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**Authors**

Link, Nathan  
Hyatt, Jordan M.  
Ruhland, Ebony

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# MONETARY SANCTIONS, LEGAL AND COLLATERAL CONSEQUENCES, AND PROBATION & PAROLE: Where Do We Go From Here?

Nathan W. Link, Jordan M. Hyatt, and Ebony Ruhland

## About the Authors

Nathan Link is an assistant professor at Rutgers University–Camden and researches incarceration, community corrections, health and crime, and crime and recidivism control strategies. Jordan M. Hyatt is an assistant professor in the Department of Criminology and Justice Studies, Drexel University. Ebony Ruhland is an assistant professor at the University of Cincinnati, School of Criminal Justice. She researches how criminal justice and correctional policies and practices affect individuals, families, and communities.

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## Introduction

In the last few years, a broad range of legal scholars, social scientists, practitioners, and advocates have drawn increased attention to the use of monetary sanctions in the criminal justice system. Penalties being examined in this new light include fines, fees, costs, surcharges, and a range of other Legal Financial Obligations (LFOs). Changes in the fiscal and policy landscape surrounding the backend of the criminal justice process have redefined the role that LFOs play, as well as drawn attention to the impact on justice-involved populations, their families, and society.

Some LFOs, especially fines and restitution, can be tied to the deterrent, retributive and restorative functions of punishment. Although other LFOs, including fees and costs, contribute to achieving a more holistically punitive sanction,<sup>1</sup> they are less explicit in their ideological justification and, more practically, can be used to generate revenue for the operation of core criminal justice functions.<sup>2</sup> For the system, an elevated dependence on the offender-funded justice model is not without broad consequences. Those in contact with the justice system and their families must fund a share of their own criminal processing, putting a strain on their already limited resources in many cases. In the absence of robust public funding, some criminal justice agencies have become dependent on a revenue stream that can only flow from the combined contributions of a substantial population of defendants and supervisees, complicating the impact of correctional reform efforts intended to reduce these numbers.

Irrespective of their function, the adverse consequences of LFOs for defendants are becoming increasingly apparent. Nonpayment of LFO-related debts can lead to serious legal and collateral consequences, including revocation of community supervision,<sup>3</sup> the loss of voting rights,<sup>4</sup> wage garnishments, loss of a driver's license, damage to one's credit, and consequently ineligibility for loans and bank accounts.<sup>5</sup> Importantly, this has effectively created a two-tiered justice system whereby those who can afford their financial obligations are able to self-divert away from

1. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 1753 (2010).
2. For a review of revenue generation and reliance on fines and fees across U.S. states generally, see Mike Maciag, *Addicted to Fines*, GOVERNING (Aug. 21, 2019), <https://www.governing.com/topics/finance/gov-addicted-to-fines.html> [<https://perma.cc/CYW3-65FL>].
3. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016); Harris et al., *supra* note 1.
4. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019).
5. See also ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf); Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471 (2018).

these aspects of supervision earlier and subsequently face fewer of these longterm collateral consequences.

Against this backdrop, researchers have begun to study the assessment, collection, and consequences of debts related to LFOs. We write as investigators on a project—the *Community Corrections Fines and Fees Study*—tasked with examining the landscape of fines and fees related to probation and parole supervision across seven states.<sup>6</sup> Below, we first provide a succinct review of the limited social scientific literature on criminal justice debt and its effects on offenders. Secondly, we discuss a variety of potentially promising avenues for policymakers seeking proactive opportunities to scale back the systematic reliance on, and adverse consequences of, financial sanctions.

Two important assumptions underlie our approach to policy and practice reforms. First, we begin with the foundational premise that fines and fees should be calibrated according to an individual's particular situation and ability to pay. In this manner, fines and fees can have a proportionally equivalent effect across people of different financial means; the intended impact is preserved while still adjusting for relative wealth. Second, we do not directly engage with the arguments for or against the abolition of financial sanctions. We do so for two reasons: (1) this policy has been addressed at length elsewhere,<sup>7</sup> and (2) we believe that, given current legislation, abolitionist policies like those implemented in San Francisco and Alameda counties<sup>8</sup> will remain out of reach for the majority of jurisdictions for the foreseeable future. Thus, our emphasis lies in setting out actionable policies appropriate for reducing the harms caused by LFOs in those jurisdictions with the greatest reliance on fines and fees.

## I. Financial Sanctions, Debt, and Their Consequences

Research findings have shown that the application of LFOs has increased on a national scale.<sup>9</sup> At the same time, empirical work on debt owed by individuals in contact with the justice system has been quite limited. Given this fact, and because LFOs vary meaningfully in purpose, size, and source across jurisdictions, many of the figures reported in the literature often come from case studies and generalize poorly. Similarly, as the focal point for much of the extant research has been on court-specific LFOs, very little data exist on the amount of supervision fees owed by those under community supervision, despite some recent evidence that such supervision fees are ubiquitous and impactful for probationers

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6. Ebony Ruhland et al., *Community Corrections Fines and Fees Study*, <http://ccff-study.org> (last visited Feb. 24, 2020).

7. See, e.g., Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505 (2011).

8. See *San Francisco County Ordinance No. 131-18: Administrative Code—Criminal Justice System Fees and Penalties*, FINES & FEES JUSTICE CTR. (Feb. 1, 2018), <https://finesandfeesjusticecenter.org/articles/san-francisco-abolish-criminal-justice-fees-penalties> [<https://perma.cc/Y2W6-Q2JX>].

9. Harris et al., *supra* note 1.

and parolees.<sup>10</sup> For example, in Texas, Reynolds et al. found that individuals released to parole owed between \$500 and \$2000 in debt related to their offense (excluding restitution).<sup>11</sup> In another case study in Cambria County, Pennsylvania, Alicia Bannon et al. reported on a defendant convicted of a drug offense who was assessed \$2464.91 in various fees, while her punishment also included a \$500 fine and restitution totaling \$325.<sup>12</sup>

Though most supervision agencies remain part of the court system, there has been an increase in the number of programs and, in some cases, entire departments that have been outsourced to for-profit companies. The fiscally-oriented focus that underlies the privatization of community supervision often exacerbates the issues surrounding LFOs.<sup>13</sup> As an example, a 2014 Human Rights Watch investigation of probation fees in Mississippi, Alabama, and Georgia, revealed a situation wherein private probation companies were able to profit by tacking on numerous additional fees, costs, and interest to cases in which probationers could not afford to pay court fines and fees upfront.<sup>14</sup> For the defendants, this led to large debts and extensions of community supervision terms; for the companies, this amounted to additional revenue.<sup>15</sup>

Taken together, these data suggest that LFOs are present across the country and they can accumulate into large amounts over the life-course of community supervision and can confer negative consequences in many areas of life. Beyond case studies, a small handful of quantitative studies have examined amounts of LFOs owed among prisoner and probation populations. Kristofer Bret Bucklen and Gary Zajac showed that parolees in Pennsylvania generally owe about \$1000, while a subset of parole violators owed approximately \$2000, almost double that amount.<sup>16</sup> Using data from Missouri, Breanne Pleggenkuhle reported an average LFO debt of about \$1800, largely due to sentencing and post-conviction fees and costs.<sup>17</sup> Nathan Link relied on prison reentry data from Ohio, Illinois, and Texas and showed an average of nearly \$900 in debt, with a wide range of deficits between \$10 and \$13,000.<sup>18</sup> Alexes

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10. CHRIS ALBIN-LACKEY, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (2014).

11. CARL REYNOLDS ET AL., COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER & TEXAS OFFICE OF COURT ADMINISTRATION, A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION, AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES (2009).

12. BANNON ET AL., *supra* note 5.

13. See Alexes HARRIS et al., *Justice "Cost Points": Examination of Privatization Within Public Systems of Justice*, 18 CRIMINOLOGY & PUB. POL'Y 343 (2019).

14. ALBIN-LACKEY, *supra* note 10, at 15.

15. *Id.*

16. Kristofer Bret Bucklen & Gary Zajac, *But Some of Them Don't Come Back (to Prison!): Resource Deprivation and Thinking Errors as Determinants of Parole Success and Failure*, 89 THE PRISON J. 239 (2009).

17. Breanne Pleggenkuhle, *The Financial Cost of a Criminal Conviction: Context and Consequences*, 45 CRIM. JUST. & BEHAV. 121 (2018).

18. Nathan W. Link, *Criminal Justice Debt During the Prisoner Reintegration*

Harris, Heather Evans, and Katherine Beckett describe the debt burdens of felons in Washington State using two different data sources.<sup>19</sup> The first stemmed from fifty interviews with people who had at least one felony living in one of four counties in Washington State. The second source was from official records on the LFOs (including restitution) applied to all felony cases in Washington during the first two months of 2004 (N = 3,366). Among the interviewees, assessments of LFOs ranged from \$500 to approximately \$80,000, with a median of \$9091. Administrative data showed wide variation in LFOs, with a minimum of \$500 for a single felony, to a maximum of \$256,257. The median amount was \$1347. From this sample they extracted a random sample of 500 cases to examine how these LFOs grow into debt over time. On average, these 500 individuals were assessed \$11,471 by the courts, and the average amount still owed four years later was \$10,840.

Criminal justice and LFO debt can often have a longterm impact, influencing the lives of the individuals well past the expiration or completion of their initial sentence. Unlike other financial obligations, debts related to adjudication and punishment are not subject to relief through most traditional mechanisms such as bankruptcy proceedings or other reductive measures, including offsetting the total debt burden by the value of surrendered property or services provided.<sup>20</sup> As a result, LFO debt can reduce access to housing, credit, loans for education and employment, or a driver's license, among others.<sup>21</sup> It may also have adverse effects on stress, mental health, and family relationships, especially during the stressful and tenuous time spent on supervision.<sup>22</sup>

Carrying LFO debt is not as mundane as an overdue credit card bill. Falling behind on payments can often directly lead to increased contact with the criminal justice system—such as extensions of the length of time on parole or heightened intensity of supervision.<sup>23</sup> In some jurisdictions, there is a risk of incarceration for nonpayment.<sup>24</sup> As such, some argue that debt acts as trap, causing people to fall back to prison,<sup>25</sup> while others

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*Process: Who Has It and How Much?* 46 CRIM. JUST. & BEHAV. 154 (2019).

19. Harris et al., *supra* note 1.
20. Beckett & Harris, *supra* note 7.
21. BANNON ET AL., *supra* note 5.
22. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003); Pleggenkuhle, *supra* note 17; Ebony Ruhland, *It's All About the Money: An Exploration of Probation Fees*, CORRECTIONS (Jan. 8, 2019), <https://doi.org/10.1080/23774657.2018.1564635>; JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005).
23. Shaila Dewan, *Private Probation Company Accused of Abuses in Tennessee*, N.Y. TIMES (Oct. 1, 2015), <https://www.nytimes.com/2015/10/02/us/private-probation-company-accused-of-abuses-in-tennessee.html> [<https://perma.cc/ZPP5-4V7Y>]; MITALI NAGRECHA, MARY FAINSOD KATZENSTEIN, & ESTELLE DAVIS, *CENTER FOR COMMUNITY ALTERNATIVES, WHEN ALL ELSE FAILS, FINING THE FAMILY* (2015).
24. Harris et al., *supra* note 1.
25. Vincent Schiraldi & Michael Jacobson, *Could Less Be More When it Comes to Probation Supervision?*, AM. CITY & COUNTY (June 4, 2014), <https://>

suggest that financial sanctions can lead to reincarceration through their indirect criminogenic (i.e., crime-causing) effects.<sup>26</sup>

A more critical group of observers argue that the collateral consequences of LFOs are not in fact collateral; they are instead seen as purposefully designed to lead to more entanglement with the justice system as there is a revenue-driven incentive to increase the length of supervision.<sup>27</sup> This perspective suggests that LFOs are not being used to meet traditional penological goals but rather to further advance the operational and pecuniary needs of the supervision system. From this vantage point, outstanding payments can be seen as an opportunity to generate more revenue from late penalties and interest.<sup>28</sup> As an example, in a scathing report from Louisiana, auditors concluded that revenue from fees levied by criminal court judges was not used to fund activities related to supervision, but rather to provide the additional revenue needed to pay for a premium health insurance plans for court staff.<sup>29</sup> Mary F. Katzenstein and Maureen R. Waller surmise that LFOs are another way of regulating the poor, which has the effect of indirectly taxing family members of the incarcerated—most of whom are women—and limiting the upward mobility of the poor.<sup>30</sup>

In short, existing research suggests there has been a shift toward an offender-funded model of community supervision and that, as a result, justice-related debt burdens are now both large and commonplace. Although the amount of empirical research to date has been admittedly limited, and causal inference impossible, there is support for the assumption that LFO debts are associated with both immediate and longterm

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[www.americancityandcounty.com/2014/06/04/could-less-be-more-when-it-comes-to-probation-supervision](http://www.americancityandcounty.com/2014/06/04/could-less-be-more-when-it-comes-to-probation-supervision) [<https://perma.cc/EZ4B-PKRY>].

26. FOSTER COOK, U. ALA. BIRMINGHAM TREATMENT ALTERNATIVES FOR SAFER COMMUNITIES (UAB TASC), *THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY* (2014); Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 *YOUTH VIOLENCE & JUV. JUST.* 325 (2016); Ruhland, *supra* note 22; Nathan W. Link & Caterina G. Roman, *Longitudinal Associations Among Child Support Debt, Employment, and Recidivism After Prison*, 58 *SOC. QUARTERLY* 140 (2017).
27. ALBIN-LACKEY, *supra* note 10; Ken Armstrong, *The Woman Who Spent Six Years Fighting a Traffic Stop*, *THE MARSHALL PROJECT* (Aug. 10, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/08/10/the-woman-who-spent-six-years-fighting-a-traffic-stop> [<https://perma.cc/5Q5X-LZNK>]; Dewan, *supra* note 23; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 *U. ILL. L. REV.* 1175 (2014); Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 *PERSPS. ON POL.* 638 (2015).
28. ALBIN-LACKEY, *supra* note 10; Armstrong, *supra* note 27.
29. Campbell Robertson, *Suit Alleges 'Scheme' in Criminal Costs Borne by New Orleans's Poor*, *N.Y. TIMES* (Sept. 17, 2015) <https://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html> [<https://perma.cc/R5FR-MGTF>].
30. Katzenstein & Waller, *supra* note 27.

consequences for those in contact with justice agencies and their social support networks.

## II. Where Do We Go from Here?

There is a significant need for descriptive and inferential empirical scholarship on the practices of assessing and collecting fines and fees and their impacts on people before a truly evidence-based strategy can be developed. However, recognizing the clear challenges today, there are several promising opportunities that may mitigate the excessive financial burden of LFOs and potentially reduce the scope or impact of the associated collateral consequences. Below, we outline several areas in which reform-oriented decisionmakers could experiment to more closely tailor LFOs to recognize the individual needs of justice-involved individuals and their families.

### A. Legislatures and Courts

The administrative and policy issues surrounding LFOs are complex. Although community corrections agencies are often responsible for collecting fees and fines and considerable negative attention has been directed at them, some of it may be misdirected. On a fundamental level, the existence of many community supervision fees results from the fact that criminal justice agencies at the state, county, and local levels are not properly funded by the legislature, counties, and/or cities. For example, Bannon et al. provided an example of case docket from Cambria county, Pennsylvania, where a host of user fees, such as transportation and service charges, are required by those who pass through that court system.<sup>31</sup> Public officials, including legislators at multiple levels of government, often establish the fines and fees that the courts or agencies are then required to assess.<sup>32</sup> This funding system limits officers' discretion to scale back the size of financial sanctions in any particular case, irrespective of indigency or need, and policies in some jurisdictions may even require them to sanction for payment noncompliance.

Where fees and other LFOs are employed to supplement, or even necessary to balance, community supervision budgets, legislators must step in and provide the necessary financial support. Although it may be politically challenging to divert the necessary revenue to fund probation and parole, some options should be seriously considered. There will be difficult choices made, including identifying the programs and operations that may receive less money, in order to offset the proportion of current budgets supported with revenue from LFOs. Absent such increases, the unfunded mandates passed down to probation and parole will inevitably lead to a continued or escalating reliance on fees and costs.

The legislative landscape for LFOs should also be reconsidered. It may be possible to redraft the enabling statutes and ordinances to reduce

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31. BANNON ET AL., *supra* note 5, at 8.

32. Harris et al., *supra* note 1.



their disparate and unintended impact. Legislators should first take an inventory of all existing legislation that requires fees and costs to be assessed against those under criminal justice supervision. At present, the scale of required fees and costs is likely both massive and unknown. As an example, legislatures should consider what Wayne A. Logan and Ronald F. Wright term “LFO Commissions”—groups of policymakers tasked with evaluating the potential impact of any proposed financial sanction in the context of the financial sanctions that already exist.<sup>33</sup> This work should additionally be predicated by a complete descriptive inventory of costs, payment strategies, usage, and outcomes. The resulting LFO Index should be made public to provide transparency and educate the public about this important but misunderstood issue. These responsibilities could be part of sentencing commissions already established, run by legislative committees, or under the authority of another public agency.

LFO Commissions and LFO Indexes could be used to encourage consistency and transparency in setting LFOs among the community supervision population. For example, based on these data, commissions could recommend increased flexibility for fees associated with community supervision. These ranges could be based on reasonable costs directly attributable to the expenses of the supervision process, with assessments within the range made based on the individual’s actual ability to pay. If a sentencing commission were to be given this responsibility, they could also revisit criminal sanctions and recommend the wider ranges (i.e., a lower floor) for fines for any given crime. This subsequently could allow judges to more comfortably (and within guideline recommendations) consider individual characteristics and would empower them to reduce the amount of the financial sanction in certain cases.

Legislatures and courts should reconsider the nature of the LFOs that they either recommend generally or assess in specific cases. Probation and parole officers are often criticized for onerous supervision conditions that can lead to violations and reincarcerations. While there are some jurisdictions in which probation officers have significant discretion regarding the application of stricter conditions and violations,<sup>34</sup> it is often the policies set by the legislature, courts, and other upstream discretionary decisionmakers (e.g., parole boards) who more directly set LFO related policies. Therefore, these recommendations should take into account the impact of LFOs on individuals and in the variation in ability to pay. Instead of a fee being set at a flat amount, for example, policy guidelines could recommend—or even require—amounts that were set proportional to an individual’s income (e.g., 5 percent of monthly wages) or that payment was contingent on nonindigent status. This would expand the range of options available to probation officers who collect

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33. Logan & Wright, *supra* note 27.

34. Ebony Ruhland, *Social Worker, Law Enforcer, and now Bill Collector: Probation Officers’ Collection of Supervision Fees*, 59 J. OFFENDER REHABILITATION 44 (2020).

LFOs, irrespective of the amount of discretion they have and ensure that individuals could remain in compliance with court ordered LFOs while, at the same time, building in a safety valve such that the unintended fiscal and criminal justice consequences for nonpayment in the face of poverty are avoided.

Legislatures can, and should, act to limit the impact of LFO debt on an individual's ability to complete community supervision when there are no other outstanding issues. Revocations, supervision extensions, and incarceration exclusively for nonpayment could be legislatively prohibited.<sup>35</sup> Similarly, suspension of driving and other privileges as secondary punishments clearly inhibit supervision goals such as securing employment and attending treatment, making repayment even less likely. These should be prohibited or, at a minimum, strict, nondiscretionary preconditions for their usage (e.g., extreme noncompliance) set at the policy level. Lastly, given the documented problems with financial incentives inherent in for-profit supervision,<sup>36</sup> legislatures could ban the use of private probation companies, as some have recommended,<sup>37</sup> or they might prohibit the retention of fees as part of the financial agreement with such agencies, making at least that aspect of privatization revenue neutral for the company.

Finally, government should begin to publicly reexamine this entire area of criminal justice policy and consider completely decoupling criminal justice debt servicing from community supervision agencies through legislation. Hearings should be held to discuss community corrections officers' roles, and ensure, as we suggest, that officers' tasks are focused on the correctional goals of rehabilitation and public safety. Public inquiries, perhaps run by independent academics or subject matter experts, should be data-driven and directly support jurisdiction-specific research. Through this mechanism, the opportunity to shift monitoring of debt repayment to a noncriminal justice arm of the government can be explored.<sup>38</sup> Under this model, LFOs can be dealt with similarly to how other debts to the government are handled, akin to wage garnishment and liens for people with outstanding taxes who can afford to pay but are willfully choosing not to. Importantly, though it may be an improvement over the status quo with regard to public agencies, care should be taken with the use of private, third-party collections companies to monitor debt given the profit motive inherent in privatization; money collected to service LFO debts should never directly become profits for a company.

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35. See SHARON BRETT & MITALI NAGRECHA, CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR REFORM (2019).

36. ALBIN-LACKEY, *supra* note 10; HARRIS et al., *supra* note 13.

37. BRETT & NAGRECHA, *supra* note 35; ABBY SHAFROTH, NAT'L CONSUMER LAW CTR., CRIMINAL JUSTICE DEBT IN THE SOUTH: A PRIMER FOR THE SOUTHERN PARTNERSHIP TO REDUCE DEBT (2018), <https://www.nclc.org/images/pdf/criminal-justice/white-paper-criminal-justice-debt-in-the-south-dec2018.pdf>.

38. BRETT & NAGRECHA, *supra* note 35.

As a collateral benefit, separating debt monitoring and law enforcement roles may free up criminal justice system resources that can be focused on addressing pressing crime and safety issues,<sup>39</sup> avoid increasing prison populations with debtors, and allow probation and parole agencies and agents to return to their core functions as correctional officers and not debt collectors.

### **B. Community Corrections Agencies**

On the ground, probation and parole departments are often responsible for the collection of legislative and judicial fines and fees, as well as for setting and collecting a range of fees associated with their own community supervision process. Many probation and parole departments may be logistically ill-equipped to monitor and enforce these monetary sanctions as officers already may be overburdened with fieldwork, court appearances, and writing case notes.<sup>40</sup> Moreover, the traditional supervision remedy for addressing LFO noncompliance is often the same as the punitive remedy for delinquency and offending, namely, sanctions, violations, and in some cases reincarceration. For example, the same administrative responses are often available for both a parolee who has willfully missed several appointments and one who cannot meet the payment obligations of their LFOs. This approach is arguably an inappropriate response for debt nonpayment generally, and certainly in the case of the person who simply cannot afford to pay. Agencies can, however, mitigate some adverse consequences by using their currently available discretion in several key ways: (1) changing how fees are applied; (2) rethinking the responses that probation and parole have in the case of nonpayment; and (3) addressing ways to make supervision less costly (and passing that savings down to the supervised population).

First, agencies can rethink how and when fees are applied during supervision. Some fees could be eliminated altogether as they are not appropriate revenue-producing vehicles for agencies and municipal governments.<sup>41</sup> For the fees that are directly related to the administration of supervision, cannot be reasonably eliminated, or are otherwise considered essential, agencies can expand the use of waivers or downward adjustments on a case by case basis. While many agencies choose to address this informally as part of the officer-supervisee relationship, which is a positive step, this creates an opportunity for the unequal allocation of waivers (for example, between lenient and strict officers) and for a high degree of variation between jurisdictions. Instead, structured and standardized assessment instruments could be developed and implemented to assess individual need, ability to pay, and the nature of the outstanding

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39. See Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URBAN AFF. REV. 5 (2018).

40. Kathryn D. Morgan, *Officer Attitudes About Supervision Fee Collection in Alabama*, 59 FED. PROB. 62, 64 (1995).

41. BRETT & NAGRECHA, *supra* note 35.

obligations (for example, restitution to a victim or court costs). This process could be implemented at the outset of the supervision case and reassessed at least annually or as financial situations change such that the need for a waiver, or an adjustment to an accelerated payment plan, was appropriate. Recognizing the complex social and financial environments for many justice-involved individuals, such instruments could take into account verifiable information on health issues, transportation, and cost of living, in addition to employment and family responsibilities.

Alternatively, probation and parole agencies could adopt a general ability-to-pay model for the specific fees they assess. Employed most commonly within the court system and popular in parts of Europe,<sup>42</sup> this approach sets fees and fines in an individualized manner and such that those who earn higher incomes or have greater personal resources pay more than individuals who lack financial resources.<sup>43</sup> This approach ensures that the purposes of punishment (or even, arguably, the need to support the functioning of supervision systems) are met while also taking into account the relative impact of an LFO and the likelihood of that debt being paid. Individually calibrating how a probationer or parolee pays in a structured manner could also have the additional benefit of improving perceptions of justice system legitimacy. While there may be some difficulties in terms of assessing who has the ability to pay,<sup>44</sup> there is also some evidence that people are generally honest when asked about their incomes.<sup>45</sup>

Second, probation and parole agencies, in consultation with the courts who oversee them, should reassess the costs and benefits of using coercive powers (e.g., violations) in the face of unpaid monetary sanctions. Such punishments have a demonstrated and adverse impact on

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42. Elena Kantorowicz-Reznichenko, *Day-Fines: Should the Rich Pay More?*, 11 REV. L. & ECON. 481 (2015).

43. Both agencies and researchers may need legal guidance on how to define ability to pay. For example, in their New Jersey study examining the effect of threats of incarceration for nonpayment, Weisburd, Einat, and Kowalski write: "As a first indicator of 'ability to work' (and thus ability to pay the court-ordered financial obligation), the [Administrative Office of the Courts] used a simple criterion of *some prior work history*." David Weisburd, Tomer Einat & Matt Kowalski, *The Miracle of Cells: An Experimental Study of Interventions to Increase Payment of Court-Ordered Financial Obligations*, 7 CRIMINOLOGY & PUB. POL'Y 9, 16 (2008) (emphasis added). Clearly, "some prior work history" constitutes an insufficient assessment of ability to pay and as such may represent a violation of *Bearden v. Georgia's* prohibition on the incarceration of people who truly cannot afford to pay. See *Bearden v. Georgia*, 461 U.S. 660 (1983).

44. Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555 (2011).

45. Sally Hillsman & Judith A. Greene, *The Use of Fines as an Intermediate Sanction*, in SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONING 123 (James M. Byrne et al. eds., 1992); see generally Beth A. Colgan, *Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay* 23–24 (Hamilton Project Policy Proposal No. 2019-04, 2019), [https://www.brookings.edu/wp-content/uploads/2019/03/Colgan\\_PP\\_201903014.pdf](https://www.brookings.edu/wp-content/uploads/2019/03/Colgan_PP_201903014.pdf).

the people subject to them. However, even where there is little concern for the probationer and the collateral consequences he or she may experience, these punitive levers are likely penny-wise and pound-foolish practices. A violation hearing is likely to be, and even just a few days of incarceration are certain to be, more costly from a systemic perspective than the vast majority of LFO debts. While collecting financial penalties is important, it is worth examining if the criminal justice system should operate at a loss to do so.

To be clear, the empirical research literature is undeveloped to the extent that the ideal alternatives for the probationer or parolee delinquent on fines and fees remains unclear. There is very little research that shows the necessary causal relationships between individual LFO types and negative outcomes, even as the body of descriptive literature begins to grow. As we have suggested above, reducing debts and removing debt monitoring from law enforcement altogether may be promising approaches.

Until that happens, shifting probationers who owe debt from criminal to administrative caseloads that do not rely on punitive levers and have less onerous or no reporting requirements is an alternative worthy of study. Another possibility is referring cases to third-party civil debt collectors who can manage debt compliance. On one hand, this practice has known problems as it creates a new set of barriers, such as further credit damage for people who are poor. In addition, as a result of the profit motivation intrinsic to third-party collections, service fees can pile up on top of what may already be an unwieldy sum of money.<sup>46</sup> On the other hand, the actual effects of implementing this counterfactual on a broad scale are largely unknown. Some evidence suggests that civil debt collection may be the lesser of two evils in comparison to the current response which involves criminal justice levers such as violation, extension of supervision, and incarceration for nonpayment/violation.<sup>47</sup> Care should be taken to avoid significantly increasing the burden of LFOs to cover costs associated with collections, as this creates a feedback loop of financial penalties that can be even more difficult to end.

Lastly, agencies may strive to be more efficient and reduce their overall budgetary needs. For example, risk-stratified supervision allows fewer officers to supervise more low-risk probationers (and at a lower cost) without decreasing public safety.<sup>48</sup> Other low-risk offenders may

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46. See BRETT & NAGRECHA, *supra* note 35.

47. However, there are cases where civil debtors have been redirected to the criminal justice system and then incarceration, although we do not have a strong sense of where and how often this occurs. See Lizzie Presser, *When Medical Debt Collectors Decide Who Gets Arrested*, PROPUBLICA (Oct. 16, 2019), <https://features.propublica.org/medical-debt/when-medical-debt-collectors-decide-who-gets-arrested-coffeyville-kansas> [<https://perma.cc/CR57-79ET>].

48. Geoffrey C. Barnes et al., *The Effects of Low-Intensity Supervision for Lower-Risk Probationers: Updated Results from a Randomized Controlled Trial*, 35 J. CRIME & JUST. 200 (2012).

be diverted away from active supervision.<sup>49</sup> Alternative forms of less resource-intensive supervision strategies, such as electronic home monitoring, GPS monitoring, or kiosk reporting may also be useful in reducing overhead expenses, though further exploration is needed as costs are often associated with these devices, many of which have already been passed down to probationers as fees in some jurisdictions.<sup>50</sup>

Todd Jermstad recently alluded to several potential improvements that may also decrease operational dependence on fees.<sup>51</sup> He suggests that equipping officers with tablets so that notes can be immediately entered into databases would obviate the need for officers to return to the office and enter case notes for hours. In addition, communication social media applications and text messaging can improve communication and minimize the amount of time it takes for officers to locate people they oversee. Although these improvements are worth of exploring and may both decrease expenses and provide other supervision benefits, it remains unclear to what extent these strategies are able to address more fundamental issues of underfunding. Should this angle be pursued, it would be critical that alternative sources of funding are identified to pay for these technological advancements to preclude the need for yet another operational fee. Perhaps most importantly, it must be ensured that any savings realized through these strategies are used to offset reliance on LFO revenue and not to support new programming that requires further revenue.

## Conclusion

LFO obligations and the consequences for not meeting them are increasingly recognized as a driving factor in both collateral consequences for probationers and parolees and fiscal support for correctional and judicial agencies. There are many empirical questions currently unaddressed within the literature surrounding LFOs. These data are necessary to inform and define policy and practice reform on fines, fees, and associated debt. However, there is a growing scholarly (and societal) consensus that the current system of financial sanctions is untenable and that we should reduce both debt amounts and their legal and collateral consequences.

In the above Parts, we have suggested alterations and reforms at both the legislative and agency level that may limit fees and their adverse consequences on individuals and families. While perhaps not the final step for reform in this area, these actionable recommendations would serve to increase transparency regarding LFOs, create a framework for more comprehensive analysis of fees and fines, and rebalance the

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49. Faith E. Lutze et al., *The Future of Community Corrections Is Now: Stop Dreaming and Take Action*, 28 J. CONTEMP. CRIM. JUST. 42 (2012).

50. Erin L. Bauer et al., *Kiosk Supervision: A Guidebook for Community Corrections Professionals*, NAT'L CRIM. JUST. REFERENCE SERV. (Westat) No. 250174 (Dec. 2015).

51. Todd Jermstad, *Inherently Unstable: The History and Future of Reliance on Court-Imposed Fees in the State of Texas*, 83 FED. PROB. 50 (2019).

allocation of LFO related revenue such that the burden of correctional funding, even in part, does not fall on justice-involved individuals. In turn, conscientious implementation of these suggested practices may serve as a foundation for developing broader, more holistic, and evidence-based reforms focused on reducing the assignment and the impact of LFOs on justice-involved individuals.