends resources and funding to collect

the fines and fees from our highest need population, but only receives an average of four percent of the total assessed each year.

This Board has taken bold steps to move away from a purely punitive criminal justice system model that negatively impacts public safety, towards a “care first, jail last” model, which prioritizes the health, well-being, and resource needs of individuals to achieve increased stability and public safety for all of Los Angeles County’s communities. Eliminating the County’s criminal system administrative fees is the next step in implementing the Board’s vision by enhancing the economic stability of low- income communities and communities of color. Therefore, the Board should eliminate the fines and fees that are within their discretion because of the detrimental impact these costs have on the wellbeing of individuals attempting to reenter society, and because the County does not meaningfully benefit from the collection.

Fines and fees in California are some of the highest in the country because of additional fees that are tacked on to the base fine. For example, the base fine for a stop sign violation infraction was \$35 in 2017. However, after additional fees are imposed, the total fine becomes \$238. Similarly, the base fine for a misdemeanor DUI was \$390, but the total amount owed was \$2,024 after additional fines and fees were added. It even costs money to complete volunteer hours. In Los Angeles County, community service referral agencies charge between \$20 and \$300 depending on the number of community service hours assigned. Importantly, Los Angeles County residents who have been impacted by these fees have shared that the most expensive fees were most often for Probation supervision, reaching as much as \$5,800 for an individual case.

These high costs are imposed on low-income communities and people of color who are overrepresented in the criminal justice system. Many individuals are forced to choose between paying the fees or paying for necessities like rent, groceries, transportation, and medical care. This financial burden impacts housing stability, employment, education opportunities, and mental and physical health. The Let’s Get Free LA Coalition outlined some of the negative consequences their members experienced because of fines and fees in their report. The report describes that a person’s inability to keep up with criminal system fees can lead to additional court hearings, additional fees, bench warrants, and sometimes incarceration. Members also experienced: barriers to obtaining a car, apartment, or employment because of damaged credit scores; the need to resort to illegal activities as a means of making money; being forced to take out loans and pawning or selling personal items; and needing to volunteer for medical trials just to pay these debts. Further, outstanding criminal system debt can make people ineligible for record-clearing, and negative impacts from the fines and fees can remain even after convictions are expunged.

The burden to pay the fines and fees also falls beyond the justice-involved individual and extends to their families. In 2015, a Ella Baker Center for Human Rights



report found that in 63% of the cases they reviewed, families bore the cost of criminal system-related fees, and that in 83% of those cases, the family members responsible for paying were women. The Ella Baker Center also found that one in five of these families took out loans to cover their payments. Court fines and fees create insurmountable barriers to reentry for many individuals and their families.

At the urging of and in collaboration with community advocates, youth, system impacted people, and community members, over the past several years, the Board has focused on reducing financial barriers for justice involved individuals. In 2009, the Probation Department stopped collecting fees charged to parents or guardians for the incarceration of their children. In 2017, the Board voted to eliminate the \$50 registration fee that was required prior to receiving services from the Public Defender, the Alternate Public Defender, or court-appointed counsel. Building upon this history, the Board voted in 2018 to discontinue the collection and forgive the \$89 million in outstanding debt for fees assessed for youth detained in Probation custody.

Eliminating fines and fees for adults is the next logical step towards removing financial barriers to successful reentry. Los Angeles County is not alone in taking this step. San Francisco County ended criminal and administrative fees and discharged \$32 million in debts in June 2018, and Alameda County did the same, discharging \$26 million in debts in November 2018. Additionally, in 2018, California Senate Bill 144 was introduced to eliminate most of the criminal system fees imposed by the state. Senate Bill 144 became a two-year bill, so it will continue in the legislative process this year.

On April 16, 2019, the Board directed the Chief Executive Office (CEO) in consultation with relevant departments to report back with a detailed report of the fines, fees, and penalties levied against adults in the criminal justice system. The report back on December 13, 2019 found that the County experiences little or no fiscal gain from the criminal fines and fees. Since 2014, Court assessments averaged \$121 million each year, but only an average of \$11.4 million was collected. That is nine percent of the total amount assessed. The County received an average of \$4.5 million, which is four percent of the total. The current outstanding balance of fines, fees, and restitution is \$1.8 billion over the last 50 years, including \$379 million for active cases, \$207 million for inactive cases, and \$1.2 billion for closed cases. Further, these numbers do not account for the cost to the County of attempting to collect these fines and fees, which is disproportionate to the low rate of collection. The County expends a significant amount of resources attempting to collect the fees with little success.

Not all fines and fees are within the discretion of the Board to discharge. However, there are four categories of fees that the Board could discharge. These include fees collected and retained by the County, fees collected by the County but partially allocated to a non-

County entity, fees allowed by County Code, and discretionary fees that are not collected by the County.

Criminal system administrative fees pose significant obstacles to reentry. These fees force individuals to make impossible choices between making payments on their debts or paying for critical needs like food, education, child care, housing, and health insurance, which can help individuals, their families, and communities achieve stability and thrive. The County does not receive a significant profit from the fines and fees because only an average of nine percent of the total amount of fees is collected and only four percent is received by the County. The costs of collection far outweigh the benefits of imposition. In order to further the Board's goal of "care first, jail last" and to take the next step towards removing unreasonable financial barriers for low-income communities and people of color, the Board should eliminate all criminal fines and fees within its jurisdiction.

WE, THEREFORE, MOVE that the Board of Supervisors:

- 1) Direct the Probation Department with the Treasurer and Tax Collector, the Chief Executive Office, the Auditor-Controller, County Counsel, and other relevant departments to:
  - A. Immediately discontinue the collection or acceptance of payment for all discretionary fees that are collected and retained by the County, which fall within the Los Angeles County Board of Supervisor's authority to suspend, including but not limited to those identified above;
  - B. Discharge and/or release any balance of outstanding debt based on the discretionary fees that fall within the Los Angeles County Board of Supervisor's authority to suspend, including but not limited to those identified above, by:
    - i. Filing satisfaction of judgments with the court for court judgments, where applicable;
    - ii. Filing releases of liens with the Los Angeles County Recorder for judgment liens, where applicable;
    - iii. Amending the County Code;
    - iv. Creating a referral, complaint, and investigation process to ensure debt collection agencies cease collections of past debt and individuals' credit ratings are restored;
    - v. Taking all other legal action as needed to discharge and/or release debts for these fees.
  - C. Develop and implement a notification protocol to clients, former clients, the Public Defender, the Alternate Public Defender, the indigent panel, and other related entities to ensure that individuals cease payment as soon as possible; and
  - D. Provide a quarterly report back on:
    - i. The progress of discontinuing fee collection and releasing or discharging outstanding debt until completed; and

- ii. The progress of reducing the reliance of County Departments on criminal system administrative fees without negatively affecting a department's operating budget or the County's overall financial position, including identifying opportunities to reduce expenses, reductions in expenses related to collections, and alternative revenue sources.
- 2) Direct the Chief Executive Office through the Legislative Affairs Division, in collaboration with County Counsel, to prepare and submit a five-signature letter to the Governor, Senators Holly Mitchell, Robert Hertzberg, and Nancy Skinner, and the County's legislative delegation in support of Senate Bill 144, and respectfully request the State and State Legislature provide adequate alternative resources to cover any potential revenue losses, including to local jurisdictions.

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**Los Angeles County Eliminates Criminal Fees.  
Will California follow? (2020)**

Jackie Botts  
CAL MATTERS

Los Angeles County will stop billing people millions of dollars a year for the costs of their incarceration in an effort to lighten the financial burden on former inmates.

The Los Angeles County Board of Supervisors voted unanimously Tuesday to eliminate all criminal administrative fees over which the county has discretion after hearing testimony from dozens of formerly incarcerated residents.

The county is the fourth in California to eliminate the fees. If a bill introduced in the state Senate is approved, the rest of California could soon follow.

"Most of the people who have contact with the criminal justice system are already struggling to make ends meet," said Supervisor Hilda Solis, who co-wrote the measure. "It's most definitely not the purpose of the justice system to punish poor people for their poverty."

Among the fees that Los Angeles will no longer collect are a monthly \$155 charge for probation supervision, \$769 for a pre-sentence report, \$50 for alcohol testing and legal counsel fees that can reach hundreds of dollars, according to a November report from a coalition of criminal justice reform advocacy groups.

“It’s just never-ending. It’s a revolving door of fees and stipulations,” Cynthia Blake told the supervisors. A mother of seven, Blake said she was homeless when she was assessed more than \$5,000 in probation fees nearly a decade ago. Unable to pay, she “ducked and dodged” the probation department, ultimately ending up in prison.

The vote followed a December report from the county’s Chief Executive Office finding that the county assessed an average of \$121 million in fines and fees each year since 2014, but collected about \$11.4 million annually, or 9%.

Including all fees, fines and restitution, Los Angeles still has over \$1.8 billion in outstanding debt on the books, dating back 50 years. The measure doesn’t touch restitution or fees and fines required by state law, however.

The county’s 2019-2020 budget for public protection—which includes the sheriff’s department, which operates county jails, probation and the courts—is \$8.9 billion.

Los Angeles follows the lead of San Francisco, Alameda and Contra Costa counties, which have passed similar measures in the past two years. More than 30% of California’s nearly 73,000 jailed inmates and 356,000 probationers reside in the four counties that have eliminated fees, according to data from the Board of State and Community Corrections and Chief Probation Officers of California. Another 127,000 inmates are in state prisons and 45,000 are on state-run parole.

Los Angeles County Supervisor Hilda Solis authored the measure to eliminate the fees.

The supervisors also resolved to write Gov. Gavin Newsom and legislators in support of SB 144, which would eliminate several of the most common and costly criminal administrative fees charged by counties and the state prison system.

“We are further hampering an already fragile family or community economically,” said Sen. Holly Mitchell, a Los Angeles Democrat who authored the bill.

The bill is opposed by counties and law enforcement groups, which say that eliminating fees would leave gaping funding holes.

“One of the problems is that the legislature passes laws that have to be paid for... When they didn’t want to use general funds, they allowed it to be done as a fine or fee,” said Darby Kernan, deputy executive director of the California State Association of Counties. “That’s what holds the system together, and minus those dollars, the system will collapse.”

Kernan pointed to a 2016 state law that required people convicted of driving under the influence to install in their cars an interlock device – a breathalyzer that must be passed to turn on the ignition – and pay an administrative fee to cover the cost.

But Mitchell urged the governor to recognize that criminal fees are a “self-defeating, anemic source of revenue,” in a statement Tuesday.

“If LA can afford it, California can to,” Mitchell said.

Los Angeles’ move may bode well for Mitchell’s bill, if history is an indication. The county was a trendsetter when it stopped charging fees to parents for their kids’ time in the juvenile justice system in 2009. Three Bay Area counties followed, Mitchell introduced a bill to do so statewide and in 2018, California became the first state in the nation to abolish juvenile fees.

But that law didn’t do away with pre-existing debt from the juvenile fees. While most counties, including Los Angeles, stopped collecting the old fees from parents, 22 counties haven’t.

Both the Los Angeles ordinance and Mitchell’s proposal make old administrative fees uncollectible.

That could make a big difference for Marquies Nunez. When the 28-year-old finished a 13-year sentence four months ago, he received a new bill for \$1,000 from Los Angeles County. That was on top of the \$12,000 he already owed in restitution fees, \$2,000 of which he had paid off by working for 30 to 60 cents per hour while imprisoned.

“I was actually devastated and hurt . . . knowing that I worked so hard while I was in jail to pay off my restitution and now here it is, I got bumped up an extra \$1,000,” said Nunez.

After Los Angeles’ vote, Nunez is optimistic about spreading the wave of reform to the rest of the state.

“We’re going in the right direction. We got a good governor, we got good people outside here voting for these laws, good people in the Senate,” Nunez said. “We’ve got a bright future ahead of us.”

**Governor Signs Historic Bill Repealing Unjust Criminal Fees in California Providing  
Much Needed Relief to Californians (September 21, 2020)**

Debt Free Justice California

SACRAMENTO, CA – Last Friday, Governor Gavin Newsom signed AB 1869, making California the first state in the country to repeal administrative fees in the criminal system. This historic reform will reduce the harm caused by court-imposed debt and strengthen the economic security of low-income communities of color.

AB 1869 permanently ends the assessment and collection of 23 administrative fees in the criminal system effective July 1, 2021. The bill also writes off all outstanding fee debt. The Policy Advocacy Clinic at Berkeley Law estimates that AB 1869 will relieve Californians of over \$16 billion in outstanding criminal fee debt, the vast majority of which is uncollectible because people cannot afford to pay.

According to Senate Budget Chair Senator Holly J. Mitchell (D-Los Angeles): “For too long, the imposition of fees by our courts has taken away much-needed resources from people and perpetuated historic forms of racialized wealth extraction. By eliminating these criminal administrative fees, we can put money back in the pockets of Black and Latinx people and invest in the public health and safety of all communities.”

Currently, California law permits counties to charge people administrative fees related to their legal representation, probation, and incarceration. These fees often add up to thousands of dollars for a single person and pose significant barriers to reentry. Unpaid fees can be enforced via wage garnishment, bank levy, and tax refund intercept.

“As a public defender, it is painful to watch clients be saddled with fees, knowing that they won’t be able to pay,” said San Francisco Public Defender Mano Raju, whose office is part of Debt Free Justice California. “The criminal legal system disrupts people’s lives and families in so many ways that adding financial penalties sets people up for failure when we should be setting them up for future success. By eliminating fees, we’re paving the way to more resilient communities.”

## ***Ending or Reducing Juvenile Fees***

### **Maryland House Bill 36**

Maryland General Assembly, 2020 Regular Session (enacted May 2020)  
(prohibits juvenile courts from imposing fines against a child found to have committed certain violations)

FOR the purpose of repealing certain provisions of law authorizing the juvenile court to impose certain civil fines against a child found to have committed certain violations; repealing a certain provision of law authorizing the juvenile court to impose certain court costs against a juvenile respondent or the respondent's parent, guardian, or custodian under certain circumstances; repealing a provision of law authorizing the juvenile court to assess against any party or a parent of a certain child compensation for the services of an attorney appointed to represent the child in a certain action; repealing a provision of law authorizing a court to order a parent to pay a certain sum to cover the support of a certain child; prohibiting a court from ordering a certain parent, guardian, custodian, or child to pay a certain fine, fee, cost, or sum of money for a certain purpose; prohibiting the assessment of compensation for the services of an attorney against a parent, guardian, custodian, or child in a delinquency proceeding; providing that the balance of certain fines, fees, or costs will become unenforceable and uncollectable on a certain date; requiring a certain portion of a certain judgment to be vacated on a certain date; making conforming changes; and generally relating to fines, fees, and costs in certain juvenile proceedings.

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### **Nevada Assembly Bill 439**

Nevada Assembly, 2019 Session (enacted July 2019)  
(limits costs imposed on a parent or guardian of a child in juvenile court proceedings)

Nevada Assembly Bill 439 repealed state laws authorizing counties to charge fees in the juvenile delinquency system.

Starting July 1, 2019, counties are no longer permitted to charge the following fees to youth in the juvenile system or their parents and guardians:

- Court Costs
  - Ancillary services that are administered or financed by a county, including, but not limited to, transportation or psychiatric, psychological, or medical services (NRS § 62B.110), unless the child receives such services from a

- provider that is not approved or the child seeks additional services beyond those recommended for the child
- Collection fee on civil judgment (NRS § 62B.420)
  - Expenses of proceedings involving the disposition of the case, including, but not limited to: (1) reasonable attorney's fees; (2) any costs incurred by the juvenile court; and (3) any costs incurred in investigating the acts committed by the child and in taking the child into custody (NRS § 62E.300)
  - Appointed Counsel
    - Representation by public defender or attorney appointed by the juvenile court (NRS § 62D.030)
  - Cost of Care
 

Expenses for the support of a child committed by the juvenile court to:

    - a public or private institution or agency (NRS §§ 62B.120)
    - the custody of a regional facility for the treatment and rehabilitation of children (NRS § 62B.140)
    - the Department of Child and Family Services (NRS §§ 62E.540, 63.430)
  - Evaluation and Treatment
    - Tobacco awareness and cessation program (NRS § 62E.440)
    - Unless the child receives such services from a provider that is not approved or the child seeks additional treatment or care beyond those recommended for the child:
      - Medical, psychiatric, psychological, or other care and treatment (NRS § 62E.280)
      - Alcohol or drug evaluation and treatment from an approved provider (NRS § 62E.620)
      - Participation in counseling or other psychological treatment related to animal cruelty or torture (NRS § 62E.680)
  - Court Program Fees
    - Informal supervision involving a program of restitution through work or a program of cognitive training and human development (NRS § 62C.210)
    - Costs related to insurance against liability for personal injury and damage to property and/or industrial insurance during periods in which a child, parent, or guardian is ordered by the juvenile court to participate in:
      - community service (NRS § 62E.180)
      - a program of cognitive training and human development, a program for the arts, or a program of sports or physical fitness (NRS § 62E.210)
      - a program of restitution through work (NRS § 62E.600)
    - A program of visitation to the office of the county coroner (NRS § 62E.720)
  - Administrative Assessments



\$10 administrative assessment in addition to a fine imposed on:

- a child in need of supervision, or the parent or guardian of the child, because of habitual truancy by the child (NRS §§ 62E.270, 62E.430)
- a child who has committed an offense related to tobacco (NRS §§ 62E.270, 62E.440)
- a child who has committed an unlawful act involving the killing or possession of certain animals (NRS §§ 62E.270, 62E.685)
- a child who has committed a minor traffic offense (NRS §§ 62E.270, 62E.700)
- a child adjudicated delinquent (NRS §§ 62E.270, 62E.730)

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**Memorandum on Implementation of Assembly Bill 439 (2019, Juvenile Fee Repeal) to Nevada Juvenile Justice Stakeholders (March 11, 2020)**

CHILDREN'S ADVOCACY ALLIANCE & BERKELEY LAW POLICY ADVOCACY CLINIC

Summary

A growing body of research shows that charging juvenile fees to youth and families perpetuates cycles of poverty, exacerbates racial injustice, and undermines youth rehabilitation and family reunification. Further, juvenile fees correlate with recidivism, which undermines public safety. As a result of these harmful outcomes, the Reno-based National Council of Juvenile and Family Court Judges, the Nevada Chapter of the U.S. Civil Rights Commission, and Nevada's Kenny Guinn Center for Policy Priorities recommended that the state end juvenile fees.

On June 3, 2019, Governor Steve Sisolak signed Assembly Bill (AB) 439. Starting July 1, 2019, AB 439 repealed state and county authority to charge fees to parents, guardians, and youth for a youth's involvement in the juvenile delinquency system. Proposed by the Children's Advocacy Alliance and sponsored by the Assembly Committee on Judiciary, the Nevada Legislature enacted AB 439 by unanimous, bipartisan votes.

This memo sets forth AB 439's requirements to end all juvenile fee assessments. The memo recommends additional actions permitted but not required by AB 439, including ending juvenile fee collection and assuming financial responsibility for medical care provided to youth in custody. To assist counties in taking these actions, we have attached a comprehensive list of repealed fees, along with references to relevant state law.

1. End All Juvenile Fee Assessments (required by AB 439 effective July 1, 2019)

Effective July 1, 2019, AB 439 repealed county and state authority to charge fees to parents, guardians, families, and youth for a youth's involvement in juvenile court, including:

- Court costs
- Appointed counsel
- Cost of care
- Evaluation and treatment
- Court program fees
- Administrative assessments

To comply with AB 439, counties are required to end all juvenile fee assessments immediately. Any fees assessed on or after the effective date are unlawful and must be refunded.

2. End All Juvenile Fee Collection (permitted but not required by AB 439)

Although not required by AB 439, we encourage counties to end all juvenile fee collection activity and to discharge all previously imposed fees. At least three counties reported that they stopped collecting previously assessed fees. To reduce their harmful and costly impacts, counties should end the collection of all juvenile fees immediately and discharge all associated judgments and stipulations to pay.

3. Assume Financial Responsibility for In-Custody Medical Care (permitted but not required by AB 439)

If a detained youth is covered by medical insurance (private or Medicaid), counties can and do bill insurers for the cost of medical care. Under limited circumstances, AB 439 permits but does not require counties to bill parents or guardians for medical care provided to a detained youth regardless of insurance status.

Some counties reported that they have opted not to charge parents or guardians for uncovered medical care of youth under any circumstances. Consistent with the intent of AB 439, we encourage counties not to charge parents or guardians for medical care provided to detained youth.

Thank you for everything you are doing to help young people succeed.

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**Press Release: On Martin Luther King, Jr. Day, Governor Murphy  
Signs Juvenile Justice Reform Legislation (January 20, 2020)**

OFFICE OF NEW JERSEY GOVERNOR PHIL MURPHY

ELIZABETH – On Martin Luther King, Jr. Day, Governor Phil Murphy today signed landmark legislation to reform New Jersey’s juvenile justice system. This legislation marks a major accomplishment in the Governor’s efforts to ensure a more humane, just, and equitable criminal justice system.

“Our Administration is committed to ensuring that New Jersey’s youth get the second chance they deserve, and today we’re taking a critical step toward creating a criminal justice system that is just, fair, and truly rehabilitates young lives,” said Governor Murphy. “I am proud to sign sweeping legislation to reform our juvenile justice system and ensure that our young people have the opportunity they deserve to turn their lives around and build a better future for themselves, their families, and their communities.”

S48 integrates several reforms to New Jersey’s juvenile justice system concerning incarceration and parole by incorporating the Juvenile Detention Alternative Initiative principles into the Juvenile Justice Code. Among those reforms include the elimination of fines as a penalty for juvenile offenders; limitations on when juveniles may be incarcerated; and the replacement of the mandatory post-incarceration supervision period with one that is discretionary. The bill also transfers the responsibility of parole decisions from the State Parole Board to a panel made up of at least two members from the Juvenile Justice Commission and one member of the State Parole Board. Under the bill, the panel is responsible for making determinations regarding parole eligibility, supervision, revocation and post-incarceration supervision for juveniles. Further, the panel will be responsible for determining the conditions of parole and ensuring that the conditions are appropriately tailored to the juvenile and the least restrictive necessary for the juvenile’s successful return to society.

“Over the last fifteen years, the Juvenile Justice Commission has implemented a number of groundbreaking reforms that have, among other things, resulted in an over 85% reduction in the number of youths in state custody,” said Attorney General Gurbir S. Grewal. “We are committed to using the additional tools included in the legislation signed today to continue this great work and to reduce the racial disparities that still exist in the system.”

“Legislation that allows eligible incarcerated juveniles with a chance to assimilate back into society through an equitable framework can provide these young people with an opportunity to create long-lasting, positive changes to their lives,” said New Jersey State Parole Board Chairman Samuel J. Plumeri, Jr. “Redemption through reentry does happen

and augmented with the proper support, young offenders can begin living their lives again.”

“I am pleased that the Governor is signing this important juvenile justice reform into law,” said Public Defender Joseph Krakora. “It reflects a national recognition that juveniles should be treated differently than adults by our criminal justice system. I hope we can continue to lead the way in juvenile justice reform.”

Primary sponsors of the legislation include Senators Nellie Pou and Shirley Turner, and Assemblymembers Benjie Wimberly, Annette Quijano, and Verlina Reynolds-Jackson.

“This law is meant to build a fairer, more just and less racially biased juvenile justice system,” said Senator Pou. “It took over two years of incredibly hard and tireless work by advocates, judges, organizations and experts and I am grateful to have worked alongside so many thoughtful and dedicated people because without them these landmark reforms could not have been possible. Currently, if a juvenile gets caught in our antiquated justice system they can spend decades trying to get out. This law makes it less likely for a juvenile caught in adolescence to spend a lifetime in the justice system, having a major impact on the individual’s life, their family and the entire community.”

“Although we have made improvements over the years, New Jersey still needs to do more for the adolescents who go through our court system. Our current justice system places more of an emphasis on harsh, mandatory sentences than on finding ways to reintegrate juvenile offenders back into society,” said Assemblymembers Wimberly, Quijano, and Reynolds-Jackson. “Many of these children and teenagers come from complicated backgrounds and may not have fully understood the repercussions of their actions. In order to successfully rehabilitate them, we must give these young people the opportunity to learn and improve from their missteps, rather than incarcerating them for extended periods of time with little hope of release. That’s why this bill introduces a number of changes to the Code of Juvenile Justice by incorporating principles of the Juvenile Detention Alternatives Initiative. These principles would place restrictions on who can be incarcerated while replacing subjective decision-making processes with more objective methods of determining sentencing suitability and parole eligibility. Community-based alternatives to imprisonment, collaboration between court officials and other interested parties – such as lawyers and advocates, improved conditions in secure facilities and data collection on racial disparities would all be promoted as well, in an effort to reform our current system. We cannot let a child’s mistake determine the rest of their lives. They deserve a chance to grow from their mistakes and create a new path for their lives.”

“We commend Governor Murphy for signing this important piece of legislation which, among other things, will eliminate unjust fines, modernize the parole process, and decrease the number of youth who are incarcerated,” said Ryan P. Haygood, President &

CEO of the New Jersey Institute for Social Justice. "A Black child is 21 times more likely to be locked up than a white child in our state, the highest racial disparity rate in the country. This law will help bring New Jersey one step closer to transforming its youth justice system from one that produces this unacceptable injustice to one that treats kids as kids."

"Because this groundbreaking legislation will help combat the gross racial disparities that persist in New Jersey's juvenile facilities, it is especially fitting that Governor Murphy will sign it today, as we celebrate the work and legacy of Dr. Martin Luther King, Jr.," said Laura Cohen, Director of the Rutgers Criminal and Youth Justice Clinic. "We applaud the commitment of the Governor and the bill's sponsors to continuing our state's progress toward a more equitable, safe, and effective youth justice system."

"Signing this bill moves New Jersey forward on the path to reforming our country's overly punitive, racially disparate juvenile justice system," said ACLU-NJ Executive Director Amol Sinha. Mandatory minimums, along with fines and fees imposed on families, can particularly wreak havoc on the lives of low-income juveniles and their families. This law acknowledges that neither should have a place in sentencing decisions for young people. We look forward to working with the Legislature and Governor Murphy to ensure that no young people are incarcerated unless absolutely necessary."

"New Jersey has led the nation with a drastic decline in the rate at which youth are locked up, but disparities remain. We applaud Governor Murphy and members of the New Jersey Legislature, who are working with advocates and stakeholders across the state to create a stronger, fairer and more effective juvenile justice system," said Mary Coogan, Vice President of Advocates for Children of New Jersey. "This is a huge step forward to build on gains in juvenile justice reform across New Jersey. While young offenders should be held accountable for their actions, the goal is to return them to their communities, equipped with the skills they need to stay out of trouble and mature into productive adults. To do this, we need to construct a juvenile justice system that is truly therapeutic rather than punitive. We need to provide youth with better alternatives, diverting those who have committed minor offenses into more constructive enterprises, and rehabilitate serious juvenile offenders with the support they need, providing a path for successful re-entry once they are released."

**New Jersey Assembly Bill 4331**

New Jersey Legislature, 2020-2021 Session, Regular Session (effective November 2020) (limits fines and fees imposed on juveniles; also limits post-incarceration supervision imposed on juveniles)

AN ACT accelerating implementation of certain juvenile justice initiatives due to the COVID-19 pandemic.

BE IT ENACTED by the Senate and General Assembly of the State 5 of New Jersey:

1. The following fines and assessments shall not be imposed on a juvenile adjudicated delinquent:

- (1) fines pursuant to paragraph (8) of subsection b. of section 24 of P.L.1982, c.77 (C.2A:4A-43);
- (2) assessments pursuant to paragraph (2) of subsection a. of N.J.S.2C:35-15; and
- (3) assessments pursuant to subparagraph (b) of paragraph (2) of subsection a. of section 2 of P.L.1979, c.396 (C:2C:43-3.1).

2. A term of post-incarceration supervision shall be imposed pursuant to paragraph (5) of subsection d. of section 25 of P.L.1982, c.77 (C.2A:4A-44) following a juvenile's release from custody only if it is deemed necessary to effectuate the juvenile's rehabilitation and reintegration into society. Post-incarceration supervision shall not exceed six months, except the term may be extended for an additional six months if continuation of the post incarceration supervision is deemed necessary to effectuate the juvenile's rehabilitation and reintegration into society. Post incarceration supervision shall not exceed one year. Post incarceration supervision shall not be imposed on any juvenile who has completed a period of parole supervision of six months or more. The term of post-incarceration supervision shall commence on the date of the expiration of the juvenile's maximum sentence. During the term of post-incarceration supervision the juvenile shall remain in the community and in the legal custody of the Juvenile Justice Commission. The juvenile shall not be required to enter or complete a residential community release program, residential treatment program, or other out-of-home placement as a condition of post incarceration supervision. A term of post-incarceration supervision 36 may be terminated if the juvenile has made a satisfactory adjustment in the community while under supervision and if continued supervision is not required.

3. This act shall take effect immediately and shall expire on October 31, 2020.

## ***Louisiana: Comprehensive Reform Efforts***

### **Louisiana House Bill 249**

Louisiana State Legislature, 2017 Regular Session (enacted August 2018)

(provides for waiver or payment plans if fines or fees would cause “substantial financial hardship,” and debt forgiveness upon partial payment in certain circumstances; modifies driver’s license suspension and probation extension procedures; implementation delayed by subsequent legislation to August 1, 2021)

To amend and reenact R.S. 47:1676(B)(1) and Code of Criminal Procedure Articles 883.2(D), 884, 885.1(A), (C), and (D), 888, 894.4, 895.1(A)(1) and (2)(a) and (E), and 895.5(C) and to enact Code of Criminal Procedure Article 875.1, relative to the financial obligations for criminal offenders; to provide relative to the payment of fines, fees, costs, restitution, and other monetary obligations related to an offender's conviction; to require the court to determine the offender's ability to pay the financial obligations imposed; to authorize the court to waive, modify, or create a payment plan for the offender's financial obligations; to provide relative to the court's authority to extend probation under certain circumstances; to provide relative to the recovery of uncollected monetary obligations at the end of a probation period; to provide for legislative intent; to provide relative to the disbursement of collected payments; to authorize the court to impose certain conditions in lieu of payment in certain situations; to provide relative to the penalties imposed when an offender fails to make certain payments or fails to appear for a hearing relative to missed payments; to require notice to an offender upon his failure to make certain payments; to provide for an effective date; and to provide for related matters.

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### **Louisiana House Bill 556**

Louisiana State Legislature, 2020 Regular Session (adjourned sine die)

(eliminates administrative fees, costs, and taxes related to juvenile delinquency cases)

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

Be it enacted by the Legislature of Louisiana:

11 Section 1. R.S. 13:1595.3(C) is hereby enacted to read as follows:

§1595.3. Fees; enumeration

C. No court exercising juvenile jurisdiction in any parish in the state of Louisiana shall tax or assess costs against any juvenile delinquent or defendant, or the parents or guardians of the juvenile delinquent or defendant, for any judicial expenses or to cover any operating expenses of the court; including but not limited to, any salaries of court personnel, the

establishment or maintenance of a law library for the court, or the purchase or maintenance of any type of equipment or supplies.

Art. 607. Child's right to appointed counsel; payment

C. If the court finds that the parents of the child are financially able, it may order the parents to pay some or all of the costs of the child's representation in accordance with Children's Code Articles 320 and 321. Representation shall be provided to the child at no expense to the child, or the parent or guardian of the child.

Art. 774. Physical and mental examination for disposition

B. After giving the caretaker a reasonable opportunity to be heard, the court may order that he shall contribute to the cost of any court-ordered examination or evaluation in an amount commensurate with his ability to pay. The child, or the parent or guardian of the child, shall not be responsible for the costs arising from an order for a physical or mental examination.

Art. 781.1. Probation and parole supervision fees

A. When the court suspends the imposition or execution of sentence and places the child or his parent or both on supervised probation or grants the child supervised parole, and the probationer or parolee is to be supervised by the Department of Public Safety and Corrections or any other agency, the court shall order payment, as a condition of probation or parole, of a monthly supervision fee. The supervision fee imposed shall be not less than ten nor more than one hundred dollars per month and shall be payable to the department or other supervising agency to defray the costs of supervision. These funds are only to supplement the level of funds that would ordinarily be available from regular state or other appropriations the court shall not order the child or the parent or guardian of the child to pay any supervision fees as a condition of probation or parole.

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## COVID-Prompted Changes

### COVID-19 Crisis: FFJC Policy Recommendations (2020)

FINES & FEES JUSTICE CENTER

The escalating public health and economic crisis wrought by COVID-19 is unlike anything in modern U.S. history. The worst harms of this crisis are falling heavily and disproportionately on the most vulnerable people in our country, especially people living paycheck-to-paycheck and people in the criminal justice system.



A recession is underway. People are losing their jobs and most low-paying jobs cannot be done remotely. Families are unable to pay their rent, buy food, or afford medical care — and they need their cars to access these basic necessities while social-distancing. In the midst of this crisis, paying fines and fees or accumulating additional court debt should be the last thing a family worries about.

People who are incarcerated are particularly vulnerable to the virus. The conditions in jails and prisons, coupled with the age and health of the incarcerated population, make the virus extremely dangerous. In response to the crisis, many jurisdictions have terminated in-person visitation between incarcerated people and their friends and families, yet continue to charge exorbitant rates for phone calls, emails and other vital forms of communication.

During the last recession, state and local governments dramatically increased the number and amount of fines and fees imposed on people for minor traffic and municipal code violations, misdemeanors and felonies in order to fill budget gaps. That regressive system of taxation continues to cause enormous harm in economically vulnerable communities, and particularly communities of color. Those communities suffered most in the last recession and will suffer again in this one. They cannot bear this unfair burden. State and local governments and courts should work to eliminate fees, make fines fair and proportionate, and never use fines and fees to balance their budgets.

In light of this ongoing national emergency, state and local governments and courts should make immediate changes to their criminal, traffic and municipal ordinance fines and fees policies to (1) increase public safety and health, (2) ensure that fines and fees are not a barrier to people's basic needs throughout this emergency, and (3) promote the resiliency of our communities.

Below are evidence-based policies that jurisdictions around the country should take to help stem this public health and economic crisis.

#### **Policy Recommendations For Our Communities:**

1. State and local jurisdictions should discharge all outstanding fines, fees and court debt. Where full discharge is not yet feasible, government and courts should implement immediately the following alternatives:
  - End all collection of fines, fees, and court debt, including but not limited to: payments due under payment plans, wage garnishment, property liens, off-sets of tax refunds, unemployment insurance and other public benefits, especially those related to housing.

- Stop sending delinquent cases to private collection companies, and direct private collection companies and probation and parole officers to stop all collection efforts.
  - Stop imposing penalties for late or missed payments of fines, fees and court debt.
  - Suspend interest on unpaid fines, fees and court debt.
2. Immediately cease issuing and enforcing warrants for unpaid fines and fees or for failure to appear at a hearing addressing unpaid fines and fees.
  3. State and local jurisdictions should stop driver's license suspensions for unpaid fines and fees or for not appearing in court, and reinstate driver's licenses suspended for non-safety reasons.
  4. Law enforcement officers should release individuals with a warning who are driving on a suspended license. Alternatively, law enforcement should cite and release any person apprehended for driving on a suspended driver's license, when the underlying suspension is based on unpaid fines and fees or not appearing in court. Under no circumstances should these individuals be arrested and jailed.
  5. Local governments should stop issuing parking tickets and municipal code violations that do not impact public safety, and stop booting, towing and impounding vehicles for unpaid fines and fees.
  6. Judges should waive or reduce any fines they impose, recognizing people's precarious financial circumstances.
  7. Jurisdictions should proactively and widely communicate any changes made in their fines and fees policies.

#### **Policy Recommendations For People in the Criminal Legal System:**

1. Co-pays for medical visits of people in custody should be waived.
2. Incarcerated people should be provided free liquid soap, hand sanitizer, and other disinfecting products.
3. People who are incarcerated and their families and loved ones should be provided with free, easily accessible phone and email communication.
4. Release any individuals incarcerated for outstanding fines and fees, and stop jailing or detaining individuals for unpaid fines and fees.
5. Probation and parole should not be extended or revoked, nor sanctions imposed, for unpaid fines and fees or other technical violations.

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**Order, In the Matter of Modifying Fines and Fees During the COVID-19 Pandemic  
(2020)**

Benton County Circuit Court

IT APPEARING TO THE COURT that Amended Chief Justice Order 20-006, dated March 27, 2020, encourages all courts in the State of Oregon to waive or suspend fines, fees, and costs for persons with limited financial resources and to take additional steps to reduce financial hardship during the COVID-19 emergency,

NOW, THEREFORE, IT IS ORDERED THAT, effective immediately:

1. The Benton County Circuit Court will:
  - a. Work with individuals to reduce monthly payments.
  - b. Offer flexible payment plans.
  - c. Allow individuals to stop making payments for a period of time.

Individuals must contact the court to request payment modifications. The individual will still owe the outstanding balance of the debt, even when a payment modification is approved. However, the debt will not accrue interest, fees, or penalties during the duration of the COVID-19 emergency. Any person affected by the COVID-19 state of emergency may request a suspension or reduction of scheduled payments by emailing [Benton.Room104@ojd.state.or.us](mailto:Benton.Room104@ojd.state.or.us), or calling (541) 243-7841.

2. The Benton County Circuit Court will not:
  - a. Impose fees to set up a payment plan.
  - b. Impose late fees on judgments more than 30 days old.
  - c. Suspend driver licenses for failure to pay a fine within 30 days.
  - d. Send delinquency notices.
  - e. Impose collection fees or refer cases to collections.
  - f. Issue new garnishments.
3. An individual able to make regularly scheduled payments, or a reduced payment, can use one of the following methods:
  - a. Online [www.courts.oregon.gov/ePay](http://www.courts.oregon.gov/ePay)
  - b. By phone at 1-888-564-2828
  - c. In-person using the drop box located at the Benton County Courthouse, outside Room 101
4. These changes remain in effect until 60 days after the governor's COVID-19 state of emergency ends, or as otherwise determined by the court.

5. Other courts, such as municipal and justice courts, are not affected by these changes.

DATED this 13th day of April, 2020.

Locke A. Williams, Presiding Judge 21st Judicial District

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**Coronavirus Emergency: Criminal Justice Debt—How States Can Help (2020)**

NATIONAL CONSUMER LAW CENTER

The coronavirus pandemic poses catastrophic risks to those involved with the criminal justice system. The number of infected law enforcement officers is swelling and experts predict the virus will spread through jails and prisons like wildfire. Amidst calls to swiftly reduce prison and jail populations to save lives, slow infection, and reduce the strain on the health care system, states should take action now to ensure that residents' inability to afford fines and fees does not entangle more people in the criminal system or further undermine families' ability to weather this crisis.

Criminal justice debt stemming from fines and fees is disproportionately borne by low-wage workers without job security and people of color. These populations will experience the financial stress caused by the pandemic most acutely. Many will lose jobs and be unable to pay criminal justice debts through no fault of their own.

Unless states act, nonpayment will result in enforcement actions that bring more of those vulnerable people into contact with the criminal system—including through suspension of driver's licenses, arrest, incarceration, and probation and parole revocations or extensions. This would put residents, officers, and prison populations at needless risk of infection, increase viral spread, and further strain the medical system.

In the face of extraordinary job losses, states should also act to ensure that criminal justice debts do not exacerbate financial stress on vulnerable families. Because of the harsh consequences for nonpayment, families will be forced to choose between paying for food, rent, and utilities or fees and fines. Late fees, interest, collection fees, and collection actions, such as wage garnishment and tax offsets, will further burden distressed communities, inhibiting successful reentry, and making recovery from the financial crisis less likely.

## What States Should Do

To protect public health and the most vulnerable residents, states should cancel outstanding fines and fees. This would ensure that people are not ensnared in the criminal system by debt and lift this debt burden from financially distressed families and communities.

At a minimum, states should take the following actions during the crisis to ensure that these debts are not a barrier to residents' ability to meet basic needs and do not put public health at risk:

- Suspend fines, fees, and criminal justice debt enforcement activities, including:
  - Halt issuance of arrest warrants for nonpayment or failure to appear at a hearing related to the debt and vacate outstanding warrants;
  - Ensure that probation, parole, or other supervision cannot be extended or revoked based on nonpayment;
  - Halt suspension of driver's licenses for nonpayment or nonappearance at a hearing related to a debt, reinstate licenses suspended for nonpayment, and stop booting, towing, and impounding vehicles for unpaid debts. Without the ability to drive, people will be unable to use drive-through testing, will have difficulty accessing health care, and will be forced to use public transportation to buy essential supplies, potentially spreading the virus, and those driving on a suspending license face traffic stops, arrest, and incarceration;
  - Stop involuntary collections, including wage garnishment, bank levies and offsets of tax refunds and recovery payments, Social Security and disability benefits, unemployment insurance, and bail bonds and commissary fund, and refund amounts seized involuntarily from individuals since the March 13, 2020 National Emergency order or any earlier state emergency order;
  - Cease assignment of debts to private collection companies and order collection companies, as well as probation, parole, and other supervision, to suspend all collections and payment requirements for government debts; and
  - Impose an automatic payment moratorium on fines, fees, and other criminal justice debts; and ensure that no interest, penalties, or late fees accrue. Payment plans that provide forgiveness after a certain number of payments should not have the forgiveness date pushed back so that this crisis does not lengthen criminal and financial burdens on residents.
- Release anyone already in jail or prison for nonpayment of fines and fees or nonappearance at a debt-related hearing.
- Suspend issuance of fines to the extent feasible, including parking tickets and municipal code violations that do not impact public safety, and reduce or waive fines so that they are proportionate to people's ability to pay at this time.

- Suspend imposition of fees and surcharges, which are amounts above and beyond the penalty fines, on people impacted by the criminal and traffic systems.
- Ensure that people who are detained do not take on additional debts due to the crisis, including by waiving medical co-pays for people in jail or prison; providing free soap and disinfecting products; and ensuring access to free emails, phone calls, and video conferencing so families and loved ones can stay in touch without in person visits.
- Communicate policy changes to the public and to impacted people

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**Changes to Procedures for Supreme Court Rule 298 Applications for Waiver of Court Fees; Changes to Requirements for Use of Summons as Provided by Supreme Court Rules 101, 283, 286(a) (2020)**

LEGAL ADVOCATES FOR REMOTE ACCESS

The crisis caused in Illinois by the novel coronavirus (COVID-19) has severely impacted the administration of justice in Illinois courts, necessitating practices to mitigate risks presented to the public accessing the courts. These proposed changes to procedures for Applications of Waiver of Court Fees made pursuant to Supreme Court Rule 298 and changes to requirements for use of summons as provided by Supreme Court Rules 101, 283, and 286(a) seek to reduce unnecessary court appearances for litigants for health and safety purposes. . . .

I. Rule 298 Application for Waiver of Court Fees

Supreme Court Rule 298 requires the court to either enter a ruling on an Application for Waiver of Court Fees or set the Application for hearing requiring the applicant to attend court in person. Instead of ruling on the Application on its face, some courts routinely set the Application for hearing pursuant to Rule 298. Many of these in-person hearings simply confirm the information contained in the Application. Considering the COVID-19 crisis, this practice unnecessarily promotes increased in-person activity in Illinois courts and presents health and safety concerns to those seeking to have their court fees waived.

This proposed order seeks to address this health, safety, and efficiency concern by directing courts to rule on fee waiver applications on the face of the application. If the application gives rise to a factual issue, the court may then set the application for hearing, after making a written finding as to the nature of the factual issue. The hearing shall be

conducted remotely; the court clerk shall schedule the remote hearing within seven days of the court's written findings.

If adopted, this proposed order will significantly reduce the number of in-person hearings on Applications for Waiver of Court Fees currently being held, and will promote the health and safety of the public accessing courts. Given that pro se litigants in Illinois are predominately from Black and Latinx communities, which have been disproportionately affected by COVID-19, these health and safety measures are even more critical for equitable access to justice for these communities. . . .

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**Illinois Courts Response to COVID-19 Emergency (2020)**

Illinois Supreme Court

Order

In the exercise of the general administrative and supervisory authority over the courts of Illinois conferred on this Court pursuant to article VI, section 16, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, sec. 16); in view of the outbreak of the novel coronavirus (COVID-19); and in accordance with the efforts of this Court to reduce unnecessary in-person court appearances and to promote remote court appearances,

IT IS HEREBY ORDERED:

1. With respect to Applications for Waiver of Court Fees pursuant to 735 ILCS 5/5-105 and Supreme Court Rule 298:
  - a. Applications by persons who are exempt from e-filing under Supreme Court Rule 9(c) may be filed by United States Mail, third-party commercial carrier, in person, or utilizing an available dropbox. All other Applications shall be e-filed.
  - b. Upon filing, an Application shall be transmitted to the judge assigned to rule on it.
  - c. The court shall enter an order ruling on the Application on the basis of the information contained in the Application, without conducting a hearing, unless the court determines that the Application gives rise to a factual issue regarding the applicant's satisfaction of the conditions for a waiver under section 5-105(b) of the Code of Civil Procedure (735 ILCS 5/5- 105(b)).

d. If the court determines there is a factual issue regarding the applicant's entitlement to a waiver, the court shall enter an order (i) stating with specificity the nature of the issue, (ii) scheduling a hearing on the Application by telephone or video conference in accordance with Supreme Court Rule 45 and this Court's Policy on Remote Court Appearances in Civil Proceedings, and (iii) specifying any documents to be submitted in support of the Application at or before the hearing. The hearing shall be scheduled promptly, with due regard for the need to provide reasonable notice to the applicant.

e. The court shall cause the clerk to serve the applicant with a copy of an order entered pursuant to paragraph (c) or (d) by e-mail (if the applicant consented, in the Application, to receive court documents by e-mail), or else by United States Mail at the address stated on the Application.

In accordance with Supreme Court Rule 298(b), if the court determines, with or without a hearing, that the conditions for a partial assessment waiver under 735 ILCS 5/5-105(b)(2) are satisfied and if necessary to avoid undue hardship on the applicant, the court may allow the applicant to defer payment of assessments, costs, and charges; make installment payments; or make payment upon reasonable terms and conditions stated in the order. . . .

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### **Illinois Supreme Court Issues Temporary Order Limiting In-Person Court Appearances Through Change to Fee Waivers and Summonses to Appear (2020)**

Supreme Court of Illinois

The Illinois Supreme Court announced late last week a temporary order which limits in-person court appearances and promotes remote court appearances to ensure the health and safety of the public accessing the court during the COVID-19 pandemic. The order is effective immediately and until further order of the court.

The temporary order addresses applications for waiver of court fees and summonses to appear in small claims and consumer cases. . . .

. . . Applications for Waiver of Court Fees will be e-filed unless the person is exempt under Supreme Court Rule 9(c). After the court reviews the Application, the court will enter an order ruling on the Application on the basis of the information contained in the Application, without conducting a hearing, unless the court determines that there is a factual issue regarding the applicant's satisfaction of the conditions for a waiver. . . .

. . . If there is a factual issue regarding the whether the applicant qualifies for a waiver, the court will schedule a hearing on the Application by telephone or video. If the



applicant is denied a fee waiver, the applicant may defer payment, make installment payments, or make payment upon reasonable terms and conditions.

Additionally, under the temporary order, summons requiring appearance on a specified day will only be used in an action for eviction, replevin, or detinue. Small claims and consumer actions will use a summons requiring each defendant to file an appearance within 30 days after service. The order specifies language that must be included in all small claims summons to clarify that the defendant must file an appearance with the circuit clerk within 30 days after service of the summons. This will eliminate the requirement of an initial appearance while ensuring defendants are still required to appear in the matter in which they are summoned. . . .

. . . With this order, the court is responding to the crisis caused by COVID-19 and its impact on the administration of justice while ensuring the health and safety of the public.