Court Fines and Fees Summit.pdf

Court Costs - Invitation Letter Final.pdf

FINAL OUTLINE.pdf

1_INDEX.pdf

2_1024-1045-Online2-2-HLS-Court Debt.pdf

3_2019-RIPL-Traffic Fines-Suspension-Hearing.pdf

4_Ahlquist-Neronha-Uprise RI-Article.pdf

5_Brennan-Ctr-Rpt.pdf

6_College Hill Independent-Court Costs Article.pdf

7_Costs Bill Revised II.pdf

8_Costs Bill.pdf

9_Criminal_Justice_Debt_Background_for_web.pdf

10_Driven-by-Dollars.pdf

11_Financial Statement DC.pdf

12_Financial Statement SC.pdf

13_Financial Statement.pdf

14a_H5196.pdf

14b_HEARING NOTES.pdf

15_Meko Lincoln.pdf

16_Memo_Costs_Bill.pdf

17_Motif-Piece.pdf

18_NAPD Letter to AG Sessions_01 18 18_SIGNED and FINAL(1).pdf

19_NAPD_Fines_and_Fees.pdf

20_OnIncarcerationAndHealth_Dr.Vanjani.pdf

21_Open Doors-brief_debt.pdf

22_Open-Doors-CourtDebt.pdf

23_Presser-Pro Publica Article.pdf

24_Rachel Black H5196 Testimony V3.pdf

25_Rachel Black Judiciary Memo 4.29.pdf

26_Rachel Black_RI Court Debt Thesis_Spring 2016.pdf

27_SCOTUS-Fines-Fees-Forfeiture-17-1091_5536.pd.pdf

28_Tsui-Pro Publica-Article.pdf

29_Ursillo-PJ-Ltr.pdf

30_YLS-Colloquim.pdf

THE RI PUBLIC DEFENDER AND THE RI ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS PRESENT:

RHODE ISLAND SUMMIT ON FINES, FEES, AND MANDATORY ASSESSMENTS IN CRIMINAL CASES

Worth the Cost? Or Impediment to Reentry, Rehabilitation, and Recovery?

A Legal, Public Health, and Educational Response

January 31, 2020 | 9:30 AM - 4 PM

RI Department of Health

3 Capitol Hill, Providence RI

Cannon Building Auditorium

Free and open to the public. Register at *tinyurl.com/finesfeesRI*
Participants can receive CLE credits.

RHODE ISLAND PUBLIC DEFENDER

http://www.ripd.org

THE RHODE ISLAND ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

http://www.riacdl.org

December 16, 2019

Dear Friends and Colleagues,

On Friday, January 31, 2020, the Rhode Island Public Defender (RIPD) and Rhode Island Association of Criminal Defense Lawyers (RIACDL) are sponsoring what is sure to be an interesting and thought provoking free event entitled,

SUMMIT ON FINES, FEES & MANDATORY ASSESSMENTS IN CRIMINAL CASES – Worth the Cost? Or Impediment to Reentry, Rehabilitation & Recovery?

A Legal, Public Health & Educational Response.

A flyer, detailed agenda (including time and location), and index to e-handouts (available soon on the RIPD and RIACDL websites) for the program are enclosed.

The program is designed for those interested in addressing systemic problems in our state's criminal justice system that impede the successful reentry of offenders into society as productive members. In proposing public policy and other solutions, the program will address difficult questions in novel ways, such as incorporating the latest research into the negative impact of exorbitant, punitive, and mandatory court costs, fees, and assessments in criminal cases, both on public health and on the rehabilitation of offenders post-incarceration. Our keynote speaker, Chris Maselli, former RI State Senator and Deputy Majority Leader, will address the growing problem of real 'debtors prisons', both in Rhode Island and across the United States, only one of several criminal justice reform issues that he feels passionately about and that have occupied his time both during and after his release from prison. Sarah Martino, from the Center for Prisoner Health and Human Rights; Rahul Vanjani, MD, Assistant Professor of Medicine, Warren Alpert Medical School at Brown University; and Annajane Yolken, MPH, Executive Director, Protect Families First, Co-Chair, Substance Use Policy, Education, and Recovery, will discuss the unique public health and other challenges imposed on those recently released from prison and in recovery, while others will address the issue from personal experience.

Finally, Nick Horton, Open Doors; Rachel Black, formerly Brown University; and Natalia Friedlander, Esq., Staff Attorney, Rhode Island Center for Justice, will engage in a lively panel discussion that will include:

- the "lay of the land" under both state and federal law
- scant resources devoted to incarcerating those who owe mandatory court costs, fees, and assessments in criminal cases are vastly outweigh the moneys realized
- groundbreaking and comprehensive legislation passed by the RI General Assembly in 2008 that reformed the ways in which court costs, fines, fees, and restitution were supposed to be assessed, collected, and in appropriate cases, waived in whole or in part
- observance of these reforms primarily in the breech
- suggested changes necessary to make these reforms effective, now

We not only hope that you (and others like you interested in meaningful reforms in this important area that you might care to bring with you) can attend, but also that you bring your individual perspectives, experience, and passion to this impactful and important issue.

The program is free and open to the public **but first you must register in order to attend!** Please do so by going to https://tinyurl.com/finesfeesRI and following the instructions. Additional information is in the flyer and agenda covered by this letter. E-handouts described in the enclosed index will be available soon at the RIPD and RIACDL websites the links to which are set out above. If you should have any questions or problems registering please feel free to contact me at any time. My personal contact information is set out below (**e-mail preferred**).

I look forward to seeing you in January.

Respectfully,

Michael A. DiLauro Assistant Public Defender // Director of Training & Legislative Liaison ---- Chairperson: RIACDL Education & Legislation Committees	160 Pine Street Providence, RI 02903 401-222-3492 // 401-222-1526 [PRIVATE LINE] 401-487-3644 [CELL] // 401-222-3289 [FAX] mdilauro@ripd.org [E-MAIL // WORK]

Enclosures

The Rhode Island Public Defender

&

Rhode Island Association of Criminal Defense Lawyers

Proudly Present:

SUMMIT ON FINES, FEES & MANDATORY ASSESSMENTS IN CRIMINAL CASES –

Worth the Cost? Or Impediment to Reentry, Rehabilitation & Recovery?

A Legal, Public Health & Educational Response.

Friday, January 31, 2020, 9:30 a.m. to 4:00 p.m.

RI Department of Health, 3 Capitol Hill, The Cannon Building Auditorium (Basement) Providence, RI 02903

IT IS STRONGLY RECOMMENDED THAT ATTENDEES ENTER THE CANNON BUILDING ON ITS NORTH SIDE / ORMS STREET ENTRANCE!

Each session will conclude with ample time for questions & answers!

I. 9:30 a.m. Registration & Networking: 30 Minutes

II. Welcome & Opening Remarks

III. **Keynote Speaker: 30 Minutes**

Christopher B. Maselli, Esq.
Law Offices of Thomas E. Badway

Chris Maselli has a powerful and compelling story to tell about his experiences as a RI state senator including serving as a Deputy Majority Leader, Chairman of the Rules Committee, and member of the Judiciary Committee where he worked on a number of criminal justice reform issues; then a downfall that resulted in him serving 27 months in federal prison; and ultimately a successful return to the practice of law. Since his release and reinstatement Chris has sought to help others by actively engaging with a number of Rhode Island criminal justice stakeholders on a variety of issues relating to the rehabilitation and reentry of returning citizens, in many respects a continuation of the work Chris did in the Senate. Foremost on that list is the ever increasing burden of escalating court costs, fines, and fees, a huge problem across the United States and especially in Rhode Island that can and often does result in failure to pay and incarceration. Chris' story and his thoughts on these and other issues are eloquently and powerfully told in the recent book he co-authored with Paul Lonardo released this past May entitled, *"The New Debtor's Prison: Why All American's Are in Danger of Losing Their Freedom.*

IV. Incarceration & Health: Reframing the Discussion: 100 Minutes

Speakers:

Sarah Martino, MPA, Deputy Director, Center for Prisoner Health and Human Rights at the Miriam Hospital

Rahul Vanjani. MD, Assistant Professor of Medicine, Warren Alpert Medical School at Brown University

Annajane Yolken, MPH, Executive Director, Protect Families First; Co-Chair, Substance Use Policy, Education, and Recovery PAC

Other Speakers: TBD

Description: The financial burden imposed by court-imposed fines and fees is extremely difficult for many justice-involved citizens who already struggle to make ends meet. But if we look deeper, we begin to see much broader implications for how being in debt to the courts impacts individuals' health and well-being. This session will explore how and why health impact is crucial to include in any discussion on court fines and fees by: 1) highlighting the health profile of those most impacted by the issue; 2) reviewing the research on the public health impact of court debt; 3) presenting examples from a local primary care practice; and 4) having a discussion with Rhode Islanders who can speak from personal experience about the intersection of court fines and fees and health/behavioral health.

LUNCH

On your own but the cafeteria at RIDOA diagonally across the street from the Statehouse is easy walking distance and comes highly recommended!

V. 1:30 p.m. *REAL* People, *REAL* Money, *REAL* Problems: 50 Minutes

Description: Outside of a small handful of individuals serving sentences of life without the possibility of parole, *EVERY OFFENDER* sentenced to the ACI eventually attains their release from prison. What happens when the courts raise money on their backs by the imposition of exorbitant and mandatory court costs, fees, and assessments set by the General Assembly, some of which bear little if any relationship or relevance to the offense charged? Does this additional hardship visited upon offenders at their most vulnerable serve as an impediment to the all-important “The R’s” – Rehabilitation, Recovery & Reentry? If so, how? We’ll hear the powerful stories of offenders caught in the vice of exorbitant, mandatory, and counterproductive courts costs, fees, and assessments; the impediments they pose to “The Three R’s”; and their inefficiency and ineffectiveness as a device to raise revenue for the state.

Speakers: TBD

VI. PANEL DISCUSSION. *What the Heck Happened?:* 100 Minutes

Nick Horton, Open Doors

Rachel Black, Educational Resource Strategies, formerly Brown University

Natalia Friedlander, Esq., Staff Attorney, Rhode Island Center for Justice

Moderator: Michael A. DiLauro, Assistant Public Defender // Director of Training & Legislative Liaison

Description: Most people believe (correctly) that both the United States and Rhode Island Supreme Courts have ruled that it is unconstitutional to imprison a person simply because they are poor. But the devil is in the details. Courts not only in Rhode Island but across the United States have found creative ways to do just that.

The panel will discuss and review:

- The "lay of the land" under both state and federal law suggesting strategies for litigation purposes both systemically and on a case by case basis.
- Groundbreaking and comprehensive legislation passed by the RI General Assembly in 2008 that reformed the ways in which court costs, fines, fees, and restitution were ***supposed to be*** assessed, collected, and in appropriate cases, waived in whole or in part. The key component of the legislation made it easier and faster for a court to assess an indigent defendant's ability to pay. Research commencing in 2015 proved that these reforms are usually honored in the breech and that approximately 17% of all commitments to the ACI annually are as a result of an inability to pay.
- The changes necessary to make these reforms effective, ***now***.

THE RHODE ISLAND ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (RIACDL) AND RHODE ISLAND PUBLIC DEFENDER (RIPD) PRESENT THIS FREE PROGRAM FOR ANY AND ALL INTERESTED IN THESE IMPORTANT ISSUES!

Subject to Supreme Court Rule IV.3, the sponsors of this program are requesting that the MCLE Commission approve a maximum of six (6.0) credits for those attending this program as well as credit towards re-certification of court appointed counsel and six (6.0) hours of the CLE requirement for criminal case panels in the District, Superior, and Supreme Courts.

Program speakers, topics, and length are subject to change with notice.

ALL ATTENDEES WILL RECEIVE A COMPREHENSIVE SET OF ONLINE MATERIALS *AVAILABLE SOON* AT:

- RIACDL: https://www.riacdl.org
- RIPD: http://www.ripd.org

REGISTRATION

- This program is ***FREE(!)*** but you need to register in order to attend.
- Register by going to https://tinyurl.com/finesfeesRI and following the instructions.
- Additional information in the flyer and letter that accompany this agenda.
- ***HAVE QUESTIONS? NEED HELP?*** **CONTACT (e-mail preferred):**

Michael A. DiLauro
Assistant Public Defender //
Director of Training & Legislative Liaison

Chairperson: RIACDL Education & Legislation Committees

---

160 Pine Street
Providence, RI 02903
401-222-3492 // 401-222-1526 [PRIVATE LINE]
401-487-3644 [CELL] // 401-222-3289 [FAX]

mdilauro@ripd.org [E-MAIL // WORK]

The Rhode Island Public Defender & Rhode Island Association of Criminal Defense Lawyers

Proudly Present:

SUMMIT ON FINES, FEES & MANDATORY ASSESSMENTS IN CRIMINAL CASES –
Worth the Cost? Or Impediment to Reentry, Rehabilitation & Recovery?
A Legal, Public Health & Educational Response.

INDEX TO HANDOUTS & MATERIALS: Unless otherwise noted available at http://www.ripd.org/FinesFeesManatoryAssessments.html or http://www.riacdl.org (click on 'COURT COSTS SUMMIT' at top of page)

- *NOTES: STATE BANS ON DEBTORS' PRISONS AND CRIMINAL JUSTICE DEBT* (online Harvard Law Review article @ pp. 1024-1045 addressing the constitutionality of incarcerating those unable to pay court costs, fines, and fees)

- 2019 RIPL Chapters 217 & 236. Legislation passed in 2019 that amends *RIGL Sec. 31-11-25* to require that an ability to pay hearing be held before a driver's license may be suspended for non-payment of fines.

- *Steve Ahlquist, A conversation with Attorney General Peter Neronha at the 49th Annual Meeting of Common Cause Rhode Island, Uprise Rhode Island online article (11/12/19)*

- *Menendez, et al, The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties, The Brennan Center for Justice at New York University School of Law (11/12/19)*

- *Anderson, et al, CAUGHT IN RHODE ISLAND: An investigation into how court fees and fines trap low-income Rhode Islanders in poverty, The College Hill Independent (4/19/19)*

  Also available online with links to supporting raw data at https://www.theindy.org/1739

- Costs Billl. Several versions of draft legislation seeking to enhance and strengthen the reforms enacted by the RI General Assembly in 2008.

- *Patel & Philip, CRIMINAL JUSTICE DEBT: A Toolkit for Action, The Brennan Center (2012)*

- *Salas & Ciolfi, DRIVEN BY DOLLARS: A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt, Legal Aid & Justice Center (Fall, 2017)*

- Financial Statements. Retrieved from the RI Judiciary website, these 3 forms purport to be the Financial Assessment Instrument (FAI) mandated by the legislature in 2008 to quickly

assess and evaluate the ability of defendants in criminal cases to pay courts costs, fines, and fees

- *2019—H 5196.*

    - Legislation seeking to enhance and strengthen the reforms enacted by the RI General Assembly in 2008

    - Notes of the hearing before the House Judiciary Committee on 2/6/19

- Meko-Lincon.pdf. *Tracy Jan, et al, After prison, more punishment. The Washington Post (9/3/19)*

  This extensive piece in the Washington Post about Rhode Island's own Meko Lincoln speaks directly to the issues of barriers faced by returning citizens and the challenges they meet in obtaining housing, employments, education, and supporting their families.

- Memo Costs Bill. Memo to RIPD attorneys and RIACDL members summarizing the legislation passed by the RI General Assembly in 2008 (7/15/08)

- *MOTIF Magazine, (4/4-18/19)*. Articles on court debt and poverty at pp. 10-11.

- National Association for Public Defense (NAPD): materials on court costs, fines, and fees

    - Letter to Attorney General Sessions (1/18/18)

    - NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS (5/3/15)

- *Rahul Vanjani, MD, On Incarceration and Health: Re-Framing the Discussion, New England Journal of Medicine (6/22/17)*

- Family Life Center (now 'Open Doors')

    - *POLICY BRIEF: JAILING THE POOR: COURT DEBT AND INCARCERATION IN RI*

    - *Court Debt and Related Incarceration in Rhode Island from 2005 through 2007 (April 2008)*

- *Lizzie Presser, When Medical Debt Collectors Decide Who Gets Arrested, Pro Publica (10/16/19)*

- Rachel Black

    - Written Testimony in support of 2019—H 5196

    - Memo to House Judiciary Committee in support of 2019—H 5196

    - Protecting vs. Policing: Indigent Defendants in Rhode Island's Court Debt Collection Regime. Brown University Senior Thesis (April, 2016)

- *TIMBS v. INDIANA, No. 17–1091, Supreme Court of the United States (US, 2/20/19).* Holding that:

    - The 8th Amendments Excessive Fines Clause is an incorporated protection applicable to the States under the 14th Amendment's Due Process Clause.

    - Prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day.

    - Protection against excessive fines has been a constant shield throughout Anglo-American history for good reason

    - Such fines undermine other liberties

    - Lower court's forfeiture order vacated and remanded

- *Anjali Tsui, They Loan You Money. Then They Get A Warrant for Your Arrest, Pro Publica (12/3/19)*

- Ursillo-PJ-Ltr.pdf. Letter to Presiding Justice Gibney dated 12/16/19 covering and questioning the legality of a Superior Court Clerk's Office memo dated 7/28/09 prohibiting the waiver of the $100.00 fee necessary for a successful expungement order to enter.

- YLS-Colloquim.pdf. *Who Pays? Fines, Fees, Bail, and the Cost of Courts, Yale Law School, Public Law Research Paper No. 644 (4/25/18).* Available at http://www.riacdl.org (click on 'COURT COSTS SUMMIT' at top of page)
  and *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165674*

  This remarkable resource is a comprehensive effort that explores the causes, impact, and potential solutions to the difficult problems posed when user fees are relied upon to help finance our justice system.

NOTES

STATE BANS ON DEBTORS' PRISONS AND CRIMINAL JUSTICE DEBT

Since the 1990s, and increasingly in the wake of the Great Recession, many municipalities, forced to operate under tight budgetary constraints, have turned to the criminal justice system as an untapped revenue stream.[1] Raising the specter of the "debtors' prisons" once prevalent in the United States,[2] imprisonment for failure to pay debts owed to the state has provoked growing concern in recent years.[3] These monetary obligations are not contractual liabilities in the ledger of an Ebenezer Scrooge,[4] but sums that the state itself assesses through the criminal justice system. Sometimes called "legal financial obligations" (LFOs), the total debt generally includes a mix of fines, fees, court costs, and interest.[5] And unlike civil collection actions (for the most part[6]), incarceration is very much on the menu of sanctions that the unpaid creditor, usually a municipality,[7] can impose.

---

[1] *See, e.g.*, Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 886–87 (2013); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1098–99 (2015).

[2] *See infra* section III.A, pp. 1034–38.

[3] *See, e.g.*, Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 262–63 (2015); McLean, *supra* note 1, at 885–91; Campbell Robertson, *Suit Alleges "Scheme" in Criminal Costs Borne by New Orleans's Poor*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleanss-poor.html. At the same time, however, legal commentators have been concerned about imprisonment for criminal debt since at least the 1960s. *See, e.g.*, Derek A. Westen, Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 787 n.79 (1969) (listing sources).

[4] In addition to featuring in DAVID COPPERFIELD (1850) and LITTLE DORRIT (1857), debtors' prisons lurk in the shadows of Dickens's classic A CHRISTMAS CAROL (1843). Those who did not pay the debts so meticulously recorded by the shivering Bob Cratchit could have been thrown in prison by Scrooge — part of why he was so hated and feared by his debtors. *See* CHARLES DICKENS, A CHRISTMAS CAROL AND OTHER CHRISTMAS BOOKS 71–72 (Robert Douglas-Fairhurst ed., Oxford Univ. Press 2006) ("[B]efore [our debt is transferred from Scrooge] we shall be ready with the money; and even though we were not, it would be a bad fortune indeed to find so merciless a creditor in his successor.").

[5] *See, e.g.*, State v. Blazina, 344 P.3d 680, 680–81, 684 (Wash. 2015); ACLU OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS 3 (2014), http://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20(3).pdf [http://perma.cc/X66N-G5EA] ("[T]he average amount of LFOs imposed in a felony case is $2540 . . . ."); *Developments in the Law — Policing*, 128 HARV. L. REV. 1706, 1727–29 (2015).

[6] In some circumstances, courts can exercise their contempt power to imprison debtors for failure to pay civil debts. *See, e.g.*, Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1526–27.

[7] *See* Telephone Interview with Douglas K. Wilson, Colo. State Pub. Def., Office of the State Pub. Def. (Oct. 21, 2014) (notes on file with Harvard Law School Library).

This practice both aggravates known racial and socioeconomic inequalities in the criminal justice system[8] and raises additional concerns. First, assessing and collecting such debt may not be justifiable on penal grounds. Instead, it seems to be driven primarily by the need to raise revenue, an illegitimate state interest for punishment, and one that, in practice, functions as a regressive tax.[9] Second, imprisonment for criminal justice debts has a distinctive and direct financial impact. The threat of imprisonment may create a hostage effect, causing debtors to hand over money from disability and welfare checks, or inducing family members and friends — who aren't legally responsible for the debt — to scrape together the money.[10]

Take the story of Harriet Cleveland as a window into the problem: Cleveland, a forty-nine-year-old mother of three from Montgomery, Alabama, worked at a day care center.[11] Starting in 2008, Cleveland received several traffic tickets at a police roadblock in her Montgomery neighborhood for operating her vehicle without the appropriate insurance.[12] After her license was suspended due to her nonpayment of the ensuing fines and court costs, she continued to drive to work and her child's school, incurring more debt to Montgomery for driving without a license.[13] Over the course of several years, including after she was laid off from her job, Cleveland attempted to "chip[] away" at her debt — while collection fees and other surcharges ballooned it up behind her back.[14] On August 20, 2013, Cleveland was arrested at her home while babysitting her two-year-old grandson.[15] The next day, a municipal judge ordered her to pay $1554 or spend thirty-one days in jail.[16] She had no choice but to "sit out" her debt at the rate of $50 per

---

[8] *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2, 6–7 (2011); Karakatsanis, *supra* note 3, at 254; Natapoff, *supra* note 1, at 1065.

[9] *See* Natapoff, *supra* note 1, at 1098 & n.208; *Developments in the Law — Policing*, *supra* note 5, at 1734. This concern is amplified by the growing trend toward outsourcing portions of the criminal justice system, such as collection, to private actors like Sentinel Offender Services, a probation company that wields the threat of imprisonment via contract with the state. *See id.* at 1726–27.

[10] *See, e.g.*, Robertson, *supra* note 3 (describing how a debtor's mother and sister "scraped together what money they [could]").

[11] *See* Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc [http://perma.cc/5SU8-EF72].

[12] *Id.*

[13] *Id.*

[14] *Id.*; *see also* Amended Complaint at 2, Cleveland v. City of Montgomery, No. 2:13-cv-00732 (M.D. Ala. Nov. 12, 2013) [hereinafter Complaint, *Cleveland v. Montgomery*], http://www.splcenter.org/sites/default/files/downloads/case/amended_complaint-_harriet_cleveland_0.pdf [http://perma.cc/Y4CM-99AK].

[15] Complaint, *Cleveland v. Montgomery*, *supra* note 14, at 2; *see* Stillman, *supra* note 11.

[16] Complaint, *Cleveland v. Montgomery*, *supra* note 14, at 4.

day.[17] In jail, "[s]he slept on the floor, using old blankets to block the sewage from a leaking toilet."[18]

Stories like Cleveland's have inspired a naissance of advocacy and scholarship that challenge the legal basis for incarceration upon nonpayment of criminal justice debts.[19] But existing approaches have failed to recognize an alternate potential font of authority: state bans on debtors' prisons.[20] Most commentators have thus far focused on the 1983 Supreme Court case *Bearden v. Georgia*.[21] *Bearden* held that a court cannot, consistently with the Fourteenth Amendment, revoke parole for failure to pay criminal debt when the debtor has made "sufficient bona fide" efforts to pay.[22] *Bearden* established a powerful (albeit somewhat vague) standard that protects debtors whose inability to pay isn't willful, by requiring courts to hold ability-to-pay hearings.[23] But, as argued below, certain types of criminal justice debtors fall under an even higher degree of protection than *Bearden* provides.

Another type of legal claim should be considered alongside *Bearden*: one based on the many state constitutional bans on debtors' prisons.[24] These state bans were enacted over several decades in the

---

[17] *Id.* at 7.

[18] Stillman, *supra* note 11. Cleveland sued the city, alleging that Montgomery's debt collection procedures and her resultant incarceration violated the Alabama and U.S. Constitutions. *See* Complaint, *Cleveland v. Montgomery*, *supra* note 14, at 2–3. They ultimately settled. *See* Judicial Procedures of the Municipal Court of the City of Montgomery for Indigent Defendants and Nonpayment, Cleveland v. City of Montgomery, No. 2:13-cv-00732 (M.D. Ala. Sept. 12, 2014) [hereinafter Settlement Agreement, *Cleveland v. Montgomery*], http://www.splcenter.org/sites/default/files/downloads/case/exhibit_a_to_joint_settlement_agreement_-_judicial_procedures-_140912.pdf [http://perma.cc/ZAH6-DFQS]. Still, as described below, there's reason to suspect such settlements will not completely solve the problem. *Cf. infra* notes 55–59 and accompanying text (discussing judicially created solutions in certain states).

[19] *See infra* Part II, pp. 1032–34.

[20] *See infra* Part III, pp. 1034–43.

[21] 461 U.S. 660 (1983).

[22] *Id.* at 662; *see also id.* at 661–62. The Court also required that a court consider whether alternate sanctions (such as a restructured payment schedule or community service) could meet the state's interest in punishment and deterrence before resorting to incarceration. *See id.* at 672.

[23] Under *Bearden*, what counts as "bona fide efforts" was left unspecified, apart from vague references to searching for employment or sources of credit. *See id.* at 668. This kind of open-ended standard, taken on its own terms, may generate a number of problems. It may leave too much discretion in the hands of the same legal actors responsible for the state of play. *See* Recent Legislation, 128 HARV. L. REV. 1312, 1316 (2015). And it seems ill-equipped to protect impoverished debtors who see no reason to embark upon, much less document, futile searches for credit or employment.

[24] While outside the scope of analysis here, Professor Beth Colgan has argued that incarceration for criminal justice debt might also violate the Excessive Fines Clause of the Eighth Amendment. *See* U.S. CONST. amend. VIII; Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014). Others assert that certain prison conditions arguably violate the Cruel and Unusual Punishments Clause or the Thirteenth Amendment's prohibition on involuntary servitude. *See* U.S. CONST. amend. VIII; *id.* amend XIII; Class Action Complaint at 57–58, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015) [hereinafter

first half of the nineteenth century, as a backlash against imprisonment for commercial debt swept the nation. While the contemporary discussion on criminal justice debt often makes cursory reference to this historic abolition of debtors' prisons,[25] the legal literature contains no sustained analysis of whether the state bans on debtors' prisons might invalidate some of what's going on today.

This Note takes a first pass at this missing constitutional argument. Part I describes the contemporary problem with criminal justice debt in greater detail. Part II covers a range of preexisting federal constitutional limitations on imprisonment for criminal justice debt. Part III introduces the state bans and argues that they should be held to apply to some fines for regulatory offenses, costs, and definitionally civil debts — both as a matter of sound interpretation of state law and as a matter of federal equal protection doctrine. Leaving traditional fines and restitution outside the scope of the state bans, this proposal would nonetheless engage with the most problematic types of criminal justice debt. Part IV explains why it makes good sense to subject the new debtors' prisons to the two-tiered regulation of both *Bearden* and these state bans, in the form of new imprisonment-for-debt claims.

I. CRIMINAL JUSTICE DEBT

Since a large portion of criminal justice debt is routed through municipal courts that aren't courts of record,[26] systemic, nationwide data aren't easily generated. But out of the mix of disturbing narratives and reports one can distill several common elements. Underlying the debts is a range of crimes, violations, and infractions, including shoplifting, domestic violence, prostitution, and traffic violations.[27] The monetary obligations come under a mix of labels, including fines, fees, costs, and interest, and are generally imposed either at sentencing or as a condition of parole.[28] Arrest warrants are sometimes issued when debtors fail to appear in court to account for their debts, but courts often fail to give debtors notice of summons, and many debtors avoid the courts out of fear of imprisonment.[29] When courts have actually held

---

Complaint, *Jenkins v. Jennings*], http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [http://perma.cc/LM7S-LZW2].

[25] *See, e.g.*, Sarah Dolisca Bellacicco, Note, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 GA. L. REV. 227, 234 (2013).

[26] *See, e.g.*, Telephone Interview with Douglas K. Wilson, *supra* note 7.

[27] *See id.*

[28] *See* sources cited *supra* note 5.

[29] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 45–50 (2015) [hereinafter DOJ, FERGUSON INVESTIGATION], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/8CQS-NZ9F].

the ability-to-pay hearings required by *Bearden*[30] — and they've often neglected to do so[31] — such hearings have been extremely short, as many misdemeanor cases are disposed of in a matter of minutes.[32] Debtors are almost never provided with legal counsel.[33] The total amount due fluctuates with payments and added fees, sometimes wildly, and debtors are often unaware at any given point of the amount they need to pay to avoid incarceration or to be released from jail.[34] Multiple municipalities have allowed debtors to pay down their debts by laboring as janitors or on a penal farm.[35] One Alabama judge credited debtors $100 for giving blood.[36]

The problem is widespread. In Colorado, Linda Roberts's offense of shoplifting $21 worth of food resulted in $746 of court costs, fines, fees, and restitution.[37] Ms. Roberts, who lived exclusively on SNAP and Social Security disability benefits, "sat out" her debt by spending fifteen days in jail.[38] And in Georgia, Tom Barrett was sentenced to twelve months of probation for stealing a can of beer.[39] But six months in, despite selling his blood plasma, Barrett still couldn't pay the costs associated with his sentence — including a $12-per-day ankle bracelet, a $50 set-up fee, and a $39-per-month fee to a private probation company — and faced imprisonment.[40] A 2010 Brennan Center report flagged problematic "criminal justice debt" practices in fifteen states, including California, Texas, Michigan, Pennsylvania, and New

---

[30] *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[31] *See, e.g.*, Complaint, *Jenkins v. Jennings*, *supra* note 24, at 43 ("The City prosecutor and City judge do not conduct indigence or ability-to-pay hearings. Regular observers of the City court have never once seen an indigence or ability to pay hearing conducted in the past decade.").

[32] *See, e.g.*, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 4–5 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [http://perma.cc/Y8BN-GVZ2]; Karakatsanis, *supra* note 3, at 262.

[33] *See, e.g.*, Karakatsanis, *supra* note 3, at 263–64.

[34] *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 18 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [http://perma.cc/6SVB-KZKQ]; HUMAN RIGHTS WATCH, *supra* note 32, at 23.

[35] *See* Class Action Complaint at 1–3, Bell v. City of Jackson, No. 3:15-cv-732 (S.D. Miss. Oct. 9, 2015) [hereinafter Complaint, *Bell v. Jackson*], https://assets.documentcloud.org/documents/2455850/15-10-09-class-action-complaint-stamped.pdf [https://perma.cc/3CKT-XXX4] (describing reduction of debt at a rate of $58 per day of work); Karakatsanis, *supra* note 3, at 262 ($25 per day).

[36] Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), http://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html.

[37] Recent Legislation, *supra* note 23, at 1314.

[38] *Id.* at 1314 & n.25.

[39] Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014, 4:58 PM), http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor.

[40] *Id.*

York.[41] A 2010 ACLU report claimed that required indigency inquiries — the heart of the constitutional protection provided by *Bearden* — were markedly absent in Louisiana, Michigan, Ohio, Georgia, and Washington.[42]

And the problem is deeply engrained, at least in some places. The best evidence to date is the Department of Justice's 2015 report on the Ferguson Police Department. The investigation revealed that Ferguson law enforcement — including both police and the municipal court — was deployed to raise revenue.[43] In March 2010, the city's finance director emailed then–Police Chief Thomas Jackson:

> [U]nless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year. What are your thoughts? Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue.[44]

In 2013, the municipal court issued over 9000 warrants for failure to pay fines and fees resulting in large part from "minor violations such as parking infractions, traffic tickets, or housing code violations."[45] The city also tacked on fines and fees for missed appearances and missed payments — and used arrest warrants as a collection device.[46]

The problem has become especially severe — or has at least drawn increased attention — within the past several years.[47] In 2015, nonprofits Equal Justice Under Law and ArchCity Defenders sued the cities of Ferguson[48] and Jennings,[49] Missouri, alleging that they were

---

[41] *See* BANNON ET AL., *supra* note 34, at 6.

[42] *See* ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 17 (2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf [http://perma.cc/2C7C-X56S] (Louisiana); *id.* at 29 (Michigan); *id.* at 43 (Ohio); *id.* at 55 (Georgia); *id.* at 65 (Washington).

[43] *See* DOJ, FERGUSON INVESTIGATION, *supra* note 29, at 3, 9–10.

[44] *Id.* at 10.

[45] *Id.* at 3.

[46] *See id.* at 42, 53. Residents of Ferguson also suffered unconstitutional stops and arrests, *see id.* at 18, misleading information about court dates and appearances, *see id.* at 46, and, of course, the death of Michael Brown at the hands of the police in August 2014, *see id.* at 5.

[47] *See, e.g.*, Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson over "Debtors Prisons,"* NPR (Feb. 8, 2015, 9:03 PM), http://www.npr.org/blogs/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons ("We've seen the rise of modern American debtors prisons, and nowhere is that phenomenon more stark than in Ferguson and Jennings municipal courts and municipal jails . . . ." (quoting lawyer Alec Karakatsanis)); *The New Debtors' Prisons*, THE ECONOMIST (Nov. 16, 2013), http://www.economist.com/news/united-states/21589903-if-you-are-poor-dont-get-caught-speeding-new-debtors-prisons [http://perma.cc/5M9N-74HT].

[48] *See* Class Action Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015) [hereinafter Complaint, *Fant v. Ferguson*], http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Ferguson-Debtors-Prison-FILE-STAMPED.pdf [http://perma.cc/MVJ9-Q9CQ]. As of October 2015, the case had survived a contentious motion to dismiss — the judge had initially dismissed, then reconsidered and reinstated, two allegations of unconstitutional imprisonment for debt — and was moving toward trial.

[49] *See* Complaint, *Jenkins v. Jennings*, *supra* note 24.

running the equivalents of modern debtors' prisons.[50] The Ferguson complaint described a "Kafkaesque journey through the debtors' prison network of Saint Louis County — a lawless and labyrinthine scheme of dungeon-like municipal facilities and perpetual debt."[51] Equal Justice Under Law and the Southern Poverty Law Center have also sued a handful of other municipalities,[52] and the ACLU has pursued an awareness campaign in a number of states, sending letters to judges and mayors in Ohio[53] and Colorado.[54]

Facing this pressure from advocates and litigants, cities, courts, and legislatures have made some changes. The city of Montgomery settled in 2014, agreeing to conduct the constitutionally required hearings, produce audio recordings,[55] provide public defenders, and adopt a "presumption of indigence" for defendants at or below 125% of the federal poverty level.[56] In Ohio, Chief Justice Maureen O'Connor took rapid action, issuing guidance materials to clarify the procedures trial and municipal judges should take before imprisoning debtors for failure to pay.[57] The Supreme Court of Washington confirmed in

---

[50] *See* Complaint, *Fant v. Ferguson*, *supra* note 48, at 3.

[51] *Id.* at 7.

[52] Two lawsuits against the City of Montgomery have settled. *See* Settlement Agreement, *Cleveland v. Montgomery*, *supra* note 18; Agreement to Settle Injunctive and Declaratory Relief Claims, Mitchell v. City of Montgomery, No. 2:14-cv-00186 (M.D. Ala. Nov. 17, 2014) [hereinafter Settlement Agreement, *Mitchell v. Montgomery*], http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf [http://perma.cc/R8S9-HW4N]. As of the time of publication, Equal Justice Under Law had litigated (or is litigating) similar issues against Jennings, Missouri; Ferguson, Missouri; New Orleans, Louisiana; Jackson, Mississippi; and Rutherford County, Tennessee. *See* Permanent Injunction, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Sept. 16, 2015); Complaint, *Fant v. Ferguson*, *supra* note 48; EQUAL JUSTICE UNDER THE LAW, *Shutting Down Debtors' Prisons*, http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/ [http://perma.cc./56WT-6RLC] (last visited Nov. 23, 2015).

[53] *See* Letter from Christine Link, Exec. Dir., ACLU of Ohio, et al., to Chief Justice Maureen O'Connor, Ohio Supreme Court (Apr. 3, 2013), http://www.acluohio.org/wp-content/uploads/2013/04/2013_0404LetterToOhioSupremeCourtChiefJustice.pdf [http://perma.cc/R3T5-WPEL].

[54] *See* Recent Legislation, *supra* note 23, at 1313 n.13. In 2012 and 2013, the ACLU of Colorado sent letters to Chief Justice Bender of the Colorado Supreme Court and three Colorado municipalities. *See, e.g.*, Letter from Mark Silverstein, Legal Dir., ACLU of Colo., and Rebecca T. Wallace, Staff Att'y, ACLU of Colo., to Chief Justice Michael Bender, Colo. Supreme Court, and Judge John Dailey, Chair, Criminal Procedure Comm. (Oct. 10, 2012), http://static.aclu-co.org/wp-content/uploads/2013/12/2012-10-10-Bender-Dailey-Wallace.pdf [http://perma.cc/5F9Y-U7RC]; Letter from Rebecca T. Wallace, Staff Att'y, ACLU of Colo., and Mark Silverstein, Legal Dir., ACLU of Colo., to Herb Atchison, Mayor of Westminster, Colo. (Dec. 16, 2013), http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Atchison-ACLU.pdf [http://perma.cc/7ZZS-X3RL].

[55] *See* Settlement Agreement, *Mitchell v. Montgomery*, *supra* note 52, at 2–3.

[56] *See* Settlement Agreement, *Cleveland v. Montgomery*, *supra* note 18, at 1.

[57] *See* OFFICE OF JUDICIAL SERVS., SUPREME COURT OF OHIO, COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (2015), http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf [http://perma.cc/43AE-V32F]; *see also* Taylor Gillan, *Ohio Supreme Court Warns Judges to End "Debtors' Prisons,"* JURIST (Feb. 7, 2014, 7:14 AM), http://jurist.org/paperchase/2014/02/ohio-supreme-court-warns-judges-to-end-debtors-prisons.php [http://perma.cc/EA4L-BKHJ].

March 2015 that the sentencing judge must make "an individualized inquiry into the defendant's current and future ability to pay before the court imposes [criminal justice debt]."[58] And in August 2015, Ferguson Municipal Judge Donald McCullin withdrew almost 10,000 arrest warrants issued before 2015.[59] As for legislatures, in 2014, the Colorado General Assembly almost unanimously passed a bill requiring courts to make ability-to-pay determinations on the record before imprisoning debtors for nonpayment of debt.[60] And in 2015, both the Georgia[61] and Missouri[62] legislatures passed laws addressing the issue.

Perhaps this pushback will resolve the concerns described above. But there are many reasons to think there's a long road ahead. First, some of the responses leave unresolved the substantive definition of indigence for the purposes of ability-to-pay hearings.[63] Without such a definition, discretion is left to the same courts that have been imprisoning criminal debtors thus far.[64] Second, even tightly written laws,[65] settlements, and resolutions need to be enforced, which requires accountability and monitoring.[66] Abolishing the new debtors' prisons is as much a test of moral and societal conviction as it is of sound drafting. And finally (of course) some states haven't taken much action, if any, to address the issue — nor has it been raised in the federal courts within the last decade, apart from the litigation previously discussed.

---

[58] State v. Blazina, 344 P.3d 680, 685 (Wash. 2015).

[59] *See* Krishnadev Calamur, *A Judge's Order Overhauls Ferguson's Municipal Courts*, THE ATLANTIC (Aug. 25, 2015), http://www.theatlantic.com/national/archive/2015/08/judges-order-overhauls-fergusons-municipal-courts/402232 [http://perma.cc/7R4J-CPCZ]. Additionally, the Supreme Court of Missouri recently amended its rules to require municipal judges to push back deadlines or allow installment plans for debtors who couldn't pay court costs, fines, and fees. *See* Order Dated December 23, 2014, re: Rule 37.65 Fines, Installment or Delayed Payments — Response to Nonpayment (Mo. Dec. 23, 2014) (en banc), http://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f86256620006326 38/fe656f36d6b518a886257db80081d43c [http://perma.cc/BTX3-4ERC].

[60] *See* Recent Legislation, *supra* note 23, at 1313, 1315.

[61] Georgia's law provides guidance for courts in indigency determinations. *See* Act of May 5, 2015, 2015 Ga. Laws 422.

[62] Missouri's law clamps down on raising revenue through traffic fines and removes incarceration as a penalty for traffic offenses. *See* Act of July 9, 2015, 2015 Mo. Laws 453.

[63] *See* Recent Legislation, *supra* note 23, at 1316–19 (criticizing the lack of such a definition in recent Colorado legislation).

[64] *See id.* at 1316.

[65] The Missouri legislation, for example, seems to constrain municipal collection of criminal justice debt within certain domains. *See* Act of July 9, 2015, 2015 Mo. Laws at 457 (codified at MO. REV. STAT. § 479.353(2) (West, Westlaw through 2015 Veto Sess.)) (prohibiting confinement for traffic violations except in enumerated situations).

[66] *See, e.g.*, Telephone Interview with Nathan Woodliff-Stanley, Exec. Dir., ACLU of Colo. (Oct. 23, 2014) (notes on file with Harvard Law School Library); Telephone Interview with Alec Karakatsanis, Co-Founder, Equal Justice Under Law (Apr. 14, 2015) (notes on file with Harvard Law School Library).

II. Federal Constitutional Limitations

Legal commentators have long recognized that the federal constitution imposes limits on imprisonment for criminal justice debt under the Equal Protection and Due Process Clauses. This Part outlines those limits, which stem from two main lines of cases in the 1970s and early 1980s, and undergird almost all debt-imprisonment litigation today.

The first line of cases prohibits states from discriminating on the basis of indigence when contemplating imprisonment for nonpayment of criminal justice debt. In *Williams v. Illinois*,[67] the defendant's failure to pay a fine and costs would have resulted in a term of imprisonment beyond the statutory maximum.[68] And in *Tate v. Short*,[69] the defendant's failure to pay would have resulted in imprisonment when the statute didn't allow for imprisonment at all.[70] The Court struck down imprisonment in each case.[71] The third and most discussed case in the trilogy, *Bearden v. Georgia*, struck down the automatic revocation of parole for nonpayment of criminal justice debt.[72] *Bearden* established a "bona fide efforts" test that asks how seriously one has tried to secure employment and credit, in addition to measuring assets.[73] The *Bearden* line of cases thus endeavors to shield criminal justice debtors making a good faith effort to pay, while leaving willful nonpayment unprotected.[74]

The second line of cases limits states' ability to treat civil debtors differently based on the procedural origins of their debt. The Court identified some of those limits in a pair of equal protection cases in the 1970s: *James v. Strange*[75] and *Fuller v. Oregon*.[76]

The debtor in *James v. Strange* owed $500 to pay for a court-appointed attorney and challenged the Kansas recoupment statute under which the state had attempted to recover the money.[77] The Court struck down the recoupment statute because it failed to provide "any of the exemptions provided by [the Kansas Code of Civil Procedure] . . . except the homestead exemption."[78] Avoiding broad com-

---

[67] 399 U.S. 235 (1970).
[68] *Id.* at 236–37, 240–41.
[69] 401 U.S. 395 (1971).
[70] *Id.* at 397–98.
[71] *See id.* at 398–99; *Williams*, 399 U.S. at 242.
[72] Bearden v. Georgia, 461 U.S. 660, 668–69 (1983).
[73] *See id.* at 668.
[74] *See Tate*, 401 U.S. at 400; *Williams*, 399 U.S. at 242 n.19.
[75] 407 U.S. 128 (1972).
[76] 417 U.S. 40 (1974).
[77] *James*, 407 U.S. at 129.
[78] *Id.* at 131. In this context, exemptions laws are provisions that exempt a certain amount of personal property from attachment and garnishment. *See id.* at 135.

mentary on the general validity of various state recoupment statutes,[79] the Court nonetheless expressed concern with the classification drawn by Kansas's recoupment statute, which "strip[ped] from indigent defendants the array of protective exemptions Kansas ha[d] erected for *other* civil judgment debtors,"[80] including state exemptions from attachment and restrictions on wage garnishment.[81] While a state could prioritize its claim to money over other creditors (say, by giving its liens priority), "[t]his does not mean . . . that a State may impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor."[82] The Court suggested that it was applying rational basis scrutiny, although in light of the Court's strong language some judges have read *James* as subjecting the classification to some form of heightened scrutiny.[83]

Similarly, the debtor in *Fuller v. Oregon* owed fees for an attorney and an investigator.[84] But in *Fuller*, the Court upheld Oregon's recoupment statute because the defendant wouldn't be forced to pay unless he was able.[85] The majority found that the recoupment statute provided all of the same protections as those provided to other judgment debtors, and was therefore "wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause."[86] Justice Marshall, joined by Justice Brennan in dissent, cited the Oregon constitutional ban on imprisonment for debt and pointed out that indigent defendants could be imprisoned for failing to pay their court-appointed lawyers, while "well-heeled defendants" who had stiffed their hired counsel could not.[87] The majority opinion pointed out that this issue hadn't been preserved for appeal,[88] and opined in dicta that the state ban on imprisonment for debt was an issue for

---

[79] *See id.* at 132–33 ("The statutes vary widely in their terms." *Id.* at 132. "[A]ny broadside pronouncement on their general validity would be inappropriate." *Id.* at 133.).

[80] *Id.* at 135 (emphasis added).

[81] *Id.* at 135–36.

[82] *Id.* at 138. The Court also likened the classification to the "invidious discrimination" of *Rinaldi v. Yeager*, 384 U.S. 305 (1966). *James*, 407 U.S. at 140 (quoting *Rinaldi*, 384 U.S. at 309).

[83] *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 105–06 (1973) (Marshall, J., dissenting); Johnson v. Bredesen, 624 F.3d 742, 749 (6th Cir. 2010).

[84] Fuller v. Oregon, 417 U.S. 40, 42 (1974).

[85] *See id.* at 45–46. The statute seems to have provided for a *Bearden*-like inquiry: "[N]o convicted person may be held in contempt for failure to repay if he shows that 'his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment . . . .'" *Id.* at 46 (quoting OR. REV. STAT. § 161.685(2) (1973) (omission in original)).

[86] *Id.* at 48; *see also id.* at 47–48.

[87] *Id.* at 61 (Marshall, J., dissenting); *see also id.* at 60–61.

[88] *See id.* at 48 n.9 (majority opinion). Justice Douglas agreed the issue wasn't properly in front of the Court. *See id.* at 57 (Douglas, J., concurring in the judgment).

state courts to decide.[89] Justice Douglas, concurring in the judgment, agreed, but noted the "apparent inconsistency between [the relevant state constitutional provision] and the recoupment statute."[90]

Thus, under *James* and *Fuller*, states cannot discriminate invidiously against at least some classes of criminal justice debtors (note that neither case involved fines) merely by virtue of the fact that the debts arise from a criminal proceeding.

The federal protections under the *Bearden* and *James* lines of cases are important tools for ensuring our criminal justice system doesn't imprison for poverty. But, as argued below, the state bans on debtors' prisons can supplement *Bearden* — and they may well be relevant to the inquiry under *James*.

III. STATE CONSTITUTIONAL LIMITATIONS

As noted above, the state bans on debtors' prisons have been given short shrift in the legal literature and recent litigation.[91] This Part begins by providing a brief historical overview of the state bans[92] and then argues that ignoring them is a legal mistake: these imprisonment-for-debt provisions plausibly extend to some parts of contemporary debtors' prisons.

A. The "Abolition" of Debtors' Prisons

The problems posed by nineteenth-century debtors' prisons in the United States differ in many ways from the challenges posed today by criminal justice debt. Most importantly for present purposes, the debts at issue historically were contractual, not criminal. Imprisonment for nonpayment of contractual debt was a normal feature of American commercial life from the colonial era into the beginning of the nineteenth century.[93] But with the rise of credit testing and the replacement of personal lending networks with secured credit, imprisonment for nonpayment came to be seen as a harsh and unwieldy sanction,[94] and a growing movement pressed for its abolition.

---

[89] *See id.* at 48 n.9 (majority opinion).

[90] *Id.* at 58 (Douglas, J., concurring in the judgment); *see also id.* ("It may be . . . that the Oregon courts would strike down the statute as being inconsistent with the constitutional provision if they faced the issue.").

[91] *But cf.* Complaint, *Fant v. Ferguson*, *supra* note 48, at 53 (arguing governments may not "take advantage of their position to impose unduly harsh methods of collection"); Complaint, *Jenkins v. Jennings*, *supra* note 24, at 58–59 (same).

[92] A more complete history would undoubtedly be helpful, but remains outside the scope of this Note.

[93] *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA 249–56 (1974).

[94] *See id.* at 260–65; Becky A. Vogt, State v. Allison*: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 345–46 (2001).

Eventually, the movement against imprisonment for debt would produce forty-one state constitutional provisions.[95] Some of the provisions read as flat bans;[96] others have various carve-outs and exceptions in the text.[97] But subsequent case law narrows the practical differences among them by reading into the flat bans largely the same carve-outs.[98] The nine states that haven't constitutionalized a ban on imprisonment for debt — Connecticut, Delaware, Louisiana, Maine, Massachusetts, New Hampshire, New York, Virginia, and West Virginia — all have taken statutory action.[99] Some statutes look on the surface a lot like the constitutional bans.[100] Practically, some explicitly abolished the old writ of *capias ad satisfaciendum* (holding the body of

[95] The constitutional imprisonment-for-debt provisions are as follows: ALA. CONST. art. I, § 20; ALASKA CONST. art. I, § 17; ARIZ. CONST. art. II, § 18; ARK. CONST. art. II, § 16; CAL. CONST. art. I, § 10; COLO. CONST. art. II, § 12; FLA. CONST. art. 1, § 11; GA. CONST. art. I, § 1, ¶ XXIII; HAW. CONST. art. I, § 19; IDAHO CONST. art. I, § 15; ILL. CONST. art. I, § 14; IND. CONST. art. I, § 22; IOWA CONST. art. I, § 19; KAN. CONST. Bill of Rights, § 16; KY. CONST. § 18; MD. CONST. art. III, § 38; MICH. CONST. art. I, § 21; MINN. CONST. art. I, § 12; MISS. CONST. art. III, § 30; MO. CONST. art. I, § 11; MONT. CONST. art. II, § 27; NEB. CONST. art. I, § 20; NEV. CONST. art. I, § 14; N.J. CONST. art. I, ¶ 13; N.M. CONST. art. II, § 21; N.C. CONST. art. I, § 28; N.D. CONST. art. I, § 15; OHIO CONST. art. I, § 15; OKLA. CONST. art. II, § 13; OR. CONST. art. I, § 19; PA. CONST. art. I, § 16; R.I. CONST. art. I, § 11; S.C. CONST. art. I, § 19; S.D. CONST. art. VI, § 15; TENN. CONST. art. I, § 18; TEX. CONST. art. I, § 18; UTAH CONST. art. I, § 16; VT. CONST. ch. II, § 40(3), para. 4; WASH. CONST. art. I, § 17; WIS. CONST. art. I, § 16; WYO. CONST. art. I, § 5. Laying the provisions out in one place seems necessary, as the stringcites available in the legal literature are now outdated. *See* Vogt, *supra* note 94, at 335 n.9; Note, *Body Attachment and Body Execution: Forgotten but Not Gone*, 17 WM. & MARY L. REV. 543, 550 n.45 (1976); Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1679 n.1 (1971). An Appendix to this Note, available on the *Harvard Law Review Forum*, provides the critical language of each of the forty-one state constitutional bans. *See* Appendix, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. F. 153 (2015), http://harvardlawreview.org/2015/11/state-bans-on-debtors-prisons-and-criminal-justice-debt-appendix.

[96] *See, e.g.*, ALA. CONST. art. I, § 20 ("That no person shall be imprisoned for debt."); GA. CONST. art. I, § 1, ¶ XXIII ("There shall be no imprisonment for debt."); TEX. CONST. art. I, § 18 ("No person shall *ever* be imprisoned for debt." (emphasis added)).

[97] *See, e.g.*, COLO. CONST. art. II, § 12 ("No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort or where there is a strong presumption of fraud."); MD. CONST. art. III, § 38 ("[A] valid decree of a court . . . for the support of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony . . . , shall not constitute a debt within the meaning of this section.").

[98] *See infra* notes 103–15 and accompanying text.

[99] *See* Armstrong v. Ayres, 19 Conn. 540, 546 (1849); Johnson v. Temple, 4 Del. (4 Harr.) 446, 447 (1846); State v. McCarroll, 70 So. 448, 448 (La. 1915); Gooch v. Stephenson, 15 Me. 129, 130 (1838); Appleton v. Hopkins, 71 Mass. (5 Gray) 530, 532 (1855); Eams v. Stevens, 26 N.H. 117, 120 (1852); Whitney v. Johnson, 12 Wend. 359, 360 (N.Y. Sup. Ct. 1834); Werdenbaugh v. Reid, 20 W. Va. 588, 593, 598 (1882) (discussing Virginia and West Virginia).

[100] For example, in 1855, Massachusetts passed a statute saying: "Imprisonment for debt is hereby forever abolished in Massachusetts." *Appleton*, 71 Mass. (5 Gray) at 532.

the debtor in satisfaction of the debt),[101] and others reinvigorated procedural protections for debtors who genuinely couldn't pay.[102]

Of course, these bans don't straightforwardly apply to criminal justice debt. As the literature has long recognized, the "abolition" of debtors' prisons was tightly constrained in scope.[103] The doctrinal limits on the bans' coverage cabined them along two dimensions: First, debtors evading payment were sculpted out from the bans. For instance, a number of constitutional provisions contained (or had read in) an exception for fraud.[104] The fraud exception has been interpreted to cover cases of concealed assets or fraudulent contracting.[105] In some cases, even leaving the state would count as fraud.[106] And if a court ordered a party to turn over specific assets, that party's refusal to comply would give rise to the jailable offense of civil contempt of court without offending the constitutional bans.[107] Second, courts have held a long list of monetary obligations not to count as "debts." Some constitutional provisions limited the ban to debts arising out of contract, as opposed to tort or crime.[108] In these places, failure to pay child support or alimony could give rise to arrest and incarceration.[109]

---

[101] The 1849 Virginia statute took this approach, which was carried over into West Virginia when that state broke away from Virginia. *See Werdenbaugh*, 20 W. Va. at 593, 598.

[102] Despite its strong language, the Massachusetts statute functioned this way: the indigent debtor was required to appear in court before receiving a discharge. *See* Thacher v. Williams, 80 Mass. (14 Gray) 324, 328 (1859).

[103] For example, one author, writing in 1889, pointed out a number of ways in which the state bans were limited. *See* J.C. Thomson, *Imprisonment for Debt in the United States*, 1 JURID. REV. 357 (1889). Over one hundred years later, another author identified the same carve-outs and concluded there's a de facto debtors' prison system in the United States. *See* Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 149–54 (2002) (discussing civil contempt); *id.* at 155–56 (discussing child support payments); *id.* at 156–57 (discussing taxes).

[104] For constitutional provisions, see, for example, ARIZ. CONST. art. II, § 18 ("There shall be no imprisonment for debt, except in cases of fraud."). For case law, see, for example, *Towsend v. State*, 52 S.E. 293, 294 (Ga. 1905) ("[I]n enacting the statute now under consideration, the [l]egislative purpose was not to punish . . . a failure to pay a debt, but . . . the act of securing the money or property of another with a fraudulent intent . . . ." (quoting Lamar v. State, 47 S.E. 958, 958 (Ga. 1904))); and *Appleton*, 71 Mass. (5 Gray) at 533 (noting that a major purpose of the statute was "to punish fraudulent debtors").

[105] *See* Note, *Civil Arrest of Fraudulent Debtors: Toward Limiting the* Capias *Process*, 26 RUTGERS L. REV. 853, 855 (1973).

[106] *See id.*

[107] *See, e.g.*, Samel v. Dodd, 142 F. 68, 70 (5th Cir. 1906); Boarman v. Boarman, 556 S.E.2d 800, 804–06 (W. Va. 2001); State v. Burrows, 5 P. 449, 449 (Kan. 1885); *see also* Thomson, *supra* note 103, at 364 ("[T]he imprisonment is for the contempt and not for the debt." (quoting State v. Becht, 23 Minn. 411, 413 (1877))).

[108] *See, e.g.*, MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied, except in cases of fraud or breach of trust."); *In re* Sanborn, 52 F. 583, 584 (N.D. Cal. 1892).

[109] *See* Thomson, *supra* note 103, at 366.

So too with criminal costs and fines.[110] Thus, in most states today one can be imprisoned for failure to pay noncommercial debts, including debts stemming from tort,[111] crime,[112] taxes and licensing fees,[113] child support,[114] and alimony.[115]

Many kinds of monetary obligations, then, have been held to fall outside the scope of the state bans. But once a monetary obligation qualifies as a "debt," states have implemented the bans' protections in one of two ways: First, some states have held that their bans on imprisonment for debt remove the courts' ability to issue contempt orders for nonpayment of qualifying debts.[116] This is the "no-hearing rule." The judgment creditor may pursue execution proceedings, attempting to attach nonexempt property, say, or garnish wages. But the court will not issue a civil contempt order to coerce the debtor into paying. Second, even in states that allow contempt proceedings, most courts require a sharply limited (and debtor-favorable) inquiry. Courts emphasize that the contempt lies in failing to comply with an injunction to turn over *specific* property that is currently under the debtor's control.[117] And that specific property must also be *nonexempt* under the

---

[110] *See id.* at 367. Courts, however, did make clear that the legislature couldn't criminalize the mere nonpayment of commercial debt as a constitutional workaround. *See, e.g.*, Bullen v. State, 518 So. 2d 227, 233 (Ala. Crim. App. 1987).

[111] *See, e.g.*, Davis v. State, 185 So. 774, 776 (Ala. 1938).

[112] *See, e.g.*, State *ex rel.* Lanz v. Dowling, 110 So. 522, 525 (Fla. 1926); Plapinger v. State, 120 S.E.2d 609, 611 (Ga. 1961); Boyer v. Kinnick, 57 N.W. 691, 691 (Iowa 1894). It's interesting to note that the Illinois state constitution specifically *includes* criminal fines. *See* ILL. CONST. art. I, § 14 ("No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment.").

[113] *See, e.g.*, City of Fort Madison v. Bergthold, 93 N.W.2d 112, 116 (Iowa 1958); Voelkel v. City of Cincinnati, 147 N.E. 754, 756–57 (Ohio 1925).

[114] *See, e.g.*, State v. Hopp, 190 N.W.2d 836, 837 (Iowa 1971); *In re* Wheeler, 8 P. 276, 277–78 (Kan. 1885).

[115] *See, e.g.*, State *ex rel.* Krueger v. Stone, 188 So. 575, 576 (Fla. 1939); Roach v. Oliver, 244 N.W. 899, 902 (Iowa 1932).

[116] *E.g.*, *In re* Nichols, 749 So. 2d 68, 72 (Miss. 1999) ("The [creditors] are free to collect the judgment by execution, garnishment, or any other available lawful means so long as it does not include imprisonment.").

[117] *See, e.g.*, Harrison v. Harrison, 394 S.W.2d 128, 130–31 (Ark. 1965). In *Lepak v. McClain*, 844 P.2d 852 (Okla. 1992), the Oklahoma Supreme Court sustained the contempt-of-court power when used "to require the delivery of . . . identified property owned by and in the possession or control of the judgment debtor . . . if the judgment debtor unjustly refuses to apply the identified property towards the satisfaction of a judgment"; however, the court struck it down under the ban on imprisonment for debt when contempt was used "to require the judgment debtor to set aside and deliver a portion of his/her future income toward the satisfaction of the judgment debt." *Id.* at 855. At an initial pass, states with cases affirming this rule include the following: Utah, *see In re* Clift's Estate, 159 P.2d 872, 876 (Utah 1945), Missouri, *see* State *ex rel.* Stanhope v. Pratt, 533 S.W.2d 567, 574–75 (Mo. 1976) (en banc); Zeitinger v. Mitchell, 244 S.W.2d 91, 97–98 (Mo. 1951) (citing *In re Clift's Estate*, 159 P.2d at 876), and Oklahoma, *see* Sommer v. Sommer, 947 P.2d 512, 519 (Okla. 1997); *Lepak*, 844 P.2d at 855.

state's exemption laws.[118] An injunction as a general rule is a "drastic and extraordinary remedy."[119] Accordingly, some states require that creditors attempt execution through in rem actions before resorting to in personam actions.[120] Herein lies the attractiveness of the state bans to the civil debtor — the protections offered to a qualifying debtor, as a general rule, far exceed those offered to the criminal debtor.

B. New Applications of the Bans

The doctrinal carve-outs for crime suggest that the state bans wouldn't apply to criminal justice debt. Nevertheless, three specific kinds of criminal monetary obligations might actually be covered by the bans: fines for regulatory offenses, costs, and definitionally civil debts. This section advances arguments from text, purpose, and original meaning, which in many cases converge on this result.

First, infractions known as "regulatory offenses," also known as "public welfare offenses." The most relevant example is traffic violations, which have played a major role in Ferguson and elsewhere. How to define the category? Although at common law, scienter requirements were generally necessary to a criminal charge (hence the regular practice of courts reading them into statutes),[121] the development of criminal law for regulatory purposes during industrialization made it increasingly desirable to impose strict liability in a number of situations. But some strict liability crimes, like statutory rape, are more easily analogized to traditional crimes despite the absence of a mens rea. A "regulatory offense" might be better defined, then, as a strict liability offense where the statute authorizes only a reasonable fine (and not a more penal-minded sanction, such as imprisonment).[122] In some states, offenses meeting this latter definition aren't even defined as "crimes."[123] An altogether different type of definition would look instead to the historical origin of the offense.[124]

---

118 *See, e.g.*, Shepard, *supra* note 6, at 1531–32.

119 Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010).

120 *See* Shepard, *supra* note 6, at 1529–30 (describing the rule's origin in the common law precept that creditors must exhaust legal remedies before turning to equitable ones).

121 *See, e.g.*, United States v. Balint, 258 U.S. 250, 251–52 (1922) ("[T]he general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime . . . ."); *see also* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 767 (1943) (citing as generally accepted the maxim that an act does not make one guilty unless the mind is guilty).

122 For a similar analysis, see *State v. Anton*, 463 A.2d 703, 706–07 (Me. 1983).

123 *See, e.g.*, FLA. STAT. § 775.08(3) (2015); MO. REV. STAT. § 556.016 (2000), *repealed and replaced by* Act effective Jan. 1, 2017, 2014 Mo. Laws 941, 1152 (to be codified at MO. REV. STAT. § 556.061(29)) (defining "infraction").

124 Indeed, when trying to determine whether or not to read a scienter requirement into a statute, courts are guided by principles like those laid out in *Morissette v. United States*, 342 U.S. 246 (1952), looking to any required culpable mental state, the purpose of the statute, its connection to

Interpreting fines for regulatory offenses to fall under the bans of many states is consistent with the bans' text, purpose, and original meaning. Starting with the text, twenty-two state bans refer to "debt" or "debtor" without drawing further distinctions between different kinds of debts,[125] and there's no textual reason why such words should exclude monetary obligations triggered by statutorily regulated conduct and owed to the state.[126] Indeed, the presence of such qualifying language in the other bans[127] strongly suggests that the words "debt" and "debtor" weren't inherently limited to commercial life as a matter of the original meaning of the text — just as they aren't today.

But the carve-outs for crime? To be fair, provisions limiting the ban to debts arising out of contract (four states)[128] or stemming from civil cases (seven states)[129] would seem to leave regulatory offenses uncovered. But other carve-outs for crime[130] aren't so clean-cut, as their purpose likely had nothing to do with regulatory offenses. To the contrary, regulatory offenses became prominent within American criminal law only *after* the abolition of debtors' prisons.[131] The Court in

---

common law, whether or not it is regulatory in nature, whether it would be difficult to enforce with a scienter requirement, and whether the sanction is severe. *See, e.g.*, *Ex parte* Phillips, 771 So. 2d 1066 (Ala. 2000) (applying *Morissette*'s framework).

125 This includes the state constitutional bans of Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Minnesota, Mississippi, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and Wyoming. *See* sources cited *supra* note 95.

126 *See, e.g.*, *Debt*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Liability on a claim; a specific sum of money due by agreement or otherwise . . . ."). Indeed, in *People ex rel. Daley v. Datacom Systems Corp.*, 585 N.E.2d 51 (Ill. 1991), the Supreme Court of Illinois held that municipal fines counted as "debts" for the purposes of the Collection Agency Act. *Id.* at 60.

127 *E.g.*, S.D. CONST. art. VI, § 15 ("No person shall be imprisoned for debt arising out of or founded upon a contract.").

128 This carve-out can be found in the state bans of Michigan, New Jersey, South Dakota, and Wisconsin. *See* sources cited *supra* note 95; *see also, e.g.*, MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied . . . .").

129 To be found in the state bans of Arkansas, California, Iowa, Nebraska, New Mexico, Ohio, and Tennessee. *See* sources cited *supra* note 95.

130 This category would include constitutional provisions with an express carve-out for crime, *e.g.*, OKLA. CONST. art. II, § 13 (exempting "fines and penalties imposed for the violation of law"), and states where case law has specifically mentioned "crime," *e.g.*, Plapinger v. State, 120 S.E.2d 609, 611 (Ga. 1961).

131 *See generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62–67 (1933) (tracing the development of public welfare offenses in the United States). Professor Jerome Hall, writing in 1941, said: "[The act requirement] and the *mens rea* principle constituted the two most basic doctrines of [Bishop's] treatise on criminal law. They are still generally accepted as such in this country." Jerome Hall, *Prolegomena to a Science of Criminal Law*, 89 U. PA. L. REV. 549, 557–58 (1941). Yet Hall was *critiquing* a blind adherence to mens rea as a ubiquitous doctrine in criminal law. *See id.* at 558 (arguing that mens rea, like the act requirement, becomes "little more than a point of orientation . . . once we encounter involuntary manslaughter, other crimes of negligence, and various statutory offenses").

Morissette v. United States[132] identified the "pilot of the [regulatory offenses] movement" in such crimes as "selling liquor to an habitual drunkard" and "selling adulterated milk," citing cases from 1849,[133] 1864,[134] and 1865.[135] A law review article published in 1933 called the "steadily growing stream of offenses punishable without any criminal intent whatsoever" a "recent movement" in criminal law,[136] placing the beginnings of the trend in the middle of the nineteenth century.[137] By comparison, all but a few states had enacted their bans on debtors' prisons by the 1850s.[138] So reading the carve-outs as unrelated to regulatory crimes is consistent with both text and original meaning. The abolition movement certainly did not intend to exclude such debts from the ban; whether legislatures meant to include them depends upon how sparing one's assumptions about past intent are.

Many state courts could therefore plausibly hold today that fines for regulatory offenses constitute civil "debt" under their state constitutional bans. While such holdings might raise a stare decisis issue in many instances, the risk of deprivations of liberty is high, and the world of criminal justice has changed so dramatically,[139] that revisiting precedent might be jurisprudentially sound. As the Ohio Supreme Court put it: "In today's society, no one, in good conscience, can contend that a nine-dollar fine for crashing a stop sign is deserving of three days in jail if one is unable to pay."[140]

Second, costs. Despite arising out of a criminal proceeding, costs are cleanly distinguishable from fines, restitution, and forfeiture in their basic purpose: compensating for or subsidizing the government's marginal expenditures on criminal proceedings. But of course, funding the government is not one of the traditional purposes of penal law.

Because the purpose of costs is not purely or event mostly to punish, they are arguably debts within the text of the state bans. As one

---

132 342 U.S. 246 (1952).

133 *Id.* at 256 (citing Barnes v. State, 19 Conn. 398 (1849)).

134 *Id.* (citing Commonwealth v. Farren, 91 Mass. (9 Allen) 489 (1864)).

135 *Id.* (citing Commonwealth v. Nichols, 92 Mass. (10 Allen) 199 (1865); Commonwealth v. Waite, 93 Mass. (11 Allen) 264 (1865)).

136 Sayre, *supra* note 131, at 55.

137 *Id.* at 56; *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–14 (2001) (describing the massive growth in statutory offenses in several states from the second half of the nineteenth century until the early twenty-first century); *cf.* Myers v. State, 1 Conn. 502 (1816) (holding that a defendant who rented his carriage on Sunday, a crime punishable by a fine of twenty dollars, couldn't be found guilty without a showing of mens rea). The late Professor William J. Stuntz also noted that regulatory crimes and "core crimes" like murder "have dramatically different histories." Stuntz, *supra*, at 512.

138 *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 52 (1935).

139 *Cf., e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2410–11 (2015) (identifying the "ero[sion]" of "statutory and doctrinal underpinnings," *id.* at 2410, as a principal justification for overruling precedent in federal stare decisis doctrine).

140 Strattman v. Studt, 253 N.E.2d 749, 753 (Ohio 1969).

might guess, the states have split on whether costs fall within the scope of the bans. The majority rule, often tersely stated, is that they don't.[141] But at least one court has held otherwise. In *Strattman v. Studt*,[142] the defendant was sentenced to the statutory maximum of six months, a fine of $500, and costs.[143] After having served his time, and when he couldn't pay his debt, he was imprisoned to sit out his debt at $3 per day.[144] The Ohio Supreme Court held that costs are imposed "for the purpose of lightening the burden on taxpayers financing the court system," not for a "punitive, retributive, or rehabilitative purpose, as are fines."[145] Observing that costs arose out of an "implied contract" with the court, *Strattman* held that "[a] judgment for costs in a criminal case is a civil, not a criminal, obligation, and may be collected only by the methods provided for the collection of civil judgments."[146] Future state supreme courts confronting the issue should embrace *Strattman*'s logic and ban cost-related imprisonment.

Indeed, federal constitutional law may compel an answer on this point. Costs trigger the precedents, discussed above, of *James* and *Fuller*.[147] Many state bans on imprisonment for debt provide equally (or more) unequivocal protections to the civil debtor than the exemption statutes in *James* did; a strong logic therefore suggests that the Court could more widely enforce *James*'s prohibition on jailing defendants for failing to pay court costs. Additionally, interpreting the *James* and *Fuller* Courts as applying some degree of heightened scrutiny,[148] the disparate application of the imprisonment-for-debt bans is an even better indicator of "invidious discrimination"[149] than the dispar-

---

141 *See, e.g.*, Lee v. State, 75 Ala. 29, 30 (1883); Mosley v. Mayor of Gallatin, 78 Tenn. 494, 497 (1882).

142 253 N.E.2d 749.

143 *Id.* at 750.

144 *Id.* at 750–51.

145 *Id.* at 754.

146 *Id.* In fact, the recent bench card promulgated by Ohio Supreme Court Chief Justice O'Connor begins as follows: "*Fines are separate from court costs.* Court costs and fees are civil, not criminal, obligations and may be collected only by the methods provided for the collection of civil judgments." OFFICE OF JUDICIAL SERVS., *supra* note 57 (citing *Strattman*, 253 N.E.2d at 754).

147 *See supra* notes 75–90 and accompanying text.

148 This possibility is made more credible by Justice O'Connor's note in the related case of *Bearden v. Georgia* that "[d]ue process and equal protection principles converge in the Court's analysis in these cases." 461 U.S. 660, 665 (1983). Of course, while the disparity between how indigent and "well-heeled" defendants are treated, *see supra* note 87 and accompanying text, is arguably not *right*, it seems reasonable enough to pass rational basis scrutiny, *see, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980). For example, a state could plausibly maintain that imprisonment for nonpayment of costs attendant to crime helps to deter criminal behavior, such that abolishing such imprisonment for civil debts, while maintaining it for criminal debts, is reasonable.

149 James v. Strange, 407 U.S. 128, 140 (1972) (quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966)).

ate applications of the Kansas and Oregon exemption statutes. Despite the Court's reluctance to rule on an issue not properly briefed, federal courts might return to the issue and confirm that states must apply their bans on imprisonment for debt to costs (and other quasi-civil debts) in a criminal case.[150] In fact, the lawsuits against Ferguson and Jennings hinted at this argument,[151] although neither complaint cited the Missouri Constitution. When dealing with costs, the states may adopt the reasoning of *Strattman* in their interpretations of state law, or the Fourteenth Amendment, under *James* and *Fuller*, may itself demand that reasoning.

Finally, violations of monetary obligations that are statutorily defined as civil. For both regulatory offenses and costs, a reviewing court must assess and characterize the debt as civil or quasi-civil for the purposes of coverage under the state ban. But sometimes, the relevant statute explicitly tags the criminal justice debt as civil or as receiving civil protections.[152]

For example, in some jurisdictions, courts have held that violations of municipal ordinances constitute civil actions.[153] In *Kansas City v. Stricklin*,[154] for example, the Supreme Court of Missouri noted that these proceedings "are not prosecutions for crime in a constitutional sense."[155] Case law in a number of states supports this approach,[156] although a fifty-state survey cannot be conducted here. As much of the furor regarding contemporary debtors' prisons revolves around municipalities, this is no minor point. Similarly, some collections statutes explicitly redefine certain debts as civil for the purposes of collec-

---

[150] It may also be worth pointing out that *James* and *Fuller* dealt most concretely with attorneys' fees. There's probably no principled reason to distinguish between attorneys' fees and other costs, like a judgment fee or a clerk fee, but doctrinally the Court may have felt especially sensitive to discrimination with respect to assigning lawyers, given its recent decision mandating counsel for indigent defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[151] *See* Complaint, *Fant v. Ferguson*, *supra* note 48; Complaint, *Jenkins v. Jennings*, *supra* note 24.

[152] The possibility that all violations of municipal ordinances (in some states) might fall under the bans is made more morally salient by the fact that many courts treat such violations as civil for the purposes of setting (lowered) procedural protections for defendants. *See, e.g.*, State v. Anton, 463 A.2d 703, 705 (Me. 1983); Kansas City v. Stricklin, 428 S.W.2d 721, 725–26 (Mo. 1968) (en banc).

[153] Naturally, there may be some overlap between this category and the two mentioned above. For example, violations of municipal ordinances boil down to the "regulatory crimes" category in states where municipalities are not empowered to imprison. Take Wisconsin, where the municipal inability to create crimes prohibits them from punishing infractions by either fine or imprisonment. *See* State v. Thierfelder, 495 N.W.2d 669, 673 (Wis. 1993); *see also* WIS. STAT. § 939.12 (2014) (defining "crime").

[154] 428 S.W.2d 721.

[155] *Id.* at 724.

[156] *See, e.g.*, City of Danville v. Hartshorn, 292 N.E.2d 382, 384 (Ill. 1973) (describing violations of municipal ordinances as "quasi-criminal in character [but] civil in form" (quoting City of Decatur v. Chasteen, 166 N.E.2d 29, 39 (Ill. 1960))).

tion. The debt in *James* had this characteristic, as the underlying statute specified that the "total amount . . . shall become a judgment *in the same manner and to the same extent as* any other judgment under the code of civil procedure."[157] In Florida, convicted indigents assessed costs for due process services are expressly provided with the same protections as civil-judgment debtors.[158] But not all collections statutes are so explicit, of course.[159]

IV. THE ADDED VALUE OF THE STATE LAW APPROACH

If courts begin to recognize claims under the state bans on debtors' prisons, imprisonment for some criminal debts would become subject to both federal and state restrictions. This Part lays out how the state law protections would differ from the federal protections, and why having multiple levels of protection makes sense.

To start, state debtor protections would not merely duplicate the federal ones. In fact, under the state law protections, criminal justice debtors would face a much friendlier inquiry than they would under *Bearden*'s freestanding equal protection jurisprudence.[160] This is true under either of the two rules detailed above. Instead of a test that asks whether the debtor has sought employment or credit per *Bearden*, in some states there would be a limited inquiry into whether the debtor possessed specific, nonexempt property that the debtor could be ordered to turn over. And many debtors currently caught in the cogs of the criminal justice system would have no such property. In other states, the court simply could not imprison for failure to pay the debt, although it could pursue other execution remedies available at law.

Why have two tests? Regulating criminal justice debt through both *Bearden* claims and imprisonment-for-debt claims makes a lot of sense. On this understanding of the law, debtor protections co-vary quite straightforwardly with the state's interest in collecting.

The baseline principle, of course, is that a court may consider a defendant's financial resources to inform its decision whether to impose jail time, fines, or other sanctions.[161] Without this discretion, courts

---

[157] James v. Strange, 407 U.S. 128, 130 n.3 (1972) (emphasis added) (quoting KAN. STAT. ANN. § 22-4513(a) (Supp. 1971)).

[158] *See* FLA. STAT. § 938.29(4) (2015) (specifying that such debtors shall not "be denied any of the protections afforded any other civil judgment debtor").

[159] *Cf., e.g.*, MISS. CODE ANN. § 99-37-13 (West 2015) ("[A] default . . . may be collected by any means authorized . . . for the enforcement of a judgment."); MO. REV. STAT. § 560.031(5) (2000) ("[T]he fine may be collected by any means authorized for the enforcement of money judgments.") (to be transferred to MO. REV. STAT. § 558.006 by Act effective Jan. 1, 2017, 2014 Mo. Laws 941).

[160] While constitutional carve-outs for fraud will capture some debtors, it can't plausibly lower the protections of the ban to the level of *Bearden*: the failure to search for a job or to seek credit is hardly fraudulent.

[161] *E.g.*, Bearden v. Georgia, 461 U.S. 660, 669–70 (1983).

might impose prison terms unnecessarily, to avoid the risk of assessing a fine on a judgment-proof defendant. And the Court has made clear this discretion is central to the core penal goals of deterrence, incapacitation, and retribution.[162] Against that baseline, the tradition of *Bearden* simply mandates that once a sentencing court has imposed a monetary obligation, it may not convert that obligation into imprisonment for failure to pay absent a special finding, a basic threshold that ensures the defendant isn't invidiously punished for being poor.

Imprisonment-for-debt claims would impose a heightened requirement on financial obligations that, unlike traditional fines and restitution, really further noncriminal goals — despite being imposed from within the criminal system. Regulatory offenses are assessed to deter low-level misbehavior, and costs are assessed to replenish the coffers of the criminal justice system, or to fund the government. Indeed, costs function more as fees for service or taxes than as punishments. More problematically, these monetary obligations, unlike most taxes, are not indexed to wealth, income, or any other proxy for ability to pay. They therefore impose the burden of funding the government on those individuals and communities least equipped to bear the weight. Conceptually, then, imprisonment-for-debt claims would regulate the new debtors' prisons along a fundamentally distinct dimension and should join *Bearden* claims as a way to challenge unconstitutional imprisonment.

Now, the imprisonment-for-debt claims wouldn't challenge the propriety of assessing such charges in the first place. The proper textual and analytical hook for that question is the Excessive Fines Clause.[163] They would, however, challenge a state's use of collection methods unavailable to civil creditors. Where a state has chosen to ban debtors' prisons, it shouldn't be able to welcome them back in surreptitiously, by grafting them onto the criminal system.[164]

* * *

So far, the vast majority of academic commentators, litigators, legislatures, and other legal actors have focused on the federal protections

---

[162] *See id.* at 672.

[163] *See* Colgan, *supra* note 24.

[164] A state, of course, could repeal its ban on debtors' prisons, but any attempt to do so would create an unlikely coalition of criminal and civil debtors, and the political-action costs of doing so are likely too high. *See generally* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, MINN. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544519 [http://perma.cc/9APA-W5VQ]. Indeed, based upon the state-by-state abolition of debtors' prisons in the nineteenth century, the bans highlight the self-determination of states within the federalist structure. This tiered regulatory model thus gives each state the ability to pursue multiple legitimate ends — including both punishment and subsidizing the criminal justice system — so long as it doesn't discriminate in applying its own law.

extended under *Bearden* and its predecessors.[165] *Bearden* represents a powerful tool for change, yet state law bans on debtors' prisons could provide even greater protections for certain criminal justice debtors where the state's interest in collecting isn't penal. *Bearden* and imprisonment-for-debt claims could operate side-by-side in a manner that's both administrable and functionally appealing.

The new American debtors' prisons seem problematic along multiple dimensions. But aside from clear policy concerns, they may violate constitutional laws at both the federal and state levels. Some of these laws — the state bans on debtors' prisons — were enacted over a hundred years ago, but can and should be invoked today.[166] The task of operationalizing these bans for a new social evil rests in the hands of litigators and courts. But the spirit behind them ought to drive other constitutional actors — executives, legislators, and citizens — to take swift action.[167]

---

[165] *See supra* p. 1028.

[166] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.").

[167] For an argument that awareness campaigns are more effective than litigation, see Eric Balaban, *Shining a Light into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275 (2014).

Motor vehicles, license suspension, failure to pay fines. 2019 RIPL Chapters 217, 236. This thoughtful legislation amends ***RIGL Sec. 31-11-25. Suspension for failure to pay fine*** to provide that:

- while the RI DMV shall suspend the license of a person to operate a motor vehicle upon certification of the clerk of the District or Superior Court or Traffic Tribunal that the person has failed to pay fines or costs imposed for a violation or has failed to make satisfactory arrangements for payment

- the person shall first be entitled to request an ability to pay hearing by filing a request with the court which that imposed the fines or costs and

- the suspension shall remain in force until all fines or costs are paid to the respective court or satisfactory arrangements made for payments of fines and fees

CHAPTER 217

2019 -- H 6254

Enacted 07/15/2019

AN ACT

RELATING TO MOTOR AND OTHER VEHICLES - SUSPENSION OR REVOCATION OF LICENSES - VIOLATIONS

Introduced By: Representatives Diaz, Slater, McKiernan, Maldonado, and Mendez
Date Introduced: June 25, 2019

It is enacted by the General Assembly as follows:

SECTION 1. Section 31-11-25 of the General Laws in Chapter 31-11 entitled "Suspension or Revocation of Licenses - Violations" is hereby amended to read as follows:

31-11-25. Suspension for failure to pay fine.

(a) The division of motor vehicles shall suspend the license of a person to operate a motor vehicle upon certification of the clerk of any county of the superior court~~,~~ or any supervising deputy clerk of the district court or a clerk of the traffic tribunal that the person has failed to pay fines or costs imposed for a violation of any provision of this title within the time period provided for payment by the court, or has failed to make satisfactory arrangements with the court for payment of the fines or costs; provided, however, the person shall first be entitled to request an ability to pay hearing by filing a request with the court ~~which~~ **that** imposed the fines or costs.

(b) The suspension shall remain in force until all fines or costs are paid to the respective court or satisfactory arrangements have been made with the court for payment of the fines or costs.

SECTION 2. This act shall take effect upon passage.

========

LC002896

========

CHAPTER 236

2019 -- S 0078

Enacted 07/15/2019

AN ACT

RELATING TO MOTOR AND OTHER VEHICLES - SUSPENSION OR REVOCATION OF LICENSES - VIOLATIONS

Introduced By: Senators Lombardi, McCaffrey, Felag, Ciccone, and Lombardo
Date Introduced: January 16, 2019

It is enacted by the General Assembly as follows:

SECTION 1. Section 31-11-25 of the General Laws in Chapter 31-11 entitled "Suspension or Revocation of Licenses - Violations" is hereby amended to read as follows:

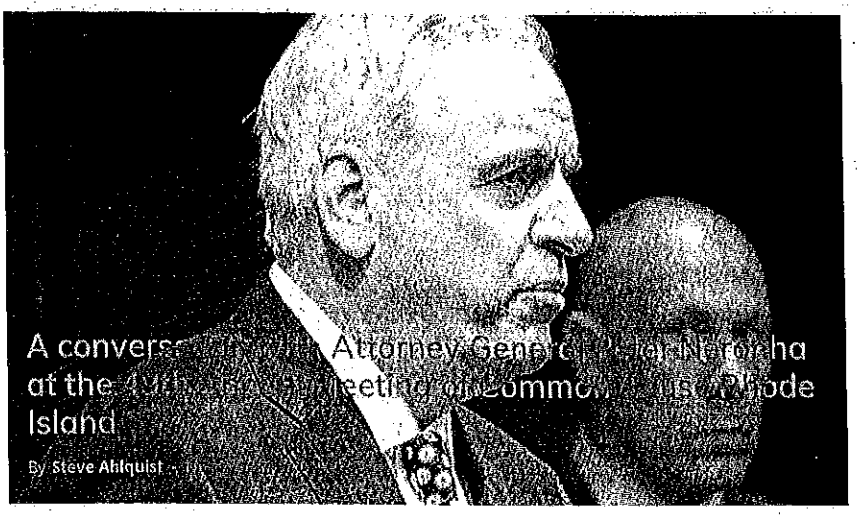
31-11-25. Suspension for failure to pay fine.

(a) The division of motor vehicles shall suspend the license of a person to operate a motor vehicle upon certification of the clerk of any county of the superior court, or any supervising deputy clerk of the district court or a clerk of the traffic tribunal that the person has failed to pay fines or costs imposed for a violation of any provision of this title within the time period provided for payment by the court, or has failed to make satisfactory arrangements with the court for payment of the fines or costs; provided, however, the person shall first be entitled to request an ability to pay hearing by filing a request with the court ~~which~~ **that** imposed the fines or costs.

(b) The suspension shall remain in force until all fines or costs are paid to the respective court or satisfactory arrangements have been made with the court for payment of the fines or costs.

SECTION 2. This act shall take effect upon passage.

LC000468



"Attorney General Barr, I've only met him once," said Neronha. *"for about an hour or so and I'm still not sure what to make of him... As Attorney General it's really important to separate politics from what it is you do on a day-to-day basis. We have a job to do... and it's a job where people aren't always happy with what it is you're doing. So you've got to be guided by whatever compass you have inside you."*

Attorney General **Peter Neronha** was featured in a a conversation with **NBC 10** Investigative Reporter **Katie Davis** at the 49th Annual Meeting of **Common Cause Rhode Island** Monday night, held at the **Providence Renaissance Hotel.**

Here are some highlights:

Neronha said that in his first months of being in office, what surprised him was the breadth of the mission. "On any given day I would be discussing with the criminal division on a homicide in Providence, i the afternoon I'd be talking about hospital consolidation, and then later maybe talking about environmental issues... The office is mall for what we do."

On releasing the 38 Studios grand jury records:

"The truth is, under the current state of the law, grand jury materials are no by law disclosable. It's not a matter of discretion it's a matter of law... It's unlawful for a prosecutor or a witness before the grand jury to talk about what occurred before the grand jury."

Neronha added that he doesn't think that oversight over the legislature, when there is no criminal activity in evidence, is not a proper role for the office of Attorney General. Neronha said that one solution to the **38 Studios** issue would be to approve legislation that he put in last year to "allow the release of a grand jury report... [The report] is something the grand jury could issue, with the approval of the presiding justice, that has due process protections built in..."

Neronha sees such a report being issued once or twice per term, and in "cases of real, significant public interest." It was as a result of having a grand jury report statute in Pennsylvania that the results of the grand jury investigation into clergy sex abuse was released in that state.

Consumer Protection Statute

"We have a really weak consumer protection statute in the country," said Neronha. "Banking, public utilities, credit card companies. If you're a regulated industry under our consumer protection statute, as interpreted by the Rhode Island Supreme Court, [the Attorney General's office] can not do an investigation. In the wake of the gas outage on **Aquidneck Island**, the Senate passed a resolution asking us to investigate. We could not investigate... under the current state of the law.

"I think that's a real problem for Rhode Island. I think Rhode Islanders expect their Attorney General to be their lawyer, be the people's lawyer..."

Marijuana

In Neronha's view, marijuana is not a gateway drug. That said, Neronha continued, "I'm not concerned about people using marijuana. as adults. I have concerns about child use... Ultimately, the people of Rhode Island will decide that question, directly or through their representatives, but what concerns me the most right now is the inability to detect whether one is operating a motor vehicle under the influence of marijuana."

Government Corruption

Neronha does not see a connection between legalizing marijuana and corruption, such as is facing Fall River Mayor **Jasiel Correia II**, noting that corruption can happen whenever governments get involved. He urged people to come forward when they are victims of government corruption.

When it comes to fighting corruption, Neronha said, "If we don't do it, who else is going to do it?"

Wyatt Detention Center guard assaults on peaceful protesters

See: **Attorney General Neronha opens up on the grand jury not indicting Wyatt correctional officers**

2020 Census

The Trump administration is moving to collect citizenship data from state's Departments of Motor Vehicles. Neronha said that the issue is one for the Governor to deal with.

"I will say this," said Neronha. "This administration's record on the census is not strong." Neronha noted that when a court questioned the Trump administration's motives as to why they wanted a citizenship question on the census, it was an extraordinary event.

The Trump Administration

Neronha reflected on working under Republican and democrat Presidents and United States Attorneys General. "This is different to me," said Neronha. "We've reached a place in the government, in the justice department where the stated reason may not be the real reason. It may seem naive to think that that's a new thing, but I really think that it is."

Has the job of the Attorney General become politicized, asked Katie Davis, and how do we come back from that?

"It's hard to say on the United States Attorney side," said Neronha. Having met with the Justice department, "I would say the department feels very different inside the building. Frankly it's a much less diverse place than it was when I was there, certainly the younger management.

"Attorney General **[William] Barr**, I've only met him once... for about an hour or so and I'm still not sure what to make of him... As Attorney General it's really important to separate politics from what it is you do on a day-to-day basis. We have a job to do... and it's a job where people aren't always happy with what it is you're doing. So you've got to be guided by whatever compass you have inside you."

Neronha added that it's important for an Attorney General, whether Federal or state, to push the office where it needs to go and not just let cases come to you.

"For example, wage theft," said Neronha. "We have not done much in the office around wage theft, the misclassification of workers, organized labor and unorganized labor. We're really making a big push there. We already have some results and I expect we'll have more. But that's something as Attorney General you've got to drive, because that's not going to happen unless you do it.

"Environmental enforcement's another one. We haven't been doing a lot of environmental enforcement in the office. If you're the Attorney General you've got to drive it to make sure it is one of your priorities... If

you don't, what you find is that you are doing defensive work most of the time."

Davis asked Neronha if he would support a Federal shield law that would provide a qualified privilege to a reporter to protect sources.

"I do support that," said Neronha. "I think the only context in which that privilege ought to be breached is in the context of national security... a real significant threat to security...

"I try to be accessible to the media..."

Restorative justice

Neronha feels his office is doing good work in this area, diverting many drug cases out of the criminal justice program and into treatment. He also spoke about the necessity of reclassifying simple possession as a misdemeanor instead of a felony, so that people would not leave prison with a felony conviction "around their necks."

Reforming our probation system

Neronha said that we need to embrace the probation system, even when it sometimes results in a person committing more crimes. "But more fundamentally, we need to make sure that when people get out of prison, they have someplace to go," said Neronha. " Because if they don't, the odds of them coming back [to jail] are really, really high."

One of the problems is the number of people on each probation officer's caseload. Federal probation officers deal with about 40 people. State probation officers are carrying 250 or more people on their caseload, said Neronha.

"If we want to talk about criminal justice reform," said Neronha, "That's where we need to invest," if we don't, "then I don't think our long term chances of success are very good."

Cash bail

Neronha sees cash bail as an issue that will be taken up by the General Assembly in the next session. Neronha noted that a lot of people getting out of prison cannot get a driver's license because thy owe the state or court costs and fines. "So there's a job for them but they can't get there."

Expungement

"Before we add eligibility for expungement, let's make sure that the people who are already eligible can get their records expunged. So we're going to have an expungement clinic in early December at the Broad Street office... Whether or not you get your record expunged shouldn't depend on the zip code you live in."

If you've served you debt to society, said Neronha, that should be the end, with one caveat. "If you have committed a crime involving public corruption, I don't think you should be able to run for office again, because once you took that oath and broke it, I don't think you should have that privilege. but short of that, godspeed, once you're released."

Open Government

Katie Davis said that when it comes to the **Access to Public Records Act (APRA)**, every government agency is following the letter of the law, which is that you have ten days to respond and a possible 20 day extension, but not the spirit of the law, because very request has taken 30 plus business days.

"Open government has been a priority of mine since taking office, " said Neronha. "There's no question that when I took office there was an

ongoing issue involving open government. My predecessor's approach was not one that isn't grounded in law. It's how you look at this...

"When in doubt," said Neronha, "err on the side of disclosure.

"I will tell you, the number of complaints have skyrocketed," said Neronha. "We have more complaints today than we've had in any year previous, over 150. That's a lot of open government complaints for our team to deal with, and they are time intensive."

Here's the full video. Because this was a fundraising dinner, there is the sound of cutlery being used throughout, in addition to issues with the sound in the room.

Steve Ahlquist

https://upriseri.com

Steve Ahlquist is a frontline reporter in Rhode Island. He has covered human rights, social justice, progressive politics and environmental news for half a decade. Uprise RI is his new project, and he's doing all he can to make it essential reading.
atomicsteve@gmail.com

RESEARCH REPORT

BRENNAN CENTER FOR JUSTICE

The Steep Costs of Criminal Justice Fees and Fines

A Fiscal Analysis of Three States and Ten Counties

By Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison

Produced with research assistance from the Texas Public Policy Foundation and Right on Crime **PUBLISHED NOVEMBER 21, 2019**

Brennan Center for Justice at New York University School of Law

Table of Contents

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from ending mass incarceration to preserving constitutional protection in the fight against terrorism. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

ABOUT THE BRENNAN CENTER'S JUSTICE PROGRAM

The Brennan Center's Justice Program seeks to secure our nation's promise of equal justice for all by creating a rational, effective, and fair justice system. Its priority focus is to reduce mass incarceration while keeping down crime. The program melds law, policy, and economics to produce new empirical analyses and innovative policy solutions to advance this critical goal.

Executive Summary

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.[1] 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.[2] 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.

Recommendations

- States and localities should pass legislation to eliminate court-imposed fees. Courts should be funded primarily by taxpayers, all of whom are served by the justice system.

- States should institute a sliding scale for assessing fines based on individuals' ability to pay. The purpose of fines is to punish those who violate the law and deter those who might otherwise do so. A $200 fine that is a minor inconvenience to one person may be an insurmountable debt to another.

- Courts should stop the practice of jailing for failure to pay, which harms rehabilitation efforts and makes little fiscal sense.

- States should eliminate driver's license suspension for nonpayment of criminal fees and fines. The practice makes it harder for poor people to pay their debts and harms individuals and their families. Lawmakers should follow the approach taken by Texas, where recent legislation will reinstate hundreds of thousands of licenses.[3]

- Courts and agencies should improve data automation practices so that affected individuals understand their outstanding court debts and policymakers can more thoroughly evaluate the efficacy of fees and fines as a source of revenue.

- States should pass laws purging old balances that are unlikely to be paid but continue to complicate the lives of millions, as some jurisdictions, including San Francisco, have done.[4] This would also ensure that individuals who have been free and clear of the criminal justice system for many years are not pulled back in simply on the basis of inability to pay.

What's the Difference Between Fees and Fines?

Fines, imposed upon conviction, are intended as both deterrence and punishment. In Texas, for example, a fine of up to $500 may be imposed for a low-level offense, such as a traffic violation; a fine of up to $2,000 may be imposed for more serious misdemeanors, such as harassment or minor drug possession; and a fine of up to $4,000 may be imposed for the most serious misdemeanors, such as unlawful carrying of a weapon and assault with injury.[5]

Fees, by contrast, are intended to raise revenue.[6] Often they are automatically imposed and bear no relation to the offense committed. In most cases, fees are intended to shift the costs of the criminal justice system from taxpayers to defendants, who are seen as the "users" of the courts. They cover almost every part of the criminal justice process and can include court-appointed attorney fees, court clerk fees, filing clerk fees, DNA database fees, jury fees, crime lab analysis fees, late fees, installment fees, and various other surcharges.

The Growing Use of Fees and Fines — and the Damage They've Done

Since 2008, almost every state has increased criminal and civil court fees or added new ones, and the categories of offenses that trigger fines have been expanded. Our justice system increasingly relies on fees and fines charged to defendants in criminal cases to fund basic operations.[7]

For example, North Carolina collects 52 separate fees, disbursing them to four state agencies and 611 counties and municipalities. It uses fees to fund half of the state's judicial budget as well as jails, law enforcement, counties, and schools.[8] Using fee and fine revenues to fund the judiciary can create perverse incentives with the potential to distort the fair administration of justice. When criminal courts become responsible for their own financing, they may prioritize the imposition of significant fee and fine amounts and dedicate substantial staff to collecting these sums.

In Florida, a significant portion of the funds raised through fees and fines is allocated to the state's general coffers.[9] Colorado has used increased court fees to replace and update public buildings, including a judicial complex and a museum.[10] Florida and Kentucky increased court fees as a way to address state fiscal crises.[11] In Oklahoma, where a 1992 referendum made it nearly impossible for legislators to raise taxes, lawmakers have increasingly come to rely on fees and fines to fund the state budget.[12] Some fee and fine revenue has even been used for personal perks: fees and surcharges allocated to a judicial expense fund in Louisiana were found to have been spent on luxury goods, including supplemental health insurance for judges, two Ford Expeditions, a leather upholstery upgrade for a take-home vehicle, and a full-time private chef.[13]

This increase in fees and fines has exacted a steep human cost. Individual amounts may be small, but they can quickly add up, meaning indigent people may face hundreds or thousands of dollars in accumulated debt that they'e unable to pay. While "debtors' prisons" have been declared unconstitutional, many states still incarcerate people for failure to pay criminal justice debt. And even when failure to pay is not an explicit charge, jail sentences are handed down for failure to appear or failure to comply — infractions that often stem from failure to pay. In Socorro County, New Mexico, for example, one magistrate judge has adopted a "three strikes" policy. For each missed payment of outstanding court costs, the court's enforcement response progresses from a bench warrant, to a bench warrant with a bond, to a charge of failure to comply that carries a three-day jail sentence. Each day spent in jail may then be credited against the defendant's outstanding debts.[14] Under the guise of different charges, such a policy perpetuates the function of a debtors' prison.

In this way, criminal justice debt represents a significant barrier to a person's chances of successfully reentering society following a conviction. It also hurts the families of those who are incarcerated, depriving them of a wage earner while adding new court costs to the defendant's criminal debts. One study found that about half of families with convicted members cannot afford to pay fees and fines. Moreover, nearly two in three families who had a family member incarcerated were unable to meet their households' basic needs, such as food and housing.[15] States such as Florida that suspend driver's

licenses for unpaid fees and fines only exacerbate this economic distress, as those who lose their license may then lose their job as well as their ability to take family members to school or medical appointments and to drive themselves to court.

There is also evidence that fees and fines are assessed in a racially discriminatory way. A 2017 report by the U.S. Commission on Civil Rights found that municipalities that rely heavily on revenue from fees and fines have a higher than average share of African American and Latino residents.[16]

By now, these harms have been well documented. But there has been much less research conducted on the fiscal costs of fees and fines. This report aims to start filling that gap. Without an understanding of how much governments are spending to administer fees and fines, and how much in fees and fines is never collected, decision-makers can't accurately gauge the efficacy of these programs.

Report Terms

Assessment. As used in this report, assessment refers to the amount of the fee or fine imposed by a judge on a criminal defendant at sentencing. For many minor offenses, assessments are made at the conclusion of a simple hearing before a judge or magistrate in which the defendant makes a plea, the evidence is reviewed, and a decision is made by the judge or magistrate. More complex and serious criminal cases may involve separate appearances in court, including an arraignment in which the charges are read and a defendant's plea is accepted by the judge, a trial before the judge (and possibly a jury), and a sentencing hearing, at which point fees and fines may be imposed by the judge.

Criminal justice debt. Criminal justice debt is composed of legally binding financial obligations imposed on those convicted by criminal courts. While such debt may comprise fees, fines, and victim restitution — payments ordered to victims as compensation — this report deals only with fees and fines (see below), which are recognized as revenue on the balance sheets of courts and other public agencies. In contrast to private and many civil debts, criminal justice debt is enforced by the criminal justice system and can result in the issuance of arrest warrants for nonpayment, criminal court hearings, additional fines and court surcharges, detention in jail, inclusion on criminal records, and — in some states — loss of voting privileges.

Fines. Criminal fines are penalties imposed on defendants after conviction, intended as both deterrence and punishment. The amount of a fine is set by statute and based on the severity of the crime. For misdemeanors, fines may be relatively small. For felonies, fines are typically larger. Fines vary by jurisdiction and may be enhanced for repeat offenses. For example, each of the three states included in this study imposes fines as a penalty for drunk driving. For a first offense, New Mexico assesses a $300 fine, Florida assesses a $500 fine, and Texas may assess up to $2,000. In all three states, drunk driving is an enhanceable offense, meaning that the penalties, including fines, escalate depending on the number of prior offenses.[17]

Fees. Criminal fees, unlike fines, are intended to raise revenue. Often they are automatically imposed and bear no relation to the offense committed. In most cases, fees are intended to shift the costs of the criminal justice system from taxpayers to defendants, who are seen as the "users" of the courts. Cash-strapped state and local governments rely on criminal fees to raise revenue for other purposes as well, thereby avoiding the politically unpopular step of raising taxes. Most jurisdictions impose certain fees on every defendant convicted, regardless of the nature of the offense. For example, one convicted of a misdemeanor in Florida is charged a $20 court cost fee, a $3 Court Cost Clearing Trust Fund fee, a $60 Fine and Forfeiture Fund fee, a $20 Crime Stoppers Program fee, a $50 prosecution fee, a $50 crime compensation fee, and a $20 Crime Prevention Fund fee, and potentially others.[18] Other fees are offense-specific and imposed only on defendants convicted of certain offenses. For example, in New Mexico there are fees for defendants convicted of driving under the influence (DUI) or drug offenses.[19] While fees may be imposed by courts, parole and probation departments, and jails and prisons, this report focuses on fees imposed by criminal courts following conviction. In some jurisdictions, fees may be referred to by another name. For example, some of the fees imposed by courts in Texas are called "court costs."[20]

Revenue. Fees and fines both serve as sources of revenue for state and local governments. The permissible uses for this revenue are typically set by statute. Many fees are earmarked for specific purposes, such as programs that divert defendants from prison, courthouse maintenance, or traffic safety education. Much of the revenue from criminal justice fees and fines is used to fund the judiciary or routed to law enforcement. In some cases it goes to a state or locality's general fund, where it may be used for purposes wholly unrelated to law enforcement or the courts. Fine revenue is disbursed according to statute in each of the three states studied. In each state, most fine revenue goes into a general fund at the state or municipal level, though some is directed toward particular programs, such as road maintenance or schools.

While state statutes prescribe the distribution of funds collected through the criminal justice system, the allocation of revenue varies. For example, in New Orleans, the $11.5 million in criminal justice fees and fines collected in 2015 was distributed among eight agencies, providing funding for the municipal court, district court, public defenders, and traffic court.[21] In Allegan County, Michi-

gan, half of court-imposed fees went toward running the county courthouse, paying employee salaries, heating the court building, purchasing copy machines, and underwriting the cost of the county employee gym.[22]

Waivers. In some courts, judges have authority to reduce the amount of certain fees and fines imposed at conviction.[23] Amounts reduced without a quid pro quo (such as the performance of community service in lieu of payment or time spent in jail) often are referred to as waivers. This is the meaning of the term as employed in this report. The issuance of waivers varies considerably among jurisdictions and states.

Jail credits. Some states waive fees and fines in exchange for jail time, which are referred to as jail credits and are distinct from the kinds of credits through which people earn reductions to sentences. Though this alternative might be pitched as a benefit to those who want to discharge their debt in this manner, no one who has a choice and can make other payment arrangements would choose jail. Further, many defendants have no say in the matter. For example, one magistrate judge in Socorro County, New Mexico, jails individuals for missing three payments without making a court appearance, regardless of ability to pay.[24] Perversely, people can accumulate additional fees during their stay in jail, leaving them with more debt than when they entered.[25]

In some states, including Alabama, Michigan, and Texas, when people are picked up on a warrant for a failure to pay traffic tickets or fines, they may be jailed involuntarily to pay off delinquent criminal justice debt through credits issued for each day spent in jail.[26] These credits do not generate actual revenue but simply exchange jail time for debt reduction at a great cost to the government. Jailing also comes at great cost to the people affected and their families. The U.S. Supreme Court has held that imprisonment for unpaid fines or fees without a hearing to determine ability to pay is unconstitutional.[27] If courts find that a defendant is unable to pay, they are required to consider alternatives, such as deferrals, payment plans, community service, and waivers. Unfortunately, in practice, many courts fail to make these financial determinations.[28]

Community service credits. Most states offer some type of community service option as an alternative to payment, though these practices vary significantly within and across states.[29] Some states offer programs assigning people to pick up trash or maintain parks in lieu of a jail sentence or fine, while other states allow people to meet educational requirements to pay off their debt. Some types of community service require classes for certification (e.g., controlling traffic for the Department of Transportation), which can lead to employment opportunities after the debt is paid.[30]

In some states, community service is seldom available to defendants because judges feel pressure to raise revenue for their city or county.[31] For those who get the opportunity, community service hours are often paid at the federal minimum wage, only $7.25 an hour, making it unrealistic for people to devote the time necessary to work down their debt. This is even harder if they have jobs or are caring for family members.[32]

I. Key Findings

A. Fees and Fines Are Inefficient for Raising Revenue

The costs of fee and fine enforcement are huge. For example, in 2017 misdemeanor and traffic courts in Travis County, Texas, spent nearly $4.8 million on in-court proceedings and staff costs related to fee and fine compliance. In addition, the county spent more than $4.6 million on jailing those who failed to pay fees and fines and those allowed to earn jail credit against amounts owed.

On average, the jurisdictions in this report spent more than $0.41 for every dollar they collected over the period studied. Because of a lack of available data, this figure counts only in-court and jail costs.[33] If all costs were measured — including the sizable cost to law enforcement for warrant enforcement and arrests, the cost to Department of Motor Vehicles (DMV) offices for processing suspended licenses, and the cost to parole and probation officers for fee and fine compliance[34] — it would be even higher.[35]

Compare these collection costs to the cost of raising revenue through taxation. The Internal Revenue Service spends just $0.34 for every *hundred dollars* in taxes collected.[36] In other words, it costs jurisdictions, on average, *121 times more* to collect criminal fees and fines — even without including some of those costs — than it costs the IRS to gather taxes. Meanwhile, Texas spends around $0.31 for every *hundred dollars* in taxes collected.[37] New Mexico spends roughly $0.95. It's clear that general taxation is significantly more cost effective than criminal fees and fines at raising revenue.[38]

B. Collecting Fees and Fines Detracts from Public Safety Efforts

Fees and fines are most often evaluated by courts and criminal justice agencies, legislators, and policymakers on the basis of the revenue they generate, but they come at a great cost to the criminal justice system. When criminal courts impose fees and fines and then spend much of their resources collecting them, this leaves less to spend on true public safety needs. For example:

- When police and sheriff's deputies are serving warrants for failure to pay fees and fines, they are less readily available to respond to 911 calls.
- When courts schedule appearances for failure to pay, proceedings for more serious crimes can be delayed or rushed.
- When community corrections officers spend much of their time reminding their clients to pay unaffordable fees and fines, they have less time to work with people to help them break the cycle of repeated contact with the criminal justice system.
- When people who can't afford to pay fees and fines are jailed, they are exposed to the many harms of incarceration, while correctional authorities are burdened with providing jail space and services to people who pose no risk to public safety.

These are just a few examples; there are many more ways in which criminal justice agency efforts to coerce payment translates into less time spent on more valuable criminal justice work.

Put concretely and in dollar terms, almost every cent spent on fee and fine collection is wasted as compared to collecting tax revenue.[39] This is a fundamentally inefficient way to collect revenue to support courts and other criminal justice agencies, and it does not make fiscal or economic sense.

C. Almost No Time Is Spent in Court Determining Whether People Can Afford to Pay Fees and Fines

One reason that fees and fines are so inefficient as a revenue raiser is that each year millions of people are given sentences that include fines and fees they are simply unable to pay. From watching more than 1,000 court proceedings in seven jurisdictions, the authors found that judges rarely hold ability-to-pay hearings. While there are plainly up-front costs associated with such hearings, in the long run, jurisdictions would spend less money by holding them rather than trying to chase down debts that cannot be paid.

D. Jailing for Nonpayment Is Costly and Irrational

The Supreme Court has held that "punishing a person for his poverty" is unconstitutional. Still, states and localities continue to jail large numbers of indigent defendants as a sanction for unpaid criminal justice debt. Jailing people for nonpayment is by far the most expensive method of enforcing collections and generates little to no revenue — making it highly uneconomical. In counties where courts incarcerate for failure to pay, the authors found that the cost of incarceration dwarfs other collections costs. For example, in Bernalillo County, New Mexico, jail costs represent as much as 98 percent of the collection costs documented by the authors.[40]

Further, while the full costs are unknown, they are considerable — with many jails in Texas and New Mexico reporting costs per inmate per day clustering around $55 to $65 or higher — and the costs negate or reduce much

of the revenue that city, county, and state officials believe that criminal fees and fines produce.

Often when someone is unable or unwilling to pay a fee or fine, the court issues a warrant.[41] Frequently, indigent people do not appear on their court date, due to a transportation issue (they may have had their license suspended), or because they have to work, or because they fear arrest for nonpayment. In these instances, courts often issue a warrant for failure to appear, resulting in additional debt for the defendant and, in some jurisdictions, jail time.[42] Some defendents receive credit toward their debt at a state-determined per diem rate for the time they spend in custody; others incur additional debt in the form of jail fees; and some are released still owing the amount they owed before the warrant was issued.[43] Jailing is particularly counterproductive not only because incarceration is extremely costly to jurisdictions but also because it diminishes a person's ability to pay outstanding fees.

E. The Amount of Uncollected Debt Continues to Grow

A substantial portion of fees and fines is never collected and is likely uncollectable, meaning that these assessments are an unreliable source of government revenue that will always come up short.

No one knows how much is owed in total because few states and courts track this information — which is itself a problem requiring attention. But from 2012 to 2018, the states of Florida, New Mexico, and Texas amassed a total of almost $1.9 billion in uncollected debt.[44] And in each of the jurisdictions studied here, the amount of unpaid debt grew significantly over the period examined. Much of this debt is unlikely to ever be collected, as those with low incomes lack resources to draw on for payment.

This high level of uncollected debt demonstrates why fees and fines are such an unreliable way to raise revenue. It also hurts those who can't pay, putting them at risk of incarceration, loss of their ability to legally drive, voter disenfranchisement, and increased difficulty in getting a job. And courts keep track of debts in perpetuity, making it all but impossible for defendants to get out from under them.

F. Jurisdictions Do Not Track Costs Related to Collecting Fees and Fines

For the most part, jurisdictions do not know how much it costs them to collect fees and fines. Of the three states studied, only Texas systematically tracks some of the costs for court collection units. But even there, the picture is incomplete. No jurisdiction tracks any of the following: the court costs for fee and fine administration, the cost to public defender systems for dealing with their clients' fees and fines, the cost to parole and probation systems for fee and fine enforcement (whether they engage in collections or simply remind their charges constantly to pay their court debts), the cost to DMV offices processing license suspensions or state tax agencies processing offsets, and the cost to law enforcement for warrant enforcement or arrests for failure to pay or suspended driver's licenses.

Though Texas collects some data on the costs of jailing people who fail to pay fees and fines or are allowed to earn jail credit against amounts owed, most courts and other criminal justice agencies do not track and report such costs.

G. Fees and Fines Are a Regressive Tax on the Poor

Revelations that cities like Ferguson, Missouri, collect millions in fees from poor citizens sparked a national debate in 2014 about predatory and regressive policies targeting vulnerable communities.[45] The city relied on rising municipal court fines to make up 20 percent of its $12 million operating budget in fiscal year 2013.[46] But Ferguson is not alone. As detailed below, fee and fine assessments in each of the states studied amount to significant costs for the people who pass through the criminal justice system, many of whom are poor. Across the three states, billions of dollars are charged without regard to ability to pay. According to the Federal Reserve, many Americans are unable to pay an unexpected bill of $400.[47] The fees and fines charged in these three states may well be more than what the average defendant can afford (and the noticeable growth of unpaid fee and fine debt bears this out). This is particularly so where evidence exists that policing frequently has a disproportionate impact on marginalized communities.[48]

II. Recommendations

Courts rely excessively on criminal fee and fine practices that are costly and inefficient, unfairly burden the poor, and do little to deter crime or improve public safety. Reforms are urgently needed.

A. States and Localities Should Eliminate Court-Imposed Fees

Courts need to be funded adequately. But even under a conservative estimate of the costs of collection, fees are an inefficient source of revenue. In addition, they fall disproportionately on the poor and create perverse incentives. And they transfer the obligation of taxpayers to fund courts to defendants in the justice system, even though the system serves society as a whole. State legislators should allocate appropriate funding to courts from their general funds and repeal legislation requiring courts to raise their own revenue by imposing fees.

B. States Should Require Courts to Assess Fines Based on Ability to Pay

The purpose of fines is to deter people from violating the law and punish those who do. But a $200 fine may represent an insurmountable obstacle to one person and a minor inconvenience to another. Charging people amounts they cannot pay is draconian. State legislatures should statutorily scale fines according to a defendant's wealth and how much he or she earns in a day, adjusted for essential expenses and obligations such as child support. In addition to ending the disproportionate punishments given to the poor, sliding-scale fines would more effectively incentivize the wealthy to obey the law. Studies show that sliding-scale fines can increase both collection rates and total fine revenue.[49] Mandating that fines are calibrated according to ability to pay would also drastically reduce the resources allocated to collections — since fines that are manageable are more likely to be paid — and reduce the burden on indigent defendants, creating a more efficient and just system.

C. Courts Should Stop the Practice of Jailing for Failure to Pay

In the three states studied here, 46 percent of fees and fines were not paid.[50] Sometimes courts waive fees and fines for those unable to pay, and sometimes they offer credit for court-ordered community service. Too frequently, however, they jail people for nonpayment.[51] Incarceration as a penalty for unpaid debt not only is unconstitutional but, as a practical matter, makes little economic sense. It provides no revenue benefit and is costlier for courts and taxpayers than simply forgiving the debt.[52]

D. States Should Eliminate Driver's License Suspension for Nonpayment of Criminal Fees and Fines

This punishment, too, is counterproductive.[53] As with incarceration, suspending someone's driver's license makes it less likely that he or she will be able to pay the debt, as it is difficult to hold a job in most parts of the United States without access to a car. License suspension also hurts families that depend on their cars to buy groceries, transport their children to school, get medical care, and provide for other needs. Suspended license enforcement becomes a needless, costly priority for law enforcement personnel who could be deployed more effectively to prevent or respond to serious crime.

E. Courts and Agencies Should Improve Data Automation Practices

As the authors learned, many states and local jurisdictions are in the dark about the amount of criminal fees and fines that are unpaid and outstanding. In part this is the result of well-intentioned automation efforts that prioritize more recent and critical case data over older data. In other cases, as the authors found in some local courts, basic operating records and ledgers remain unautomated, making it hard to quickly collect information on caseloads, amounts owed, and amounts paid. Given the risk of arrest and other consequences for nonpayment of criminal fees and fines, courts are under an obligation to ensure that relevant data is easily retrievable and regularly updated to reflect actual amounts waived, credited, paid, and owed. Such efforts would serve policymakers as well, allowing them to more systematically assess the inefficiency of relying on fees and fines as a revenue stream.

F. States Should Pass Laws Requiring Purging of Old Balances That Are Unlikely to Be Paid

As detailed in this report, tremendous amounts of old fee and fine debt will never be collected but continue to burden millions of people. Jurisdictions are unlikely to receive revenue from arrears of any kind that go back many years, especially from those least able to pay. Financial professionals have long employed accounting methods such as "allowances for doubtful accounts" to identify uncollectible debts and assign them a value of zero for

purposes of preparing financial statements. Some jurisdictions, such as San Francisco, have adopted this kind of financial practice and wiped millions of dollars in uncollected debt off the books.[54] Courts should more widely adopt these practices in tracking and reporting outstanding balances of criminal fees and fines, recognizing that older debts have little prospect of ever being paid. States should require courts to report on uncollected fees and fines and issue periodic waivers or adjustments in cases where significant additional payment is unlikely. In addition to providing relief to the least well-off defendants, it would free public agencies from expending resources trying to chase down uncollectible debts.

Assessing Fines Based on Ability to Pay

>> While sliding scales for fines may seem radical, this approach has been successfully implemented in Europe as a default sanction for numerous crimes.[55] When it was introduced in West Germany in the 1970s as a replacement for incarceration, the number of short-term prison sentences dropped by 90 percent. Germany still uses these "day fines" as the only sanction imposed for three-quarters of all property crimes and two-thirds of all assaults.[56]

Day fines have also worked in the United States. When a court in Staten Island, New York, replaced fixed fines with day fines in 1988, both collection rates and fine amounts increased.[57] In Maricopa County, Arizona, an experimental day fine program in the 1980s saw a 100 percent increase in the proportion of people fully paying off their court debt, and a drop in the recidivism rate from 17 to 11 percent.[58]

Disproportionate Policing in Marginalized Communities

>> **Research indicates** that economically disadvantaged communities and people of color are policed at greater rates than white, affluent areas are. This means that fees and fines are imposed on and collected more frequently from them, creating a cycle of debt and incarceration. The consequences for marginalized communities are particularly severe and regressive.

>> **Operating primarily** in low-income communities of color, the "broken windows" theory of policing has drastically increased the number of citations and arrests for low-level, nonviolent offenses.[59] The theory, introduced in 1982, held that cracking down on minor offenses would prevent major crime.[60] However, it resulted in criminalizing poor communities for activities that would go unchecked in white, wealthy areas. For example, in Newark, New Jersey, citations for low-level offenses — known as "blue summonses" — were regularly handed out, forcing residents to pay fines or make court appearances on violations such as loitering or drinking in public.[61] Although police officers were rewarded for distributing high numbers of citations, including through quotas instituted by police leadership, crime levels did not go down. Instead, this approach damaged the relationship between residents and the Newark Police Department. It also shifted law enforcement's focus to "convenient targets" rather than serious crime, leading to federal intervention and attempts at reform in recent years.[62]

>> **In Ferguson, Missouri,** police issued 32,975 arrest warrants for nonviolent offenses and collected $2.6 million in fees and fines in 2013.[63] These fines were mostly imposed for minor, nonviolent offenses such as traffic infractions, and data shows huge racial disparities in those citations. In Ferguson, 67 percent of the population is black, but 86 percent of traffic stops were of black drivers. Conversely, 29 percent of the population is white, but only about 12 percent of traffic stops involved white drivers.[64] A 2018 report from the Missouri attorney general examines the disparity, noting that in more than 1.5 million traffic stops in the state, black drivers were 91 percent more likely to be pulled over than white drivers.[65]

>> **Racial profiling** and bias continue to contribute to the over-policing of people of color. A comprehensive study of 20 million traffic stops in North Carolina found that black drivers were twice as likely to be pulled over as white drivers and four times as likely to be searched, even though whites drive more on average.[66] The study also indicated that racial minorities were less likely to be found with contraband, despite being more likely to be searched.[67] A 2013 Department of Justice study found that about 2 percent of white drivers are searched after being pulled over, versus 6 percent of black and 7 percent of Latino drivers.[68]

>> **Gentrification** and changing social dynamics in low-income neighborhoods are leading to an increased criminalization of people of color who have lived in those areas for decades.[69] The influx of wealth into these communities has created pressure for the perception of public safety and order. Higher rates of arrest and increased citations have been the result of increases in police presence rather than in offenses, and as resources are concentrated in these gentrifying areas, they are diverted from others.[70]

>> **In San Francisco,** an app called Open311 was launched in 2013 to make it easier to report loitering, vandalism, and other quality-of-life complaints.[71] Data gathered from the app shows a disproportionate increase in 311 calls and responses in gentrified areas of the city after the app was launched.[72] Approximately 11 percent of 311 calls in San Francisco were from the Mission District, a neighborhood whose population makes up about 5 percent of San Francisco's total. The community, with a significant Hispanic and Latino population, has seen increased gentrification in the last few decades.[73] More than 112,000 calls were reported from the Mission in 2013 compared with about 48,000 from the financial district.[74] The tension between newcomers and lifelong residents can be fatal: in 2014, 28-year-old Alejandro Nieto — the son of Latino immigrants who had lived in the neighborhood all his life — was anxiously pacing after a run-in with a dog when he was shot dead by officers responding to a 911 call from a new resident who reported that Nieto was "behaving suspiciously."[75]

III. County Fiscal Impacts

This basic fiscal analysis identifies the cost to courts and criminal justice agencies in target counties of assessing and collecting criminal fees and fines, then subtracts those costs from the revenues collected for each jurisdiction.[76] The remainder is the net gain in revenue.

Until now, the costs of assessing and collecting criminal justice fees and fines have gone largely unmeasured. To provide a clearer understanding of whether fees and fines are an efficient means of raising government revenue, both within each jurisdiction studied and on average, the authors gathered data from various stakeholders in the criminal justice system engaged in the collection of fees and fines in 10 counties. These included courts, prosecu-

FIGURE 1

Fiscal Analysis of Target Counties in Texas (2017), New Mexico (2016), and Florida (2017)

Thousands of dollars

	TEXAS				NEW MEXICO			FLORIDA			RANGE	
Total Fees and Fines Assessed	**Travis**	**El Paso**	**Jim Hogg**	**Marion**	**Bernalillo**	**Santa Fe**	**Socorro**	**Leon**	**Miami-Dade**	**Madison**	**Low**	**High**
Total Assessments	$38,006	$14,109	N/A	N/A	$4,170	$1,138	$207	$1,148	$10,143	$257	$207	$38,006
Waivers/Adjustments	$1,176	$308	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	$308	$1,176
Community Service Credits	$561	$83	N/A	N/A	$84	$55	$2	$44	$12	$1	$1	$561
Jail Credits	$6,958	$3,140	N/A	N/A	$1,448	$214	$76	$0	$0	$0	$0	$6,958
Conversions to Liens	N/A	N/A	N/A	N/A	N/A	N/A	N/A	$0	$0	$54	$0	$54
Other Credits	$0	$0	N/A	N/A	$661	$83	$10	$20	$0	$6	$0	$661
Total Adjustments	$8,694	$3,532	N/A	N/A	$2,193	$352	$88	$64	$12	$61	$12	$8,694
Net Amounts Owed	$29,312	$10,577	N/A	N/A	$1,977	$787	$120	$1,084	$10,131	$196	$120	$29,312
Revenue Collected												
Collections	$26,929	$8,132	$237	$366	$1,862	$724	$119	$858	$7,978	$174	$119	$26,929
Collections as a Percentage of Assessments	71%	58%	N/A	N/A	45%	64%	58%	75%	79%	68%	45%	79%
Cost to Levy and Collect												
In-Court Costs	$3,186	$68	$10	$29	$40	$54	$14	$31	$267	N/A	$10	$3,186
Collections Unit Costs	$1,610	$733	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	$733	$1,610
Jail Costs	$4,627	$2,917	N/A	N/A	$2,138	$239	$81	N/A	N/A	N/A	$81	$4,627
Other Costs	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	$0	$0
Total Costs	$9,423	$3,718	$10	$29	$2,178	$294	$96	N/A	N/A	N/A	$10	$9,423
Costs as a Percentage of Collections	35%	46%	4%	8%	117%	41%	80%	N/A	N/A	N/A	4%	117%
Net Gain (Revenue Minus Cost)	**$17,506**	**$4,414**	**$227**	**$336**	**-$316**	**$430**	**$24**	**N/A**	**N/A**	**N/A**	**-$316**	**$17,506**

Sources: New Mexico Judicial Information Division; Texas Collection Improvement Program; Florida Court Clerks & Comptrollers; Brennan Center calculations.

tors, public defenders, probation/parole officers, and local jails. The authors had the most success obtaining data for courts, with jailing costs also available for some jurisdictions. With this data, the authors were able to quantify the costs associated with in-court proceedings dealing with fees and fines, court collection costs for some jurisdictions, and jailing costs for nonpayment in certain jurisdictions. For a variety of reasons, including local policies, the authors were unable to collect any information from law enforcement agencies.

Our fiscal analysis revealed that, across the counties studied, 66 percent of criminal justice debts assessed were eventually collected. In the most recent year examined, revenues ranged up to $27 million raised in these jurisdictions, with more populous and urban counties at the higher end. Costs associated with assessments and collections that could be documented were as much as $9.4 million, depending on the county.[77] As expected, costs were higher in counties where courts jailed for nonpayment. Costs associated with time spent on fees and fines in court proceedings were estimated to be relatively low, as little time was observed in courtrooms considering the amounts owed or the ability to pay.

The authors' estimates of collection and enforcement costs underestimate the full set of direct costs due to limited data availability in the jurisdictions studied; if data had been fully available, this study's cost estimates would have been higher.

- The authors observed court proceedings to estimate personnel costs for the judges, prosecutors, public defenders, and other staff involved in court proceedings in all but three jurisdictions, smaller counties in which court proceedings do not occur weekly. Personnel costs are therefore not included in estimates for those counties.
- Jail costs could be calculated for New Mexico and larger Texas counties. Florida jail data was not available. Florida does not jail for failure to pay but does incur costs for incarceration for driving with a license that has been suspended due to inability to pay fees and fines.
- The authors were not able to obtain the cost of court collections for a large portion of Texas counties.
- The authors were unable to obtain adequate survey responses from judges, court clerks and their staff, prosecutors, public defenders, and probation and parole staff to document time spent outside courtrooms on fee/fine enforcement and collection; and no cooperation was received from law enforcement agencies.

In addition to the basic fiscal analysis, the authors tallied uncollected court debts in most of the 10 jurisdictions to calculate the extent of accumulating unpaid fees and fines. Courts are rarely able to provide estimates of outstanding balances. The authors therefore examined how these debts accumulated by using several years of fee and fine assessments, credits, waivers, and collections data for each jurisdiction; calculating unpaid balances for each year; and totaling these amounts for the years examined.

Figure 2 illustrates how revenues compare across each county studied over a five-year period. While the trends vary among jurisdictions (see section IV), one major finding of this report is that across states, the amount of uncollected debt increases year over year.

FIGURE 2

Summary of Collections and New Debt from Fees and Fines in Counties Studied, 2013–2017

Cumulative unpaid balances (net of waivers/credits) in thousands of dollars by fiscal year

	2013	2014	2015	2016	2017	
Florida						**5-Year Total**
Leon County						
Assessed	$3,661	$3,240	$2,673	$2,431	$1,148	$13,153
Collected	$2,065	$1,825	$1,953	$1,888	$858	$8,589
Credits/Waivers/Liens	$379	$217	$83	$259	$64	$1,002
Remaining Outstanding	$1,217	$1,198	$637	$283	$226	$3,562
Cumulative Unpaid Balance	$1,217	$2,415	$3,053	$3,336	$3,562	$3,562
Collection Rate	56%	56%	73%	78%	75%	65%
Miami-Dade County						
Assessed	$20,872	$14,384	$15,772	$12,178	$10,143	$73,348
Collected	$12,245	$9,353	$9,453	$8,297	$7,978	$47,326
Credits/Waivers/Liens	$28	$33	$43	$23	$12	$140
Remaining Outstanding	$8,598	$4,998	$6,276	$3,858	$2,153	$25,883
Cumulative Unpaid Balance	$8,598	$13,596	$19,872	$23,730	$25,883	$25,883
Collection Rate	59%	65%	60%	68%	79%	65%
Madison County						
Assessed	$288	$291	$224	$243	$257	$1,303
Collected	$124	$190	$187	$175	$174	$850
Credits/Waivers/Liens	$60	$38	$36	$74	$61	$268
Remaining Outstanding	$104	$63	$2	-$6	$22	$185
Cumulative Unpaid Balance	$104	$167	$169	$163	$185	$185
Collection Rate	43%	65%	83%	72%	68%	65%
New Mexico						**4-Year Total**
Bernalillo County						
Assessed	$5,371	$5,294	$4,558	$4,170	N/A	$19,393
Collected	$3,062	$2,704	$2,267	$1,862	N/A	$9,895
Credits/Waivers/Liens	$1,703	$2,077	$2,089	$2,193	N/A	$8,062
Remaining Outstanding	$606	$513	$203	$115	N/A	$1,437
Cumulative Unpaid Balance	$606	$1,119	$1,322	$1,437	N/A	$1,437
Collection Rate	57%	51%	50%	45%	N/A	51%
Santa Fe County						
Assessed	$987	$1,243	$1,370	$1,138	N/A	$4,738
Collected	$675	$843	$952	$724	N/A	$3,193
Credits/Waivers/Liens	$172	$143	$350	$352	N/A	$1,016
Remaining Outstanding	$141	$256	$69	$63	N/A	$528
Cumulative Unpaid Balance	$141	$397	$465	$528	N/A	$528
Collection Rate	68%	68%	69%	64%	N/A	67%

Continues>

FIGURE 2-CONTINUES

Summary of Collections and New Debt from Fees and Fines in Counties Studied, 2013–2017

Cumulative unpaid balances (net of waivers/credits) in thousands of dollars by fiscal year

	2013	2014	2015	2016	2017	
New Mexico						**4-Year Total**
Socorro County						
Assessed	$289	$281	$231	$207	N/A	$1,008
Collected	$156	$155	$140	$119	N/A	$569
Credits/Waivers/Liens	$105	$112	$102	$88	N/A	$406
Remaining Outstanding	$29	$14	-$10	$0	N/A	$33
Cumulative Unpaid Balance	$29	$43	$33	$33	N/A	$33
Collection Rate	54%	55%	60%	58%	N/A	56%
Texas						**5-Year Total**
El Paso County						
Assessed	$34,690	$34,568	$34,364	$31,272	$14,109	$149,003
Collected	$22,497	$19,075	$19,844	$19,083	$8,132	$88,631
Credits/Waivers/Liens	$11,267	$12,602	$10,587	$7,970	$3,532	$45,958
Remaining Outstanding	$926	$2,890	$3,933	$4,220	$2,445	$14,414
Cumulative Unpaid Balance	$926	$3,816	$7,749	$11,969	$14,414	$14,414
Collection Rate	65%	55%	58%	61%	58%	59%
Jim Hogg County						
Assessed	N/A	N/A	N/A	N/A	N/A	N/A
Collected	$206	$215	$196	$292	$237	$1,147
Credits/Waivers/Liens	N/A	N/A	N/A	N/A	N/A	N/A
Outstanding	N/A	N/A	N/A	N/A	N/A	N/A
Cumulative Unpaid Balance	N/A	N/A	N/A	N/A	N/A	N/A
Collection Rate	N/A	N/A	N/A	N/A	N/A	N/A
Marion County						
Assessed	N/A	N/A	N/A	N/A	N/A	N/A
Collected	$352	$287	$324	$394	$366	$1,722
Credits/Waivers/Liens	N/A	N/A	N/A	N/A	N/A	N/A
Outstanding	N/A	N/A	N/A	N/A	N/A	N/A
Cumulative Unpaid Balance	N/A	N/A	N/A	N/A	N/A	N/A
Collection Rate	N/A	N/A	N/A	N/A	N/A	N/A
Travis County						
Assessed	$48,412	$51,563	$49,307	$41,497	$38,006	$228,784
Collected	$34,090	$36,619	$35,703	$29,164	$26,929	$162,505
Credits/Waivers/Liens	$11,882	$10,112	$9,827	$8,026	$8,694	$48,541
Remaining Outstanding	$2,440	$4,833	$3,777	$4,307	$2,382	$17,738
Cumulative Unpaid Balance	$2,440	$7,272	$11,049	$15,356	$17,738	$17,738
Collection Rate	70%	71%	72%	70%	71%	71%

FIGURE 3

Summary of Collections and New Debt from Fees and Fines in States Studied, 2012–2018

Thousands of dollars by fiscal year

	2012	2013	2014	2015	2016	2017	2018	
Florida								**7-Year Total**
Assessed	$489,689	$482,927	$461,447	$453,718	$484,594	$427,737	$441,829	$3,241,942
Collected	$158,353	$153,664	$158,921	$181,877	$182,065	$167,865	$172,217	$1,174,960
Credits/ Waivers/Liens	$144,993	$131,850	$90,252	$134,769	$164,812	$123,622	$141,872	$932,170
Remaining Outstanding	$186,343	$197,413	$212,275	$137,073	$137,717	$136,250	$127,740	$1,134,812
Cumulative Unpaid Balance	$186,343	$383,757	$596,032	$733,104	$870,821	$1,007,071	$1,134,812	$1,134,812
Collection Rate	32%	32%	34%	40%	38%	39%	39%	36%
New Mexico								**5-Year Total**
Assessed	$17,855	$23,806	$24,445	$23,699	$23,344	N/A	N/A	$113,149
Collected	$9,196	$14,474	$15,036	$14,521	$13,431	N/A	N/A	$66,659
Credits/ Waivers/Liens	$2,558	$5,398	$6,347	$6,420	$6,760	N/A	N/A	$27,483
Remaining Outstanding	$6,101	$3,933	$3,062	$2,759	$3,152	N/A	N/A	$19,007
Cumulative Unpaid Balance	$6,101	$10,034	$13,096	$15,855	$19,007	N/A	N/A	$19,007
Collection Rate	52%	61%	62%	61%	58%	N/A	N/A	59%
Texas								**7-Year Total**
Assessed	$1,142,695	$965,942	$932,339	$808,289	$786,583	$824,876	$769,166	$6,229,890
Collected	$585,584	$602,778	$581,181	$526,207	$525,762	$509,393	$480,884	$3,811,790
Credits/ Waivers/Liens	$384,010	$246,049	$236,683	$194,202	$205,294	$205,974	$204,143	$1,676,355
Remaining Outstanding	$173,101	$117,115	$114,475	$87,880	$55,527	$109,509	$84,139	$741,746
Cumulative Unpaid Balance	$173,101	$290,216	$404,691	$492,572	$548,098	$657,607	$741,746	$741,746
Collection Rate	51%	62%	62%	65%	67%	62%	63%	61%

Additional Research Needed

More research is needed to determine the many costs of imposing and collecting criminal fees and fines. The network of courts and criminal justice agencies involved in levying, processing, and collecting fees and fines is vast, and the full scope of practices and costs is not fully understood. Public personnel involved include judges, court clerks, and administrators; prosecutors and public defenders; police and sheriffs; and parole and probation officers. In some jurisdictions, this network includes DMV staff who process driver's license suspensions, state tax agency personnel who process requests to deduct amounts owed from tax refunds, police and sheriffs who make arrests for failure to pay or for driving with a suspended license, and correctional officers who incarcerate those with outstanding debt. In some places, this network also includes businesses, such as private collection agencies or private probation services. Despite numerous contacts, including visits, phone calls, and emailed surveys, much of the cost of this network remains for future and more intensive research to determine.

Further, juvenile justice, noncriminal traffic infractions, and restitution were beyond the scope of this analysis, though the costs of all three are considerable.

- The juvenile justice system operates separately from the adult criminal system. But it mirrors the adult system in certain respects, often including the imposition of considerable fees and fines. The authors did not include the juvenile justice system in this study.

- Traffic violations vary from state to state in terms of the range of penalties imposed and whether common types are regarded as infractions or criminal misdemeanors (or worse, felonies). For example, in Texas even seemingly minor "moving violations" that occur while a driver is operating a vehicle are classified by state law as misdemeanors, while this is not the case in Florida and New Mexico. In its analysis, this report focuses on criminal fees and fines imposed in misdemeanor cases in 10 local jurisdictions and both misdemeanor and felony cases statewide for Florida, New Mexico, and Texas. It does not include fees and fines associated with noncriminal traffic infractions.

- Restitution amounts imposed by the courts as recompense to crime victims are also not considered in this report.

- Finally, the authors did not attempt to quantify massive costs associated with collateral consequences for individuals, families, and communities faced with significant fee and fine charges they cannot afford to pay. Loss of income to those who are incarcerated or who lose their license, attendant loss of future earning potential and tax revenue, costs to families and communities disproportionately affected, and other costs were beyond this study's scope.

The costs of collection estimated by this study are therefore lower (and perhaps significantly so) than the full and true costs. Further study of the full costs of collection will help states, counties, and municipalities better understand the inefficiency of relying on fees and fines to generate revenue.

Cost Shifting Hides Some Costs of Debt Collection

Significant hidden costs are not reflected in court and other public safety budgets because of a tangled web of costs, functions, revenues, and records among state, county, and municipal governments. For example, if you commit a traffic infraction or misdemeanor in Socorro County, New Mexico, the sheriff's deputy who tickets or arrests you is paid by the county. The judge who hears your case in the municipal court is paid by the city, the attorney who prosecutes your case is paid by the district, and the lawyer who serves as your public defender — if you're entitled to one — is paid by the state.[78] This cost shifting across levels of government makes it difficult to quantify the total cost of enforcing fees and fines. It also complicates the task of understanding the incentives to impose fees in the first place.

While criminal fines and certain fees may appear as revenue sources in state budgets (often indistinct from noncriminal fee revenue), much of the cost of enforcing and collecting these fees is borne by counties and municipalities. Even when the costs are shouldered by the states, they are stretched across multiple agencies, making them difficult to aggregate.

These different jurisdictions may fund their justice systems using a combination of tax revenue, "fees for service," and money from state and federal programs, leading to webs of intergovernmental charges.

In some cases, cost shifting has led to conflicts between states and cities. For example, in Austin, Texas, the mayor accused the state of creating an unfunded mandate by requiring the city to collect fees without providing funding adequate to cover the cost of collections.[79] The typical speeding ticket in the city carried $103 in fees, $76 of which went to the state.[80]

Often, cost shifting takes place between municipalities and counties, further obscuring the costs of collecting fees and fines. For example, when municipal courts in Austin impose jail time for failure to pay fees and fines,

Consequences of Fees and Fines

>> **Criminal justice debt** creates a downward spiral of collateral consequences for those who cannot afford fee and fine payments. Shanetra Roach, a defendant in Austin, told the Brennan Center in 2018 that she received a speeding ticket in 2004. Her failure to pay triggered a driver's license surcharge of $250 per year for three years. When she could not afford these payments, her driver's license was suspended. In the 14 years since, she has been arrested three times, all on warrants derived from her inability to pay the initial ticket. The debt has grown to $1,800 in driver's license surcharge fees, and she is doing community service to satisfy $1,200 in outstanding court costs. This debt has prevented her from getting jobs that she is well qualified for. "It's a monkey on a person's back," she said. "It's pushing people further and further into a hole."[84]

>> **Some penalties** for failure to pay debts are imposed by statute, while others are imposed at the discretion of a judge or even a court clerk.[85] Common penalties include bench warrants, license suspension, disenfranchisement, and incarceration, and can result in lower credit scores, fueling a cycle that impedes reentry.

- **Bench warrants.** Bench warrants authorize an arrest. The arrest often occurs when the defendant encounters law enforcement in an unrelated incident, most commonly a traffic stop. The issuance of a bench warrant may trigger an additional fee that is added to the defendant's criminal justice debt.

- **License suspension.** In 43 states, driver's license suspensions are authorized or mandated for failure to pay.[86] License suspension can make finding or keeping a job hard, sometimes impossible. Driving on a suspended license can lead to additional fees and fines, along with incarceration.

- **Disenfranchisement.** In many states, disenfranchisement can be imposed on a discretionary basis or can even be a requirement of the criminal justice system. Thirty states continue to disenfranchise voters on the basis of wealth by requiring payment of all legal financial obligations for voting rights restoration, according to a new report from the Campaign Legal Center and the Civil Rights Clinic at Georgetown University Law Center.[87] This is effectively a modern-day poll tax, despite the 24th Amendment's promise of the right to vote without such a tax.[88]

- **Incarceration.** In almost all 50 states, a formerly incarcerated person may be reincarcerated if he or she is found to be willfully delinquent in payments. A 2016 report by the *Atlantic* found that "the determination of whether an individual is 'willfully' trying to make payments is very much up to judges; some judges decide that a former prisoner's inability to get a job can constitute a lack of willful attempts to pay fees and fines — resulting in them ending up back in jail and facing even more fines."[89] This often leads to disparate outcomes for those charged with the same offense in different counties, or even in different courtrooms in the same courthouse.

- **Lower credit scores.** Criminal justice debt can also damage credit, impairing an individual's ability to obtain a loan or a mortgage or to secure housing. Additionally, such debt on a credit report can provide employers a backdoor means of learning whether an applicant has a criminal history. And wage and tax garnishment can discourage individuals from participating in legitimate employment, pushing them toward the underground economy.[90]

defendants are confined in a Travis County facility.[81] Austin reimburses the county for jail costs but does not report those costs to the state office charged with compiling data on the costs of fee and fine compliance.[82]

The disconnect between the government agencies that benefit from fees and fines and those that bear the costs of enforcement is widened when people are jailed for failure to pay. Counties pay 85 percent of local jail costs, and costs per inmate can range from $55 to $180 per day.[83] This can create a cost spiral: As states prod courts to impose fees because of the revenue they generate, they shift significant collection costs to counties. In turn, counties ask courts to fund more of their operations through additional fees to offset the costs of collecting the fees the state imposed.

IV. Key Variations Among Jurisdictions

This section examines key variations in collections practices and demographics among the 10 jurisdictions studied. Appendix A provides a detailed fiscal analysis for criminal fees and fines imposed by misdemeanor courts in each of the 10 jurisdictions.

A. Collections Practices

This study covers 10 counties in three states: Florida, New Mexico, and Texas. Figure 4 summarizes the range of collections practices used in each of these states, the available alternatives to payment, and how the ability to pay fees and fines is determined.

To enforce payment of fees and fines, nonpayment carries an escalating series of penalties in most counties. These practices can carry high costs for defendants and can also have profound effects on the amount of net revenue collected in each county. For example:

- While the full costs of collecting criminal fees and fines could not be determined, documented collection costs are significantly higher in counties where courts jail for nonpayment than in counties where courts do not. Although Florida courts do not jail for failure to pay, they do jail many who are arrested for driving on a suspended license, which may be a consequence of failing to pay fees and fines. Counties studied in New Mexico and Texas, where courts jail for nonpayment, had lower collection rates — and higher collection costs — than counties studied in Florida, although Florida also imposes counterproductive license suspensions that likely do not improve collections and result in costly jailing for driving with a suspended license.

- Statewide warrant roundups occur in Texas and New Mexico but not in Florida. These warrant roundups are a partnership between state and local law enforcement aimed at clearing uncollected debt for low-level offenses. They usually involve a public information campaign regarding old warrants and checkpoints where law enforcement personnel run people's license plates and IDs to check for outstanding warrants.

In theory, defendants in each county in this analysis have the same alternatives to payment. In practice, there is wide variation both between and within states in how often these alternatives are offered to defendants. In most jurisdictions, decisions regarding waivers, community service credits, incarceration for nonpayment, and tailored determinations based on ability to pay are left to the discretion of individual judges.

FIGURE 4

Collections Practices Across Jurisdictions

	TEXAS	FLORIDA	NEW MEXICO
Enforcement			
Referrals to Private Collection Agencies	Yes	Yes	Yes*
License Suspensions for Failure to Pay	Yes	Yes	No
Vehicle Registration Holds for Failure to Pay	Yes	No	No
Arrest Warrants Issued for Failure to Pay	Yes	No	Yes
Arrest Warrants Issued for Failure to Appear	Yes	Yes	Yes
Statewide Warrant Roundup Program	Yes	No	Yes
Collections Courts	No	No	No
Online Payment Options	Yes	Yes	Yes
Wage Garnishment for Restitution	No	Yes	Yes
Bank Account Garnishment for Restitution	Yes	Yes	Yes
Property Liens for Restitution	Yes	Yes	Yes
Alternatives to Payment			
Jail Credits	Yes	Yes	Yes
Community Service	Yes	Yes	Yes
Waivers for Fines and Fees	Yes	Yes	Yes
Payment Plans/ Installment Payments	Yes	Yes	Yes
Ability to Pay			
Ability-to-Pay Hearings Before Issuing Warrants	Yes	N/A	Yes*
Ability-to-Pay Determinations at Sentencing	Yes	Yes	Yes*

* Practices occur in some, but not all, courts or counties.

Source: New Mexico Criminal Code; Florida Criminal Code; Texas Penal Code.

FIGURE 5

Variations in Demographics, 2016

	TEXAS				NEW MEXICO			FLORIDA		
	Travis	El Paso	Jim Hogg	Marion	Bernalillo	Santa Fe	Socorro	Leon	Miami-Dade	Madison
Demographics										
Population	1,176,584	834,825	5,262	10,140	674,855	147,514	17,098	285,890	2,702,602	18,518
Population Density (per sq. mi.)	1,188	824	5	27	581	77	3	429	1,423	27
Poverty Rate	12.2%	22.7%	27.9%	22.6%	16.2%	14.0%	25.4%	19.0%	18.2%	31.9%
Median Income	$68,350	$43,244	$31,403	$36,938	$50,386	$57,945	$34,008	$49,941	$46,338	$31,816
Unemployment Rate	3.2%	4.9%	9.6%	7.0%	5.8%	5.2%	7.3%	4.5%	5.1%	5.2%
Percentage of White (not Hispanic or Latino)	49%	12%	6%	71%	39%	43%	35%	57%	14%	54%
Percentage of Black or African American	8%	3%	0%	24%	3%	1%	0%	31%	18%	39%
Percentage of Hispanic or Latino (of any race)	34%	82%	94%	4%	50%	51%	50%	6%	67%	5%
Collections										
Assessments Per Capita	$32.30	$12.82	N/A	N/A	$6	$8	$12	$4	$4	$14
Collections Per Capita	$22.89	$7.78	$45	$36	$3	$5	$7	$3	$3	$9
Collection Rate	71%	61%	N/A	N/A	45%	64%	58%	75%	79%	68%

Sources: U.S. Census Bureau (2013–2017 ACS 5-year estimates, 2016 SAIPE); Bureau of Labor Statistics; Florida Court Clerks & Comptrollers; New Mexico Judicial Information Division; Texas Collection Improvement Program; Texas Office of Court Administration; Brennan Center calculations.

B. Demographics

The jurisdictions in this analysis represent a wide range of racial, ethnic, political, and economic diversity. A summary of the demographics of each county is shown in figure 5. These demographic differences highlight how the system of fines and fees plays out differently across communities. These are some results comparing 2016 data across our target counties:

- Collections per capita were highest in Texas, where they averaged $28 per person across four target counties. In Florida and New Mexico, collections per capita were much lower, each at $5.[91]

- Assessments per capita were generally higher in rural areas. In Florida, rural Madison County had the state's highest assessments per capita. Likewise, in New Mexico, another rural county, Socorro, had the state's highest assessments per capita.[92] Unfortunately, the authors were unable to compare rural counties in Texas because assessment per capita data for rural counties was unavailable.

- In all target counties across the three states, rural counties had higher collections per capita than other counties. Governments in rural areas are frequently poorly funded and may be more reliant on revenue generated from fees and fines. This may lead rural governments to prioritize generating this fee and fine revenue. For example, in Texas, Jim Hogg and Marion Counties — both rural — had higher collections per capita than urban El Paso and Travis Counties. Compared with El Paso and Travis, Marion and Jim Hogg have a larger proportion of residents that face financial burdens, indicated by the counties' lower median household incomes. In Florida, Madison County also had the highest collections per capita in 2016. Those in rural Madison County face more financial burdens than their urban counterparts in Miami-Dade and Leon Counties. Finally, New Mexico's rural Socorro County had the highest collections per capita in 2016. As in rural counties in Texas and Florida, the residents of Socorro are more financially burdened than their counterparts in the urban Santa Fe and Bernalillo Counties, also both in New Mexico.

V. Statewide Analysis

This section provides a set of statewide analyses of criminal fees and fines imposed by both misdemeanor and felony courts in Texas, Florida, and New Mexico. Figure 6 shows statewide totals for assessments, waivers, and collections for misdemeanor and felony courts in each of the three states studied, as well as some enforcement costs in Texas and New Mexico, including jail costs.

A. Texas

Between 2012 and 2018, Texas criminal courts imposed as much as $8.7 billion in fees and fines, which is a projected estimate for a state in which most, but not all, courts report to the state.[93] In an average year, the amount of these legal financial obligations could total $47 for every person in the state — a significant source of revenue both for the state's general revenue fund and for local court programs.[94] Rather than raise this revenue from general taxes, however, Texas criminal courts assess criminal defendants in cases ranging from minor traffic infractions to serious felonies.

While Texas lacks statewide data, its Office of Court Administration collects information from more than 70 counties and most cities with a population greater than 100,000; this represents about 72 percent of Texas by population.[95] The data suggests that the average amount of fees and fines charged to each defendant between 2012 and 2018 was $268.[96] However, the size of criminal fees and fines imposed varies tremendously by court and type of charge. Additional findings include:

- In general, district courts, which handle mainly felony cases, assessed an average of $957 per defendant between 2012 and 2018. These courts, however, administered just 3 percent of the cases in which fees and fines were imposed.
- For county courts, which tend to handle serious misdemeanors, the average assessment per person was $606. The county courts administered 7 percent of fee and fine cases.
- For justice of the peace courts (justice courts) and municipal courts, which tend to handle traffic cases and some misdemeanors, the average fee and fine amount assessed were $222 and $213, respectively. Together these courts hear 90 percent of cases in which fees and fines were assessed.[97] Overwhelmingly, the criminal cases handled by justice and municipal courts are traffic violations — 87 percent in the justice courts and 78 percent in the municipal courts.[98]

FIGURE 6

Statewide Fiscal Analysis for Texas (2017), New Mexico (2016), and Florida (2017)

Thousands of dollars

	TEXAS	NEW MEXICO	FLORIDA
Total Fees and Fines Assessed			
Total Assessments	$763,058	$23,344	$427,737
Waivers	-$46,091	N/A	-$9,173
Community Service Credits	-$10,722	-$603	-$4,055
Jail Credits	-$140,476	-$4,358	-$403
Conversions to Liens	N/A	N/A	-$109,993
Other Credits	$0	-$1,800	$0
Total Adjustments	-$197,289	-$6,760	-$123,622
Net Amounts Owed	$565,769	$16,584	$304,115
Revenue Collected			
Collections	$465,391	$13,431	$167,865
Collections as a Percentage of Assessments	61%	58%	39%
Costs			
Collections Unit Costs	$16,314	N/A	N/A
Jail Costs	$134,170	$5,267	N/A
Total Costs	$150,484	$5,267	N/A
Costs as a Percentage of Collections	32%	39%	N/A
Revenue Minus Cost			
Net Gain	**$314,906**	**$8,164**	**N/A**

Source: New Mexico Judicial Information Division; Texas Collection Improvement Program; Brennan Center calculations.

FIGURE 7

Assessments, Cases, and Types of Cases by Type of Court, 2012-2018

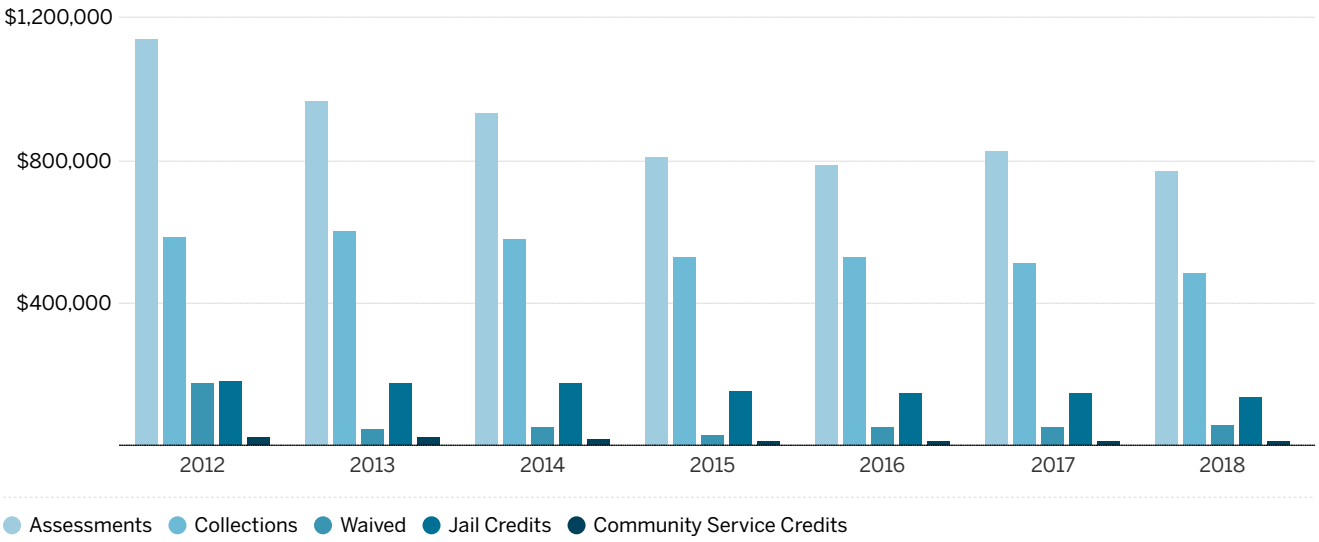
	AVERAGE ASSESSMENT	PERCENTAGE OF FEE/FINE CASES	COLLECTION RATE	MAIN TYPES OF CRIMINAL CASES
District Courts	$957	3%	33%	Serious Felonies
County Courts	$606	7%	49%	Serious Misdemeanors
Justice of the Peace Courts	$222	23%	82%	Traffic Cases
Municipal Courts	$213	67%	64%	Traffic Cases
All Courts	$268	100%	61%	-

Source: Texas Collection Improvement Program; Annual Statistical Report for the Texas Judiciary, Fiscal Year 2018.

FIGURE 8

Reported Texas Criminal Fee and Fine Assessments, Collections, Waivers, and Credits, 2012-2018

Thousands of dollars



Source: Texas Collection Improvement Program.

FIGURE 9

Average Texas Jail Credits and Cost of Incarceration, Associated with Jail Credits 2012–2017

	AVERAGE ANNUAL CREDITS	AVERAGE ANNUAL COST	PERCENTAGE OF TOTAL COST
District Courts	$5,129,365	$3,982,078	3%
County Courts	$37,811,999	$28,996,783	21%
Justice of the Peace Courts	$16,154,378	$13,443,971	10%
Municipal Courts	$109,324,473	$91,182,746	66%
Total	$168,420,216	$137,605,577	100%

Source: Texas Collection Improvement Program.

In an average year, Texas courts collect about 61 percent of the criminal fees and fines levied. That means 39 percent cannot be collected, and much of that will not ever be collected.

Between 2012 and 2018, Texas data indicates that 21 percent of fees and fines on average were credited.

- 14 percent of fees and fines was satisfied by time served in jail. This accounted for more than half of all amounts waived or credited.
- 6 percent was waived, usually for indigency or other hardship.
- 1 percent was satisfied by community service credits, usually given for some number of hours of work for a community nonprofit or other local organization.

Jail credits are an expensive proposition. For example, between 2012 and 2018, Texas criminal courts issued more than $1 billion in credits for jail time; this represents more than 10 million days of incarceration. Some of these credits were issued by courts to defendants already serving sentences for crimes. However, some credits were associated with jailing solely to satisfy outstanding court debts, a type of incarceration that serves no useful public safety purpose. Texas spent more than $825 million on these jail stays between 2012 and 2018, an average of more than $137 million a year.[99] There is no revenue associated with jail credits. For Texas courts and jurisdictions, jail credits only represent costs. For Texas courts reporting such costs, the average daily cost of jailing is $81.08.

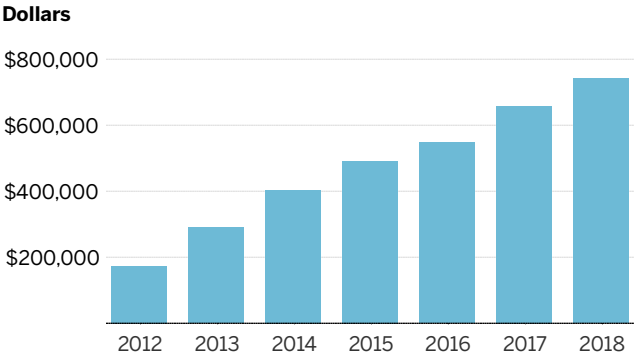
Not every case of jailing associated with the use of jail credits represents incarceration simply for the purpose of satisfying fees and fines; there may be other offenses involved beyond failure to pay. However, until recently, the use of both voluntary and involuntary jail stays to satisfy court debts was common. During the period studied, municipal courts, which handle traffic cases and low-level misdemeanors that do not typically involve jailing, granted the majority of jail credits statewide, suggesting that jail stays were used to satisfy fee and fine debt. In 2017 Texas passed legislation intended to limit involuntary jailing for nonpayment of fees and fines.[100] Data released by the Texas judiciary shows a decline in the number of people incarcerated for nonpayment from 523,059 in 2017 to 456,220 in 2018.[101] But this still represents the incarceration of nearly half a million people for inability to pay.

Significantly, despite the use of waivers and credits, there is also a growing balance of unpaid fee and fine debt in Texas. While there is no official accounting of total uncollected criminal fees and fines in the state, between 2012 and 2018 almost $742 million was not collected, credited, or waived, averaging $106 million in added debt per year. Without action by the Texas judiciary or legislature to remediate this debt, it will continue to grow.

One important consideration for the courts is that if fees and fines are not collected soon after they are imposed, the rate of collections falls to a comparative trickle, further highlighting that many of these debts are unlikely to be collected. For example, during 2016 courts took in 66 percent of their fee and fine collections in the first 30 days after imposition. After that, collections slowed to 5.5 percent in the next 30 days and continued to drop from there. This indicates that people who can pay these debts tend to pay them within the first 30 days; those who cannot will struggle to pay for a much longer period, and many older debts may never be paid.

FIGURE 10

Texas Growth of Uncollected Criminal Fees and Fines, 2012–2018



Source: Texas Collection Improvement Program.

FIGURE 11

Drop-Off in Collections Over Time in Texas, 2016

DAYS UNTIL COLLECTION	AMOUNT COLLECTED (IN MILLIONS)	PERCENTAGE COLLECTED
0 to 30 Days	$342.7	66%
31 to 60 Days	$285.6	6%
61 to 90 Days	$205.0	4%
91 to 120 Days	$160.8	3%
121 Days and Over	$115.6	22%

Source: Texas Collection Improvement Program.

Promising Reforms in Texas

>> **Over the past** several years, Texas has passed a series of reforms aimed at improving inefficient fee and fine collection practices that placed significant burdens on indigent defendants.

>> **Texas Senate Bill 1913** was passed in 2017 to alleviate criminal justice debt.[102] The law broadly requires judges to conduct ability-to-pay hearings, allows waivers or reductions of fees and fines, and offers alternatives to jail sentences.[103] This has led to a decline of 11.4 percent in arrest warrants, and data released in 2018 by the Texas Office of Court Administration shows a drop over a year in the number of people incarcerated for failure to pay fines from 523,059 to 456,220.[104]

>> **In 2019,** Texas built on Senate Bill 1913 and passed new legislation, Senate Bill 1637, to mitigate the burdens imposed on defendants facing unaffordable fees and fines.[105] The law changed the state's imposition and collection of fines and fees by requiring courts to administer ability-to-pay hearings upon notice to the court that defendants are unable to pay, though judges have the authority to waive the hearing if an inability to pay is already apparent.[106] If defendants are unable to pay, alternative options must be offered, including full or partial waivers of the fees and fines, deferred payment plans, or community service.[107] If community service is also shown to be an undue hardship (for reasons such as child-care responsibilities, health concerns, employment, or homelessness), then the fees and fines must be waived.[108] Under Senate Bill 1637, judges also have greater discretion to waive certain fees and are no longer required to issue warrants for failure to appear.[109] The bill came soon after a ruling by a federal judge in Texas in 2018 that it is unconstitutional to set bail without considering ability to pay.[110]

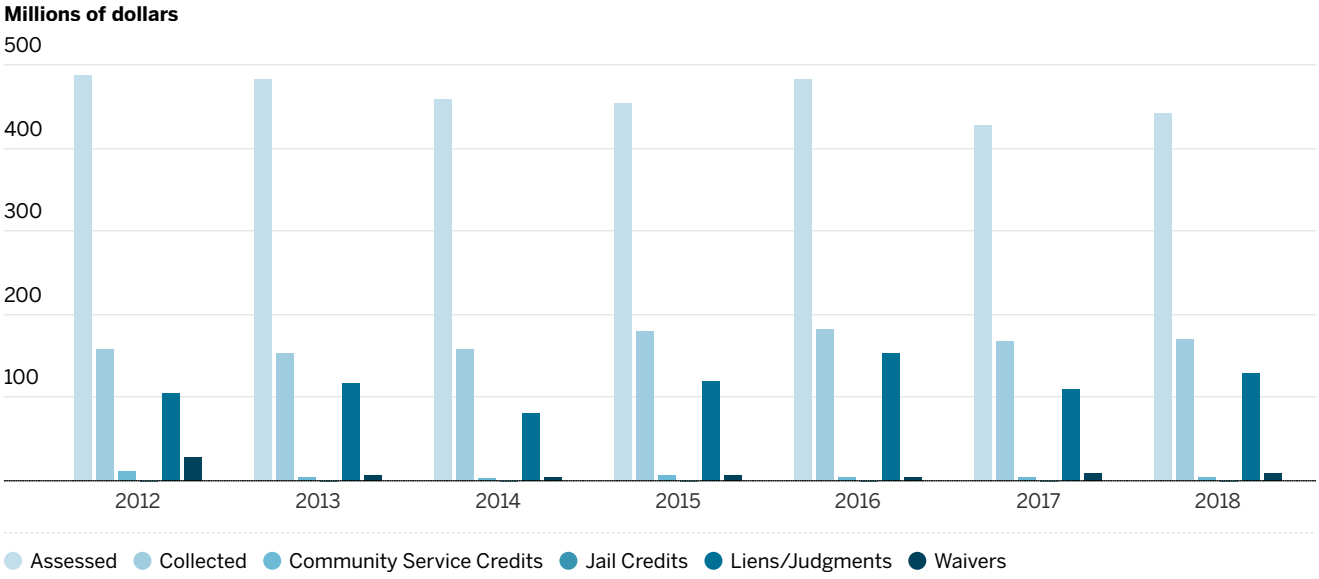
>> **Also in 2019,** lawmakers in Texas unanimously approved a bill to repeal the Driver Responsibility Program (DRP), limiting the practice of license suspensions for unpaid fines.[111] Under the DRP, which was enacted in 2003, drivers were penalized with hefty fines for traffic offenses ranging from speeding to driving without insurance, and if the surcharges were not paid within 105 days, their licenses were automatically suspended.[112] These fines recurred annually, and failure to pay or a failure to appear in court prevented drivers from renewing their licenses.[113] Some 1.8 million drivers with unpaid surcharges related to traffic violations have had their licenses suspended.[114]

>> **The DRP was created** to fund trauma centers in rural areas of the state that lacked access to emergency medical care due to underfunding.[115] However, most of the license suspensions under the DRP were not imposed for serious public safety violations, such as driving while intoxicated or speeding. Likewise, though the number of trauma centers in Texas has increased through DRP surcharges, less than 12 percent of the driving offenses generating these charges were of the type that send people to trauma centers.[116] In fact, the magnitude of license suspensions under the program has led to an increase in uninsured and unlicensed drivers.[117] Once the repeal of the DRP goes into effect, the decline in trauma center funding will be offset by an increase in minimum fines for traffic citations, from $30 to $50, and more than 1.5 million Texans will be eligible for license reinstatement.[118]

The full cost of collecting these debts is unknown, but it comes to at least 25 percent of revenue, based on incomplete reporting to the state, and an average of more than $120 million a year for incarceration of those with debt outstanding. The full cost is likely higher. Further, in 2015, the best recent year for compliance with cost-reporting requirements, Texas criminal courts spent $27.4 million in salaries, benefits, and other operating costs, and used 750 employees, for collection activities. Again, these costs understate what Texas spends on collection of criminal fees and fines. First, reporting is incomplete — many of the courts required to participate in data reporting for the state's Collection Improvement Program do not do so. Second, the program's reporting requirements cover only about 72 percent of the state's population. Third, these costs do not include expenses of other public employees involved in the collection of these debts (e.g., time spent by judges, public defenders, prosecutors, and other employees during court appearances; warrant service for nonpayment; and community corrections officers' time monitoring probationer and parolee compliance with fee and fine sanctions). Only with more complete reporting can the full cost to local, county, and state agencies be fully tallied.

FIGURE 12

Florida Criminal Fee and Fine Assessments, Collections, Waivers, and Credits, 2012–2018



Source: Annual Assessments and Collections Reports, Florida Court Clerks & Comptrollers Association.

B. Florida

Between 2012 and 2018, Florida criminal courts imposed $3.2 billion in fees and fines, an annual average of $22 for every person in the state.[119] This revenue is used to fund criminal justice and local court programs.[120] Rather than raise this revenue from taxes, Florida criminal courts assess these amounts on criminal defendants in cases ranging from traffic infractions to serious felonies. In fiscal year 2018 alone, these fees and fines totaled almost $442 million.[121]

In an average year, Florida courts collect only $168 million, or 36 percent of total criminal fees and fines assessed, meaning that nearly two-thirds, or $295 million, of court debts are simply not collected. On average, circuit courts collect just 27 percent of amounts assessed, while county courts collect 73 percent.

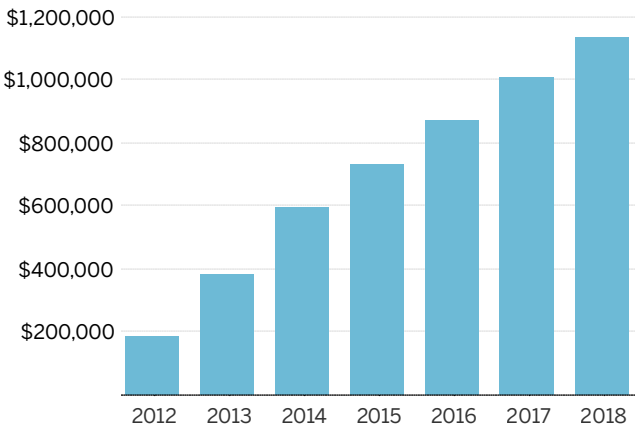
Florida courts appear to recognize that a significant portion of these debts cannot be collected. In fiscal year 2018, circuit courts treated 23 percent of criminal fees and fines assessed as "at risk" for collection because of indigency.[122] County courts considered 26 percent of assessments at risk for the same reason.[123]

However, courts only sparingly waive or offer credits against amounts owed. In the period studied, they waived just 2 percent of the total, credited 1 percent in exchange for community service, and credited less than 1 percent for jail time served. This totaled just $16 million a year on average.

By contrast, conversions to liens and civil judgments are used liberally by Florida courts. On average, 25 percent of fees and fines imposed are converted this way, even though Florida courts have low expectations for eventual payment. These civil conversions are used routinely by

FIGURE 13

Florida Growth of Uncollected Criminal Fees and Fines, 2012–2018



Source: Annual Assessments and Collections Reports, Florida Court Clerks & Comptrollers Association.

License Suspension Costs

>> Forty-three states use the threat of driver's license suspension to coerce the payment of amounts owed to courts.[127] Nationwide, more than 7 million people have had their driver's licenses suspended for failure to pay court or administrative debt, a number that could well be much higher because states do not uniformly report such data.[128] In Texas alone, 1.8 million people have had their driver's license suspended for failure to pay fines and fees.[129] In Florida, more than 1.1 million license suspension notices were issued in 2018, just for failure to pay court debts. As in most states, suspensions take place with no ability-to-pay determination, resulting in people losing their licenses with little opportunity to present their case.[130]

>> Driver's license suspensions impose a significant cost on those affected, as most Americans drive to work. Without a car, it's often hard to hold down a job. In a New Jersey study of suspended licenses, almost half of those affected lost their jobs and were unable to find another.[131] People face other hardships without a driver's license, including an inability to drive children to school or even to buy groceries. At a recent Texas Senate hearing on a surcharge program responsible for many driver's license suspensions for failure to pay, Sen. Don Huffines (R–Dallas) said the program led to a "permanent underclass" and split "society by those who can pay the fines and those who can't."[132]

>> There are also significant costs to state and local governments. Processing and executing license suspensions consumes staff time and other resources. Efforts to apprehend and punish those who drive without a valid license also impose a cost on police, courts, prosecutors, public defenders, and jails. While comprehensive data on these public costs is unavailable, examples in a few states suggest they may be substantial:

- In 2019, an Oregon legislative proposal to eliminate license suspension for failure to pay fines led the Oregon Department of Transportation to predict savings of almost $1 million by eliminating processing costs and the need to address drivers' questions about suspensions.[133]
- Colorado estimated its annual requirements for non-safety-related suspensions of driver's licenses under a new state code and found a cost of 18,646 man-hours to process and hold hearings involving 16,800 suspension cases — roughly nine full-time-equivalent employees.
- In Washington State, failure to pay a fine or appear in court on a moving violation currently results in driver's license suspension. In 2015 almost 38,000 cases of driving following such a suspension were prosecuted at a cost of $925 per case. More than 14,000 convictions were secured, many including jail time, at a net cost — less any fines revenue — of $182 per case. In total, the estimated cost to the state in 2015 alone was $37.5 million.[134] Additional fees imposed to offset these costs are expected to cover less than half the state's expenses: Washington forecasts revenue of $10.6 million in driver's license reinstatement fees and $4.7 million in hearing fees for 2019 through 2021.[135]

Reasons for Driver's License Suspension Notices in Florida (2018)

Delinquency on Child Support Payments	134,079
Failure to Pay Court Financial Obligations (Traffic, Misdemeanor, and Felony)	1,118,601
Other	387,446
Total Suspensions and Revocations	1,640,126

Source: Fines and Fees Justice Center.

circuit courts in felony cases, where they total 36 percent of assessed criminal fees and fines, and less so by county courts for misdemeanor cases, at 11 percent.

Besides indigency, another factor making criminal fees and fines difficult to collect is incarceration. In 2018 the circuit courts rated 55 percent of amounts imposed as at risk for collection purposes because the defendants were jailed or serving prison sentences.[124] The comparable figure for county courts was just 4.4 percent.[125] In total, for the factors the judiciary considers as impediments to collection, 86 percent of circuit court criminal assessments and 38 percent of county court assessments were rated "at risk" of non-collection in 2018.[126] In other words, of the $442 million assessed in 2018, two-thirds, or $295 million, was considered uncollectible by the courts.

With little use of waivers and credits, defendants in

Disenfranchisement in Florida

>> In 2018, Florida voters passed Amendment 4, a historic initiative restoring voting rights to the 1.4 million people in the state with past felony convictions.[136] Minorities, especially black and low-income people, were vastly overrepresented in this group. But in May 2019, Florida enacted a law requiring they pay all fees, fines, and restitution in order to be eligible to vote again.[137] The average income of the formerly incarcerated people who registered to vote between January and March of 2018 is nearly $15,000 below that of an average Florida voter.[138] Disenfranchisement for failure to pay court debts disproportionately removes the poor from voter rolls, depriving them of a voice in their government.

Florida face a growing balance of fee and fine debt. While the total amount of uncollected criminal fees and fines in the state is unknown, an average of more than $162 million a year was added to the balance between 2012 and 2018, for a total of more than $1.1 billion over the seven-year period. Without action by the Florida judiciary or legislature to remediate this debt, it almost certainly will continue to grow. While Florida courts appear to recognize that indigency poses a problem for collections, extremely low usage of indigency waivers and community service credits fuels spiraling uncollected court debt that serves neither the courts nor those held liable for unpaid amounts.

The cost to Florida of collecting criminal fees and fines is unknown. With no systematic collection and reporting of data, it is impossible to tally the costs for the courts, the law enforcement agencies that perform warrant service or enforcement of driver's license suspensions due to nonpayment, or probation and parole services that must remind their clients of payment requirements.

C. New Mexico

Between 2012 and 2016, New Mexico's district, magistrate, and metropolitan courts assessed an estimated $113 million in fees and fines. In an average year, this amounts to about $54 for every person in the state.[139] While data for county courts is unavailable, even this partial total is significant, coming to more than $23 million in 2016 alone.

- Magistrate courts, which handle mainly misdemeanor and traffic violations, assessed an average of $16,219,194 per year between 2012 and 2016. These courts handled, on average, 70 percent of the cases in which fees and fines were imposed.

- District courts are courts of general jurisdiction handling a wide range of cases. These courts assessed an average of $1,712,418 per year and administered 6 percent of fee and fine cases on average.

- The Bernalillo Metropolitan Court combines the county's municipal and magistrate courts in a single court serving New Mexico's most populous county. The court assessed an average of $4,698,242 per year and administered 24 percent of the state's fee and fine cases on average.

The authors observed the following yearly averages for 2012 through 2016:

- Of the $1.7 million assessed in district courts, $326,462 was converted into credits and only $298,000 was collected, leaving $1,088,111 uncollected.

- Magistrate courts had the highest amount of fee and fine activity. Of the approximately $16.2 million in fees and fines imposed, $3,332,494 in credits were awarded and $10,609,152 in fees and fines were collected, leaving $2,277,549 uncollected.

- The Bernalillo Metropolitan Court awarded $1,837,685 million in credits and collected $2,424,789 million in fees and fines, leaving $435,768 uncollected out of $4.7 million assessed.

On average, credits as a percentage of assessments was rather low for district and magistrate courts — at 19 percent and 21 percent, respectively — compared with 39 percent for the Bernalillo Metropolitan Court.

Jail credit was the most common type of credit applied by the magistrate and metropolitan courts. From 2012 to 2016, magistrate courts applied a total of $16.6 million credits, of which $11.3 million, or 68 percent, were jail credits. In the metropolitan court, there were $9.2 million credits, of which $6.5 million, or 71 percent, were jail credits. The amount of jail credits issued in district courts was relatively low from 2012 to 2016, totaling $9,709. Across the district, magistrate, and metropolitan courts from 2012 to 2016, a total of $17,835,136 in jail credits was issued. This corresponds to 300,502 days in jail — which cost a total of $21,814,692.[140]

Although credits and waivers are supposed to reduce the amount of debt owed, considerable amounts of uncollected fees and fines still accumulate each year. Figure 16 shows that uncollected fees and fines have piled up

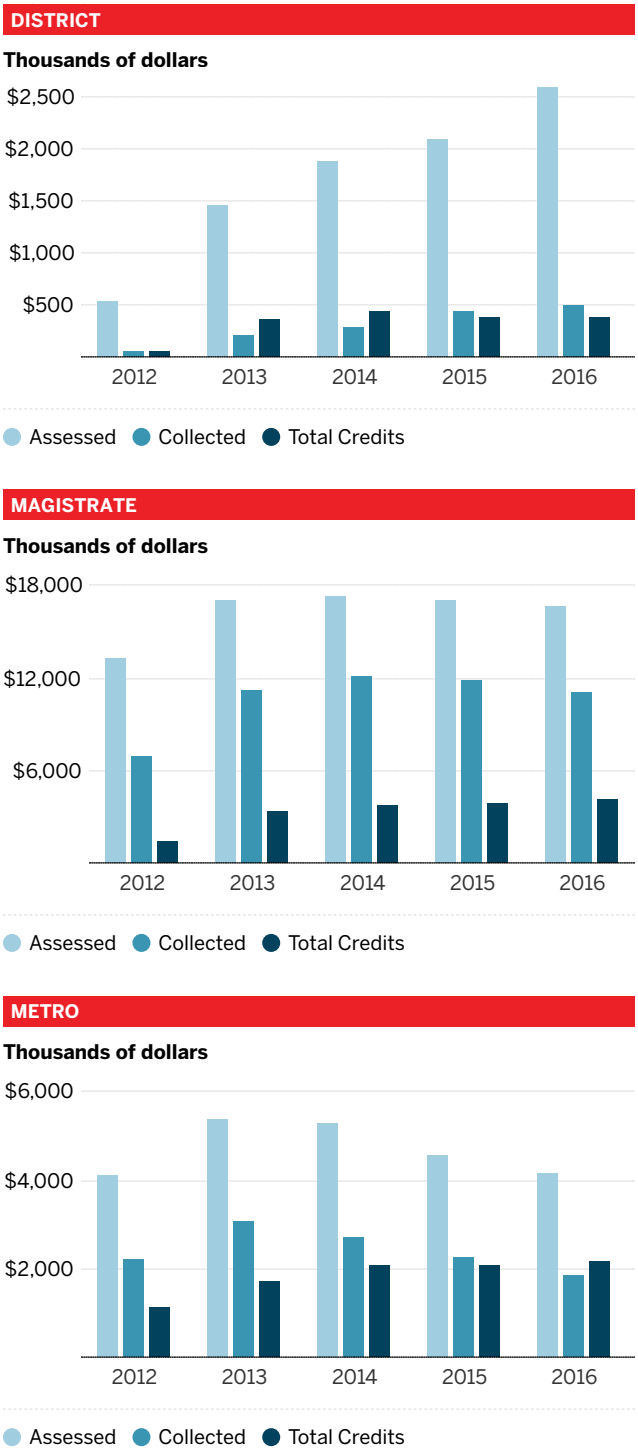
Reforms in New Mexico

>> Bernalillo Metropolitan Court has hosted "Safe Surrender" events for the past several years, inviting people to work with a judge to address their outstanding bench warrants and avoid the risk of arrest.[145] Prosecutors and defense attorneys are available at these one-day events for individual meetings ahead of appearances before a judge. New Mexico courts have promoted this opportunity — including through an active Twitter account — to encourage people to voluntarily appear and resolve pending issues.[146] The program does not provide a formal amnesty, but judges promise to resolve or at least offer new opportunities to settle amounts owed for every case.[147] People who appear on a traffic citation are almost guaranteed to have their cases resolved, while those appearing on warrants for public safety violations and other types of misdemeanors can expect to have an opportunity to set a future court date without being arrested.[148]

>> In 2010, New Mexico defendants spent a median of 147 days in jail while awaiting trial.[149] Judges often set the bail high to keep defendants in custody and avoid the risk of releasing dangerous people — though wealthier defendants or those using bail bond companies could still bail out.[150] In 2016 New Mexico voters approved Constitutional Amendment 1 to protect the right to pretrial release for non-dangerous defendants.[151] The new bail measures prohibit judges from jailing defendants simply because of financial inability to pay bail, and they allow a defendant to file a motion to request release on nonmonetary conditions.[152] Although the amendment also grants judges broad authority to deny bail to defendants charged with a felony who are deemed dangerous or flight risks, its provisions for reform are an important step in allowing future litigation against unfair monetary bail practices.[153] And though prosecutors have pushed back against the reforms, the New Mexico Supreme Court is committed to continuing on the path to bail reform and noted that crime rates appear to have dropped since the measure was implemented.[154]

FIGURE 14

New Mexico Criminal Fee and Fine Assessments, Collections, and Credits, 2012–2016



Source: New Mexico Judicial Information Division.

FIGURE 15

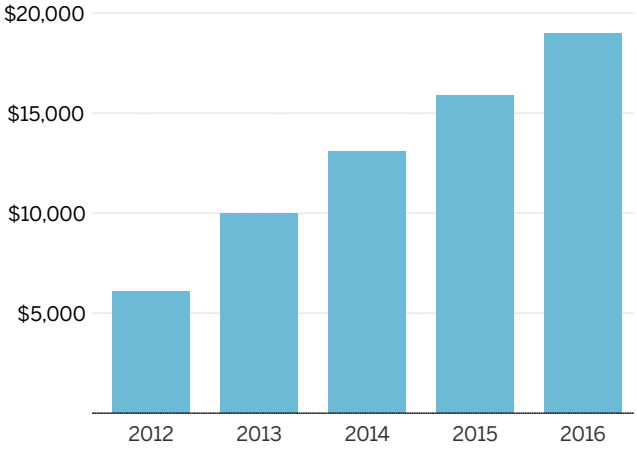
Comparison of Credits in New Mexico, 2012–2016

Source: New Mexico Judicial Information Division.

FIGURE 16

New Mexico Growth of Uncollected Fees and Fines, 2012–2016

Thousands of dollars



Source: New Mexico Judicial Information Division.

each year in New Mexico since 2012. The average increase was almost $4 million per year, with approximately $19 million uncollected in total.

The accumulation of uncollected debt is a problem for New Mexico. The rate of uncollected debt in counties throughout New Mexico correlates with the poverty rate within each county. This relationship underscores how fees and fines tend to be a serious problem for the communities that can least afford them. (The authors could not perform a similar analysis for Florida and Texas because of lack of available data. In Texas, revenue data for rural and less-populated counties is unavailable, which would bias the results. Likewise, for Florida, the authors did not have access to sufficient data at the county level.)

Not only do fees and fines appear to be an inefficient way to collect revenue, but they are also poorly targeted and perpetuate social and economic disparities for people who cannot afford to pay them. For example, Hidalgo, Luna, and Quay Counties have relatively high poverty rates as well as rather high amounts of uncollected fee and fine debt per capita between 2012 and 2016.[141]

- Hidalgo County, with a poverty rate of 24.8 percent, has $78.45 of uncollected fees and fines per person.[142]
- Luna County, with a poverty rate of 28.3 percent, has $47.96 of uncollected fees and fines per person.[143]
- Finally, Quay County, with a poverty rate of 23.9 percent, has $28.05 of uncollected fees and fines per person.[144]

By comparison, New Mexico has a statewide poverty rate of 19 percent and uncollected fees and fines of $9.30 per person.

VI. Conclusion

In recent years, states and municipalities have come to rely on criminal fees and fines, shifting the burden for funding courts, the criminal justice system — and, sometimes, general government operations — from the general public to defendants. But these fees and fines undermine rehabilitation and public safety by saddling people with debt just as they are reentering society. This report shows that they also fail at their primary objective: raising revenue.

The ten counties across Florida, New Mexico, and Texas studied here show that criminal fees and fines are an unreliable and inefficient revenue stream. They frequently burden the members of society who are least able to pay, and the costs of collection are many times greater than those of general taxation, effectively canceling out much of the revenue. Particularly costly is the practice of jailing defendants solely for their failure — or inability — to pay these debts.

While it is clear that fees and fines don't deliver, the full costs to jurisdictions certainly exceed those estimated here. Activities involved with fees and fines are spread across agencies and levels of government, and none of the agencies or jurisdictions studied here track the full scope of work involved in imposing and enforcing them. Only with a thorough accounting can jurisdictions appreciate just how inefficient fines and fees are as a source of revenue.

Appendix A: Fiscal Impact Analysis of Individual Jurisdictions

A. New Mexico

New Mexico has a population of 2 million, concentrated mostly in urban areas around Albuquerque, Las Cruces, Rio Rancho, and Santa Fe.[155] The state faces severe economic challenges, with a poverty rate of 20 percent, the second highest in the country.[156] A Republican governor was succeeded by a Democrat in early 2019, and New Mexico leans Democratic in national elections. The state's population is approximately 49 percent Hispanic or Latino, 37 percent white non-Hispanic, 10 percent Native American, and 2 percent black.[157]

Every New Mexico county except Bernalillo has three levels of criminal courts.[158] Municipal courts deal mostly with traffic violations, magistrate courts handle low-level misdemeanors and small claims such as debt collection and landlord-tenant disputes, and district courts oversee serious misdemeanors and felonies. In Bernalillo, the municipal and magistrate courts are combined into a single metropolitan court. Most fee and fine activity occurs in magistrate and municipal courts, but data for municipal courts is limited. Therefore, this report focuses on magistrate courts in Santa Fe and Socorro Counties and the Metropolitan Court in Bernalillo County.

When someone is unable to pay assessed fees and fines in New Mexico, a bench warrant is issued for that person's arrest and an additional $100 bench warrant fee is added to the court debts. This also triggers an automatic driver's license suspension. To reinstate the license, the defendant must pay $30 to the DMV. This means that, for each warrant issued by the court, most defendants actually owe $130.

Figure 17 provides an example of the fees and fines imposed on defendants in New Mexico.

FIGURE 17

Fees and Fines in New Mexico

Fines	Amount
Motor Vehicle Code Violation	Up to $300
Petty Misdemeanor	Up to $500
Misdemeanor	Up to $1,000
Universal Fees	
Domestic Violence Offender Treatment Fee	$5
Crime Victims Reparations Fee	$50
Magistrate Court Automation Fee	$10
Traffic Safety Fee	$3
Judicial Education Fee	$3
Jury and Witness Fee	$5
Brain Injury Services Fee	$5
Case-Specific Fees	
DUI Chemical Testing Fee	$85
DUI Community Program Fee	$75
Controlled Substances Testing Fee	$75
Public Defender Fee	$10
Mediation Fee	$5
Pre-prosecution Diversion Program Fee	$85/month
Misdemeanor Probation Fee	$15/month

Source: New Mexico Criminal Code.

1. Bernalillo County

Bernalillo County is home to New Mexico's largest city, Albuquerque. With nearly 675,000 residents, it is also the most populous county in the state.[159] Bernalillo's local government contains a mix of Democrats and

FIGURE 18

Bernalillo County Criminal Fee and Fine Fiscal Analysis, 2016

Thousands of dollars

Revenue Collected	
Assessments	$4,170
Credits	$2,193
Collections	$1,862
Percentage of Fees and Fines Collected	45%
Costs	
In-Court Costs	$40
Jail Costs	$2,138
Total Costs	$2,178
Cost as a Percentage of Collections	117%
Net Gain (+)/Loss (-)	**-$316**

Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

Republicans, but like the state as a whole, the county leans Democratic in national elections.[160] Albuquerque was established as a Spanish colonial outpost, and the county's history is reflected in its demographics: It is 50 percent Hispanic or Latino, 39 percent white non-Hispanic, 4 percent Native American, and 3 percent black.[161] While Bernalillo is home to some of New Mexico's wealthiest citizens, mostly in northeastern Albuquerque and the adjacent suburbs, it also has some of its poorest. The poverty rate in the county is 19 percent, roughly equal to that of the state overall.[162]

Two courts with criminal jurisdiction operate in Bernalillo County — the Bernalillo Metropolitan Court and the Second Judicial District Court. The metropolitan court, which handles traffic and misdemeanor cases, generates the greatest fee and fine volume and is the focus of this analysis. The district court handles felonies.[163]

While the docket changes each day, custody and traffic arraignments occur daily. Once someone is arrested, court rules require arraignment within 24 hours.[164] After the judge arrives, each court appearance typically lasts between two and five minutes. Fees and fines are rarely mentioned, and no indigence determinations were observed in the courtroom. After appearing before the judge, the defendant meets with a clerk who explains the fee and fine obligations, how to convert them to community service hours, the date by which they must be paid, and any other requirements. One judge told the authors that access to community service conversions has greatly reduced the amount of paperwork for clerks and defendants and has reduced instances of people failing to pay.

If a person fails to make payments, the court issues a warrant. When that person next comes into contact with the justice system, as in a traffic stop, he or she is taken into custody. Typically, arraignment occurs the day following the arrest, at which point a jail credit is applied to this person's fees and fines, the outstanding amount is waived, and he or she is released.

Figure 18 shows the results of the Brennan Center's fiscal analysis for traffic and misdemeanor criminal fees and fines imposed by the Bernalillo Metropolitan Court for fiscal year 2016. The $2.2 million cost estimate for 2016 is conservative because of the difficulty of determining some collections and related law enforcement costs (e.g., for warrant service, arrest, and processing).

Key findings:

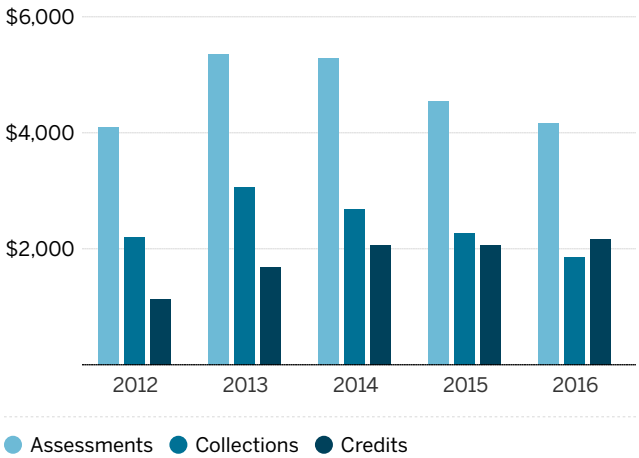
- Court and jail costs for imposing and collecting fees and fines from Bernalillo Metropolitan Court were $2.178 million in 2016, or 117 percent of what ultimately was collected.[165]

- In 2016 the Bernalillo Metropolitan Court assessed more than $4.1 million in criminal fees and fines. Nearly $2.2 million was written off, either through waivers or credits for time served in jail or community service. Of the remainder, close to $1.9 million

FIGURE 19

Bernalillo County Assessments, Collections, and Credits, 2012–2016

Thousands of dollars

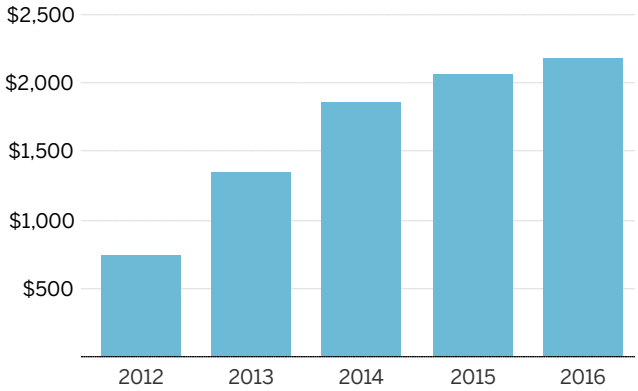


Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

FIGURE 20

Bernalillo County Growth of Uncollected Criminal Fees and Fines, 2012–2016

Thousands of dollars



Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

was ultimately collected. However, more than $2.1 million was spent on collections activity; therefore, the collected amount reflects a net loss of $316,000.

- The authors estimate that approximately $40,000 was spent on the portion of court proceedings dealing with fees and fines.

- Bernalillo County expended an estimated $2.138 million for jailing due to unpaid fees and fines in 2016. In addition to being costly, jailing is an example of cost shifting from the state-funded Bernalillo Metropolitan Court to local county taxpayers.

Figure 19 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, criminal fees and fines collected fall short of the amounts assessed; on average, 9 percent of the fees and fines charged to defendants went uncollected and not credited or waived between 2012 and 2016. Further:

- Fee and fine assessments and revenues have fallen for Bernalillo County in recent years.

- Assessments have fallen faster than revenue, meaning that a larger portion of fees and fines are being collected each year.

Figure 20 depicts how uncollected amounts in Bernalillo County have grown since 2012.

New Mexico courts do not produce reliable estimates of the total amount of criminal fees and fines that remain uncollected. Therefore, figure 20 shows only the amount of uncollected debt that has accumulated since 2012. This represents just a small subset of the total not collected. Even so, these amounts are considerable.

Uncollected amounts rose between 2012 and 2016, although the rate of growth of uncollected criminal fees and fines appears to have slowed during this period. Much of this court-imposed debt will never be paid and will continue to pose challenges for the courts because of its uncollectibility. Tracking these uncollectible amounts imposes costs on the courts for information technology and personnel. More significantly, enforcing warrants and scheduling repeated hearings for failure to pay takes up valuable law enforcement and court time that would be better spent on serious criminal matters.

2. Santa Fe County

Bordering Bernalillo County is Santa Fe County, which contains New Mexico's capital city. It is smaller than Bernalillo in area, and its population of just under 150,000 makes it the third-most-populous county in New Mexico.[166] Like Bernalillo, its electorate leans Democratic.[167] The county is about 51 percent Hispanic or Latino, 43 percent white non-Hispanic, 2 percent Native American, and 1 percent black.[168] The area around the state capitol attracts many professional workers, and the county is wealthier than the rest of the state. The poverty rate is 14 percent, the lowest of the three New Mexico counties included in this report.[169]

Santa Fe County is home to the New Mexico Supreme Court, a court of appeals, a district court, a magistrate court, a municipal court, and a probate court. The district court has general jurisdiction over civil and criminal matters, and the magistrate court handles various low-level civil matters.

Arraignments of defendants held in custody take place via video feed to the county jail. One court employee told the Brennan Center in 2018 that seven people were in custody that day solely because of failure to pay fees and fines.

Defendants are able to pay fees and fines in three ways. They can pay the amount in full or through a payment plan, perform community service and reduce their debt at a rate equal to the federal minimum wage ($7.25 per hour), or serve jail time to earn a credit of $58 per day (equal to eight hours of the federal minimum wage).

Jail time is considered only if a person fails to make payments or complete community service. The court then sends a notice to appear for a hearing. If the person misses the hearing, the court will issue a warrant for arrest for failure to pay. One judge estimated that about half of the people who receive a notification return to court and the other half are taken into custody.[170]

Figure 21 represents the Brennan Center's fiscal analysis for misdemeanor criminal fees and fines for Santa Fe County

FIGURE 21

Santa Fe County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

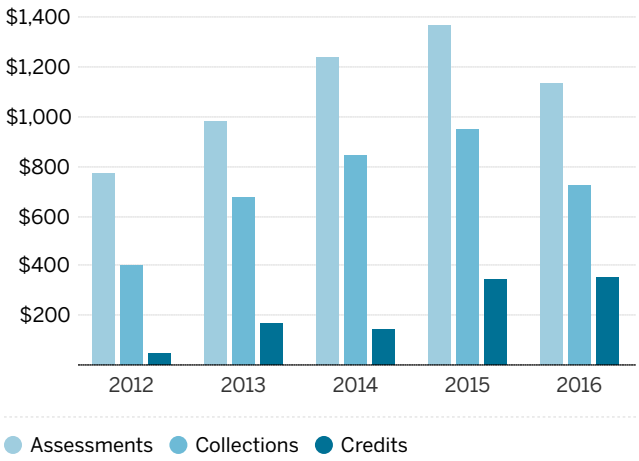
Revenue Collected	
Assessments	$1,138
Credits	$352
Collections	$724
Percentage of Fees and Fines Collected	64%
Costs	
In-Court Costs	$54
Jail Costs	$239
Total Costs	$294
Cost as a Percentage of Collections	41%
Net Gain (+)/Loss (-)	**$430**

Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

FIGURE 22

Santa Fe County Assessments, Credits, and Collections, 2012–2016

Thousands of dollars

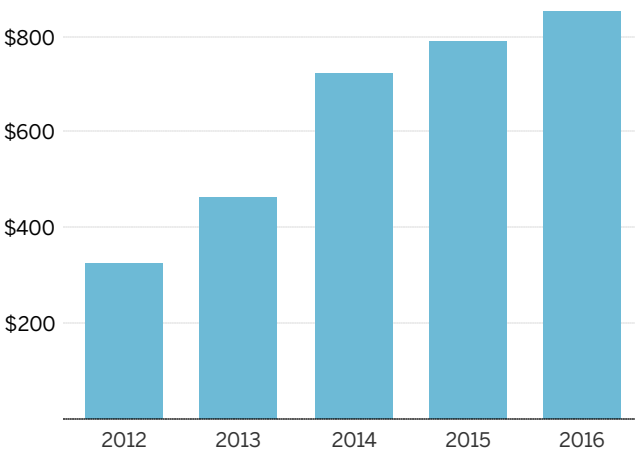


Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

FIGURE 23

Santa Fe County Growth of Uncollected Criminal Fees and Fines, 2012–2016

Thousands of dollars



Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

for fiscal year 2016. The total collection cost estimate of $294,000 is a conservative one because of difficulties in determining some collections and related law enforcement costs (e.g., for warrant service, arrests, and processing).

Key findings:

- In 2016, the Santa Fe Magistrate Court assessed about $1.1 million in criminal fees and fines, of which $352,000 was written off through credits, such as community service and jail. Of the remaining $786,000, $724,000 was ultimately collected.

- At least $294,000 was spent on collections activity in court and jailing alone. The collected amount therefore reflects at most $430,000 in net gain, 38 percent of what was originally assessed.

Figure 22 shows how criminal fees and fines imposed, collected, and credited have changed over time in Santa Fe County.

As shown, criminal fees and fines collected do not approach the amounts assessed. On average, from 2012 to 2016, 17 percent went uncollected and was not credited or waived. Further:

- While fee and fine assessments and collections increased through 2015, both were lower in 2016, highlighting the unreliability of criminal fees and fines as a source of funding.

- Santa Fe County offered a lower amount of credits to defendants than Bernalillo County.

Figure 23 depicts how uncollected amounts in Santa Fe County have significantly grown since 2012.

Reliable estimates of the total amount of criminal fees and fines that remain uncollected are unavailable. Therefore, figure 23 shows only the amount of debt that has accumulated since 2012. This represents just a small subset of the total not collected. Even so, these amounts are considerable: uncollected amounts rose by $528,367 between 2012 and 2016. Much of this court-imposed debt will never be paid.

3. Socorro County

With a population of just over 17,000, Socorro County is the smallest New Mexico county in this analysis.[171] Just over half of the residents in this rural county live in the town of Socorro, 75 miles south of Albuquerque. Much like the rest of the state, Socorro County leans Democratic in county and state elections.[172] The county's population is approximately 50 percent Hispanic or Latino, 35 percent white non-Hispanic, 10 percent Native American, and 1 percent black.[173] With a poverty rate of 25 percent, Socorro is one of the poorest counties in New Mexico and the poorest in this analysis.[174]

The staff of the Socorro Magistrate Court consists of one elected judge and five clerks. The judge was previously the county sheriff, a position he first held at the age of 25. While he has an extensive background in law enforcement, he does not have a law degree. During busi-

FIGURE 24

Socorro County Criminal Fee and Fine Fiscal Analysis, 2016

Thousands of dollars

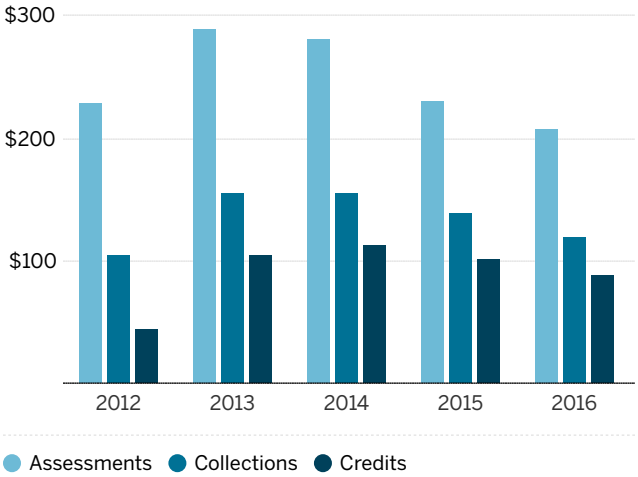
Revenue Collected	
Assessments	$207
Credits	$88
Collections	$119
Percentage of Fees and Fines Collected	58%
Costs	
In-Court Costs	$14
Jail Costs	$81
Total Costs	$96
Cost as a Percentage of Collections	80%
Net Gain (+)/Loss (-)	**$24**

Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

FIGURE 25

Socorro County Assessments, Credits, and Collections, 2012–2016

Thousands of dollars



Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

ness hours, three clerks work at windows in the lobby. In the mornings, particularly before court starts at 9:00 a.m., the clerks are kept busy by defendants checking in and people making payments. When asked, one clerk said that her entire job revolves around court costs.

According to the clerks, nearly all defendants enter into payment plans to pay their fees and fines. It is rare for a defendant to pay in full at the time of assessment. The standard payment is $50 per month, although clerks have the discretion to lower this amount. Still, the clerks estimate that 60 to 70 percent of people miss payments and are issued bench warrants.

In the courtroom on a day when a Brennan Center staff member was present, the magistrate judge asked each defendant how much he or she would be able to pay. Some defendants expressed an inability to pay anything at all. Many stated that they were unemployed and had no income, and others said they earned no more than $40 per month. Still, community service was not initially offered as an option to most defendants. Rather, they were entered into payment plans, with some payments as low as $10 per month. The judge repeatedly instructed defendants to contact the court if they would be unable to make a payment deadline.

Community service was granted only to those defendants who specifically requested it. Of 24 cases observed in which costs were assessed, only three defendants did so. Two requests were granted and the third was denied, though that defendant's monthly payment was reduced. When conversions to community service were granted, community service hours were credited at the federal minimum wage of $7.25 per hour.

If a defendant misses a payment for a third time, the magistrate judge may charge the defendant with failure to comply and hold that person in jail. Jail time is credited against court fees at $58 per day. As the former county sheriff, the current judge is aware of the high daily cost of jailing and said that the county would "rather make money than lose money." Still, in the week observed by a Brennan Center staffer, he sentenced two defendants to jail time for "willfully refus[ing] to pay court costs or perform community service." One of them was sentenced to 10 days.

Two days per week are dedicated to bench trials and case management, meaning that state prosecutors, public defenders, and law enforcement officers appear in court. Two public defenders handle the bulk of these dockets. One public defender expressed concern about the length of time that cases "languish on" until defendants are able to pay off their debt and ultimately close their cases. She estimated that 10 percent of her clients complete community service and that 30 to 40 percent serve jail time for court costs.

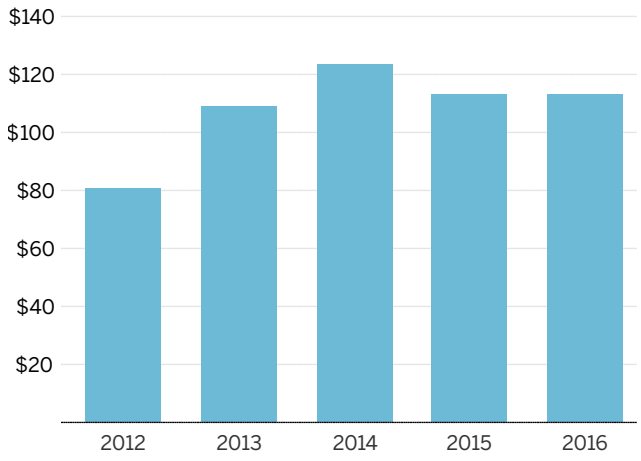
For his part, the magistrate judge is under no illusions about the role of court costs in his courtroom. "This is a money-making machine," he said. "We collect $20,000 per month, easy. The state just wants to make money. It's tough on [the defendants], man."

Figure 24 represents the Brennan Center's fiscal analysis of misdemeanor criminal fees and fines for Socorro County for fiscal year 2016. The cost estimate of $96,000

FIGURE 26

Socorro County Growth of Uncollected Criminal Fees and Fines, 2012–2016

Thousands of dollars



Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

is conservative, as many potential costs of collections and law enforcement could not be tallied.

Key findings:

- In 2016, the Socorro Magistrate Court assessed about $207,000 in criminal fees and fines.
- The magistrate court wrote off $88,000 through either waivers or credit given for jail time or community service. Virtually all of the remainder, $119,000, was collected.
- At least $96,000 was spent on jail costs and collections activity in court, so the collected amount reflects at most a net gain of $24,000, 11 percent of what was originally assessed.

Figure 25 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, criminal fees and fines collected fall far short of the amounts assessed. On average for 2012 to 2016, 9 percent went uncollected and was not waived or credited. Figure 26 depicts how uncollected amounts in Socorro County have grown significantly since 2012.

There are no reliable estimates of the total amount of criminal fees and fines that remain uncollected. Therefore, figure 26 shows only the amount of debt that has accumulated since 2012. This represents just a small subset of the total not collected. Even so, these amounts are considerable.

- Uncollected amounts rose by about $33,000 between 2012 and 2016. Much of this court-imposed debt will never be paid.
- Growing balances of uncollected court debt strain the courts as well as local law enforcement. In fact, an officer in Socorro's police department told the authors that they stopped processing many warrants requested by the courts for nonpayment.[175]

B. Florida

Florida has a population of more than 20 million and a poverty rate of about 14 percent.[176] With more than 90 percent of its population living in cities, it is the most urban state included in this report. Florida has leaned slightly Republican in the most recent national and state elections.[177] Its population is approximately 54 percent white non-Hispanic, 26 percent Hispanic or Latino, and 17 percent black.[178]

COURT FEES AS FUNDING

Between 1996 and 2007, the Florida legislature added more than 20 new categories of legal financial obligations, including surcharges and fees, many of which were increased after their introduction.[179] Florida courts have increasingly come to rely on fees to finance core government functions and have removed exemptions for indigence.[180] This is still felt today: across the state, court clerks' offices are funded primarily through fines and fees.[181] As most court fees are statutorily imposed, Florida judges have little to no discretion to waive them, even for indigent defendants.

The shift toward reliance on court fee collections came with a 1998 amendment to the Florida Constitution. The amendment absolved counties and municipalities of fiscal responsibility for clerks of court, requiring that clerks draw on revenue collected from court-imposed fees.[182] In effect, this amendment made the fiscal viability of Florida clerks dependent on their ability to collect fees and fines. As one circuit court public defender described it, "Our clerks are underfunded, and this is their blood. It's pretty much their source of funding, so they're in a bind."[183] In fact, collections rates are baked in to their performance evaluations. When a county clerk of court drops below a specified collections rate, the office must submit a corrective action plan to the clerk of state and file it with the state legislature.[184]

This funding scheme has a distorting effect on court operations. In the observed counties, clerks of court reported employing substantial numbers of full-time staff whose sole mandate is to collect court-imposed fees.

One former public defender noted that clerks are not the only parties interested in maintaining this system, which she described as "a little unholy." Pieces of the collections pie also go to courts, public defenders, prosecutors, and even state general revenue.[185]

COLLECTIONS AGENCIES

Florida law requires clerks to refer court debts to collectors if not fully paid within 90 days. These firms are legally permitted to add surcharges of up to 40 percent.[186] One circuit public defender candidly described the collections agencies: "They're nasty as hell," he said. "They scare our clients to death."[187]

ABILITY TO PAY

The Florida Supreme Court has held that due process requires a judicial ability-to-pay determination when the state seeks to enforce collection and the defendant is subject to loss of liberty or property.[188] However, this principle is not always — and likely rarely — satisfied. Because an ability-to-pay inquiry is not required at the point when fines are imposed, clerks need to make these determinations during enforcement of collections. To compound the problem, this due process right may be lost with the use of collections agencies.[189] What is puzzling is that the vast majority of Floridians with court debts qualify for indigent defense. Presumably, the finding of indigency would indicate an inability to pay — yet this is not what happens for many.

Florida law authorizes, but does not require, judges to convert court debts to community service hours in cases of indigency.[190] These are typically credited at $7.25 per hour, the federal minimum wage. It is reported that clerks in some counties fail to notify defendants of this option or impose an additional processing fee for granting it.[191]

DRIVER'S LICENSE SUSPENSIONS

Driver's license suspension for failure to pay criminal fines and fees is a legally permitted and common practice in Florida, and one that is mandatory in noncriminal traffic cases.[192] In fact, in 2018 more than 1.1 million driver's license suspension notices were issued simply because of Floridians failing to meet court financial obligations.[193] Across Florida, more than 71 percent of driver's license suspension notices in 2018 were for failing to pay a court debt.[194] Licenses are often suspended automatically when cases are transferred to private collectors and are not restored until debts are paid in full. Suspensions disproportionately impact low-income defendants who are not able to pay their fees and fines upon assessment. In most cases, defendants are not afforded an ability-to-pay hearing prior to having their driver's license suspended.[195] While the language of the state law on license suspensions for criminal court debt permits discretion, it is the policy of the clerks of court to read it as mandatory, making suspensions automatic with failure to pay.[196]

Reinstating a driver's license, by contrast, is not automatic. A person must obtain an affidavit from the clerk stating that payments have been satisfied or converted to community service. The affidavit then has to be taken to the DMV as proof of payment to obtain reinstatement. The DMV also imposes reinstatement fees that can reportedly add hundreds of dollars in additional costs.[197] Further, many people must work with multiple agencies to reinstate a license, most commonly the court clerk, DMV, and Department of Revenue.[198]

Some counties, notably Leon County, now hold driver's license reinstatement clinics. By assembling all relevant agencies, attorneys, and judges in one place, such clinics aim to streamline the process of regaining valid driving licenses. Leon County's first clinic attracted more than 1,200 attendees. Most, however, were unable to have their licenses reinstated, primarily because of the number of agencies involved in the process and the money required.[199]

FIGURE 27

Fees and Fines in Florida

Fines	Amount
Second-Degree or Noncriminal Misdemeanor	$500
First-Degree Misdemeanor	$1,000
Third-Degree Felony	$5,000
First- or Second-Degree Felony	$10,000
Life Felony	$15,000
Drug Trafficking	$25,000–$750,000
Universal Fees	
Misdemeanor & Violation Court Cost Fee	$20
Court Cost Clearing Trust Fund	$3
Crimes Compensation Trust Fund	$50
Fine and Forfeiture Fund	$60
Operating Trust Fund of the Department of Law Enforcement	$100
Crime Stoppers Program Fee	$20
Costs Incurred by Law Enforcement	$50
Misdemeanor Prosecution Fee	$50
Felony Prosecution Fee	$100
Case-Specific Fees	
Determination of Indigent Status Fee	$50
Cost of Representation Fee	$50
Traffic Offense Surcharge	5%
Teen Court Cost Fee	$3

Source: Florida Criminal Code.

FIGURE 28

Leon County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

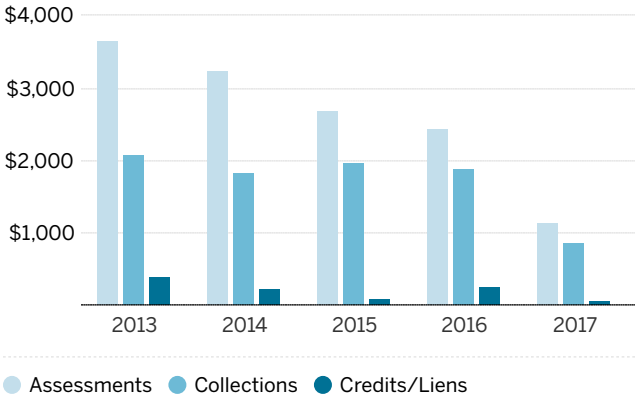
Revenue Collected	
Assessments	$1,148
Credits/Liens	$64
Collections	$858
Percentage of Fees and Fines Collected	75%
Costs	
In-Court Costs	$31
Cost as a Percentage of Collections	4%
Net Gain (+)/Loss (-)	**$827**

Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

FIGURE 29

Leon County Assessments, Credits, and Collections, 2013–2017

Thousands of dollars



Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

1. Leon County

Leon County sits on the Florida Panhandle and is home to Tallahassee, the state capital and a midsize city. The county population of approximately 285,000 is 57 percent white non-Hispanic, 31 percent black, and 6.1 percent Hispanic or Latino.[200] Approximately 19 percent of Leon County residents live in poverty, a rate slightly higher than for Florida overall.[201] The county has leaned Democratic in recent national and local elections.[202]

This research focused specifically on the Leon County Court, where five judges currently sit. The county court handles misdemeanor and criminal traffic cases. Like many lower-level criminal courts, the vast majority of the court's docket is composed of case management and first appearances.

Within the large court clerk payments office, clerks working from six windows report spending approximately half of their workday on matters related to court fees. A separate cashiering department with a large, full-time staff manages court fee collections.

For a week of proceedings observed by a Brennan Center staffer, a single judge presided over all criminal cases. Judges have no discretion to reduce statutorily imposed fees. Clerks stressed this point, and the observed judge emphasized his lack of discretion and his inability to defy or influence the legislature. Public defenders may request that non-mandatory fines be reduced or dismissed, but such motions appear to be rare.

For individuals offered plea deals, an assessment of court fees is included in the offer. In a few observed cases, this amount was found to be miscalculated and was later corrected by a clerk. For each plea entered, the judge asked how the defendant would like to pay the fees, often expressing sympathy as to the high amount. The overwhelming majority of defendants requested a payment plan. As of October 2018, 92 percent of defendants owing court fees in Leon County had entered into payment plans. The default payment for a criminal traffic offense is $50 per month. There is also a one-time fee to create a payment plan of $25, with a lower monthly alternative option.[203]

Clerks draft all initial payment plans. The judge informed nearly every defendant that the clerk would be flexible to accommodate their ability to pay, often explaining that there was no expectation that they forgo necessities in order to make payments, particularly if they have children. According to the court manager, "Since we're a self-funded office, it gets a little hairy. We have to collect the money, but we also want to be mindful of what our customers are able to do without raking them over the coals." Florida law requires clerks to offer "reasonable" payment plans, with a presumption that 2 percent of a person's monthly income is a reasonable amount. However, it is not clear that clerks abide by the standard, and the judge privately conceded that he does not conduct formal ability-to-pay hearings.[204]

Judges do have the discretion to grant community service in lieu of payments. In each case in which community service was granted, the defendant was given 30 to 45 days to complete the hours of service. Defendants who enter into payment plans also can later request to convert outstanding debts to community service. Clerks typically grant these requests. Still, waivers and community service credits are almost never used in Leon County. Overall, they satisfied just 3.3 percent of all assessments from 2013 to 2017.

The observed judge extensively warned defendants of the risks of missing payments or failing to complete community service hours, including the possibility of driver's license suspension and the addition of surcharges imposed by collections agencies — what he described in open court as a "parade of horribles." Judges have discretion to convert fines and fees to civil judgments, which prevents license suspensions and referrals to collection agencies. The judge exercised this discretion with some indigent defendants. Civil judgments accrue interest, however, and may harm an individual's credit score.

Figure 28 highlights the results of the Brennan Center's fiscal analysis for criminal misdemeanor and traffic criminal fees and fines for Leon County for fiscal year 2017. It includes a conservative estimate of the in-court costs of imposing and collecting fees and fines. It does not include costs associated with license suspension or other time spent on enforcement of fees and fines, because of the lack of available data. License suspension is the primary means of enforcement for unpaid fines and fees in Florida.

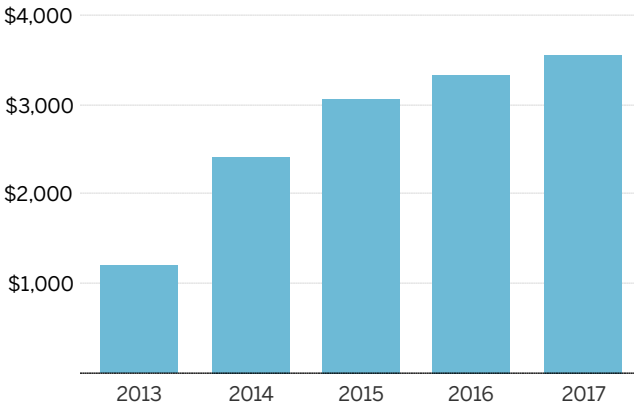
Key findings:

- In 2017, Leon County Court assessed about $1,148,000 in criminal fees and fines, of which $64,000 was waived either due to community service ($44,000) or for other reasons ($20,000). Of the remaining $1,084,000, $858,000 was ultimately collected. At least $31,000 was spent on collections activity, so the collected amount represents $827,000 in net gain, 72 percent of what was assessed.
- In-court costs of collection were relatively low but included a fair amount of license suspensions. Seventeen percent of the 163 cases observed involved license suspension. The observed costs of license suspension fall primarily on defendants and law enforcement, rather than on the court, though the authors were unable to estimate costs for enforcement incurred outside the courtroom.

FIGURE 30

Leon County Growth of Uncollected Criminal Fees and Fines, 2013–2017

Thousands of dollars



Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

Figure 29 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, criminal fees and fines collected fell far short of the amounts assessed. About 25 percent, on average, of the fees and fines charged to defendants from 2013 to 2017 went uncollected in Leon County. Assessments have dropped rapidly since 2013, perhaps putting even more pressure on court clerks. While collections held relatively steady through 2016, they dropped off dramatically in 2017.

Figure 30 depicts how uncollected amounts in Leon County have grown significantly since 2013.

Florida courts do not produce reliable estimates of the total amount of criminal fees and fines that remain uncollected. Therefore, figure 30 shows only the amount of uncollected debt that has accumulated since 2013. This represents just a small subset of the total not collected. Even so, these amounts are considerable. Despite rising collection rates, the balance of uncollected amounts rose by almost $3.6 million between 2013 and 2017. Much of this court-imposed debt will never be paid.

2. Miami-Dade County

Miami-Dade County is a large county at the southeastern tip of Florida. With a population of close to 2.7 million, it is the most populous county in Florida, and it contains Miami, the largest city included in this analysis. A diverse area with a large Cuban expatriate population, it is 67 percent Hispanic or Latino, 18 percent black, and 14 percent white non-Hispanic.[205] Miami-Dade County leans Democratic in national elections but elects both Democrats and Republicans at the state and local levels.[206] The county has a poverty rate of approximately 18 percent, just above that of the state as a whole.[207]

The county's court divisions include civil court, criminal court, juvenile services, probate and mental health court, small claims court, and traffic court. The Miami-Dade Criminal Court is composed of circuit criminal and county criminal courts. Generally, the county criminal court handles most misdemeanor and criminal traffic cases, while the circuit criminal court deals with felonies.

In traffic court proceedings observed by Brennan Center staff, the judge's goal was to move defendants through the process quickly so they could get back to work. Most defendants in court for criminal traffic arraignments were

there due to suspended licenses. In cases for which the defendant showed up, the judge often reduced a citation to a lesser offense. The judge was clearly concerned about the well-being of the defendants, at one point saying, "Knock it down to a parking ticket so he doesn't lose his license and his livelihood."[208]

The chief assistant public defender said that public defenders handle a vast number of license suspension cases, but Miami-Dade has no data on how many of these cases stem from failure to pay. Defendants who are not directed to a pretrial diversion program must pay a $50 public defender application fee if they need a public defender, as well as a $50 cost of defense fee.[209]

On the walls of Miami-Dade courtrooms are posters that detail the fines that a defendant might incur. For a DUI offense, there is a $500 fine plus a $622.25 surcharge. Criminal traffic fines vary according to the offense, with a $358 fine for driving without a valid license, a $476.25 fine for reckless driving, and a $411.25 fine for leaving the scene of an accident.

One judge explained various options defendants have regarding their traffic citations. For example, a defendant with many tickets or infractions may enter the Drive Legal Program, which, according to the judge, "helps close out cases, converts fines to community service, and is a good program for those with a financial situation." To participate, defendants must pay a program fee of $100. Another option is a pretrial diversion program, in which defendants pay a $200 fee for a four-hour class in order to dismiss a ticket. During the observed court sessions, most traffic arraignments resulted in pretrial diversion or admission to the Drive Legal Program. Miami-Dade courthouse officials are conscious of the financial burden that fees and fines impose on defendants and have sought to address the issue. Still, waivers and community service credits are almost never used in the county courts, satisfying less than 1 percent of all fees and fines assessed.

Figure 31 highlights the results of the Brennan Center's fiscal analysis for criminal fees and fines for Miami-Dade County for fiscal year 2017. The estimated in-court costs of imposing and collecting fees and fines are a small part of the total costs of fee and fine collection. Because license suspension is the primary means of enforcement for unpaid fines and fees in Florida, large costs of collection — such as DMV employee time, law enforcement time spent enforcing warrants, and costs of incarceration for those caught driving on a suspended license — were not measurable for this report and are not reflected in the costs listed in figure 31 or the discussion below.

Key findings:

- In 2017, the Miami-Dade County Court assessed more than $10 million in criminal fees and fines. About $12,000 was waived for community service. Just over $7.9 million was collected. At least $267,000 was spent on collections activity, so the collected amount represents $7.7 million in net gain, 79 percent of what was assessed.
- In-court costs of collection were relatively low but included a large proportion of license suspensions — 37 percent of the 49 cases observed. The costs of license suspension fall not just on the court but also on defendants, the DMV, and law enforcement.

FIGURE 31

Miami-Dade County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

Revenue Collected	
Assessments	$10,143
Credits/Liens	$12
Collections	$7,978
Percentage of Fees and Fines Collected	79%
Costs	
In-Court Costs	$267
Cost as a Percentage of Collections	3%
Net Gain (+)/Loss (-)	**$7,711**

Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

Figure 32 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, criminal fees and fines collected fall short of the amounts assessed. A large portion (34 percent, on average) of the fees and fines charged to defendants went uncollected each year between 2013 and 2017. Further, while assessments have dropped steadily since 2013, collections have not. In fact, collection rates have increased dramatically, from 58 percent in 2013 to 79 percent in 2017.

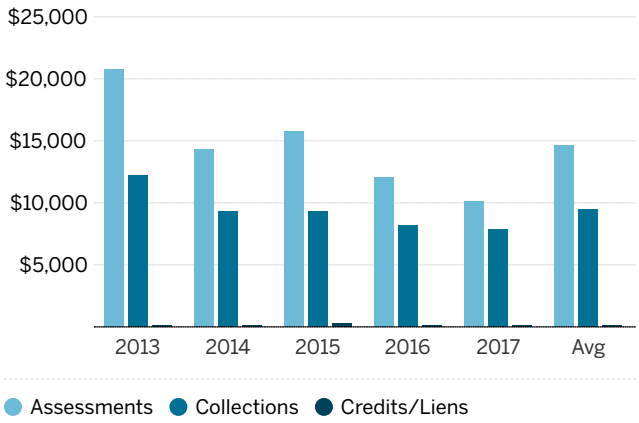
Figure 33 depicts how uncollected amounts in Miami-Dade County have significantly grown since 2013.

Florida courts do not produce reliable estimates of the total amount of criminal fees and fines that remain uncollected. Therefore, figure 33 shows only the amount of uncollected debt that has accumulated since 2013. This represents just a small subset of the total not collected. Even so, these amounts are considerable: uncollected amounts rose by almost $17.3 million between 2013 and 2017. Much of this court-imposed debt will never be paid.

FIGURE 32

Miami-Dade County Assessments, Credits, and Collections, 2013–2017

Thousands of dollars

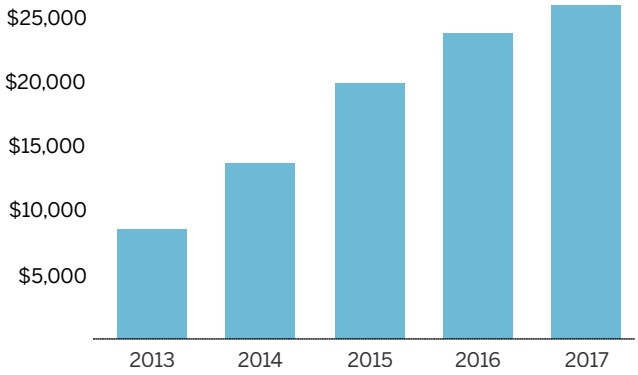


Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

FIGURE 33

Miami-Dade County Growth of Uncollected Criminal Fees and Fines, 2013-2017

Thousands of dollars



Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

3. Madison County

Madison County is a rural county on Florida's northern border with Georgia. It has a population of roughly 18,000 and is the poorest county in the state, with a poverty rate of more than 30 percent in 2016.[210] Madison is 54 percent white non-Hispanic, 39 percent black, and 6 percent Hispanic or Latino.[211] The county leans Republican in federal elections, and its voters are largely polarized along racial lines. In local races, voters elect both Democrats and Republicans.[212]

The Madison County courthouse is a small, historic building that serves as the centerpiece of the town of Madison. Beyond a one-block radius, the county's poverty becomes apparent.

The courthouse contains the clerk's office, the county judge's chambers, and two additional clerks' offices: one for misdemeanors, the other for felonies. Three clerks handle all criminal traffic and misdemeanor cases. Court for these dockets is held once every two weeks.

Approximately 100 criminal traffic and misdemeanor cases are handled in the county court per month, and a significant portion are related to failure to pay court-imposed fees. For September 2018, 17 people were scheduled to appear on charges related to failure to pay, with outstanding debts ranging from $200 to $400.[213] A clerk said this was typical, estimating that there are generally 20 such cases monthly. The clerk reported that more than half of the people who face court fees enter into payment plans. Although the county has a high rate of indigency, she said that she had never witnessed an ability-to-pay hearing.

In addition to these cases, the traffic clerk reported processing approximately 15 driver's license suspensions per month that result directly from failure to pay fees and fines.[214] The suspensions processed in September 2018 were triggered by payment deadlines that had passed two months prior, in July. The traffic clerk said she tries to allow people more time to pay before triggering the suspensions, suggesting that clerks have some discretion about when suspensions are issued.

The elected clerk of court is under no illusions about the ability of individuals within the jurisdiction to pay court debts. "Madison is a poor county," he said. "You can't squeeze much out of a stone."

Madison County stands out among Florida counties in that its courts do not rely as heavily on the collection of fees to support its operating costs. This is largely due to the highly active Madison County Sheriff's Office, whose

FIGURE 34

Madison County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

Revenue Collected	
Assessments	$257
Credits/Liens	$61
Collections	$174
Percentage of Fees and Fines Collected	68%

Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

deputies patrol the interstate running through the county and issue a comparatively large number of speeding tickets. (This practice has led to accusations of racial profiling against the Madison County Sheriff's Office.[215]) Most ticketed people do not contest such citations, resulting in a large source of income for Madison County.

As is true across Florida, fees are statutorily imposed. One public defender noted that it is rare for defendants to come away from a misdemeanor conviction in Madison County without at least $450 in fees.

Figure 34 highlights the results of the Brennan Center's fiscal analysis for criminal fees and fines for Madison County in 2017. It includes fee and fine amounts imposed by the Madison County Court as well as revenue collected; the authors were unable to obtain cost data for the court.

Key finding:

- In 2017, the Madison County Court assessed about $257,000 in criminal fees and fines. Of this amount, there was $61,000 in credits, of which 88 percent was reduced to a civil judgment or lien. Smaller portions were waived for community service or for other reasons. Some $174,000 was collected, 68 percent of what was assessed.

Figure 35 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, the criminal fees and fines collected fall well short of the amounts assessed. A large portion (30 percent, on average) of criminal fees and fines charged to defendants each year between 2013 and 2017 went uncollected. Further:

- Since 2013, roughly 1.2 percent of fees and fines assessed have been waived or satisfied through community service. Significant amounts of debt have been converted to liens in recent years.

- Unlike other Florida jurisdictions in this analysis, assessments have changed little in recent years. However, collection rates have varied widely, from 83 percent in 2015 down to as low as 43 percent in 2013, highlighting the unreliability of criminal fees and fines as a source of revenue.

Figure 36 depicts how uncollected amounts in Madison County have varied since 2013, while trending upward.

Florida courts do not produce reliable estimates of the total amount of criminal fees and fines that remain uncollected. Figure 36 therefore shows only the amount of uncollected debt that has accumulated since 2013. This represents just a small subset of the total not collected. Even so, these amounts are considerable. Uncollected debt rose by $80,000 between 2013 and 2017, and much of this court-imposed debt will never be paid.

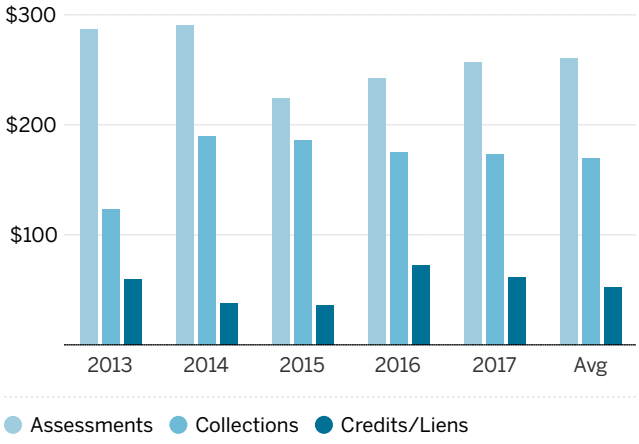
C. Texas

Texas has a population of just over 25 million, approximately 85 percent of which is urban. Its poverty rate is 17 percent, well above the 13.4 percent national rate.[216] The state has a Republican governor and has voted solidly Republican in national elections.[217] Its population is 44

FIGURE 35

Madison County Assessments, Credits, and Collections, 2013–2017

Thousands of dollars

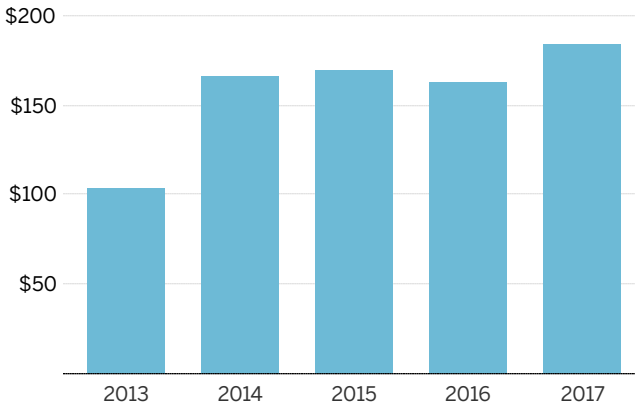


Source: New Mexico Administrative Office of the Courts; Brennan Center calculations.

FIGURE 36

Madison County Growth of Uncollected Criminal Fees and Fines, 2013–2017

Thousands of dollars



Source: Florida Court Clerks & Comptrollers; Brennan Center calculations.

percent white non-Hispanic, 38 percent Hispanic or Latino, and 12 percent black.[218] The counties examined here vary considerably in their demographics and follow diverse fee-and-fine practices.

In 2016, 95 percent of warrants issued in Texas were for unpaid fees and fines.[219] Texas has the nation's highest rate of incarceration for failure to pay, with a staggering 640,000 people jailed for this reason in 2016 alone.[220] This is done at great cost, and often in contradiction of state and federal law, which prohibits incarcerating people for fees and fines they are unable to pay. (The authors expect that this practice has diminished with changes to state law in June 2017, as discussed on page 26.)[221]

As of 2017, 1.8 million Texans' driver's licenses were suspended for failure to pay fees and fines.[222] Over a three-year period, more than 400,000 new criminal filings were related to driving on licenses suspended for nonpayment of traffic-related fines.[223]

FIGURE 37

Fees and Fines in Texas

Fines	Amount
Class A Misdemeanor	Up to $4,000
Class B Misdemeanor	Up to $2,000
Class C Misdemeanor	Up to $500
Universal Fees	
Services of Peace Officers	$0.15/mile traveled by officer
Jury Services Fee	$4
Court Clerk Services Fee	$40
Written Notice to Appear Issuance Fee	$5
Execution of Arrest Warrant Fee	$50
Court Technology Fee	$4
Juvenile Delinquency Prevention Fee	$50
Case-Specific Fees	
Bad Check Fee	$10–$500
Prosecutor Fee for Gambling Offense	$25
Class B Misdemeanor Court Cost Fee	$60
Driving While Intoxicated	$15
Taking and Approving a Bond	$10
Summoning a Jury	$8
Pretrial Intervention Program Fee	$60/month

Source: Texas Penal Code.

Texas's Office of Court Administration (OCA) maintained the Collection Improvement Program (CIP), which helped municipal and county courts collect fees and fines assessed to individuals convicted of misdemeanor or felony charges. CIP was canceled by action of the state legislature effective September 1, 2019.

Criminal courts in Texas are separated into four levels. District courts handle felonies and more serious misdemeanors, while less serious misdemeanors and traffic violations are split among county, municipal, and justice of the peace courts. Collection of legal debt is not always handled by the courts; probation and other collections offices bring in a large portion of fee and fine revenue.

Figure 37 illustrates the array of fees and fines an individual convicted of a misdemeanor in Texas may face.

1. Travis County

Travis County is a large county in central Texas that encompasses Austin, the state capital and county seat. Its population of 1.2 million is 49 percent white non-Hispanic, 34 percent Hispanic or Latino, and 9 percent black, making it less diverse than Texas as a whole.[224] The county votes Democratic in national elections, and relatively few local positions are held by Republicans.[225] The county has a larger proportion of wealthy residents than most of Texas. However, despite its high median income of $61,000, 13 percent of the county's residents live in poverty.[226]

FIGURE 38

Travis County Criminal Fee and Fine Fiscal Analysis, 2017

Thousand of dollars

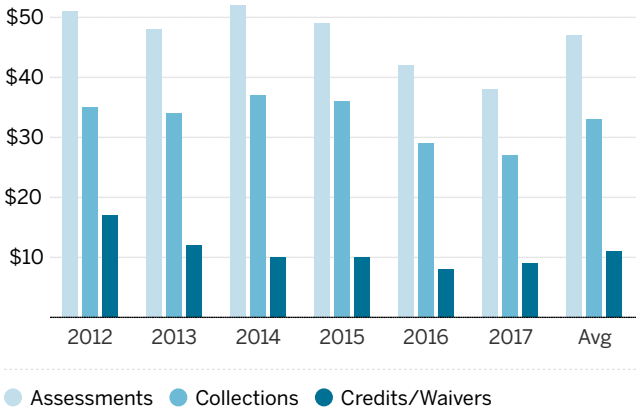
Revenue Collected	
Assessments	$38,006
Credits/Waivers	$8,694
Collections	$26,929
Percentage of Fees and Fines Collected	71%
Costs	
In-Court Costs	$3,186
Court Collections Costs	$1,610
Jail Costs	$4,627
Total Costs	$9,423
Cost as a Percentage of Collections	35%
Net Gain (+)/Loss (-)	**$17,506**

Source: Texas Collection Improvement Program; Brennan Center calculations. (Excludes waivers in June and August 2016 due to likely errors in reported assessments.)

FIGURE 39

Travis County Assessments, Credits, and Collections, 2012–2017

Millions of dollars

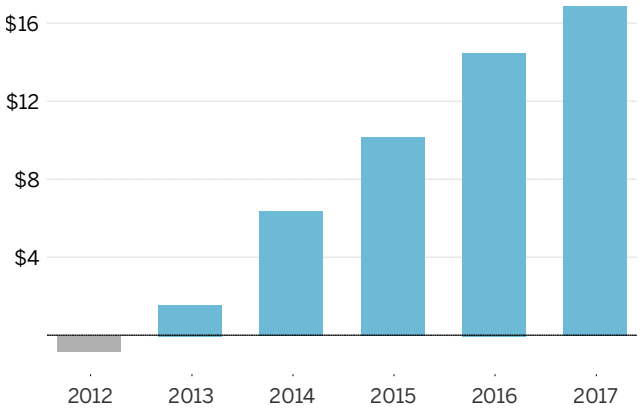


Source: Texas Collection Improvement Program; Brennan Center calculations.

FIGURE 40

Travis County Growth of Uncollected Criminal Fees and Fines, 2012–2017

Millions of dollars



Source: Texas Collection Improvement Program; Brennan Center calculations.

Within Austin, low-level criminal charges are divided among several courts. For this report, proceedings at the county and municipal court and the Downtown Austin Community Court (a special municipal court) were observed, and one justice of the peace was interviewed. Each of these courts applies its own policies and procedures to assess indigency.

COUNTY COURT

At the Blackwell-Thurman Justice Center in downtown Austin, county judges often conduct brief, informal ability-to-pay proceedings during plea hearings. Judges may ask defendants how much they can afford to pay, what their monthly income is, and whether they are responsible for dependents. One judge observed by the authors waived fees for defendants with income of less than 150 percent of the federal poverty level. The standard is 125 percent, but the judge recognizes that "people still struggle at 150 percent." A second judge was less inclined to waive fees, explaining, "I don't do it automatically. This is how we fund our department."[227]

The vast majority of fees and fines assessed result in payment plans or community service hours. Judges frequently impose costs in tandem with jail time so that fees and fines will be fully satisfied by the time the individual spends in jail.[228]

MUNICIPAL COURT

Municipal court judges rotate traffic, mitigation, and jury trial dockets. Criminal cases at the municipal court are limited to Class C misdemeanors, for which the maximum penalty is a fine.

Indigence determinations vary; one judge reported that he assesses individuals as indigent if their income is less than 200 percent of the federal poverty level. Individuals unable to pay fees and fines may make an additional appearance in mitigation, or "walk-in," court. Here, individuals can request an indigency hearing, adjustment of a payment plan, or conversion of costs to community service.

For nearly all defendants appearing in mitigation court, the presiding judge offers a choice between a payment plan and community service credited at $15 per hour. Most opt for community service. One single mother, referring to payments, explained, "It's really hard to do that with four kids." A number of those appearing in mitigation court have outstanding debts nearly a decade old.

JUSTICES OF THE PEACE

The jurisdictions of the five justices of the peace overlap with that of the municipal court, and they assess a substantial amount of fees and fines. Defendants may qualify for community service in lieu of payments, and if they can demonstrate that community service would also be onerous, the justices may waive outstanding debts.

One justice of the peace has adopted a discretionary practice of refraining from issuing warrants for arrests for failure to pay. Instead, the court issues letters to individuals requesting that they appear. The judge began doing this in the wake of the U.S. Justice Department's report on law enforcement practices in Ferguson, Missouri.[229]

DOWNTOWN AUSTIN COMMUNITY COURT

The jurisdiction of the Downtown Austin Community Court (DACC) encompasses the downtown Austin area. Homeless people make up the largest population served by this court, and many struggle with mental health issues. The court has a staff of 10 social workers who operate alongside the prosecutor and judge to provide restorative justice.[230]

DACC judges rely heavily on community service to satisfy fees and fines. Many defendants fail to complete their community service and cycle in and out of court. Jail credit is available for those arrested. Social workers may grant credit against fees and fines for a client who has completed activities such as showing up for a doctor's appointment or receiving a housing assessment.

Figure 38 highlights the results of the Brennan Center's fiscal analysis for traffic and misdemeanor criminal fees and fines in Travis County for fiscal year 2017. Its estimate of the in-court and jail costs of imposing and collecting fees and fines is a conservative one.

Key findings:

- In 2017, Travis County's county, municipal, and justice of the peace courts assessed approximately $38 million in criminal fees and fines. More than $8.6 million was written off through waivers, community service, or jail time.
- Collection costs related to fees and fines were $9.4 million in 2017, or 35 percent of what ultimately was collected.[231]
- The authors estimate that almost $3.2 million was spent on the portion of court proceedings dealing with fees and fines.
- Travis County spent an estimated $4.6 million for jailing due to unpaid fees and fines in 2017.

Figure 39 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, a good portion of assessed criminal fees and fines were collected. Still, each year an average of 6 percent of the fees and fines charged to defendants went uncollected. Further, the use of jail credits has fallen since 2010, reflecting growing pressure on the Austin Municipal Court to end jailing for unpaid debt.[232]

Figure 40 depicts how uncollected amounts in Travis County have significantly grown since 2012.

Texas courts do not produce reliable estimates of the total amount of criminal fees and fines that remain uncollected. Therefore, figure 40 shows only the amount of uncollected debt that has accumulated since 2012. During this period alone, the growth of these balances has been considerable:

- Uncollected balances net of credits for Travis County's county, justice of the peace, and municipal courts have grown by an estimated $17.7 million from 2012 to 2017.
- The use of credits, especially in later years — 2016 and 2017 — shows a willingness to correct uncollected balances. However, issuing credits can inflict extra costs. For example, the cost of jailing people for fees and fines was about $4.6 million in 2017.

2. El Paso County

El Paso County is the westernmost county in the state of Texas and shares a border with Ciudad Juárez in the Mexican state of Chihuahua. The county's population of more than 800,000 is largely binational and 82 percent Hispanic or Latino, 12 percent white non-Hispanic, and 3 percent black.[233] El Paso County has a strong Democratic tilt in national and local elections. The poverty rate is nearly 23 percent, significantly higher than that of the state overall.[234]

There are eight justice of the peace precincts in the city of El Paso; these were described to the authors as the "last outpost of cowboy justice." These courts handle both criminal and civil cases, while five municipal courts in the city have jurisdiction over traffic violations and Class C misdemeanors. The county courts at law handle more serious Class A and B misdemeanors.

FIGURE 41

El Paso County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

Revenue Collected	
Assessments	$14,109
Credits/Waivers	$3,532
Collections	$8,132
Percentage of Fees and Fines Collected	58%
Costs	
In-Court Costs	$68
Court Collections Costs	$733
Jail Costs	$2,917
Total Costs	$3,718
Cost as a Percentage of Collections	46%
Net Gain (+)/Loss (-)	**$4,414**

Source: Texas Collection Improvement Program; Brennan Center calculations.

For this report, the authors interviewed justice of the peace court staff, observed proceedings at the main El Paso Municipal Court branch, and collected data for all three levels of courts.

JUSTICE OF THE PEACE COURTS

Located across El Paso County, justices of the peace have jurisdiction over traffic and criminal cases carrying fines not exceeding $500. These courts handle a high volume of fees and fines. One judge sets up monthly payment plans on the basis of what defendants say they can afford per month. At another justice of the peace court, defendants who are unable to pay a fine in full are sent directly to Financial Recovery Services, a division of the county Budget and Fiscal Policy Department responsible for obtaining payments imposed during the judicial process.

EL PASO MUNICIPAL COURT

Three blocks from the county courthouse sits the municipal courthouse, handling mostly traffic offenses, such as driving without insurance or without a valid license. Indigency, failure to appear, and "show cause" hearings occur monthly or bimonthly. According to a court coordinator, many failure-to-appear charges are referred directly to the Texas Department of Public Safety, which may deny the renewal of a driver's license.[235]

In most cases, the judge informs the defendant of the fines incurred but does not address fees. Defendants may enter into payment plans or request community service in lieu of payments.

One judge reported that approximately 25 percent of municipal court cases deal with failure to pay. This judge considers a defendant's individual circumstances when addressing such cases. Recently the judge worked with a homeless person and a domestic violence survivor to craft manageable payment plans.

Figure 41 highlights the results of the Brennan Center's fiscal analysis for criminal fees and fines for El Paso County for fiscal year 2017. The estimate of the in-court and jail costs of imposing and collecting fees and fines is a conservative one.

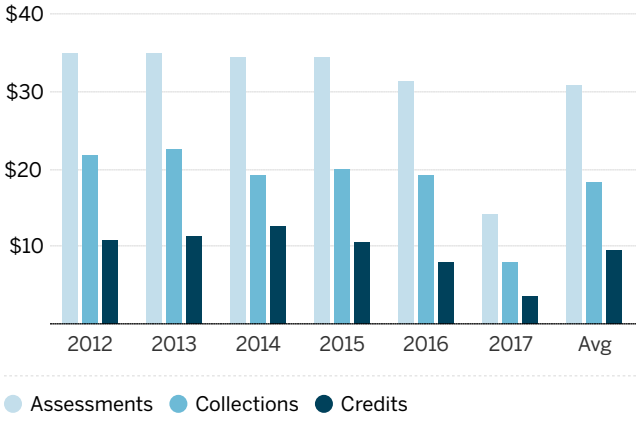
Key findings:

- In 2017, El Paso county, municipal, and justice of the peace courts assessed about $14 million in criminal fees and fines. More than $3.5 million was written off, either through waivers or through time served in jail or community service. Of the remaining $10.5 million, $8.1 million was ultimately collected.
- About $3.7 million was spent on collections activity in 2017 on in-court and jail costs alone. The $8.1 million in collections translates into about $4.4 million in net gain, just 31 percent of what was originally assessed.
- In-court costs, jail costs, and other collections costs for imposing and collecting fees and fines from these courts were just over $3.7 million in 2017, or 46 percent of what ultimately was collected.[236] Of that, most was for jailing for unpaid fees and fines.

FIGURE 42

El Paso County Assessments, Credits, and Collections, 2012–2017

Millions of dollars

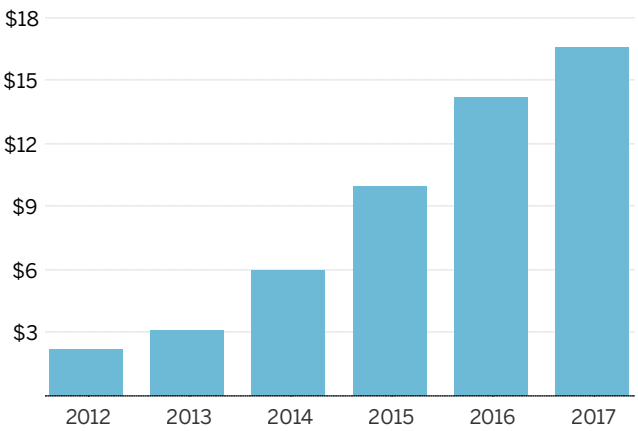


Source: Texas Collection Improvement Program; Brennan Center calculations.

FIGURE 43

El Paso County Growth of Uncollected Criminal Fees and Fines, 2012–2017

Millions of dollars



Source: Texas Collection Improvement Program; Brennan Center calculations.

- The authors estimate that approximately $68,000 was spent on the portion of court proceedings dealing with fees and fines, and that $733,000 was spent on the salaries, benefits, and operating expenses for collections staff.

Figure 42 shows how criminal fees and fines imposed, collected, and credited have changed over time.

As shown, on average, 10 percent of the fees and fines charged to defendants each year from 2012 to 2017 went uncollected. Further:

- Jail credits have consistently been the most-used form of credits within El Paso from 2012 to 2017.

- The use of jail credits has varied significantly since 2012, satisfying 26 percent of fees and fines in 2012, peaking at nearly 30 percent in 2014, and falling to 22 percent in 2017. The year with the second-lowest collections, 2016, saw the highest use of jailing.[237] This may indicate that fines were particularly ill-targeted that year, leading to higher incidences of failure to pay. As of 2017, community service credits were little used in El Paso, suggesting that people who are unable to pay either have costs waived or are jailed.

Figure 43 depicts how uncollected amounts in El Paso County have significantly grown since 2012.

Texas courts do not produce reliable estimates of the total amount of criminal fees and fines that remain uncollected. Figure 43 therefore shows only the amount of uncollected debt that has accumulated since 2012. During this period alone, the growth of this uncollected debt was considerable. Uncollected amounts grew by $14.4 million between 2012 and 2017. Much of this court-imposed debt will never be paid.

3. Jim Hogg County

Jim Hogg County is a small, rural county on the southern tip of Texas with a population of about 5,300. Like many of the counties on the border, it is largely Hispanic or Latino (94 percent).[238] About 6 percent is white non-Hispanic, and 1 percent is black.[239] It is a strongly Democratic county with a poverty rate of almost 30 percent, above that of the state overall. Jim Hogg County has a median household income of $34,769.[240]

Jim Hogg County has six courts in the county seat of Hebbronville: a district court, a county court, and four justice of the peace courts. The district court holds original jurisdiction over felony criminal cases. The county court has original jurisdiction over all criminal cases involving Class A and Class B misdemeanors. There are four justice of the peace precincts, all with original jurisdiction over lower-level Class C misdemeanor criminal cases.[241]

One judge told the authors that the justices perform many duties outside the scope of the justice of the peace court and are also on call 24/7, sharing one full-time clerk and one part-time clerk. According to the judge, they "prefer people out there working to support their families rather than arrested on [failure-to-pay] warrants." The judge said surcharges incurred on fines can lead to a vicious cycle: with costs increasing but wages remaining stagnant, "people get desperate."[242]

If a defendant does not pay fees and fines, the judge first sends a courtesy letter of notice. If there is no response, the court issues a show cause order, which allows the defendant to provide justification for the lack of payment. If the defendant again fails to respond, the judge then issues an arrest warrant if the individual resides in Jim Hogg County. For nonresidents, the failure-to-pay and failure-to-appear charges are entered into OmniBase, a service that administers the Texas Department of Public Safety's Failure to Appear Program.[243] Once a defendant is entered into this system, the defendant's license is put on hold. While the license is not immediately suspended, it cannot be renewed until the the fees and fines are paid.

Defendants have several options for paying. They can arrange a monthly payment plan, opt for community service for credit of $100 per eight-hour day, or be jailed for credit of $100 per day. The justice of the peace court offers at-clerk payment processing at the court, or defendants can use a third-party payment service, which charges a 3 to 5 percent processing fee. The judges offer ability-to-pay hearings, but most people opt out of them due to the amount of paperwork required.[244] According to the judge, about 75 percent of people pay their fines rather than opt for community service or jail.

County and district courts differ from justice of the peace court in their practices. Neither court offers

FIGURE 44

Jim Hogg County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

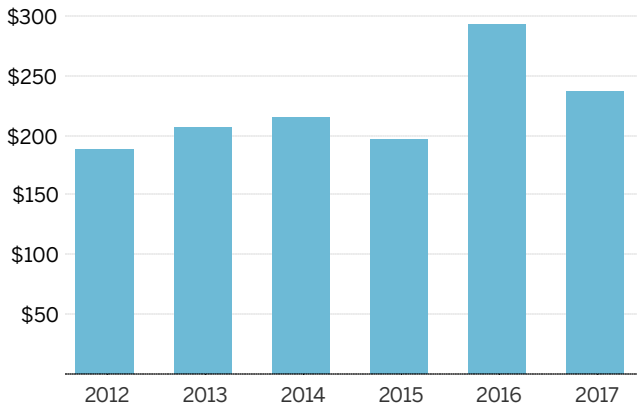
Revenue Collected	
Collections	$237
Costs	
Court Costs	$10
Cost as a Percentage of Collections	4%
Net Gain (+)/Loss (-)	**$227**

Source: Texas Office of Court Administration; Brennan Center calculations.

FIGURE 45

Jim Hogg County Collections, 2012–2017

Thousands of dollars

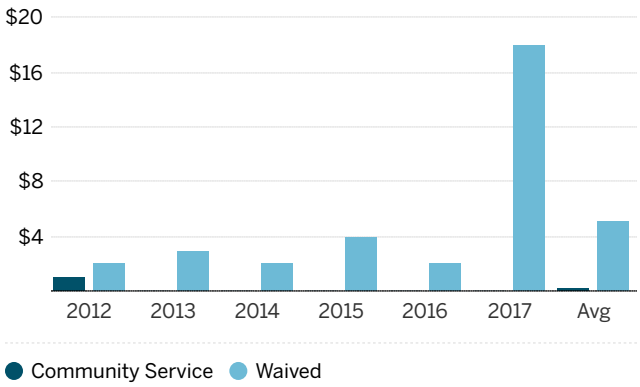


Source: Texas Collection Improvement Program; Brennan Center calculations.

FIGURE 46

Jim Hogg County Alternatives to Payment of Criminal Fees and Fines, 2012–2017

Number of cases



Source: Texas Office of Court Administration; Brennan Center calculations.

payment plans for amounts under $500; larger amounts can be split into two payments.[245] According to the person who serves as clerk to both the county and district courts, "a lot of indigency" and numerous "out of towners" mean that defaults are common, and so courts have little faith in payment plans. When a payment plan is allowed, it is structured such that defendants have 90 days to pay what can amount to staggering costs. According to the Jim Hogg County investigator, before a case is over, a defendant can easily owe more than $2,000 in fees and fines.

Figure 44 shows court costs and collections in Jim Hogg County's justice of the peace courts in 2017. The Texas Office of Court Administration collects little data on rural county courts, so the value of assessments, credits, and waivers in Jim Hogg County is not available.

Key findings:

- In 2017, the Jim Hogg justice of the peace courts collected about $237,000 in criminal fees and fines. Around $10,000 was spent on in-court collections activity, so net gain came to $227,000.[246]

- Clerks estimated that they spend, on average, 11 hours per week on issues related to fees and fines, at a total cost of $8,000 per year. The judge estimates that she spends, on average, four hours a week on issues related to fees and fines, at a cost of $2,200 per year.[247]

Figure 45 shows how the amount of criminal fees and fines collected has changed over time.

As shown, Jim Hogg County collections stayed fairly constant from 2012 to 2017, apart from an unexplained spike in 2016.

Figure 46 depicts the number of cases in which fines and fees were waived for indigence or satisfied through jail or community service credit. The dollar value of these waivers and credits was not reported.

As illustrated above, waivers, the main alternative to collection, rose significantly in 2017. Despite a recent spike in the number of fines and fees waived for indigence, collections have not declined dramatically, as demonstrated above in figure 45.

4. Marion County

Marion County is a rural county in eastern Texas with a population of just over 10,000. It is majority non-Hispanic white, at 71 percent, with a significant black minority of 24 percent and only a small Hispanic or Latino population, at almost 4 percent.[248] Marion County is primarily Republican. It has a poverty rate of nearly 23 percent, higher than that of the state overall.[249]

The Marion County courthouse sits in Jefferson and houses four courts: the district, county, municipal, and justice of the peace courts. There are two sitting district court judges, who handle felonies, and two justices of the peace, one of whom also serves as a municipal court judge. Only the two district court judges have law degrees. The staff includes one municipal clerk, two county clerks, one justice of the peace clerk, and two contracted public defenders, one of whom also serves as city prosecutor.[250]

FIGURE 47

Marion County Criminal Fee and Fine Fiscal Analysis, 2017

Thousands of dollars

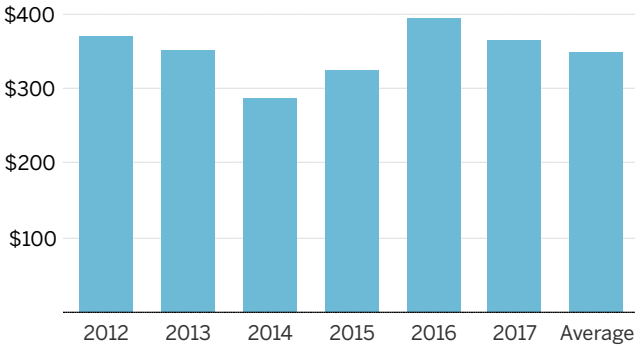
Revenue Collected	
Collections	$366
Costs	
Court Costs	$29
Cost as a Percentage of Collections	8%
Net Gain (+)/Loss (-)	**$336**

Source: Texas Office of Court Administration; Brennan Center calculations.

FIGURE 48

Marion County Collections, 2012–2017

Thousands of dollars



Source: Texas Collection Improvement Program; Brennan Center calculations.

JUSTICE OF THE PEACE

This court handles Class C misdemeanors, small claims, and civil suits. Most of its cases are traffic citations issued by highway patrol officers outside the town limits. The court holds hearings once every three to six months, with about 40 cases on the docket each time. Many cases are related to failure to pay, and most defendants fail to appear. If the defendant does not contact the clerk within 60 days of failure to appear, a collections company sends a pre-warrant notice. A show-cause hearing is scheduled, and if the defendant again does not show up, the clerk issues an arrest warrant.

The justice of the peace handles all ability-to-pay determinations. In applying for indigency, defendants must fill out an affidavit attesting to their inability to pay and submit supporting documentation, including their most recent bank statement, tax return, and utility bills. The justice of the peace reviews the application and either grants or denies indigency, which is solely within the judge's discretion.[251]

MUNICIPAL COURT

This court handles all traffic citations issued by city police. Hearings are scheduled once every month; a typical docket contains 30 to 40 cases. The municipal court clerk handles about 30 cases per week, roughly half of which are related to failure to pay court fees. When defendants plead guilty or no contest, they have 14 days to pay. If they plead not guilty, the case is scheduled for a subsequent hearing. Defendants who do not show up have 10 days to pay before an arrest warrant is issued. All defendants can enroll in a monthly payment plan or receive credits for community service ($10 per hour) or jail time ($100 per day). The average defendant will end up owing $250 to $500 in court fees and fines.[252]

COUNTY COURT

This court deals only with Class A and B misdemeanors; most of the cases are for driving while intoxicated or minor drug possession charges. Like the justice of the peace and municipal courts, there is no set schedule for county court. Instead, hearings are scheduled once every month, and the typical docket contains around 40 cases. The county clerk is responsible for collections from defendants not on probation; the probation office collects the money from those on probation at each monthly visit and then issues a check to the county at the end of each month. As of October 2018, there were 311 probationers and parolees, whom the county clerk described as the "vast majority" of defendants.[253]

Across these courts, several officials criticized the fee and fine process in Marion County. They noted that only a small percentage of the assessed fees and fines are eventually collected, largely due to residents' poverty.

Figure 47 highlights the results of the Brennan Center's fiscal analysis for criminal fees and fines for Marion County. Its conservative estimate of the in-court costs of imposing and collecting fees and fines is based on surveys of judges and clerks in these courts. The Texas Office of Court Administration collects little data on rural county courts, so the value of assessments, credits, and waivers in Marion County is not available.

Key findings:

- In 2017, Marion County's county, municipal, and justice of the peace courts collected about $366,000 in criminal fees and fines.[254] At least $29,000 was spent on court collections activity, so the net gain was no more than $336,000.

- In the county and justice of the peace courts, clerks spend 12 to 13 hours per week on fees and fines. In municipal court, they spend around five hours per week. This represents costs of approximately $24,600 per year.[255]

- The county court spends roughly five hours per week and the justice of the peace courts spend a half hour per week on fees and fines. This represents costs of approximately $4,900 per year.[256]

Figure 48 shows how the amount of criminal fees and fines collected has changed over time. Collections stayed relatively constant from 2012 to 2016 but decreased in 2017.

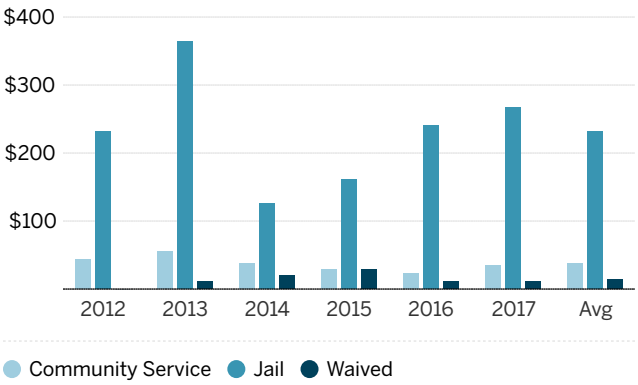
Figure 49 depicts the number of cases in which fines and fees were waived for indigence or satisfied through jail or community service credits. The dollar value of these waivers and credits was not reported.

As shown, 80 percent of the cases in which fees and fines were satisfied by a method other than payment were, in an average year, satisfied by jail credits. Also in an average year, fees and fines were waived for indigence in slightly more than 6 percent of cases satisfied by a method other than payment.

FIGURE 49

Marion County Alternatives to Payment of Criminal Fees and Fines, 2012–2017

Number of cases



Source: Texas Office of Court Administration; Brennan Center calculations.

The county court reported $261,000 in fees and fines outstanding as of October 2018.

Appendix B: Methodology

To obtain the data for the fiscal analysis, the authors conducted interviews and requested quantitative data from stakeholders in each of the selected counties. The information collected through interviews includes both qualitative data, relating to processes, policies, and practices, and quantitative data, including caseloads, hours worked, and time spent on fees and fines.

Once collected, this data was used to estimate costs by jurisdiction and arrayed with revenues in the broader fiscal analysis. Much of the cost data was calculated using salary data and time-use information collected through interviews, in addition to other factors, including criminal caseloads, employee compensation, and other input from state databases. Revenue data was calculated from reports that indicate the amounts of fees and fines collected, waived, and uncollected. Other criminal justice revenues and costs exist but were either beyond the scope of this study or unavailable. For example, this study did not consider the costs and revenues of bail and bond systems or restitution. The authors were also unable to estimate costs of warrant enforcement and driver's license suspensions by departments of motor vehicles.

Cost Data Collection

For most of the study's jurisdictions, the collected cost data includes time spent by court and other public employees in court proceedings ("in-court costs") dealing with criminal fee and fine matters. For some jurisdictions, the cost data also includes costs of time spent by court employees assessing and collecting criminal fines and court fees and detention costs of people jailed for failure to pay or failure to appear on fee/fine-only charges. Further, for some jurisdictions, the cost data includes estimates of jailing costs, derived from reported jailing costs and jail credits issued. Cost data was collected in the following ways:

Surveys

The authors attempted to collect quantitative cost information by administering surveys asking how court and other criminal justice personnel spend their time, and how much of that time is spent on assessing and collecting fees and fines. Surveys were emailed to judges, prosecutors, public defenders, court clerks, DMV employees who suspend licenses, police officers who arrest people for failure to pay, probation/parole officers who participate in collections, court budget/finance officers, and state tax agencies that collect fees and fines through offsets to tax refunds. Many surveys were distributed via statewide public agencies.

The authors distributed surveys to more than 3,000 members of the Texas justice system. In New Mexico, surveys went to more than 200 members of the state judiciary.

While some surveys were completed and returned by email, and others were completed online, there were not enough useable responses to incorporate the data into meaningful cost estimates.

Public Data

Quantitative public budget data was collected from courts and other agencies that make such data available online, including the following:

- Salaries and staffing for courts, prosecutors, public defenders, police/sheriff's departments, DMVs, and state tax agencies, with a goal of estimating the costs of assessing and collecting fees and fines and associated sanctions. Of these, the most heavily used salary and staffing data sets were online "sunshine" portals made available to the public by state agencies or news sites.

- Some daily jail cost data, collected from federal, state, or public advocacy organizations' online reports and obtained data (e.g., the Vera Institute's Price of Prisons Survey, reported rates paid by U.S. Marshals for detention in local jails, and Texas Collection Improvement Program data).

- Budget data, collected from municipal, county, and other agency budget documents.

Direct Data Requests

Where online public data and surveys proved inadequate, direct requests were made to agencies for quantitative budget data, such as salaries and staffing for courts and supporting agencies. For example, the Texas Office of Court Administration shared data from its Collection

Improvement Program, with reports of court collection costs for all 71 of the state's most heavily populated counties (except for Harris County). The New Mexico Administrative Office of the Courts supplied extensive criminal case data, including information on fees and fines, for the courts supported by the state (Bernalillo Metropolitan Court, magistrate courts, and district courts).

Court Watching

Over the course of this study, Brennan Center staff observed over 1,000 cases across 16 different courts in seven counties. The study sent project staff to nine of the study jurisdictions to observe court proceedings for up to a week. (Court watching was feasible only in seven of the counties because three largely rural counties only had part-time courts that were not in session during staff visits.) These court observations were used to gauge time spent on fee and fine matters for in-court cost estimates. Because of the low level of survey response from targeted jurisdictions, court watching was the primary tool for estimating the time courts spend on fees and fines (staff were not able to perform court watching in Jim Hogg, Marion, and Madison Counties). Court observations and interviews with judges, clerks, public defenders, and defendants were helpful in determining how processes and procedures, including ability-to-pay determinations and payment plans, vary from court to court.

Revenue Data Collection

Revenue data includes all criminal fines and court fees collected by local or state agencies in the jurisdictions, excluding restitution and child support payments, which were not relevant to this study.

Public Data

Some quantitative public data on criminal fee and fine revenue and collections was gleaned from state associations for court clerks. For example, in Florida, public quantitative data on fee and fine assessments and collections came from online reports prepared by the Florida Court Clerks & Comptrollers.

Direct Data Requests

Some data relating to assessments and revenues was collected directly from state agencies. This information was collected by contacting state-based judicial agencies, such as administrative offices of courts, and requesting that statistical data be provided for analysis. For example, the Texas Office of Court Administration shared data on court fee and fine collections for 71 of the state's most heavily populated counties. The New Mexico Administrative Office of the Courts supplied extensive criminal case data, including information on fee and fine assessments and collections for each of the courts funded by the state.

Supplemental Research

During site visits and interviews, and through other research, qualitative data was collected to illuminate how courts and supporting agencies operate when imposing and collecting criminal fees and fines.

Site Visits and In-Person Interviews

During site visits, interviews were held with court officials, prosecutors, public defenders, police officers and sheriffs, and probation/parole departments in many jurisdictions. While the interviews focused on collecting quantitative survey data, the visits were also used to document the process of criminal fee and fine assessment and collection in each jurisdiction. Many site visits also included court watching. In courts that were rarely were in session (thus preventing court watching), these visits and interviews were a primary data collection tool.

Phone Interviews

Additional interviews were conducted by phone with state judiciary and public defender agencies to supplement information collected by other means.

Surveys

The surveys provided space for notes and comments by respondents. These were reviewed and followed up on with additional questions when feasible.

Literature and Statistical Review

The authors analyzed reports and articles published by governmental, advocacy, and news organizations to document how criminal fees and fines are assessed and collected in each jurisdiction. They also compiled demographic information from public sources, such as the U.S. census, to provide context for each jurisdiction, including ethnic makeup, average income, and poverty level.

County Fiscal Analyses

Fiscal analysis traditionally involves a diverse array of analyses focused on budgets, costs, and revenues. When applied to a governmental project or activity, such analysis is often used to compare changes in costs and changes in revenues over a period of time. The result of this comparison is often the "net fiscal impact" or, in this context, "net gain." This is the type of analysis attempted for this report. It can indicate whether a governmental activity is a financially sensible one — and whether taxpayers should pay for if it fails to cover enough of its costs. While the revenue data collected for courts in each jurisdiction focuses on criminal misdemeanors, the data for the Bernalillo Metropolitan Court in Albuquerque includes both non-criminal traffic and misdemeanor criminal fees and fines.

Balance Sheet Approach

At its core, the fiscal analysis employed in this report makes use of a simple balance sheet approach. For the most recent fiscal year obtainable, the identified costs of levying and collecting criminal fees and fines are subtracted from the sums collected for each jurisdiction to obtain the "net gain" in revenue. In practice, this meant identifying and quantifying as much cost information related to fees and fines as possible and subtracting it from reported revenue collected from state court agencies and clerks' associations.

Additional Fiscal Analysis Measures

The authors also refer in the fiscal analysis to "percentage of fees and fines collected" and "cost per $100 of revenue collected." While "net gain" indicates the revenue (or loss) yielded by the activities associated with imposing and collecting criminal fees and fines, measuring "percentage of fees and fines collected" shows how much of what is assessed during a year is ultimately collected during that year, an indicator of how well fee and fine assessments and collections efforts are targeted.

"Cost per $100 of revenue collected" is a standard measure of the efficiency of revenue collection. For example, if the cost of collecting fees and fines is higher than the cost of collecting tax revenue, it is a less fiscally prudent means of funding court (or other government) operations.

County Unit of Analysis

The authors conducted this fiscal analysis by examining criminal fees and fines levied by courts, as well as costs, in 10 counties in Florida, Texas, and New Mexico. They were chosen to represent a cross section of geographic, economic, political, and demographic conditions found across the country. The authors examined criminal fees and fines levied by courts, whether these courts were state or locally funded. While the project presents a fiscal balance sheet for criminal fees and fines by county, depending on the jurisdiction, it may contain a mix of costs incurred by the cities, counties, and the respective states. Similarly, depending on the state, the revenue collected may represent a mixture of amounts ultimately transferred to the state and the locality or retained by the court for court operations. As a result, some of the costs and revenues in this report may be found on the various balance sheets of cities, counties, and states, rather than all in one place. The benefit of this report's approach is that it takes disparate information that is difficult for taxpayers, let alone government officials, to decipher and analyzes it in a way that sheds light on court-related fee and fine activity in each county.

Estimated Costs

In-Court Costs

Judges, court clerks, prosecutors, public defenders, and sometimes probation officers attend court proceedings at which criminal fees and fines are imposed. Because the authors found no courts or other agencies that record or track the cost of this employee time, the authors produced estimated costs in the following manner:

- **Time spent.** For each county, the authors gathered data on time spent by personnel on criminal fees and fines, as described before. This data was used to determine the average time spent on criminal fees and fines per case inside the courtroom. To build yearly estimates, this "time per case" measure was annualized using yearly caseload statistics. For cases related solely to fees and fines (such as failure to pay and failure to appear on a summons related to a fine-only case), the fraction of such cases observed during court watching was assumed to hold steady across the entire year.

- **Salaries and benefits.** The authors took salary and benefits information obtained as described above and used this data to construct an average hourly compensation cost for each type of personnel (e.g., judges, court clerks, prosecutors, public defenders, and probation/parole officers).[257]

- **Cost of time spent.** For in-court criminal cases, court watching was used to estimate time spent on fees and fines, and that time was assumed to be representative for the most recent year of the analysis. The average hourly compensation cost for each type of personnel was multiplied by the average number of hours per year spent in court proceedings while fee and fine matters were being handled to determine the cost of time spent on fees and fines. This information was used to project an annual estimate for the in-court cost of fees and fines in each jurisdiction. For this analysis, average hourly compensation includes an estimate of the cost of benefits, assumed at 40 percent for personnel in courts in New Mexico and Florida. The 40 percent rate documented for the New Mexico judiciary was substantially similar to the rate modeled for Florida court personnel using standard benefits rates and information. For Texas's decentralized court system, local county and municipal budgets available online were consulted to calculate both benefits rates and other direct cost information to supplement the compensation data. Court watching was performed in seven counties. In two additional jurisdictions, Jim Hogg and Marion Counties in Texas, courts

were not in session when the team attempted site visits, so informal estimates of time spent in court were based on interviews with judges or clerks. No court watching was performed in Madison County, Florida.

Court Collection Costs
Court personnel and sometimes staff from other agencies, such as parole/probation offices, state tax agencies, other public agencies, and private collection agencies, collect court-imposed criminal fees and fines. The authors focused on court collection costs reported by the courts or state judiciary agencies, as cost information for other forms of fee and fine collection proved difficult to obtain.

Jailing Costs
Sometimes courts order individuals to jail for nonpayment of fees and fines, and sometimes police arrest individuals on a warrant and have them jailed because of nonpayment. Defendants in some jurisdictions also may elect to earn credit against fees and fines owed by spending time in jail. Much of the jail costs determined by the authors is attributable to this involuntary and voluntary jailing for the purpose of earning "jail credits" against fees and fines. However, defendants in some jurisdictions jailed for other crimes may sometimes receive credits against fees and fines owed. The authors were unable to determine the portion of calculated jailing costs attributable to these cases. The authors were also unable to estimate jailing costs in Florida, because incarceration in target counties there takes place only as a result of license suspension, and the proportion of license suspensions resulting from unpaid fines and fees could not be obtained. Estimated jailing costs for New Mexico and Texas were calculated as follows:

- **New Mexico.** In Santa Fe and Socorro Counties, time spent in jail was estimated on the basis of the value of jail credits earned against fines and fees in magistrate courts, compiled by the state Administrative Office of the Courts (AOC). In Bernalillo County's Metropolitan Court, jail credit data compiled by AOC also was used. Jail credits were translated into time served using a daily jail credit of $58, equal to eight hours at the federal minimum wage, the amount typically awarded by judges in these jurisdictions. Jail costs were estimated based on the daily jail rate estimated for the Bernalillo Metropolitan Correctional Facility in the Vera Institute's Price of Jails report and the daily rate paid to other county jails by the U.S. Marshals Service. Where no Vera or U.S. Marshals daily jail rate was available for the county, an average of the U.S. Marshals rate for other counties was used.
- **Texas.** Jail credits reported to the Collection Improvement Program (CIP) was used to estimate jail costs. The jail credits reported in each county were divided by the reported jail credit rates for the courts in these counties to estimate total days of incarceration. For years in which the jail credit rates were not reported, an average rate was substituted. The total days of incarceration were then multiplied by the per diem cost of incarceration reported to CIP. When the per diem cost was not reported, the average per diem cost of incarceration was used in its place.

Uncollected Fees and Fines
Interviews with state judiciary and local court officials revealed, with rare exception, that little is known about outstanding balances of court-imposed fees and fines. While the authors were unable to estimate such balances, they obtained data on assessments, waivers, credits, and collections to calculate the accumulated balances of unpaid fees and fines for most study jurisdictions over a multiyear period. The uncollected balance remaining after waivers, credits, and collections were accounted for was calculated for each year. These amounts were then cumulatively summed. The total represents the accumulated unpaid balance over several years.

Statewide Analyses
Several years' worth of data on criminal fee and fine assessments, collections, waivers, credits, and other actions was obtained for felony and misdemeanor courts in Florida, New Mexico, and much of Texas. While little cost data was available, jailing costs associated with criminal fees and fines were estimated for Texas and New Mexico.

Texas
Comprehensive revenue data covering cities and counties representing 72 percent of Texas by population came from CIP. A statewide projection for fee and fine assessments was estimated. Several years of criminal fee and fine assessments, collections, waivers, and credits were analyzed based on the jurisdictions reporting to CIP.

Jail costs were analyzed using the data courts reported to CIP. Jail credits issued by the courts in each jurisdiction were divided by the reported jail credit rates for the courts in these counties to estimate total days of incarceration. For years in which the jail credit rates were not reported, an average rate was substituted. The total days of incarceration was then multiplied by the per diem cost of incarceration reported to CIP. When the per diem cost was not reported, the average per diem cost of incarceration was used in its place.

The growth in balances owed of unpaid criminal fee and fine debt was calculated by netting collections, waivers, credits, and liens from amounts assessed by the courts.

The collectibility of criminal fees and fines was analyzed using aging information reported by courts to CIP.

Florida

Several years of extensive criminal fee and fine data covering assessments, collections, waivers, and credits for the felony and misdemeanor courts in each of Florida's counties was obtained from reports formerly located on the website of the Florida Court Clerks & Comptrollers Association, which is charged with annual reporting to the state. (Except for the most recent annual report, this data was later removed from the Florida Court Clerks & Comptrollers Association website.) This data was analyzed to provide a comprehensive statewide view of fee and fine activity over several years. The growth in balances owed of unpaid criminal fee and fine debt was calculated by netting collections, waivers, credits, and liens from amounts assessed by the courts. No cost data was obtainable on a statewide basis for Florida.

New Mexico

Comprehensive data covering several years and criminal fee and fine assessments, collections, waivers, and credits was obtained from the state's Administrative Office of the Courts. This data covered all state-funded district and magistrate courts statewide as well as state-funded Bernalillo Metropolitan Court, which handles the bulk of the county's misdemeanor and felony criminal cases. The data does not include the activity of locally funded municipal or county courts.

While the data provided was transactional, case-related data, it was analyzed to determine totals for assessments, collections, waivers, and credits for the years 2012 through 2016.

The data also was used to calculate jail costs associated with criminal fees and fines. Jail credits were divided by a $58-per-day federal minimum wage, the valuation used by New Mexico courts for jail credits, to obtain days of incarceration. The results were then multiplied by a low ($64.22, cost for Santa Fe) and a high ($85.63, cost for Bernalillo) estimate of daily incarceration costs to simulate the range of possible incarceration costs.

Note on Rounding in Tables Appearing in Figures

Where numbers appearing in tables in some of the figures appearing in this report are rounded to thousands, some totals may not appear to add up due to rounding.

Challenges and Limitations

- **Surveys.** While the study was built around the use of survey data, few and often no survey responses were obtained from the study jurisdictions. This was despite the help of state administrative offices of courts and other agencies in distributing the surveys, survey redesign, and considerable follow-up by phone and email. The failure to obtain needed data by survey necessitated site visits and limited some of the cost data originally planned to be collected.

- **Court watching.** Court observations were made over a one-week period in most study jurisdictions. The authors assume that proceedings were typical and adequate for the construction of annual estimates. However, this method does not consider potential seasonal or caseload fluctuations that may occur over the year.

- **Budgets.** The authors originally anticipated finding useful cost data in court and other agency budgets, including salaries of court personnel, agency officials, and staff engaged in levying and collecting fees and fines. Little useful information was obtained in this manner, and agency budget/chief financial officer staff generally were not responsive to the authors' emails and surveys.

- **Criminal justice system data.** Sometimes extensive criminal justice system data was made available to the authors by state administrative offices of the courts, as in New Mexico and Texas. However, the nature of the data tracked, the multiple and disparate systems, and sometimes a lack of recordkeeping — all of which vary by state and jurisdiction — meant that some data was unobtainable. For example, the authors were unable to obtain municipal court data in New Mexico or data for courts in less populated counties in Texas. The authors also were unable to identify sources for balance information on outstanding criminal justice debt. In some localities, information is still tracked on paper, making data difficult to compile. In many jurisdictions, information such as the extent of jailing for failure to pay is not tabulated, existing simply as anecdotal information.

- **Procedural requirements for public release of data.** Some agencies and jurisdictions insisted that data requests be made through the procedural requirements of their respective state's freedom of information statutes. These generally proved to be fruitless inquiries, with no mechanism for person-to-person follow-up.

Endnotes

1 Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice, 2010, 30, http://www.brennancenter.org/sites/default/files/legacy/Fees and Fines FINAL.pdf; Matt Ford, "The Problem with Funding Government Through Fines," *Atlantic*, Apr. 2, 2015, https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387.

2 Traffic offenses may be criminal in some jurisdictions and civil in others. The authors attempted to include criminal traffic offenses but not civil traffic offenses. Juvenile justice, noncriminal traffic infractions, and restitution were beyond the scope of this analysis, though the costs of each are considerable.

3 Tex. H.B. 2048, 86th Leg., R.S. (2019).

4 San Francisco Office of the Treasurer & Tax Collector, "San Francisco to Become First County in the Nation to Eliminate All Locally Controlled Fees Assessed from People Exiting the Criminal Justice System," May 22, 2018, https://sftreasurer.org/press-release-san-francisco-become-first-county-nation-eliminate-all-locally-controlled-fees.

5 Texas Penal Code §12.03 (1994).

6 Joseph Shapiro, "As Court Fees Rise, the Poor Are Paying the Price," NPR, May 19, 2014. https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger.

7 Matthew Shaer, "How Cities Make Money by Fining the Poor," *New York Times Magazine*, Jan. 8, 2019, https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html.

8 Joseph Neff, "No Mercy for Judges Who Show Mercy," *Marshall Project*, Nov. 29, 2017, https://www.themarshallproject.org/2017/11/29/no-mercy-for-judges-who-show-mercy.

9 Florida Clerks of Court, interview.

10 Mark Harden, "Judicial Complex, Museum Get Go-Ahead," *Denver Business Journal*, June 4, 2008, https://www.bizjournals.com/denver/stories/2008/06/02/daily32.html.

11 Rebekah Diller, *Court Fees As Revenue?*, Brennan Center for Justice, 2008, https://www.brennancenter.org/analysis/court-fees-revenue.

12 Kate Carlton Greer, "Over The Years, Court Fines, Fees Have Replaced General Revenue Funds," KGOU, Feb. 9, 2015, http://kgou.org/post/over-years-court-fines-fees-have-replaced-general-revenue-funds.

13 Criminal Justice Policy Program, Confronting Criminal Justice Debt: A Guide for Policy Reform, Harvard Law School, 2016, http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

14 Deborah Fowler et al., *Pay or Stay: The High Cost of Jailing Texans for Fines and Fees*, Texas Appleseed and Texas Fair Defense Project, 2017, https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf.

15 Ella Baker Center for Human Rights et al., *The True Cost of Incarceration on Families*, Sept. 2015, 7–9, https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf.

16 U.S. Commission on Civil Rights, "Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications," Sept. 2017, 3, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

17 Fla. Stat. §316.193 (2019), www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0300-0399/0316/Sections/0316.193.html; New Mexico Motor Vehicle Department, "DWI Information," http://www.mvd.newmexico.gov/dwi-information.aspx; Texas Department of Transportation, "Driving While Intoxicated (DWI)," https://www.txdot.gov/inside-txdot/division/traffic/safety/sober-safe/intoxication.html.

18 Fla. Criminal Procedure and Corrections Code §938.01–938.06 (2005).

19 New Mexico Motor Vehicle Department, "DWI Information," http://www.mvd.newmexico.gov/dwi-information.aspx.

20 Texas Judicial Branch, "Filing Fees and Court Costs," www.txcourts.gov/publications-training/publications/filing-fees-courts-costs.aspx.

21 Mathilde Laisne et al., *Past Due: Examining the Cost and Consequences of Charging for Justice in New Orleans*, Vera Institute of Justice, 2017, 20–21, https://www.vera.org/publications/past-due-costs-consequences-charging-for-justice-new-orleans.

22 Shapiro, "As Court Fees Rise, the Poor Are Paying the Price."

23 Neff, "No Mercy for Judges Who Show Mercy."

24 Brennan Center original research (see Appendix B: Methodology).

25 Lauren-Brooke Eisen, "Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause," *Loyola Journal of Public Interest Law* 15 (2014): 319–341.

26 "State Bans on Debtors' Prisons and Criminal Justice Debt," *Harvard Law Review* 129 (2016): 1024–1045, https://harvardlawreview.org/2016/02/state-bans-on-debtors-prisons-and-criminal-justice-debt.

27 Bearden v. Georgia, 461 U.S. 660 (1983).

28 "Settlement Requires L.A. Superior Court to Consider Drivers' Inability to Pay Traffic Fines," American Civil Liberties Union of Southern California, Oct. 8, 2018, https://www.aclusocal.org/en/press-releases/settlement-requires-la-superior-court-consider-drivers-inability-pay-traffic-fines.

29 Bannon et al., *Criminal Justice Debt*, 15–17.

30 Ibid.

31 Ibid., 30.

32 Ibid.

33 This estimate is necessarily conservative. The authors were not able to estimate a number of costs, such as time spent by law enforcement, DMV employees, probation and parole officers, and others.

34 Bannon et al., *Criminal Justice Debt*.

35 Ibid.

36 Internal Revenue Service, *Internal Revenue Service Data Book*, 2017, 66, https://www.irs.gov/pub/irs-soi/17databk.pdf.

37 United States Census Bureau, *Annual Survey of State Government Tax Collections*, 2017, https://www.census.gov/data/tables/2017/econ/stc/2017-annual.html; Texas Comptroller of Public Accounts, 2017, https://comptroller.texas.gov/transparency/budget/tools.php (computed based on FY 2017 expenditures).

38 New Mexico Sunshine Portal, "Budget," 2019, https://ssp2.sunshineportalnm.com/#budget (computed based on respective tax agency expenditures).

39 The calculation is as follows: if the average cost to jurisdictions to collect criminal fees and fines is at least $0.34 for every $1 collected, and if it costs the IRS only $0.034 to collect a dollar

of federal tax revenue, then the jurisdiction cost minus the IRS cost is $0.3366, or 99 percent of the IRS cost — the percentage of wasted resources. State tax authorities in some cases spend more or less than the IRS cost, but the argument still holds that much of the fee and fine cost represents waste or funds that could be put to better use.

40 New Mexico collections data provided at case level by New Mexico Judicial Information Division. Cost data calculated through a combination of court watching, surveys, and analysis of credits (see Appendix B: Methodology).

41 Ted Alcorn, "Handcuffed and Arrested for Not Paying a Traffic Ticket," *New York Times*, May 8, 2019, https://www.nytimes.com/2019/05/08/nyregion/suspending-licenses-minor-offense-money.html.

42 Ibid.

43 See Figure 5; N.M. Stat. § 30; Fla. tit. XLVI; Tex. Penal Code.

44 See Figure 3; Brennan Center calculations.

45 Joseph Shapiro, "In Ferguson, Court Fines and Fees Fuel Anger," NPR, Aug. 25, 2014, https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger.

46 Department of Justice, *Investigation of the Ferguson Police Department*, 9, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

47 Federal Reserve, "Report on the Economic Well-Being of U.S. Households in 2018," https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf.

48 Frank R. Baumgartner and Derek A. Epp, "What 20 Million Traffic Stops Reveal About Policing and Race in America," Scholars Strategy Network, June 1, 2018, https://scholars.org/brief/what-20-million-traffic-stops-reveal-about-policing-and-race-america.

49 Bureau of Justice Assistance, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction*, U.S. Department of Justice, https://www.ncjrs.gov/pdffiles/156242.pdf.

50 See Figure 3; Brennan Center calculations.

51 Alcorn, "Handcuffed and Arrested."

52 Bannon et al., *Criminal Justice Debt*, 25.

53 Texas Fair Defense Project and Texas Appleseed, *Driven by Debt: How Driver's License Suspensions for Unpaid Fines and Fees Hurt Texas Families*, 2017, http://stories.texasappleseed.org/driven-by-debt.

54 Joshua Sabatini, "SF Abolishes Abolishes Criminal Justice Fees," *San Francisco Examiner*, May 22, 2018, http://www.sfexaminer.com/sf-abolishes-criminal-justice-fines-fees.

55 Bureau of Justice Assistance, *How to Use Structured Fines*.

56 Ibid., 17.

57 Ibid. Results from other U.S. pilot programs in Connecticut, Iowa, and Oregon have brought both increased revenues and positive responses from judges, prosecutors, and attorneys.

58 Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 15, https://www.brennancenter.org/sites/default/files/publications/Criminal_Justice_An_Election_Agenda_for_Candidates_Activists_and_Legislators%20.pdf.

59 Ryan McMaken, "The Broken Windows Theory of Policing Has Failed," Mises Institute, July 14, 2016, https://mises.org/wire/broken-windows-theory-policing-has-failed.

60 George L. Kelling and James Q. Wilson, "Broken Windows: The police and neighborhood safety," *Atlantic*, Mar. 19, 1982, https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

61 Sarah Childress, "How Newark's Police Reform Deal Breaks with the Past," PBS, Mar. 31, 2016, https://www.pbs.org/wgbh/frontline/article/how-newarks-police-reform-deal-breaks-with-the-past.

62 United States Department of Justice Civil Rights Division and United States Attorney's Office for the District of New Jersey, *Investigation of the Newark Police Department*, July 22, 2014, 16–21, https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

63 Shapiro, "In Ferguson, Court Fines And Fees Fuel Anger."

64 Ibid.

65 Eric Schmitt, *2018 Vehicle Stops Executive Summary*, Missouri Attorney General, https://ago.mo.gov/home/vehicle-stops-report/2018-executive-summary.

66 Baumgartner and Epp, "What 20 Million Traffic Stops Reveal.".

67 Ibid.

68 Lynn Langton and Matthew Durose, "Police Behavior During Traffic and Street Stops, 2011," Bureau of Justice Statistics, U.S. Department of Justice, September 2013, https://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

69 Benjamin Ryan, "What 311 Calls Can Tell Us About Gentrification," *The Cut*, Aug. 21, 2015, https://www.thecut.com/2015/08/what-311-calls-can-tell-us-about-gentrification.html.

70 Abdallah Fayyad, "The Criminalization of Gentrifying Neighborhoods," *Atlantic*, Dec. 20, 2017, https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837.

71 City of San Francisco, "San Francisco Launches Open311 API," Mar. 10, 2010, http://www.open311.org/2010/03/san-francisco-launches-its-open311-api.

72 Anti-Eviction Mapping Project, "On 311," http://www.antievictionmappingproject.net/311.html.

73 Memorandum from the City of San Francisco Budget and Legislative Analyst's Office to Supervisor David Campos (Oct. 27, 2015) (on file with the San Francisco Board of Supervisor), sfbos.org/sites/default/files/FileCenter/Documents/54068-BLA.MissionDisplacement.102715.Final.pdf.

74 Anti-Eviction Mapping Project, "11% of All 311 Calls from the Mission, " http://www.antievictionmappingproject.net/311.html.

75 Rebecca Solnit, "Death by Gentrification: The Killing that Shamed San Francisco," *Guardian*, Mar. 21, 2016, https://www.theguardian.com/us-news/2016/mar/21/death-by-gentrification-the-killing-that-shamed-san-francisco.

76 Note that while this study focuses on criminal fees and fines imposed by misdemeanor courts in several jurisdictions, the authors were unable to separate noncriminal traffic or other misdemeanor infractions heard by Florida's county criminal courts from the data.

77 The average cost of fee and fine collections in a county could not be estimated because the types of costs the study team was able to document varied by jurisdiction. For example, no court watching could be performed in rural counties (e.g., Jim Hogg and Marion Counties in Texas), and jailing costs could be computed for Bernalillo County in New Mexico and some Texas counties, but not for any of the Florida jurisdictions.

78 Authors' observation notes.

79 Tyler Whitson, "Why Your Speeding Ticket Doesn't Pay for What You Think It Does," *Austin Monitor*, Apr. 22, 2015, https://www.austinmonitor.com/stories/2015/04/why-your-speeding-ticket-doesnt-pay-for-what-you-think-it-does.

80 "Traffic Ticket Fines & Court Costs," Travis County, Texas, https://www.traviscountytx.gov/justices-of-peace/jp1/court-costs.

81 Katie Hall, "Suit Alleges Austin's Municipal Court Turns Jail into Debtors' Prison," *Austin American-Statesman*, Oct. 27, 2015, http://www.mystatesman.com/news/local-govt--politics/suit-alleges-austin-municipal-court-turns-jail-into-debtors-prison/opRkkeP3L3i-

d65jphU5p0L.

82 Interlocal Agreement Between Travis County and the City of Austin for Booking and Related Services, effective October 1, 2016, http://www.austintexas.gov/edims/document.cfm?id=270298; Collection Improvement Program data provided by the Texas Office of Court Administration.

83 Christian Henrichson, Joshua Rinaldi, and Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, Vera Institute of Justice, 2015, 16, 19, https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration.

84 Shanetra Roach, interview, Oct. 11, 2018.

85 Monica Llorente, "Criminalizing Poverty Through Fines, Fees, and Costs," American Bar Association, Oct. 3, 2016, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs.

86 Mario Salas and Angela Ciolfi, *Driven By Dollars: A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, Legal Aid Justice Center, 2017, https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf.

87 Campaign Legal Center and Civil Rights Clinic at Georgetown Law, *Can't Pay, Can't Vote: A National Survey on the Modern Poll Tax*, https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf.

88 Ibid.

89 Alana Semuels, "The Fines and Fees That Keep Former Prisoners Poor," *Atlantic*, July 5, 2016, https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026.

90 Bannon et al., *Criminal Justice Debt*, 27.

91 Brennan Center calculations.

92 Brennan Center calculations based on population data; United States Census Bureau, "SAIPE State and County Estimates for 2017," Nov. 30, 2017, https://www.census.gov/data/datasets/2017/demo/saipe/2017-state-and-county.html. Per capita uncollected fees and fines" is the sum of the uncollected fees and fines from 2012 to 2016 divided by the 2013–2017 five-year ACS population estimates.

93 Brennan Center original research (see Appendix B: Methodology).

94 The $47 per capita rate is derived from the reported fiscal year 2012 to 2018 assessments from court jurisdictions participating in the Collection Improvement Program (CIP), administered by the Texas Office of Court Administration, and the 2017 population estimate for CIP counties from American Community Survey, administered by the U.S. Census Bureau.

95 Texas Code of Crim. Pro. Art. 103.0033.

96 This data comes from the Collection Improvement Program (CIP), administered by the Texas Office of Court Administration. The program covered approximately 72 percent of Texas by population in 2018. Cities and counties below 100,000 in population — and Harris County (Houston) — did not participate in the program.

97 Ibid.

98 Texas Office of Court Administration, *Annual Statistical Report for the Texas Judiciary*, FY 2018, https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf.

99 The cost of incarceration associated with jail credits could be much higher in Texas. Many courts do not report enough data to calculate these costs.

100 Fines and Fees Justice Center, "Texas SB 1913: Relating to the administrative, civil, and criminal consequences, including fines, fees, and costs, imposed on persons arrested for, charged with, or convicted of certain criminal offenses," June 20, 2017, https://finesandfeesjusticecenter.org/articles/texas-sb-1913-fines-fees.

101 Texas Office of Court Administration, "Indicators of Impact of Fines, Fees & Court Costs Legislation," https://www.txcourts.gov/media/1442212/ff-indicators.pdf.

102 Fines and Fees Justice Center, "Texas SB 1913."

103 Ibid.

104 Texas Office of Court Administration, "Indicators of Impact."

105 86 (R) S.B. No. 1637 (Tex. 2019).

106 Fees and Fines Justice Center, "Texas Senate Bill 1637: Fees, Fines, and Costs," Mar. 6, 2019, https://finesandfeesjusticecenter.org/articles/texas-senate-bill-1637-fines-fees-and-costs.

107 Fines and Fees Justice Center, "Texas SB 1913."

108 Ibid.

109 Ibid.

110 Daves v. Dall. Cty., 341 F. Supp. 3d 688 (N.D. Tex. 2018) (order granting preliminary injunction).

111 86 (R) H.B. No. 2048 (Tex. 2019).

112 Morgan Smith, "To Pay for Trauma Centers, State Program Sinks Thousands of Texas Drivers into Deep Debt," *Texas Tribune*, Aug. 27, 2018, https://www.texastribune.org/2018/08/27/pay-trauma-centers-texas-sinks-thousands-drivers-deep-debt.

113 Ibid.

114 Fees and Fines Justice Center, "Texas Senate Bill 1637: Fees, Fines, and Costs," Mar. 6, 2019, https://finesandfeesjusticecenter.org/articles/texas-senate-bill-1637-fines-fees-and-costs.

115 Arya Sundaram, "This Texas Program Lands Poor People in Jail. Getting Rid of It Has Been too Complicated — but that Might Be Changing," *Texas Tribune*, Feb. 13, 2019, https://www.texastribune.org/2019/02/13/texas-lawmakers-push-fix-driver-responsibility-program.

116 Texas Fair Defense Project and Texas Appleseed, *Driven by Debt*.

117 Texas Criminal Justice Coalition, "Repeal Texas' Driver Responsibility Program and Identify Alternative Funding Sources for Trauma Hospitals," https://www.texascjc.org/repeal-texas-%E2%80%99-driver-responsibility-program-and-identify-alternative-funding-sources-trauma.

118 Fees and Fines Justice Center, "Texas SB 1913."

119 While this study focuses on criminal fees and fines imposed by misdemeanor courts in several jurisdictions, the authors were unable to separate noncriminal traffic or other nonmisdemeanor infractions heard by Florida's county criminal courts from the data.

120 The $22 per capita rate is derived from the reported fiscal year 2012–2018 assessments from Florida's circuit and county criminal courts, as reported in annual assessments and collections reports of the Florida Court Clerks & Comptrollers association, https://www.flclerks.com/page/PublicDocuments; the 2017 population estimate for Florida from the American Community Survey, administered by the U.S. Census Bureau, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml.

121 The fiscal year 2018 annual assessments and collections report of the Florida Court Clerks & Comptrollers, https://www.flclerks.com/page/PublicDocuments.

122 Florida Court Clerks & Comptrollers, *2018 Annual Assessments and Collections Report*, 11, https://finesandfeesjusticecenter.org/content/uploads/2019/01/2018-Annual-Assessments-and-Collections-Report.pdf.

123 Ibid., 20.

124 Ibid., 11.

125 Ibid., 20.

126 Ibid., 11 (actual estimate for circuit courts); ibid., 20 (actual estimate for county courts).

127 Salas and Ciolfi, *Driven By Dollars*.

128 Justin Wm. Moyer, "More than 7 Million People May Have Lost

Driver's Licenses Because of Traffic Debt," *Washington Post*, May 19, 2018, https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html.

129 National Center for State Courts, *Trends in State Courts: Fines, Fees, and Bail Practices — Challenges and Opportunities*, 2017, https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Rethinking-Drivers-License-Suspensions-Trends-2017.ashx.

130 Salas and Ciolfi, *Driven By Dollars*.

131 Ibid.

132 Morgan Smith, "To Pay for Trauma Centers, State Program Sinks Thousands of Texas Drivers into Deep Debt," *Texas Tribune*, Aug. 27, 2018, https://www.texastribune.org/2018/08/27/pay-trauma-centers-texas-sinks-thousands-drivers-deep-debt.

133 Meg Bushman-Reinhold, "Fiscal Impact of Proposed Legislation, Measure: HB 2614," Mar. 7, 2019, https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureAnalysisDocument/45131.

134 ACLU of Washington, *Driven to Fail: The High Cost of Washington's Most Ineffective Crime - DWLS III*, Feb. 21, 2017, https://www.aclu-wa.org/docs/driven-fail-high-cost-washingtons-most-ineffective-crime.

135 Washington State Legislature, "State Taxes and Fees," 2018, 107, http://leg.wa.gov/JTC/trm/Documents/TRM%202019%20Update/StateTaxesFeesREV.pdf.

136 Florida Association of Counties, "Amendment 4: Voting Rights Restoration for Felons Initiative," https://www.fl-counties.com/amendment-4.

137 S.B. 7066, 2019 Leg., Reg. Sess. (Fla. 2019).

138 Kevin Morris, "Thwarting Amendment 4," Brennan Center for Justice, May 9, 2019, https://www.brennancenter.org/analysis/thwarting-amendment-4.

139 The $54 per capita rate is derived from the 2017 population estimate for CIP counties from the American Community Survey.

140 This is the high range amount of the jail credit analysis.

141 United States Census Bureau, "SAIPE State and County Estimates for 2017," Nov. 30, 2017, https://www.census.gov/data/datasets/2017/demo/saipe/2017-state-and-county.html. "Per capita uncollected fees and fines" is the sum of the uncollected fees and fines from 2012 to 2016 divided by the 2013–2017 five-year ACS population estimates.

142 Ibid.

143 Ibid.

144 Ibid.

145 "'Safe Surrender' Event Lets You Resolve Outstanding Warrants," *Albuquerque Journal,* July 6, 2018, https://www.abqjournal.com/1193677/metro-court-safe-surrender-event-lets-you-resolve-outstanding-warrants.html.

146 New Mexico Magistrate Courts (@NMSafeSurrender), Twitter, https://twitter.com/NMSafeSurrender.

147 John Miller, "Moriarty Magistrate Courts Offer 'Safe Surrender' Opportunity on Saturday," *Taos News*, Feb. 15, 2019, https://www.taosnews.com/stories/magistrate-courts-offer-safe-surrender-opportunity-on-saturday,55094.

148 "Magistrate Court to Offer 'Safe Surrender' Chance," *Santa Fe New Mexican*, Apr. 19, 2018, https://www.santafenewmexican.com/news/local_news/magistrate-court-to-offer-safe-surrender-chance/article_4cf41241-6afc-5d7d-b06c-bfab01d492e8.html.

149 Grace Philips, *New Mexico's County Jails: An Overview*, New Mexico Association of Counties, May 27, 2016, https://www.nmlegis.gov/handouts/CCJ%20052716%20Item%203%20NM%20County%20Jails%20An%20Overview.pdf.

150 Nick Wing, "New Mexico Votes to Reform Bail System That Jails People Just Because They're Poor," *HuffPost Politics*, Nov. 8, 2016, https://www.huffpost.com/entry/new-mexico-amendment-1_n_5817a3cfe4b0990edc32ed05.

151 Ibid. Constitutional Amendment 1 was upheld by the 10th Circuit in 2019 after a class action suit from the Bail Bond Association of New Mexico.

152 Ibid.

153 Ibid. Taken from a quote by New Mexico Supreme Court Chief Justice Charles Daniels, a prominent critic of monetary bail systems.

154 Chris Ramirez, "Vote 4 NM: Gubernatorial Candidates Agree; Bail Reform Is 'Not Working'," KOB4, Oct. 29, 2018, https://www.kob.com/politics-news/vote-4-nm-gubernatorial-candidates-agree-bail-reform-is-not-working/5125778. Chief Justice Daniels again reiterated his support for Constitutional Amendment 1 in an interview with KOB4.

155 United States Census Bureau, "American Fact Finder," https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml. Demographic data is based on 2013–2017 American Community Survey five-year estimates.

156 United States Census Bureau, "SAIPE State and County Estimates for 2016," Nov. 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from the "US and All States and Counties" table.

157 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

158 In Bernalillo County, both traffic claims and misdemeanors are handled by a single metropolitan court (rather than individual magistrate and municipal courts). In New Mexico, the Administrative Office of the Courts (AOC) supports district, magistrate, and metropolitan courts across the state. AOC provides human resources, accounting, and administrative services to the courts and ensures that resources are distributed equitably.

159 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

160 Brennan Center original research (see Appendix B: Methodology).

161 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

162 United States Census Bureau, "SAIPE State and County Estimates for 2016," Nov. 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from the "US and All States and Counties" table.

163 Focusing on traffic and misdemeanor offenses, which generate the greatest fee and fine volume, the authors conducted four days of court watching at the Bernalillo Metropolitan Court. The analysis also uses data made available by the New Mexico Administrative Office of the Courts and jail data obtained by web scraping the inmate custody list posted online by the Bernalillo Metropolitan Detention Center.

164 Brennan Center original research (see Appendix B: Methodology).

165 The costs do not include the significant law enforcement and out-of-court judicial costs of collecting fees and fines.

166 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey

five-year estimates.

167 Brennan Center original research.

168 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

169 "United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

170 Brennan Center original research (see Appendix B: Methodology).

171 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

172 Brennan Center original research (see Appendix B: Methodology).

173 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

174 United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

175 Brennan Center original research (see Appendix B: Methodology).

176 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates; United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

177 Florida Department of State, Division of Elections, "Election Results Archive," https://dos.myflorida.com/elections/data-statistics/elections-data/election-results-archive.

178 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

179 Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, Brennan Center for Justice, 2010, 5, https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF%26F.pdf.

180 Ibid., 7.

181 Florida Courts, "Court Funding and Budget," https://www.flcourts.org/Administration-Funding/Court-Funding-Budget.

182 Fla. Const. art. §§ 14(b-c) (1998), http://www.leg.state.fl.us/statutes/index.cfm?submenu=3#A5S14.

183 Andy Thomas, Florida Second Circuit public defender, interview, Sept. 13, 2018.

184 Leon County Clerk of Court staff, interview.

185 Fla. Stat. § 938.29 (2010) (mandating minimum $50 public defender fee per case for misdemeanor and criminal traffic offenses, even where defendant is found indigent).

186 Diller, *Hidden Costs*, 21.

187 Andy Thomas, Florida Second Circuit public defender, interview, Sept. 13, 2018.

188 State v. Beasley, 580 So. 2d 139 (Fla. 1991).

189 Southern Legal Counsel, interview, Sept. 17, 2018.

190 Fla. Stat. § 938.30(2) (2013).

191 Peter Sabian, interview.

192 Fla. Stat. § 322.245; § 318.15.

193 Fines and Fees Justice Center, "Campaign: Florida,"https://finesandfeesjusticecenter.org/campaigns/florida-campaign-fines-fees/.

194 Ibid.

195 Peter Sabian, interview.

196 Diller, *Hidden Costs*, 27.

197 Wayne K. Roustan, "Florida Suspends Nearly 2 Million Driver's Licenses. Help May Be on the Way," *South Florida Sun Sentinel*, Feb. 16, 2018, https://www.sun-sentinel.com/news/transportation/fl-reg-drivers-license-suspensions-20180208-story.html; Florida Highway Safety and Motor Vehicles, "Fees," https://www.flhsmv.gov/fees.

198 Ibid.

199 Gary Blankenship, "Veteran's Clinics, License Restoration Program Ready for Replication," *Florida Bar News*, Jan. 1, 2019, https://www.floridabar.org/the-florida-bar-news/veterans-clinics-license-restoration-program-ready-for-replication.

200 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

201 United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

202 Florida Department of State, Division of Elections, "Election Results Archive," https://dos.myflorida.com/elections/data-statistics/elections-data/election-results-archive.

203 Interview with Ashley Thomas, Fines and Fees Justice Center, July 29, 2019.

204 Information provided by Lisa Foster, codirector, Fines and Fees Justice Center, August 15, 2019.

205 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

206 Florida Department of State, Division of Elections, "Election Results Archive," https://dos.myflorida.com/elections/data-statistics/elections-data/election-results-archive.

207 "United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

208 Brennan Center original research (see Appendix B: Methodology).

209 Brennan Center original research (see Appendix B: Methodology).

210 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates; "United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

211 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

212 Florida Department of State, "Election Results Archive."

213 Brennan Center original research (see Appendix B: Methodology).

214 In Florida, traffic violations may be civil or criminal, and both types of violations may be handled by the same court. Accordingly,

the authors were not able to determine the number of criminal proceedings.

215 Michael Braga and Josh Salman, "'God-Fearing and Very Fair': Wide Racial Disparities Show Up in Prosecutor's Sentencing Numbers. But in Tiny Madison County, the Sheriff Runs the Show," *Herald Tribune*, Aug. 30, 2018, http://projects.heraldtribune.com/influence/madison.

216 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates; "United States Census Bureau, "SAIPE State and County Estimates for 2016," Nov. 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

217 Texas Secretary of State, "Turnout and Voter Registration Figures (1970–Current)," https://www.sos.state.tx.us/elections/historical/70-92.shtml.

218 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimates.

219 "Texas Mulls Non-Jail Options for Those Who Can't Pay Fines," Associated Press, June 11, 2017, https://www.bostonglobe.com/news/nation/2017/06/11/texas-mulls-non-jail-options-for-those-who-can-pay-fines/ItybKIjuKOJN9GQy0XCk2H/story.html.

220 Ibid.

221 Ryan Kocian, "Texas Reforms Its System of Debtors' Prisons," Courthouse News Service, June 20, 2017, https://www.courthousenews.com/texas-reforms-system-debtors-prisons.

222 Andrea M. Marsh, *Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, National Center for State Courts, 2017, 21, https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Rethinking-Drivers-License-Suspensions-Trends-2017.ashx.

223 Ibid., 23.

224 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimate.

225 See generally Travis County Clerk, "Travis County Election Results," https://countyclerk.traviscountytx.gov/election-results.html.

226 United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table. Dallas County (containing the city of Dallas), Bexar County (containing the city of San Antonio), and Harris County (containing the city of Houston) all have median incomes between $50,000 and $55,000.

227 Brennan Center original research; authors' interview.

228 Brennan Center original research; see Appendix B: Methodology.

229 Department of Justice, *Investigation of the Ferguson Police Department*.

230 Brennan Center original research (see Appendix B: Methodology).

231 The costs do not include the significant law enforcement and out-of-court judicial costs of collecting fees and fines.

232 Jazmine Ulloa, "The Price They Pay: Austin Rethinks Whether to Send Poor People to Jail for Unpaid Traffic Fines They Can't Afford," *Austin American-Statesman*, May 20, 2016, http://specials.mystatesman.com/traffic-fines.

233 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimate.

234 United States Census Bureau, "SAIPE State and County Estimates for 2016," Nov. 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

235 Texas Department of Public Safety, "Failure to Appear/Failure to Pay Program," https://www.dps.texas.gov/DriverLicense/failureToAppear.htm.

236 The costs do not include the significant law enforcement and out-of-court judicial costs of collecting fees and fines.

237 Brennan Center original research based on data provided by the Texas Office of Court Administration.

238 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimate.

239 Ibid.

240 United States Census Bureau, "SAIPE State and County Estimates for 2016," Nov. 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

241 Brennan Center original research (see Appendix B: Methodology).

242 Brennan Center original research (see Appendix B: Methodology).

243 Texas Department of Public Safety, "Failure to Appear / Failure to Pay Program," https://www.dps.texas.gov/DriverLicense/failureToAppear.htm.

244 Brennan Center original research (see Appendix B: Methodology).

245 Brennan Center original research (see Appendix B: Methodology).

246 The county court in Marion County does not report its collections each year. Q1 2018 data was provided by the court clerk and annualized.

247 Brennan Center original research (see Appendix B: Methodology).

248 United States Census Bureau, "American Fact Finder." Demographic data is based on 2013–2017 American Community Survey five-year estimate.

249 United States Census Bureau, "SAIPE State and County Estimates for 2016," November 30, 2017, https://www.census.gov/data/datasets/2016/demo/saipe/2016-state-and-county.html. Poverty rate estimates were pulled from "US and All States and Counties" table.

250 Brennan Center original research (see Appendix B: Methodology).

251 Brennan Center original research (see Appendix B: Methodology).

252 Brennan Center original research (see Appendix B: Methodology).

253 Brennan Center original research (see Appendix B: Methodology).

254 The county court in Marion County does not report its collections each year. Q1 2018 data was provided by the court clerk and annualized.

255 Brennan Center original research (see Appendix B: Methodology).

256 Brennan Center original research (see Appendix B: Methodology).

257 Our court watchers did not observe in every case all of the types of personnel that we expected to be present in courtrooms. For example, no public defenders were observed in courts in Travis County, Texas, and our cost estimates do not include them. Subsequent research found that there is no public defender system for the adult criminal courts in Travis County, although there is an assigned counsel system.

ABOUT THE AUTHORS

▶ **Matthew Menendez** is counsel in the Justice Program at the Brennan Center for Justice and previously worked for four years as counsel in the Fair Courts project in the Brennan Center's Democracy Program. Prior to joining the Brennan Center, Menendez was a litigator at Gibson, Dunn & Crutcher LLP in New York City. Menendez attended New York University School of Law as a Dean's Scholar and graduated in 2007, having served as notes editor of the *NYU Environmental Law Journal*. He received his BA in economics and political science from Swarthmore College in 1999. After graduating from Swarthmore, he worked in Washington, DC, as an aide to Senator John D. Rockefeller IV, where he concentrated on issues including the judiciary, energy, and the environment. Menendez is also an adjunct professor at NYU School of Law, where he teaches the Brennan Center Public Policy Advocacy Clinic.

▶ **Michael F. Crowley** is a senior fellow at the Brennan Center for Justice. Prior to joining the Brennan Center, Crowley was a criminal justice consultant and a senior justice policy analyst at the White House Office of Management and Budget, where he worked for both Republican and Democratic administrations during a tenure spanning more than 20 years. From 2003 to 2013, he was responsible for policy, budget, and legislative oversight of more than $3 billion in Department of Justice state and local grants, as well as research and statistics programs. Prior to that, he served on the staff of the U.S. Department of Labor's Bureau of Labor Statistics and the U.S. Department of the Treasury. Crowley is a graduate of the University of the Pacific and LBJ School of Public Affairs at the University of Texas at Austin.

▶ **Lauren-Brooke Eisen** is a senior fellow and the acting director of the Justice Program at the Brennan Center for Justice. With expertise in criminal law and practice, Eisen spearheads the program's creation of innovative policy proposals and legal recommendations. Previously she was a senior program associate at the Vera Institute of Justice in the Center on Sentencing and Corrections. Eisen also served as an assistant district attorney in New York City in the Sex Crimes and Special Victims Bureau, Criminal Court Bureau, and Appeals Bureau, where she prosecuted a wide variety of criminal cases. She has worked as a journalist in Laredo, Texas, covering crime and justice; served as an adjunct instructor at the John Jay College of Criminal Justice; and taught a seminar on mass incarceration at Yale College. She holds an AB from Princeton University and a JD from the Georgetown University Law Center.

▶ **Noah Atchison** is a data and policy specialist at Community Resources for Justice. He was previously a research and program associate in the Justice Program at the Brennan Center for Justice. Prior to joining the Brennan Center, he worked at the Federal Reserve Bank of New York and interned at the Fair Housing Council of Oregon. Atchison earned a BA in economics from Reed College.

ACKNOWLEDGMENTS

This publication was made possible through the support of Arnold Ventures. The opinions expressed in this publication are those of the authors and do not necessarily reflect the views of Arnold Ventures.

The authors are grateful to Lisa Foster and Joanna Weiss, who direct the Fees and Fines Justice Center, for their feedback on this report, along with Julie James, Cybele Kotonias, Jeremy Travis, and Carson Whitelemons at Arnold Ventures for their guidance on this project.

The Brennan Center also acknowledges the Texas Public Policy Foundation and its Right on Crime initiative for their help in gathering certain data that informed the report and providing input on early report drafts.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at
www.brennancenter.org

Sign up for our electronic newsletters at
www.brennancenter.org/signup

BRENNAN CENTER FOR JUSTICE

Brennan Center for Justice at New York University School of Law
120 Broadway // 17th Floor // New York, NY 10271
www.brennancenter.org

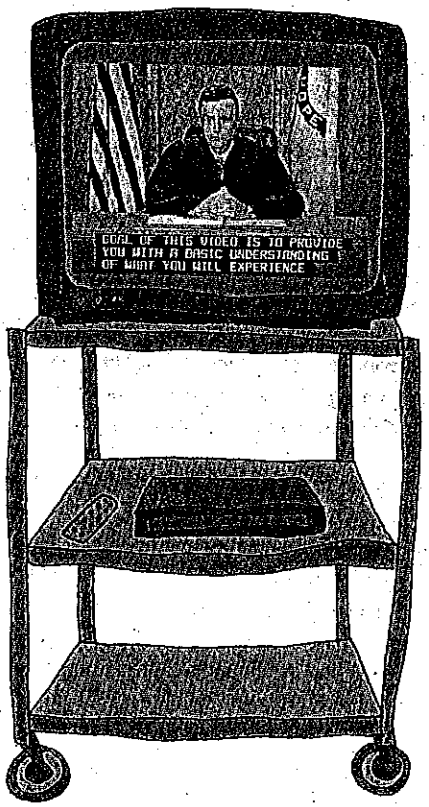
CAUGHT IN RHODE ISLAND

An investigation into how court fees and fines trap low-income Rhode Islanders in poverty

by Sydney Anderson (/author?n=Sydney Anderson), Harry August (/author?n=Harry August), Matt Ishimaru (/author?n=Matt Ishimaru), Olivia Kan-Sperling (/author?n=Olivia Kan-Sperling), Sophie Khomtchenko (/author?n=Sophie Khomtchenko), Alina Kulman (/author?n=Alina Kulman), Julia Rock (/author?n=Julia Rock), Nick Roblee-Strauss (/author?n=Nick Roblee-Strauss) & Lucas Smolcic Larson (/author?n=Lucas Smolcic Larson)

Illustration by Pia Mileaf-Patel (/illustrator?n=Pia Mileaf-Patel)

published April 19, 2019



When Roberto Torres appeared in District Court on February 14, 2019, and plead no contest to a reckless driving charge, he was unemployed, on food stamps, and already $1,417.32 in debt to the Rhode Island Judiciary for a litany of past violations.

This legally qualifies Torres, 27, as an indigent defendant: someone with a severely restricted ability to pay his fines and court fees. This also qualified the judge, Joseph T. Houlihan Jr., to remit—eliminate—some or all the court costs. Instead, in an arraignment that lasted only a few minutes, Houlihan Jr. sentenced Torres the maximum fine: $500. And beyond that, Torres found out after the arraignment that this sentence included an additional $142.75 in court costs and fees—bringing his current outstanding debt to $2,144.

Each month, Torres and the other 48,026 individuals in debt to the Rhode Island District Court, must submit a minimum payment to the court of $10, or as much as they can afford. On April 2, Torres paid $6.07. At that rate, with no further convictions, Torres will still be in debt until at least 2038. And Torres knows the stakes are high: "If I can't afford the payment, they issue a court warrant," he told the *College Hill Independent* last week.

If a defendant misses a monthly payment, the court will automatically issue an arrest warrant, dragging him back before a judge, and, if that judge finds "willful nonpayment," to jail. What's more, the costs of this arrest warrant—$125—could be tacked on to Torres's debt, a process he has already undergone twice in the past five years. (District Court Administrator Stephen Waluk wrote in an email to the *Indy* that this only occurs "after multiple incidences of appearing and being unable to pay.")

Torres is now part of what many call a "two-tiered justice system." In Rhode Island and across the country, the well-off easily pay court costs, dodging prison and further involvement with the legal system, while low-income defendants, disproportionately people of color, are cast headlong into a cycle of debt. Often, these individuals must choose between meeting basic expenses, like rent, and paying the courts to avoid being locked up. Within a criminal justice system that time and time again produces punitive outcomes for low-income communities, subjecting them to harsh policing and incarceration, fees and fines are a quiet but far-reaching burden.

"If we are forcing someone to choose between feeding their kid or paying their court fine and not going back to prison ... that is a violent choice that we have forced someone to make," said Jordan Seaberry, director of public policy and advocacy for the Providence-based Nonviolence Institute and a long-time advocate for a more humane justice system.

It's a decision enforced by coercion, he said. Studies published in 2008 (http://opendoorsri.org/courtdebtreform) and 2016 (https://www.documentcloud.org/documents/5956271-Rachel-Black-Thesis-Final-Draft-4-16.html) showed nonpayment (technically, a failure to appear at a payment date) is a leading cause of incarceration in Rhode Island, accounting for 15.5 percent of all commitments in 2015. Officially, debtor's prison was abolished by the federal government in 1833, and the Eighth Amendment to the US Constitution protects against excessive monetary sanctions. But for people who pass through Rhode Island's state courts, debt can be all-consuming, deepening poverty, damaging employment prospects, and threatening the ability to hold a driver's license.

Taking stock of this system, the *Indy* decided to document what is happening every day in our state's courts. Our nine-person investigative team spent many hours in the courtroom, interviewed lawyers, advocates, and defendants, and compiled a year's worth of the Judiciary's online court payment records.

Over three months, we observed over 100 arraignments and 11 sentencings involving the imposition of fees and fines at the Sixth District courthouse in Providence. We documented little to no efforts by judges to assess low-income defendants' ability to pay these sums, as is required by state law. (In a handful of cases, judges waived court costs, imposed on top of a fine, at the request of a public defender.) And remittances must happen from the bench: Clerks, who actually handle the money, said they could easily put someone on an installment plan of just a few dollars a month but couldn't waive costs themselves.

Data we obtained (https://drive.google.com/drive/folders/10iyIFx--L8zDoUufrE1KHlPUK04ia4jG?usp=sharing) by public records request from the Rhode Island Judiciary show that just over half of all court fees and fines imposed in criminal cases in Superior Court and nearly 20 percent imposed in District Court—some $50 million in total (https://docs.google.com/spreadsheets/d/1ZKuoi730OwzS3qzoMLvwzSHG8rZEzBB3YAJZgu2wSXY/usp=sharing)—are outstanding, as of last year. In Fiscal Year 2018, Superior Court collected only eight percent of court costs assessed that year in criminal cases, while the District Court's first-year collection rate was just 24 percent. This indicates that defendants are overwhelmingly unable to pay their court costs.

Furthermore, judges are ignoring state laws on the books that empower them to end the cycle of debt. According to our analysis of online payment data for over 28,000 separate cases in 2018 (85.8 percent of criminal cases filed in District and Superior Court that year), when people are brought before a judge for an "ability-to-pay hearing," costs are remitted just 0.35 percent of the time—only 25 of 7,160 hearings in 2018 resulted in debts being lowered.

These numbers paint a picture of a court system hell-bent on trying to "squeeze blood from a stone, to wring these costs out of people who simply cannot pay them," in the words of Natalia Friedlander, a staff attorney at the Rhode Island Center for Justice. How did we get to this point? And what needs to change? We asked these questions of everyone we talked to, from defendants to defense lawyers. Their answers indicate that Rhode Island's situation is far from inevitable and definitely not irreversible. It's the story of squandered reform, where an undergraduate thesis from 2016 stands as one of the only thorough accounts of how fees and fines excessively punish the poor in Rhode Island. Three years later, our investigation shows this is still a reality.

KEY FINDINGS

Rhode Island's system of court fees and fines creates what many call a "two-tiered justice system," where the well-off easily pay court costs while low-income defendants are cast into a cycle of debt, coerced by the threat of incarceration.

Rhode Island's District and Superior Court judges are supposed to determine a defendant's ability to pay fees and fines—and can waive many courts costs at their discretion—but rarely choose to do either.

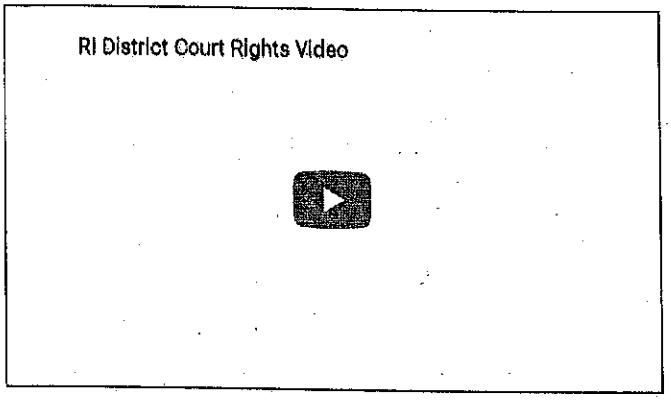
The state led the nation with a fees and fines reform bill in 2008, but 10 years later, the courts struggle to recover even half of the $50 million in court costs still outstanding from more than 48,000 defendants, five percent of Rhode Island.

A Day in Court

Each weekday morning, the same scene repeats itself inside the Garrahy Judicial Complex, the imposing red-brick home of the Sixth District Court in downtown Providence. After shedding belts and watches to pass through the metal detectors at the door (a pile of contraband pocket knives tends to develop under a shrub outside the main doors), people mill about the fourth floor, outside Courtroom 4C. There are lawyers in dark suits, police officers in uniform, and friends and family of defendants in street clothes. Arraignments are scheduled to start at 9 AM, although the hearings are often delayed for half an hour or more.

When the doors are unlocked, a small crowd files into the rows in the back half of the room. A low wooden barrier cuts the room in half, separating observers from the bench. Defendants who have been held overnight in Rhode Island's Adult Correctional Institute (ACI) are then brought in through a side door by police officers, walking slowly to the jury box, as they are handcuffed and chained to each other in pairs. Other people charged with minor offenses, like driving on a suspended license, sit in the rows, waiting for their names to be called.

Before long, one of the police officers in the courtroom rolls out an enormous cathode-ray television set that plays a grainy VHS tape narrated by District Court Judge Robert Pirraglia, who retired 15 years ago. As '90s-style animations show the scales of justice and wooden gavels, Pirraglia begins to explain: "Anyone charged with an offense has certain legal rights. Here they are...." He outlines the different types of offenses defendants may be charged with, the different types of bail, and, most importantly, their constitutional rights in the courtroom. Then, the video repeats in Spanish—not that the courtroom's occupants are necessarily paying attention to the tape. Defendants are still filing in, and many are not even present at this point, missing the opportunity to hear a clear, albeit dated, explanation of their legal rights.



The video outlines defendants' right to legal counsel. Nationally, 80 percent of criminal defendants (https://www.nytimes.com/2013/03/16/us/16gideon.html) can't afford a lawyer. But many days, there are no public defenders at arraignments in District Court, as they often have to prioritize cases that are going to trial. They are, like public defenders everywhere in the country, incredibly overworked. A 2017 study of workloads in the Rhode Island Public Defender's Office (https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid found that it would need approximately 85 additional full-time attorneys to fully attend to its nearly 300,000 hours of work per year. So if defendants plead guilty or nolo contendere, meaning they agree not to contest their charge, judges guide the whole arraignment, and defendants are forced to navigate negotiations over their court fines and fees on their own.

And so they do. All morning, judges call out the accused by name and birthdate, summoning them to the bench. There, the judge reads out charges. Rhode Island is one of about 14 states in the nation that let police officers serve as prosecutors in district court. (Two local legal experts, Roger Williams law professors Andy Horwitz and John Grasso, maintain that this is illegal since cops are not licensed to practice law. They wrote in a 2006 article in the *Rhode Island Bar Journal* (https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid that police prosecutors practically make Rhode Island an "unsupervised police state.")

Cops cycle in and out of the courtroom, reading from police reports: domestic disputes, traffic stops, assaults. Defendants are instructed to listen quietly, as the police prosecutors outline the alleged crimes. Then the judge asks how they choose to plea. If a defendant chooses guilty or nolo contendere—and many do, forfeiting their right to a trial in favor of a plea deal and quicker resolution of their charges—fines are assessed according to statute. The process is a finely-tuned machine, with a handful of bailiffs channeling defendants to the bench and disciplining those who disrupt order in the courtroom. Each case, from the description of the alleged crime to the plea and sentencing, takes only a few minutes.

Total amount outstanding from criminal cases in District and Superior Court

$50,616,042

(Source: RI Judiciary)

Rhode Island law instructs judges to consider a defendant's finances. Section 12-21-20 (http://webserver.rilin.state.ri.us/Statutes/TITLE12/12-21/12-21-20.HTM) reads, "In district court, the judge shall make a preliminary assessment of the defendant's ability to pay [fees and fines] immediately after sentencing or nearly thereafter...." Whether this happens in practice seems to be entirely at the whim of whichever judge is presiding that day.

Angela Lawless, a former public defender in district courtrooms in Providence and Newport, has represented many people with histories of repeated legal involvement—and years of accumulated debt. "There's a decent number of judges on the District Court bench who are amenable to listening to what your client's circumstances are and potentially remitting or waiving court costs," she said.

Based on our observation, some judges are more willing to negotiate than others. The same day Judge Houlihan gave Roberto Torres the maximum fine, he waived the court fees for a defendant charged with driving with a suspended license, on the basis that he found the defendant's car model, a Toyota Corolla, "so sad." (The Judiciary did not respond to a request for comment in response to his statement.) Cases likes these show the arbitrary nature of waving court fees and fines, which often seems to be as reliant on the judge's whim, or the presence of a public defender, as it is on the defendant's actual ability to pay.

But time and again, we observed defendants accept fines with no inquiry into their ability to pay them, no elaboration of what fees would be attached to the fine, and no discussion of the possible consequences of nonpayment (notably, incarceration). Lawless said that costs are "really only discussed if the defense attorney brings [them] up and asks for [them] to be waived" during sentencing.

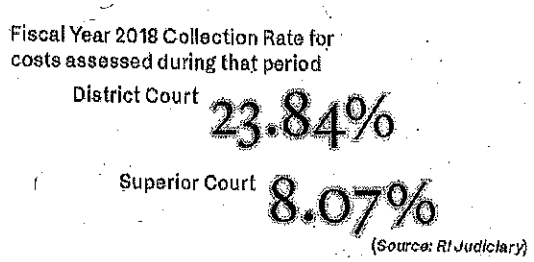
When people are brought before a judge for an "ability-to-pay hearing," costs are remitted just 0.35% of the time—only 25 of 7,160 hearings in 2018 resulted in debts being lowered.

(Source: RI Judiciary's online court records)

After a defendant pleads guilty or nolo contendere at the initial hearing, they go to the clerk's desk, where they are assigned a fee, which is a user cost the courts charge defendants on top of any fines they receive for

breaking the law. Ideally, a public defender should be present to help them understand what the fees mean and how payment will work, but this depends on the availability of the Public Defender's Office on any given day.

Court fees are minor compared to a large fine or long probation, but they are frequently a huge hidden cost—sometimes adding hundreds of dollars in extra debt. Take driving under the influence, for example. The fine for a first violation is set at $100 or greater. But on top of that fine, a $500 "Highway Assessment Fee" is added, which goes into the state's general fund, just like a fine, as well as an $86 court fee. Thus, the total sum owed is more than six times as much as minimum the fine alone. In addition, defendants have to pay hundreds of dollars more on a driver's education class and license reinstatement costs. Over the course of our time in court, the *Indy* observed two first-time DUI pre-trial hearings, and on both occasions the judge, Associate Judge Christopher Smith, only mentioned the $100 fine during the hearing—leaving the defendant to discover the additional hundreds of dollars in costs after pleading guilty or no contest.



Fees and fines together comprise the debt an individual owes to the court, and if they are unable to pay in full at the time of sentencing (which District Court Clerk Jim Plante estimated to be the reality for about half of all defendants), they are put on a payment plan. Month after month, they have to make small payments towards their debt, at the court, or online if the case is in District Court (plus a 3.25 percent credit card surcharge). A defendant who repeatedly misses a payment date has a bench warrant put out for their arrest for "failure to appear." They aren't notified when this happens, but once a bench warrant is issued, any police encounter, even without an offense, can result in an arrest and commitment to the Intake Service Center at Rhode Island's ACI.

Ronnie Walker, 53, has been on a payment plan of $10 per month for the past year. When we spoke to him in the Sixth District Court clerk's office, he said he had six or seven months remaining to pay off his debt. "[You] just gotta pay to keep warrants and police out of your hair, because if they pick you up on a Friday [for nonpayment], you're locked up for the weekend," he said. (2008 reforms mandated a 48 hour cap on imprisonment before defendants are brought before a judge, with exceptions for weekends and holidays.)

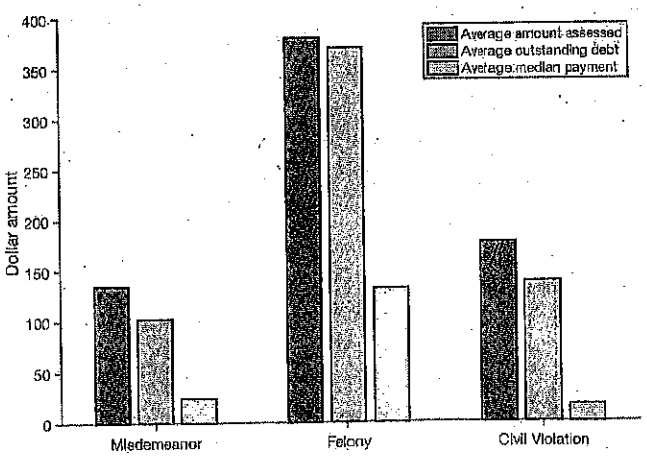
For others, small debts compound into insurmountable obligations. "It's a fear that lives inside you," said Tarah Dorsey, a senior streetworker at the Nonviolence Institute who has been in debt to the Rhode Island Judiciary since her first court appearance in 1996. For 23 years, court debt has been another anxiety on top of "the problems of not being able to get a job because of my [criminal] record, problems of not being able to keep the lights on, or pay my rent," she said.

While jail is one of the most serious consequences of nonpayment, it isn't the only one. Rhode Islanders can lose their driver's license if their court costs go unpaid. As of April 15, 2019, the Rhode Island Division of Motor Vehicles (DMV) reported a total of 28,528 drivers (3.7 percent of the state's licensed and permitted drivers) with unresolved license suspensions as a result of failure to pay or appear in court. Licenses are suspended for a failure to make court payments in the cases heard by the Rhode Island Traffic Tribunal and for a variety of driving-related offenses, like DUIs, in District and Superior Court. If a defendant continues to use their car—a daily necessity for many—charges of driving with a suspended license bring a whole new round of fees, fines, and court obligations they must meet in order to get their license reinstated.

Marcy Coleman, assistant administrator for safety and regulations at the Rhode Island Division of Motor Vehicles (DMV), advocates for a move away from using suspensions as a punitive measure (https://www.aamva.org/ReducingSuspendedDriversAternativeReinstatementBP/) in non-driving related offenses, like nonpayment. She observes a "downward spiral" of suspensions in cases where people are unable to pay court costs. "We have horrible public transportation," she said, "a person needs their license here in Rhode Island to get to and from work." Each court-ordered suspension incurs an additional $151.50 fee to the DMV, on top of the requirement of paying off outstanding court debt or going on a payment plan, to reinstate a license.

Legislation passed in 2016 reduced penalties on the first two offenses for driving without a license, categorizing them as civil offenses rather than misdemeanors, lowering fines, and eliminating criminal charges. After the first two charges, the offense becomes a misdemeanor, with higher fines and the added potential of jail time in addition to further license suspension (we observed many defendants with six or more driving on a suspended license charges). Coleman reports this shift meant a significant reduction in suspensions. In 2018, out of 7,097 people convicted of driving with a suspended license, only 16 received an additional suspension as a result of these new charges, she said.

These changes came too late for Tarah Dorsey. She was unable to hold a valid license for most of her life, buried under her debt to the courts. But two years ago, at age 39, she finally got one. The total costs involved, to the courts and the DMV: $1,800.



Source: RI Judiciary's online court records

How We Got Here

The Rhode Island legislature has been increasing the use of fees and fines as a punitive measure since tough-on-crime rhetoric became popular in the '80s and '90s. "As mass incarceration grew and criminal justice agency budgets exploded, state and local politicians were either unable or unwilling to fund those agencies through public revenue, so fees being regressive taxes [were] sort of a politically easier imposition," Jonathan Ben-Menachem, policy and communications associate at the national Fines and Fees Justice Center (https://finesandfeesjusticecenter.org/), told the *Indy*. A combination of anti-crime and anti-tax rhetoric encouraged politicians to pass what were essentially taxes on the poor to raise revenue.

Since then, court fees and fines have become a broader means of funding state governments. In her 2016 Brown University undergraduate thesis (https://www.documentcloud.org/documents/5956271-Rachel-Black-Thesis-Final-Draft-4-16.html)—the most recent comprehensive report on fees and fines in Rhode Island—Rachel Black tracked the way legislation was amended to redirect specific fees into the state's general fund, while maintaining their original names. (A $100 "lab maintenance fee," still tacked onto drug possession charges, no longer goes directly to any lab.)

Court costs add up. In 2007, Ricardo Graham spent 40 days in prison as a result of his inability to pay court debts amounting to $745, at an estimated cost to the state of $4,000 for his time at the ACI. Graham found himself subject to Rhode Island's debt collection system: warrants and imprisonment for those who miss payment dates, even when the cost to the state far outweighs the debt it is owed. He lost his job while behind bars.

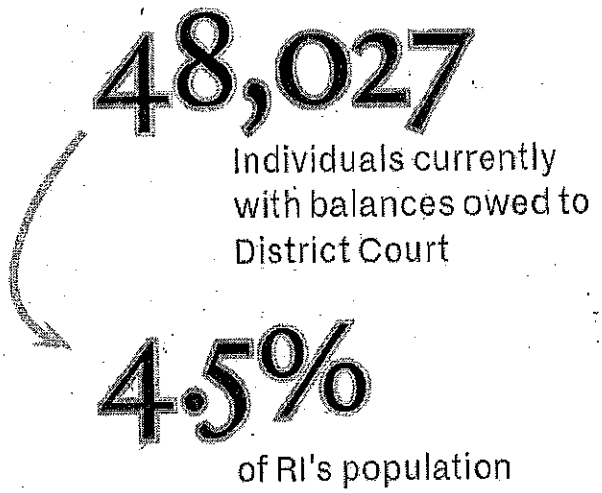
Advocacy by OpenDoors RI (then the Family Life Center) and other organizations brought public attention to the problem of court debt collection. In 2008, the Family Life Center published a lengthy report (http://opendoorsri.org/courtdebtreform) revealing that failure to pay court debt (or appear at a payment date) was the most common reason for imprisonment in Rhode Island, accounting for 17 percent of all jailings. In 15 percent of all cases, the amount the state spent incarcerating people was more than the amount they owed to the court.

Judges, who were supposed to consider ability to pay in assessing court costs, typically did not, as a result of merely suggestive statutes and large caseloads that limited time they could dedicate to individual defendants. (*Indy* reporters witnessed a judge in the Sixth District court with 65 arraignments on his docket on one day in April.) It's not exactly clear why judges weren't prioritizing an ability-to-pay determination in assessing these fines, but Rachel Black, in an interview with the *Indy*, said "at the time [in 2008], at least, the Judiciary didn't seem to think it was their problem."

The lack of financial assessment tools for judges and statutory protections for indigent defendants made it difficult to get out of a courtroom without being sentenced to some amount of court costs—a minimum of $93.50 in fees for misdemeanor charges and $270 for felonies, a statute that still stands. Based on decades of experience with court debt, Dorsey said that she learned early on to expect being penalized with fees in any interaction with the courts, even just setting foot in the courtroom (she plead out most of her charges).

The under-resourced state, dependent on funds raised through the courts, began to act as a collection agency. By issuing warrants for "failure to appear" at a payment date, rather than "failure to pay," Rhode Island was able to skirt a 1971 Supreme Court ruling

(https://www.oyez.org/cases/1970/324) that prohibited states from incarcerating those unable to pay court debts, and requiring that judges must inquire about a person's ability to pay and consider alternatives before incarceration.



2008: A First Attempt at Reform

In response to attention generated from the Family Life Center report, the Rhode Island legislature passed a bill in 2008 that, at the time, led the nation in court fee and fine reform. The legislation aimed to protect low-income debtors from punitive debt collection systems managed by the state and reduce the number of people in jail for court debt. Seven years later, however, Rachel Black published her thesis, in which she found that the law, Senate Bill 2234 (http://webserver.rilin.state.ri.us/BillText/BillText08/SenateText08/S2234Aaa.pdf), yielded only moderate results due to weak implementation.

The bill restricted the amount of time debtors spent in prison, limiting debtor incarceration to a maximum of 48 hours before seeing a judge for an ability-to-pay assessment. It also required that debtors arrested during court hours be taken to court immediately. This stipulation was the strictest and most measurable part of the bill, and Black found in her 2016 research that these stipulations were being enforced. But, according to her thesis, debtors still represent a large portion of the incarcerated population.

The rest of the bill required judges to consider "ability to pay" when assessing court debts, but did not require them to remit any costs if they found a defendant indigent. Despite its weaknesses, the bill marked the first time that Rhode Island judges were explicitly empowered to waive an indigent defendant's court costs. The bill stipulated that judges use a "financial assessment instrument," specifying what counts as evidence of indigency, including receiving many forms of public assistance. Apparently, encouragement to assess indigency was not enough. Black found in 2016 that, in practice, ability-to-pay assessments happened sporadically at best, and only around three percent of jailed debtors had all costs waived—a tiny fraction of the debtor inmates who were unemployed and likely should have qualified for cost abatement.

Still, the reforms set the stage for incremental change. A coordinating law, passed simultaneously, incentivized the Judiciary to reduce jail time for debtors by crediting $150 towards court debts for each night they spent in

jail, later reduced in 2012 to $50 per night. Research by OpenDoors RI found that the credit system immediately reduced the amount of time people were spending in jail on court debt-related charges. Despite its success, the measure essentially amounted to massive spending by the state to alleviate small debts it was never likely to collect.

In an interview, Jordan Seaberry of the Nonviolence Institute highlighted the "need for the law to state clearly and directly that our courts must meaningfully assess a defendant's ability to pay in a standardized, comprehensive, and good-faith way." "The tools are there," he told the *Indy*, "but the responsibility is ours."

2019: Court Costs Return to the State House

Much of the national conversation around court costs can be exemplified by an exchange in the Rhode Island State House this past February. On a busy day before the House Judiciary Committee (http://ritv.devosvideo.com/show?video=90ec60863275&apg=a734473b), Nick Horton, who also worked on the 2008 legislation, testified in support of a new law, House Bill 5196 (https://legiscan.com/RI/text/H5196/id/1872863/Rhode_Island-2019-H5196-Introduced.pdf), which brings the failed 2008 reforms back into focus. He said that the legislation would "maximize [both] the cost effectiveness of the [criminal justice] system and the rights of the indigent defendants."

The new bill seeks to enforce the requirement that judges routinely take ability to pay into account and makes qualifying for the services of a public defender—being unable to afford a private lawyer—legal evidence of indigency. Significantly, it provides that "no costs shall be ordered unless procedures for determining ability to pay are followed." House Bill 5196 has found supporters in Rhode Island who have long championed the poor and worked with the legislature on various criminal justice reforms, from community organizers to the Public Defender's Office.

At the February hearing, proponents testified to the inefficacy of the 2008 reforms, demonstrating that stronger steps must be taken if the courts' cost assessment system is going to change. Before the Committee, Director of Legislative Initiatives for the Public Defender's Office Michael DiLauro said that of the 150 lawyers that he reached out to, only one reported ever seeing a judge use the ability-to-pay instrument. (The instrument exists as a one-page form on the Judiciary's website, but we never saw it in the courtroom. The defendants we talked to didn't recognize it when we showed it to them.)

Jordan Seaberry, a driving force behind the new bill, implored the legislature and the Judiciary to take a human-centered approach to debt. "When we are talking about this bill we are not just talking about the experience of the Judiciary or the process of being in the courtroom, we're talking about actual lives. We're talking about human beings, who impact their families and their communities," he said.

The Judiciary's lobbyist, Elizabeth Suever, responded to Seaberry's call to humanize debtors with her own call for criminalization, telling the committee, "we're not talking about innocent until proven guilty, these people are proven guilty." She added, "We're now talking about these people paying restitution to people that were harmed, paying for the costs,

paying for all these other things ... we're not talking about innocent people anymore." (Others who testified emphasized that the bill would not affect victims' restitution).

Suever claimed that the bill would exempt far too many people from having to pay fees and fines to the court, pointing out the necessity of these payments in generating the state's general revenue. "We do want to make sure that if they have any capability whatsoever that they do pay ... that's important to the maintenance of the system, that's important to keeping taxes low, so everyone doesn't have to pay for the system," she said, gesturing towards anti-tax rhetoric reminiscent of the tough on crime moment of the '90s.

When a committee member asked Suever if she would be able to provide statistical evidence that ability-to-pay assessments are being conducted on a regular basis, she responded, "Maybe? I'll look into it. I can't make any promises." A spokesperson for the Judiciary did not respond to the *Indy*'s questions about whether financial assessments are conducted on a regular basis.

Ultimately, the hearing spoke to an uncommunicative system that has evolved out of years of piecemeal legislation in which numbers, figures, and spending are poorly tracked—a system held accountable only by watchdogs on the outside.

While there is hope that the bill will reduce the burden on low-income people sentenced to onerous court debt, Ben-Menachem from the Fees and Fines Center told the *Indy* that "reforms tend to last longer or be implemented more robustly if they happen through litigation because that's the courts recognizing their obligation."

It's one thing for the legislature to make laws instituting fees and fines in a courtroom—a power exerted on defendants—but it's fundamentally more difficult for the legislature to tell judges what to do on the bench. In Rhode Island, judges and clerks conduct business as they always have, in a system separate from and parallel to the legislature. According to Rachel Black, "[judges and clerks] weren't surprised nor did they have any problem telling me what's happening right now because they didn't see it as being illegal or problematic."

A Nation of Cash Register Justice

Judicial action on court debt may not be far away. A recent *Harvard Law Review* article (https://harvardlawreview.org/2016/02/state-bans-on-debtors-prisons-and-criminal-justice-debt/) argued that Rhode Island's ban on debtor's prison covers incarceration for nonpayment of fines for regulatory offenses, costs, and civil debts because the state constitution does not distinguish between private debts and those owed to the state.

This February, Justice Ruth Bader Ginsburg wrote the Supreme Court's decision in *Timbs v. Indiana* (https://www.oyez.org/cases/2018/17-1091), which mandated the application of the constitutional prohibition on excessive fees and fines to the states, tracing the issue back eight centuries. The Magna Carta, Ginsberg wrote, required that "economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'" These protections were enshrined in English law, adopted

in the American colonies, and finally written into the Eighth Amendment of the US Constitution, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

But Ginsburg also recognized a centuries-long practice of casting these lofty legal protections aside. The 17th century Stuart kings used "large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay," she wrote. After the US Civil War, states in the South weaponized fines against newly freed slaves. The "Black Codes" employed broadly-defined crimes ("vagrancy," for example) and draconian fines to force African Americans back into involuntary labor when they could not pay these penalties.

Today, advocates refer to a system of "cash register justice" that "target[s] poor citizens and communities of color for fines and fees," according to a 2017 report by the US Commission on Civil Rights. As Megan Smith, a longtime caseworker for homeless people in Rhode Island said about court costs: "Fines and fees are definitely one of those things that are implicitly, if not explicitly, classed. They just fundamentally don't affect rich and poor people the same way." To her, "it definitely feels like one more way that the system has its thumb on certain people that it doesn't like and that it wishes would disappear."

Where We Go From Here

The debate around court debt extends beyond Rhode Island, and national conversations about reform have ramped up over the past few years. The National Task Force on Fines, Fees and Bail Practices, for example, released a set of principles with which each state should assess their own judicial systems. Among these are key recommendations: provide court funding in its entirety through state government funds, standardize statewide ability-to-pay processes, and abolish interest on court-related debts. But many of these reforms place an emphasis on altering the particulars of court debt rather than changing the underlying reality that fees and fines act as a hidden tax on the poor.

One such reform is alternative payment. In April 2018, a criminal justice reform bill (https://malegislature.gov/Bills/190/S2371), signed by Massachusetts Governor Charlie Baker, implemented community service as one such alternative to court costs. The bill also ups the amount people are credited towards their debt for time in prison to $90 a day. However, the legislation still relies on judges determining "substantial financial hardship" for alternative payments to even be considered. And mandatory community service still limits the poor from working, attending school, and caring for children. While Governor Baker portrayed the law as relief for court debtors, it doesn't gaurantee that judges will assess their ability to pay, or that alternative payment methods will be implemented more widely.

San Francisco, heralded as a leader in court debt reform, has attacked the issue more directly. In 2016, the city launched the Financial Justice Project (https://sftreasurer.org/sites/default/files/Overview%20of%20the%20Financial%20Justice%20Project%2012.11.18.pdf), a branch of the city treasurer's office aimed at auditing local fees and fines' effect on the poor. Its first success came in May 2018 with the abolition of all locally-controlled criminal justice administration fees, including a monthly probation fee that had had a collection rate of just nine percent. Getting rid of this fee eliminated $32.7 million of outstanding debt overnight. Additionally, the project created a lower fee for towed and booted cars for those with

incomes below 200 percent of the poverty line. The project created a database of low-income residents, so court officials could assess their incomes without the need for paperwork and documentation filed by the arraigned. The project eases court debt for many defendants, yet it fails to standardize ability-to-pay hearings. If judges' discretion does not act in service of the poor and in conjunction with these programs, the poorest residents will still end up in debt to the court, even for reduced (often halved) fines. For many arraigned San Franciscans—and Rhode Islanders—any fine at all is enough to disrupt their ability to meet basic needs and place them on the precipice of destitution.

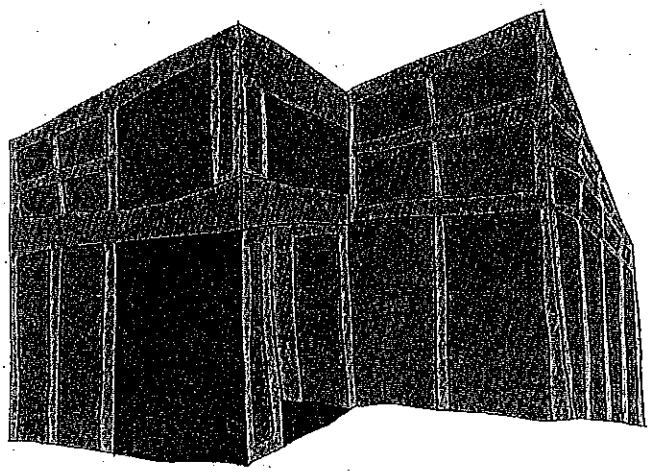
Outside the US, Germany offers an even more innovative approach to equalizing criminal justice. Rather than assigning a flat fine for a misdemeanor, like in the US, courts scale fines in proportion to one's daily income. In Germany, the cost of a misdemeanor is not measured by the 'cost to society,' but rather by whatever is considered an appropriate inhibitive penalty on a specific person. After all, traffic violations are committed across class lines.

In the United States, a justice system without punitive fees and fines is, at this point, still beyond reach. The fees—intended to cover administrative processes—could be replaced with funding from states' revenue. Fines, however, are meant to serve a separate function: inhibiting future crimes through fiscal punishment. But, in practice, these penalties fail to deter criminal behavior and, in doing so, define poverty in criminal terms.

+++

On Monday, the same scene will repeat itself again at the Garrahy Judicial Complex: People mill about waiting for court to open, bailiffs prowl the aisles as the VHS tape rolls, judges call names, clerks hand off stacks of papers, and the defendant approaches the bench. Plea agreements are taken. Fines are levied. Fees are assessed. And more Rhode Islanders enter payment plans, adding to the millions in statewide court debt. To Jordan Seaberry, this debt can be an unspoken life sentence. "We never hear a judge sentence someone ... to a lifetime of economic servitude, but that's the reality."

SYDNEY ANDERSON B'19, HARRY AUGUST B'19, MATT ISHIMARU B'20, OLIVIA KAN-SPERLING B'20, SOPHIE KHOMTCHENKO B'21, ALINA KULMAN B'21, NICK ROBLEE-STRAUSS B'22, JULIA ROCK B'19, and LUCAS SMOLCIC LARSON B'19 hid their pocket knives in the shrub outside the courthouse.



Data Explanation

We used several sources of data to report this story. Breakdowns on ability-to-pay hearings, transaction amounts, where cases were filed, and types of charges for 2018 were extracted from the Rhode Island Judiciary Public Portal using a web-scraping program built for this project. This program used the web-browser automation tool Selenium to input case numbers taken from a list of all criminal cases filed at the District and Superior court level. (This list was obtained by public records request from the Judiciary by Megan Smith and shared with us). Our program then retrieved the corresponding case file publicly available through the portal and downloaded relevant information to a local database. Of the 32,756 individual case numbers for 2018, we were able to retrieve 28,088 records (85.8 percent). Somes cases were missing from the portal, though an unknown percentage of failures were due to requests being blocked by the server—likely because of the high volume of requests being made. We attempted to minimize this latter case by running our program on the failure IDs until the process no longer yielded significant returns. We used this database to create the above data visualization for 2018.

We also obtained data describing how much money is owed, or currently outstanding, for fees and fines related to criminal cases for each branch of the courts, broken down by fiscal year. This information came from a public information request made by the national Fees and Fines Justice Center to the Rhode Island Judiciary.

Click here to access our data.
(https://drive.google.com/drive/folders/10iylFx--L8zDoUufrE1KHlPUK04ia4jG?usp=sharing)

§ 12-20-10. Remission of costs – Prohibition against remitting restitution to victims of crime – Ability to pay – Indigency.

(a) The payment of costs in criminal cases may, upon application, be remitted by any justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken. Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment or other costs of prosecution, provided no order of restitution shall be suspended by the court.

(b) For purposes of §§ 12-18.1-3(d), 12-21-20, 12-25-28(b), 21-28-4.01(c)(3)(iv) and 21-28-4.17.1, the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay:

(1) Qualification for and/or receipt of any of the following benefits or services by the defendant:

(i) temporary assistance to needy families

(ii) social security including supplemental security income and state supplemental payments program;

(iii) public assistance

(iv) disability insurance~~; or~~

(v) food stamps; or

(vi) qualifying for the services of the public defender as an “indigent person” pursuant to § 12-15-8 of the general laws.

(2) Despite the defendant's good faith efforts to pay, outstanding court orders for payment in the amount of one-hundred dollars ($100) or more for any of the following:

(i) restitution payments to the victims of crime;

(ii) child support payments; or

(iii) payments for any counseling required as a condition of the sentence imposed including, but not limited to, substance abuse, mental health, and domestic violence.

(3) When the procedures prescribed by § 12-21-20 to determine a defendant’s ability to pay are not performed by the court.

§ 12-21-20. Order to pay costs and determination of ability to pay.

(a) If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law. No order requiring payment shall enter unless and until the procedures prescribed by this section to determine a defendant's ability to pay are performed by the court.

(b) In superior court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing by use of the procedures specified in this section.

(c) In district court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of the procedures specified in this section.

(d) The defendant's ability to pay and payment schedule ~~shall~~ must be determined by the court using ~~use of~~ standardized procedures including a financial assessment instrument. The financial assessment instrument shall be:

(1) based upon sound and generally accepted accounting principles;

(2) completed based on a personal interview of the defendant and includes any and all relevant information relating to the defendant's present ability to pay including, but not limited to, the information contained in § 12-20-10(b)(1), (2); and

(3) made by the defendant under oath.

(e) The financial instrument may, from time to time and after hearing, be modified by the court.

(f) When persons come before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of the procedures specified in this section.

(g) Nothing in this section shall be construed to limit the court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information.

§ 12-20-10. Remission of costs – Prohibition against remitting restitution to victims of crime – Ability to pay – Indigency.

(a) The payment of costs in criminal cases may, upon application, be remitted by any justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken. Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment or other costs of prosecution, provided no order of restitution shall be suspended by the court.

(b) For purposes of §§ 12-18.1-3(d), 12-21-20, 12-25-28(b), 21-28-4.01(c)(3)(iv) and 21-28-4.17.1, the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay:

(1) Qualification for and/or receipt of any of the following benefits or services by the defendant:

(i) temporary assistance to needy families

(ii) social security including supplemental security income and state supplemental payments program;

(iii) public assistance

(iv) disability insurance; or

(v) food stamps

(2) Despite the defendant's good faith efforts to pay, outstanding court orders for payment in the amount of one-hundred dollars ($100) or more for any of the following:

(i) restitution payments to the victims of crime;

(ii) child support payments; or

(iii) payments for any counseling required as a condition of the sentence imposed including, but not limited to, substance abuse, mental health, and domestic violence.

(3) When the procedures prescribed by § 12-21-20 to determine a defendant’s ability to pay are not performed by the court.

§ 12-21-20. Order to pay costs and determination of ability to pay.

(a) If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law. No order requiring payment shall enter unless and until the procedures prescribed by this section to determine a defendant's ability to pay are performed by the court.

(b) In superior court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing by use of the procedures specified in this section.

(c) In district court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of the procedures specified in this section.

(d) The defendant's ability to pay and payment schedule shall be determined by use of standardized procedures including a financial assessment instrument. The financial assessment instrument shall be:

(1) based upon sound and generally accepted accounting principles;

(2) completed based on a personal interview of the defendant and includes any and all relevant information relating to the defendant's present ability to pay including, but not limited to, the information contained in § 12-20-10; and

(3) made by the defendant under oath.

(e) The financial instrument may, from time to time and after hearing, be modified by the court.

(f) When persons come before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of the procedures specified in this section.

(g) Nothing in this section shall be construed to limit the court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information.

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

CRIMINAL JUSTICE DEBT

A TOOLKIT FOR ACTION

By Roopal Patel and Meghna Philip

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S JUSTICE PROGRAM

The Brennan Center's Justice Program pursues justice system reforms designed to reduce the "justice gap," the distance between the nation's promise of equal justice and the reality that people of color and low-income litigants face in our courts. We work to achieve a justice system in which the ability of people to rely on courts and other agencies to secure the rule of law and prevent harms is not controlled by wealth, ethnicity, immigration status or the community from which they come.

ABOUT THE AUTHORS

Roopal Patel joined the Brennan Center as the Katz Fellow/Counsel in the Justice Program in September 2011. She attended NYU Law School where she was an Arthur Garfield Hays Fellow. She gained litigation experience in the Immigrant Rights Clinic while in law school. She has also interned at the American Civil Liberties Union, the Center for Constitutional Rights, the Brooklyn Family Defense Project, and the Department of Justice Civil Rights Division. She has done legal support work for a water rights movement in South Africa and a displaced people's movement in India. Prior to law school she worked as a community organizer in the South Bronx and has experience teaching students in prisons. She attended Harvard as an undergraduate.

Meghna Philip joined the Brennan Center in October 2011 as a Research Associate in the Justice Program. Prior to joining the Brennan Center, Meghna worked at the Vera Institute of Justice, analyzing national trends in prison and community corrections, and planning program alternatives for poor individuals saddled with criminal justice debt. She also worked on advocacy and research efforts to expand post-secondary educational opportunities for incarcerated people, at the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. Meghna graduated from Brown University in May 2011, where she coordinated student efforts to expand access to housing for low-income and homeless communities in Rhode Island.

ACKNOWLEDGEMENTS

We are grateful to the people who helped shape this toolkit. Sarah Hook, a legal intern, and Fabian McNally, a pro bono law clerk provided important research assistance. Shayla Silver-Balbus, a legal intern, was an important part of the editing process. Rebekah Diller laid the foundation for this toolkit, and Laura Abel provided valuable support and edits in its early stages. Mark Ladov, Thomas Giovanni, Jim Lyons, Desiree Reiner, and Madeline Friedman provided valuable feedback throughout the writing process and helped move the report to completion. We thank Michael Waldman and John Kowal for their continued guidance and encouragement for this project.

We are also thankful to the advocates and attorneys who shared their stories of successful reform efforts. We are especially grateful to Nick Allen, an attorney at Columbia Legal Services, and Melissa Broome at the Job Opportunities Task Force for their consistent, helpful feedback. We also thank the people directly impacted by criminal justice debt who shared their stories with us.

This publication was supported by a generous grant from the Public Welfare Foundation. We are also extremely grateful to the Democracy Alliance Partners, Ford Foundation, Open Society Foundations, and the William B. Wiener, Jr. Foundation for their support of the Brennan Center's criminal justice initiatives. Roopal Patel's work is also supported by The George A. Katz Fellowship program of Wachtell, Lipton, Rosen & Katz.

CRIMINAL JUSTICE DEBT

A TOOLKIT FOR ACTION

By Roopal Patel and Meghna Philip

CRIMINAL JUSTICE DEBT
A TOOLKIT FOR ACTION

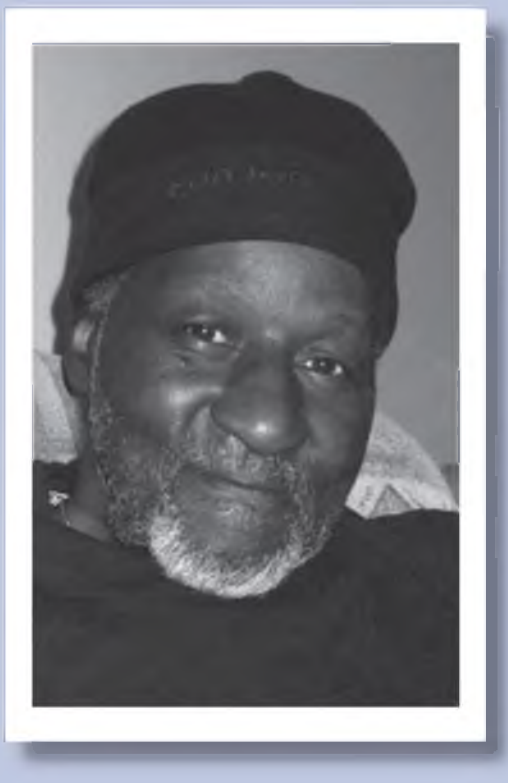
TABLE OF CONTENTS

PROPOSED REFORMS

INTRODUCTION

In 2008, the Rhode Island Family Life Center conducted interviews of people managing court debt and facing debt-based incarceration. Harold Brooks, a 58-year-old veteran, was arrested and jailed for 10 days after falling behind on payments of court fines.[1] At the time, Mr. Brooks was receiving Supplemental Security Income disability payments because of cancer and heart problems. He had faced a long series of incarcerations over the course of more than three decades, due solely to his inability to keep up with criminal justice debt payments.

> "My court fees started in the '70s, and to get rid of them took over 30 years," Mr. Brooks said in an interview. "In my life, I'd say I was in prison for court fines more than five times… enough that when I get a court date for a court fine and I know that I haven't got the funds to pay it, I get really shaky when it comes to that time."[2]



Mr. Brooks' problem is becoming disturbingly common. As states have become increasingly strapped for funds, some have looked to a most unlikely revenue source: the disproportionately poor people involved in the criminal justice system. Despite decades-old Supreme Court cases ruling that incarceration solely for debt is unconstitutional,[3] a 2010 Brennan Center report, *Criminal Justice Debt: A Barrier to Reentry,* uncovered existing modern-day debtor's prisons. Now, although some states are creating more fiscally-sound and fair policies, increasing numbers of states are creating new pathways to imprisonment based solely on criminal justice debt.[4]

Criminal justice fees, applied without consideration of a person's ability to pay, create enormous costs for states, communities, and the individuals ensnared in the criminal justice system. In an increasing number of jurisdictions, people are faced with a complex and extensive array of fees at every stage of criminal processing: fees for public defenders, jail fees, prison fees, court administrative fees, prosecution fees, probation fees, and parole fees. Estimates are that at least 80 percent of people going through the criminal justice system are eligible for appointed counsel,[5] indicating that the majority of the people in the criminal justice system have had a judicial determination of indigency. Poor to begin with, and often lacking even a high school diploma,[6] it is difficult for people going through the criminal justice system to find the sort of employment that would enable them to re-pay their financial debt. Sociological studies have indicated that criminal justice fees and fines incentivize criminal behaviors as people try to meet payments amounts, and discourage people from contact with authorities, including obtaining necessary medical assistance and reporting to the police when they themselves are victimized.[7]

Criminal justice debt policies vary from state to state, but our research reveals common themes and trends. Many states are failing to consider financial, structural, and social costs as they create fees and enforce their collection. This limited perspective results in senseless policies that punish people for being poor, rather than generate revenue. Also, several practices may violate fundamental constitutional protections.

Regardless of jurisdictional variations, advocates face many similar challenges and would benefit from having tools to assist their work. Intelligent reform efforts, whether broad or incremental, should call for proof that creating more criminal justice debt will actually provide revenue and square with fundamental principles of fairness and justice.

The Brennan Center has identified five core recommendations for successful advocacy against the rise of modern day debtors' prisons:

1. Conduct Impact Analysis of Proposed and Existing Fees

Such studies can show lawmakers that the imposition and enforcement of fees and fines has both financial and social costs, and that these laws fail to generate revenue.

2. Create and Enforce Exemptions for Indigence

The most effective way to break the cycle of debt and poverty that criminal justice debt perpetuates is to create exemptions for indigent people and effectively enforce them.

3. Eliminate Unnecessary Interest, Late Fees, and Collateral Consequences

Where exemptions are not possible, other policies can reduce the onerous burden of debt. Eliminating interest and late fees makes debt more manageable. Collateral punishments, such as suspending driver's licenses, only make it more difficult for people to obtain the employment necessary to make payments.

4. End Incarceration and Supervision for Non-Willful Failure to Pay

Criminal justice debt ensures that people who are no threat to public safety remain enmeshed in the system. Often people facing the possibility of re-incarceration or further supervision have no right to counsel. Such practices raise constitutional questions, are costly to states, and decrease public safety as court and criminal justice resources are diverted.

5. Focus on Rehabilitation through Meaningful Workforce Development

Offering optional community service as a means for paying criminal justice debt has the potential to improve the long-term job prospects for those who enroll, improving rentry prospects and providing states with an alternative means to collect debt.

Criminal Justice Debt: A Barrier to Reentry proposed a number of reforms to criminal justice debt policies. Several of the Brennan Center's recommendations have been successfully implemented. Further, advocacy organizations around the country have successfully challenged shortsighted and unjust criminal justice debt practices.

This Toolkit examines the issues created by criminal justice debt collection policies and also profiles positive examples of reform efforts from around the country. These success stories will assist advocates as they decide upon their advocacy efforts. The Toolkit also provides statutory language, sample campaign pieces, and a step-by-step guide for a successful campaign. Since the intricacies of criminal justice debt differ from state to state, advocates should adapt models and initiatives to best fit their jurisdictions.

OVERVIEW: CRIMINAL JUSTICE DEBT

THE TRUE COSTS

More jurisdictions are adding user fees at every stage of a criminal proceeding. While the fees can be an easy way to score political points or to theoretically fill budget gaps, without proper oversight, criminal justice debt policies often do more harm than good.

In many states today, offenders now serve multiple sentences. People serve the criminal sentence handed down by a court. Afterwards, a person is confronted with a bewildering array of fees and fines they must pay to the state. People who fail to pay the state may be faced with another physical sentence. Or, as people struggle to make payments, they may suffer a host of collateral consequences that create barriers to reentry and raise the specter of reimprisonment.

Some jurisdictions have haphazardly created an interlocking system of fees that can combine to create insurmountable debt burdens. Florida has added more than 20 new fees since 1996.[8] In 2009, the Council of State Governments Justice Center, a national nonprofit organization, partnered with the Texas Office of Court Administration to report on criminal justice debt collection practices.[9] The report found that a "sprawling number of state and local fees and court costs that state law prescribes as a result of a criminal conviction amounts to a nearly incomprehensible package."[10] In 2009, North Carolina instituted late fees for failure to pay a fine, and added a surcharge for being placed on a payment plan.[11] Jurisdictions in at least nine states charge people *extra* fees for entering into payment plans, which are purportedly designed to make payments easier.[12]

> A 2009 Council of State Governments Justice Center and Texas Office of Court Administration report on criminal justice debt collection found that a "sprawling number of state and local fees and court costs that state law prescribes as a result of a criminal conviction amounts to a nearly incomprehensible package."

Furthermore, policymakers often fail to acknowledge aspects of the criminal justice system that will make collection of criminal justice debt difficult, if not impossible. People going through the criminal justice system are often poor. After conviction, punitive laws regarding the collateral consequences of criminal convictions make it exceedingly difficult for people to find the means to satisfy their debts.

Large numbers of the people going through the criminal justice system are indigent. Estimates indicate that at least 80 percent of people charged with criminal offenses qualify for indigent defense.[13] Every state has policies and laws that create collateral consequences of conviction, such as the loss of driver's licenses or a professional license. These policies greatly restrict the ability of those convicted of crimes to find future employment. Many employers will not hire people with criminal records. Up to 60 percent of former inmates are unemployed one year after release.[14] Criminal debt collection schemes do not take these realities into account, and therefore become counter-productive. Charging those who are unable to pay serves no purpose; persons unable to pay will not be any more able to pay simply because their debt has increased. Instead of raising revenues, these fees and fines may actually increase the costs for local governments, and increase the likelihood of recidivism.

Fiscal Costs to the State

The assumption that court user fees provide a valuable revenue source ignores the vast expenditures incurred in attempts to collect fees, mostly from people unable to pay. Policymakers must also consider direct costs of collection, such as the salary and time for the clerks, probation officers, attorneys, and judges who will be involved in fee collection processes.[15]

For example, a state that revokes or fails to grant supervised release to someone who has not paid their criminal justice-related debt will often spend more money incarcerating that person than it could expect to collect if a criminal justice debt were paid in full. There are inmates in Pennsylvania who are eligible for release but are kept in prison based on their inability to pay a $60 fee.[16] The daily cost of confinement is nearly $100 per day.[17] In 2009, Mecklenburg County, North Carolina arrested 564 people because they fell behind on debt; the County jailed 246 debtors who did not pay for an average of 4 days.[18] The county collected $33,476 while the jail term itself cost $40,000 — a loss for the county of $6,524.[19]

The Burden on the Criminal Justice System

Turning court and correctional officials into collection agents also interferes with the proper administration of justice. Judges are no longer able to act as impartial adjudicators if they are forced to act as collections agents in the hopes of obtaining revenue for their own courts. Furthermore, even if courts are able to collect, such dependence is an unstable and a short-sighted means to fund an important public service. As crime rates fluctuate, perverse policy incentives could develop when there are fewer people going through criminal proceedings.

> Pennsylvania inmates who are eligible for release but remain in prison because of justice debt are charged $60 a day. The daily cost of their confinement is nearly $100 per day.

In some cases, criminal fees are used to support general revenue funds or treasuries unrelated to the administration of criminal law.[20] This undermines separation of powers, by forcing courts to act as fundraisers for other programs or agencies created by the legislature or executives.

Some states task probation and parole officers with acting as collections agents. They are responsible for monitoring payments, setting up payment plans, dunning persons under supervision, and taking punitive actions such as reporting failures to pay. These are distractions from other far more important duties. Officers should be monitoring persons at risk of re-offending, and promoting public safety.

Social Costs

People jailed for failure to pay debt are torn away from their communities and families, making reintegration harder upon release. Jail time undermines other important obligations such as maintaining employment and making child support payments. Incarceration can also result in disruptions in medical treatments such as treatments for drug addictions. Loss of employment means a further loss of state tax revenue. Failure to meet such obligations can result in further criminal penalties.[21]

People who have probation extended for failure to pay face increased risk of incarceration for technical violations of probation. Such violations can result in a loss of public benefits, along with expensive and pointless re-incarceration. Under federal law, people who violate parole or probation are ineligible for Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program benefits (food stamps), low-income housing assistance, and Supplemental Security Income.[22]

Criminal justice debt policies may also infringe on a person's right to vote. This prevents a person from taking on rights and duties of citizenship. Several states disenfranchise people with criminal convictions and will not restore voting rights until after criminal justice debt is satisfied.[23] But this policy fails to recognize that voting helps transform a former prisoner from an outsider into a participating member of the community. Law enforcement and reentry professionals recognize that creating community ties through participatory roles such as voting integrates an individual back into a society after a criminal conviction.

Research in Washington State showed that criminal justice debt caused poorer reentry outcomes, increased costs to counties and states for collection and re-incarceration, and lowered actual payments to the victims who are owed restitution.[24] Not a single policy goal used to justify criminal justice debt was met. In fact, the results were *contrary* to the policy goals.

Costs to Families

Policymakers often fail to account for the exorbitant financial and social costs of imposing criminal justice fees. Fees and fines associated with incarceration amount to a hidden regressive tax that disproportionately impacts the poor. Families shoulder these extra financial burdens while facing the reduced income inherent to having a family member incarcerated. Jail fees are often taken from inmate commissary accounts. Those accounts are usually funded by family members, who are often poor. When debt collection systems dock funds from an inmate's commissary account, usually the burden falls upon the inmate's family. The wife of an inmate at the Marin County Correctional Institute in Florida, criticizing jail-stay fees, told a reporter, "It's like [families] are a private ATM for the corrections department, and they know there's nothing we can do about it."[25]

> "I have scratched my head more than once trying to determine what public good is promoted by a statute that essentially authorized the seizure of 35 percent of every cent that a prison inmate's spouse sends to the inmate... I feel comfortable believing that many, if not most, of the spouses of inmates are low income individuals... These spouses, who are mostly women, must then dig deep again if they are to offset the State's cut. In doing so they undoubtedly deprive themselves of funds that could be devoted to the purchase of necessities for them and their children. Such a scheme strikes me as not only unwise but unfair."
>
> **—Washington State Supreme Court Chief Justice Gerry Alexander**[26]

DEBTORS' PRISONS: CONSTITUTIONAL VIOLATIONS

Many criminal justice debt-collection practices employed today violate the Constitution. The Supreme Court has made clear that incarceration can only be used to collect criminal justice debt when a person has the ability to make payments but refuses to do so. In *Williams v. Illinois* (1970), the Supreme Court ruled that extending a maximum prison term because a person is too poor to pay violates equal protection under the Fourteenth Amendment. In *Tate v. Short* (1971), the Supreme Court held that courts cannot automatically convert an indigent person's unpaid fines into a jail sentence because it violates the Fourteenth Amendment. In *Bearden v. Georgia* (1983), the Supreme Court ruled that the Fourteenth Amendment bars courts from revoking probation for failure to pay a fine without first inquiring into a person's ability to pay and considering adequate alternatives to imprisonment.

Right to an Inquiry into Ability to Pay

The *Bearden* ruling established the constitutional right to a judicial inquiry into ability to pay. Yet, despite this, states' imposition of fees and fines is often capricious. Courts often fail to make a comprehensive inquiry into a person's ability to pay before sending people to a modern-day debtors' prison. A public defender in Illinois observed a judge who simply asked people who came before him if they smoked. If the person was a smoker and had paid nothing since the last court date, the judge found willful nonpayment and put them in jail without any further inquiry.[27] A judge in Michigan presumed that if someone had cable television service, they were able to pay.[28] Most egregiously, in certain states, such as California and Missouri,[29] judges strong-arm poor people into a Hobson's choice of incarceration to satisfy debt they cannot pay: defendants are allowed to "request" incarceration to satisfy their debt.

Right to Counsel

Some practices related to the imposition and collection of criminal justice debt also undermine the right to counsel. Public defender fees discourage people from seeking representation, eroding the principles of *Gideon v. Wainwright* and decreasing access to fair trials. Then, after the criminal case is concluded, some states do not allow a person a right to counsel in fee collection proceedings, even though the proceeding may result in incarceration. For example, Florida,[30] Georgia,[31] and Ohio[32] refuse to recognize a right to counsel in civil proceedings that could result in incarceration (although lower courts in Ohio are divided about whether this continues to be good law[33]).

In response to these issues, advocates have been challenging wrongful criminal justice debt policies. In *Washington v. Stone,* Mr. Stone was able to obtain counsel to assist in his appeal from a jail sentence imposed for failure to pay criminal justice debt. Mr. Stone did not have counsel at the initial proceeding. In that case, the Washington State Court of Appeals affirmed a person's right to counsel at enforcement proceedings for payment obligations.[34] The court found that a person has a right to counsel at "ability-to-pay" proceedings where incarceration may result. The court further held Mr. Stone's due process rights were violated when he was charged with jail time without a finding as to his ability to pay. In Hamilton County, Ohio, civil rights attorneys won a ruling where a court struck down a practice of confiscating any "cash-on-hand" from arrested individuals to pay up to $30 for a booking fee as a violation of due process.[35]

RECOMMENDED REFORMS

Key Reform 1: Conduct Impact Analysis Of Proposed And Existing Fees

> In their study of criminal justice debt, the Rhode Island Family Life Center interviewed Ricardo Graham. In 2007, Mr. Graham was incarcerated for 40 days because he was unable to keep up with payments on his $745 court debt. His incarceration cost the state of Rhode Island approximately $4,000. As a result of his imprisonment, Mr. Graham lost his job, and fell even further behind in his payments.[36]

More states are turning to evidence-based approaches to determine whether imposing fees actually increases revenue or lowers recidivism. Evidence-based practices significantly lower the costs borne by the state, and benefit the people involved in the system, making those practices a popular, bipartisan approach for criminal justice reform.

Advocacy organizations can conduct their own studies to determine the impact of a criminal justice fee. They can also lobby state legislatures to form committees that comprehensively study the financial and social costs of imposing fees and fines. A thorough accounting will demonstrate whether a policy is fiscally sound, or merely a hypothetical revenue source that will actually cost more to implement than it generates in revenue.

Success Story: Massachusetts

The experience of the Massachusetts Special Commission to Study the Feasibility of Establishing Inmate Fees demonstrates how an impact analysis can reveal the negative fiscal impact criminal justice fees have on states, and the anti-rehabilitative impact they have on people. From 2002-2004, Bristol County, Massachusetts charged inmates $5 in daily jail stay fees, plus additional fees for medical care, haircuts, and other expenses. This program was halted in 2004 when a class action lawsuit filed by prisoners reached the Massachusetts Supreme Court. The court ruled that a fee system could only be imposed by the State legislature.[37] In June 2010, the Massachusetts state legislature created a special seven-member commission to study the impact of a proposed jail fee; they released their report in 2011. The commission conducted a thorough impact analysis, considering such factors as: the revenue that could be generated from the fees; the cost of administering the fees; the impact of the fees on inmates; methods and sources of collecting the fees; the impact of the fees on prisoner work programs; and waiver of the fees for indigent people.[38] The bipartisan commission represented a variety of perspectives, including input from the Department of Public Safety, the Sheriffs' Association, Prisoners' Legal Services, and the Correctional System Union.[39]

The Commission conducted a literature review, interviews with representatives from the New York and Pennsylvania Departments of Correction (DOC) regarding their systems of inmate fees, and two surveys administered in Massachusetts. This comprehensive inquiry provided insights that a simple profit-centric analysis might have ignored. The first survey demonstrated that 10 counties lacked systems for tracking inmates who owed debt upon release.[40]

Recognizing that any reasonable fee system must adjust for indigence, advisors from New York's DOC recommended that the costs of staffing persons or developing programs to track inmate accounts and debts should be calculated when considering implementation of the new jail fee system in Massachusetts.[41] The Commission concluded that establishing additional inmate fees would create a "host of negative and unintended consequences."[42] The Commission predicted that additional fees would increase the number of inmates qualifying as indigent, increase the financial burdens on inmates and their families, and jeopardize successful reentry.[43] The Commission believed that imposing a fee would increase costs to taxpayers and make recidivism more likely.[44] Following the report of the

Special Commission, Massachusetts did not adopt a state-wide jail fee.

Massachusetts is just one example. Other states have also recognized the importance of evidence-based practices. In 2011, Kentucky collaborated with the Pew Center on the States to implement reforms such as strengthening parole and probation programs in order to reduce recidivism and control costs based on evidence and focused research.[45] South Carolina passed an omnibus criminal justice reform bill requiring that fiscal impact statements accompany proposed changes to sentencing.[46] Such actions are promising in their application of cost-benefit analysis to review systems of criminal justice debt collection.

Success Story: Rhode Island

Advocacy organizations such as the Rhode Island Family Life Center (FLC) have also spearheaded impact analysis studies. In 2008, FLC conducted a three-year, in-depth study of court debt and related incarceration in Rhode Island. The results of the study were striking.

FLC found that court debt was the most common reason people in Rhode Island were jailed. It accounted for 18 percent of all jailings.[48] The average amount of debt owed was approximately $826.[49] Many of the people arrested were homeless, mentally or physically disabled, and unemployed—effectively unable to pay. Incarceration created significant obstacles to people's attempts to overcome the causes of their original convictions, and made it harder for them to establish stable lives and livelihoods.[50] Thus, in many instances, the state was spending more money incarcerating people than those people *owed* in total court debt—let alone the amounts they were actually able to pay.[51] Rhode Island was creating a new era of debtors' prisons.

> A study by the Rhode Island Family Life Center found that court debt was the most common reason people in the state were jailed.[47]

Using the results of their research, FLC advocated for a series of comprehensive legislative reforms.[52] Their compelling statistics regarding both the unfair impact of criminal justice debt on poor clients, as well as the unnecessary associated costs incurred by the state, led to several key reforms in 2008, which amended procedures for the assessment, collection, and waiver of all court costs, fines, fees, and assessments associated with the prosecution of criminal cases.[53] These amendments will hopefully reduce unfair, counterproductive debt burdens and collateral consequences on people unable to pay.

A 2009 Rhode Island Family Life Center follow-up study indicated that less incarceration for court debt had resulted in significant savings for the state, including $190,000 in marginal costs.

The reforms have had positive impacts in Rhode Island. In the last four years, advocates have been able to use some of the new statutory provisions to help indigent people obtain waivers of certain fees and fines, as well as more manageable payment plans.[54] When warrants are issued for failure to appear at payment hearings, procedural guidelines dictate prompt court hearings, which reduce the amount of time that people languish in jails before even seeing a judge.

An FLC follow-up study in 2009 indicated that less incarceration for court debt had resulted in significant savings for the state, including $190,000 in marginal costs.[55] At the same time, Rhode Island courts actually *increased* the amount of funds collected yearly by $160,599.[56]

Key Reform 2: Create and Enforce Exemptions for Indigence

In 2006 the *Atlanta Journal Constitution* reported that a county Judge required Ora Lee Hurley be held until she paid $705 in fines. Ms. Hurley was incarcerated in a diversion center in Atlanta. She was not considered a threat to anyone: she was solely being punished for her debt. As part of the diversion program, she was permitted to work during the day and return to the center at night. Five days a week she worked full-time at a restaurant, earning $6.50 an hour and, after taxes, netting about $700 a month. Room and board at the center cost $600, her monthly transportation cost $52, and miscellaneous other expenses ate up what was left each month.[57] A senseless system kept Ms. Hurley perpetually imprisoned because of her poverty.

Create Exemptions and Opportunities to Petition for Waivers

Criminal justice debt holds little promise of revenue for states and is unjust. All states should adopt mechanisms to exempt indigent people from criminal justice debt. A comprehensive system for exemptions includes an up-front determination by the court of a person's ability to pay, prior to the imposition of fees and fines. Such an evaluation is necessary if people are to avoid the immediate penalties for nonpayment such as probation revocation, loss of driving privileges, damaged credit, or loss of public benefits. Timely ability-to-pay determinations also save states money, allowing states to avoid needless costs incurred in futile collection attempts.

As recent economic developments in the country have made abundantly clear, a person's economic situation can change. Statutes should be written so that people who are initially found to be able to pay criminal justice debts will have an opportunity to petition for waivers after the imposition of fees and fines, should their circumstances change. Courts should create personalized payment plans that allow people to pay affordable weekly or monthly amounts for people who do not initially qualify for waivers or exemptions, but cannot afford lump-sum payments.

Several states have statutes instructing courts to grant full or partial waivers or exemptions for people such as Ms. Hurley, who are unable to pay fees or fines. These states include Hawaii, Kansas, Connecticut, and Ohio.[58] Hawaii has explicit statutory language exempting people unable to pay from court fees and fines and is one of the best examples of fee waivers in use.[59]

Enforcing Fee Exemptions

Statutory exemptions for criminal justice fees often fall short because many people are unaware that the exemptions exist, and they lack the legal resources to become aware or apply for them. Therefore, states and local jurisdictions need to include procedures that require relevant personnel to inform people of the exemptions.

Creating an explicit statutory requirement that people on probation and parole must be notified of exemptions is a first step in protecting people's constitutional rights. In *Bearden v. Georgia* the Supreme Court held that under the Constitution, probation or parole can only be revoked after a court makes an ability to pay inquiry.[60] A number of states punish supervisees with incarceration for willfully missing payments. In places where exemptions exist for those unable to pay, many people may not be able to obtain them because the process for obtaining one is poorly defined or overly complicated.

MODEL LANGUAGE – ENFORCE FEE EXEMPTIONS

Upon release of a supervisee the [relevant department: probation/parole] and the appropriate local detention center shall provide the supervisee with an oral and written notice that:

a. States the criteria listed that the [relevant department: probation/parole] uses to exempt a supervisee from the supervision fee, and

b. Explains the process for applying for an exemption from a supervisee, and

c. Makes explicit that a supervisee may seek waivers, exemptions or modifications at any time his/her circumstances merit such changes.

Success Story: Telling Maryland Supervisees About Exemptions

In 2011, the Brennan Center and the Job Opportunities Task Force (JOTF) in Maryland successfully advocated for a bill that ensures people learn of exemptions from parole fees.

In 1991, the Maryland Legislature instituted a $40 monthly fee for persons on parole. The Legislature explicitly sought to exempt people who were unable to pay the fee.[61] The Maryland General Assembly had predicted that only about 15 percent of the parolee population would be able to actually pay the fee.[62] In recognition of that prediction, the Legislature created a number of exemptions based upon a person's ability to pay.[63] Yet few parolees eligible for an exemption were actually able to obtain one. For example, 89 percent of parolees listed in Maryland's Division of Probation and Parole (DPP) records as unemployed were still required to pay the fee, despite the fact that unemployment was a specified ground for exemptions.[64] Among those listed in DPP's records as students, another exemption ground, 75 percent were required to pay the fee.[65]

There were two major barriers to enforcing the exemptions of parole and probation extension. First, people were unaware that the exemptions existed because corrections and court officials failed to inform them. Second, even when people were aware of potential exemptions, the mechanism for obtaining exemptions was convoluted and inaccessible. Under Maryland law, the sole power to grant exemptions does not rest with the DPP, whose agents have regular contact with parolees, but rather with the Parole Commission, a body that has little contact with parolees and does not conduct evaluations of whether or not parolees receive exemptions.[66] Official policy had prohibited probation and parole agents, who had the most regular contact with parolees, from assisting parolees in applying for exemptions; instead, agents were instructed to advise parolees to consult with a lawyer.[67] Apparently, little thought was given as to how someone unable to pay a $40 supervision fee could afford lawyer's fees.

In response to the failings of the exemption system, and assisted by the advocacy of the Brennan Center and the JOTF, the legislature passed House Bill 749 and the governor signed it into law in May 2011. The law requires that the DPP and the detention center provide supervisees with information regarding the exemptions, including the existence of the exemptions, the criteria used to determine exemptions, and the process for applying for an exemption.[68]

The bill was before the Legislature for two years and underwent numerous revisions before it finally passed. Recognizing that Maryland's fiscal climate wouldn't allow for the complete abolition of the fee, the initial draft of the legislation proposed that authority to grant fee exemptions be transferred from the Parole Commission to DPP, whose agents meet regularly with parolees and are best poised to know whether people may qualify for an exemption.

When the 2010 version of the bill was introduced, the JOTF and its partners faced unexpected opposition from the union who represented the DPP agents. Union representatives argued that parole agents were already overworked with unmanageable caseloads and that they would not be able to handle this extra task of determining fee exemptions. Though the bill failed, JOTF and the Brennan Center succeeded in raising legislators' awareness of this important issue.

Having learned from what transpired in 2010, the revised 2011 legislation required the Department of Public Safety and Correctional Services (DPSCS) to provide information about the parole fee exemption process to people upon their release from incarceration, both orally and in writing. This time around, the JOTF worked with DPSCS officials to garner their support prior to the bill hearings.

In addition, the JOTF engaged numerous partners, both nonprofit service providers and people who had been burdened by the fee, to testify in support at the hearings. Legislators were particularly moved by the people who spoke about how the imposition of the fee had impeded their reentry to the community. One man's testimony was particularly compelling when he produced for the committee the threatening letter that had been sent to him just days after his release.

With the momentum built from previous efforts, the changes in the law, the new partners and new voices in support of the 2011 bill, there was virtually no opposition to the 2011 bill. The legislation passed the House and Senate with nearly unanimous support[69] and was signed into law by Governor Martin O'Malley on May 10, 2011.[70] JOTF has since continued working with DPSCS to ensure that the printed exemption information be presented in terms that are easily understood by people with low levels of education.

Key Reform 3: Eliminate Unnecessary Interest, Late Fees, and Collateral Consequences

"I have made regular payments for five years, and I have not seen my total debt load decrease. At this rate, I don't think it's ever going to decrease," says Pam Reid. [71] Ms. Reid, a 64-year-old resident of Washington State, has seen her debts double, and in some cases triple, due to interest accrued while she was in prison, and, of course, unable to earn money to pay the debt. Ms. Reid was incarcerated in 1994, her convictions were finalized in 1996, and she served slightly over fifteen years for theft and forgery convictions.[72] One of her judgments was $36,000 when she entered prison, and totaled well over $100,000 upon her release. In order to earn money she does landscaping work independently, though at the time of an interview with the Brennan Center in April 2012, she was suffering from a broken ankle and was not working.[73] Ms. Reid only makes about $1,000 a month, most of which goes to paying rent and basic living expenses. She makes monthly payments of $225 on all her criminal justice debt. Her monthly payments first go to a processing fee that the county charges for paperwork.[74] Despite working hard and making regular monthly payments for over five years, she still hasn't been able to make a dent in the majority of her debts.[75]

When people fail to pay off their debts immediately, states often charge additional fees without ascertaining whether the debtor has the resources to pay, effectively penalizing people for being poor. A number of states charge interest or late fees for late or missing payments, even if the reasons for nonpayment are important, conflicting obligations such as child support.[76] Late fees can be significant, such as a late fee of $300 in California, or late charges of $10-20 every time a defendant makes a late payment in some Florida counties[77] (in comparison, the maximum late fee for a green American Express card is $35[78]). States also authorize exorbitant "collection fees," frequently payable to private debt collection firms, as well as fees levied on individuals for entering into payment plans, without exemptions for poverty. Payment plan fee amounts in New Orleans can be as high as $100.[79]

MODEL LANGUAGE – ELIMINATE INTEREST AND LATE FEES

a. **People who are assessed [insert specific criminal justice fees], shall not be assessed interest, surcharges, or late payments charges unless the court first conducts an on-the-record inquiry [hearing or similar court proceeding] to determine if the person is able but unwilling to pay.**

b. **If the court determines that a person is unable to pay [insert specific criminal justice fees], the court shall waive any accrued interest, surcharges, or criminal justice debt related to any payments missed due to an inability to pay.[80] Such waiver shall be effective from the date at which the court determines the person became unable to pay.**

c. **If the court initially finds that a person is able to pay such interest, surcharges and late payments, said person may petition for a waiver should their circumstances change. All payment requirements and interest accrual that are the subject of the petition shall be suspended from the date of filing the petition until the court rules on the petition.**

Success Story: Waiving Interest in Washington State

In Washington State, Columbia Legal Services (CLS) successfully fought for legislation that allows people to waive interest accrued on criminal justice debt while incarcerated.[81] Criminal justice debt interest in Washington accrues at the rate of 12 percent per year during incarceration.[82] During this period, people are most often unable to be employed or are making very little money,[83] if anything, working in prison industries.[84] Comparing estimates of expected earnings with median legal debt, sociology professors at the University of Washington determined that formerly incarcerated white, black, and Hispanic men owed 60 percent, 50 percent, and 36 percent, respectively, of their annual incomes in legal debt.[85] The portion of this debt accrued in interest was often significant, as demonstrated by Ms. Reid's story. In response to the plight of their clients, CLS, along with the American Civil Liberties Union of Washington and the Washington Defender Association in Washington State, successfully advocated for legislation that allows for waivers of interest on debt while people are incarcerated.

> "Most of the time, the ideal piece of legislation is not passable. I think we did a good job of finding balance between keeping people responsible for their legal financial obligations and offering real options for relief to people who want to successfully re-enter their communities. These were two ideas legislators could buy into."
>
> **—Nick Allen, Columbia Legal Services in Washington**

Due to CLS' successful advocacy, upon release, people can petition for a waiver of interest accrued during their period of incarceration. The waiver is limited to non-restitution criminal justice debt. Court clerks can calculate the interest each person accrues once they know the period of total confinement, making it a relatively simple process to obtain the information necessary to determine the amount of debt that can be waived.

The legislation received bipartisan support because CLS demonstrated that it would encourage realistic payments of criminal justice debt by creating a more manageable debt load, reducing the costs of collection and re-incarceration, and contributing to successful reentry. The advocacy efforts in Washington provide a good template for how other states can begin to tackle the negative impacts of criminal justice debt legislatively. By focusing on a particular poverty penalty, the campaign was able to highlight a number of the negative consequences of criminal justice debt: disproportionate impact on poor people, lack of uniformity, and insurmountable debt loads. Like the Job Opportunities Task Force in Maryland, CLS did not walk away from the issue once the bill was signed. CLS has established a "Legal Financial Obligations Community Legal Clinic" to make people aware of the new interest waivers, and provide direct advice and assistance to people seeking the waivers.

Reforming Suspended License Practices

One of the most widespread and detrimental methods of collecting fees is to suspend a person's driver's license for failure to pay. A lack of transportation jeopardizes a person's efforts to seek or maintain employment,[86] making it even less likely that such people will be able to pay their debt.

Employment is a major part of the rehabilitative and reentry process, whether that involves securing a job or maintaining an existing one, and access to a car may mean the difference between success and failure.[87] One study of New Jersey drivers found that 42 percent of all drivers lost their jobs when their license was suspended, and almost half — 45 percent — could not find another job during the suspension.[88] Even more stunning, less than six percent of the license suspensions were directly tied to driving offenses.[89] Of course, these penalties fall disproportionately on poor people. The study found that while only 16.5 percent of New Jersey's licensed drivers lived in low-income

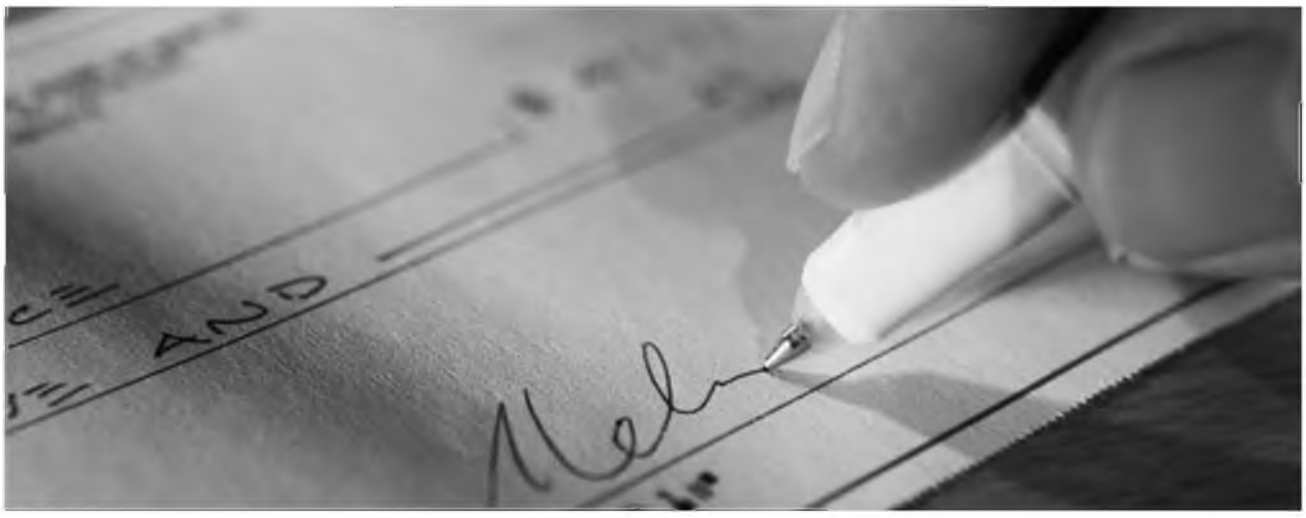
zip codes (which, unlike many other states, tend to be densely urban with access to adequate public transportation), these zip codes accounted for 43 percent of all suspended licenses.[90]

License suspension also increases the risk that people will be re-arrested (and incur new fees) for driving with a suspended license. Unable to legally drive to work, people face a choice between losing a job and suffering increased penalties for nonpayment. One study found that failure to pay fines was the leading cause of license suspensions.[91] The same study found that 80 percent of participants were disqualified from employment opportunities because their license was suspended. In states where licenses may be suspended without an adequate determination of a person's ability to pay the underlying fees, poor people are disproportionately affected by suspensions and suspension-related unemployment. Because of the detrimental effects suspensions have on the employment prospects of indigent people and because debt-related suspensions have no relation to driver safety, the practice of suspending licenses for failure to pay fees is completely lacking in rehabilitative or deterrent value.

Creating exemptions to license suspensions can help break cycles of debt and re-incarceration. Under such a scheme, only drivers who are able to pay but who willfully refuse to satisfy court fees will be punished with suspension. In a 2004 state Supreme Court case, Washington established the principle that automatically suspending a driver's license without first affording the person an opportunity to be heard in an administrative hearing violates due process.[92] Maryland has a similar policy in place.[93] These administrative hearings allow indigent persons to explain the circumstances behind their failure to pay and argue against suspension.

Another useful strategy for promoting fairness in suspensions is to provide a conditional or limited-use license for driving to work, school, or certain medical or family emergencies. These are most effective when the fees for obtaining a conditional license are waived for indigent people and, perhaps more importantly, when the state is required to notify a defendant of the option for a conditional license at the same time the suspension is imposed. Ideally, use of these conditional licenses should not be tied to existing full-time employment, since that would disqualify people who work part-time, as well as certain self-employed people, and it could discourage people from seeking employment during the suspension period. Indiana permits drivers to obtain restricted licenses to go to work, church, or to participate in parenting time consistent with a court order.[94]

Statutes should be drafted to make conditional licenses explicitly available for debt-related suspensions, since many states that have conditional licenses exclude people who have not paid fines and fees from eligibility. Ironically, some states that exclude drivers who can't pay fees from getting conditional licenses *will* issue conditional licenses to drivers who have been convicted of driving under the influence, where the ability to drive is actually related to the offense and connected to public safety.[95]



Key Reform 4: End Incarceration and Supervision for Non-Willful Failure To Pay

Advocates at Community Legal Services of Philadelphia received a request for help from Gregory.[96] Gregory is a 56-year-old man who is intellectually disabled. He is being chased for over $15,000 in unpaid criminal justice debt from a 1995 case. He has not had any run-ins with the law in many years. Gregory's only income is SSI disability benefits. He owns no property. Gregory is scared out of his mind, literally to tears, by the thought of being locked up again (which is what he's been threatened will happen if he doesn't make payments).[97]

End extension of probation and parole for failure to pay

At least 13 states have a statute or practice allowing courts to extend probation terms for failure to pay debt in some cases.[98] This creates a system where people who have met the other terms of their sentence, satisfied the conditions of probation, and paid their debt to society remain under supervision by criminal justice authorities because of a monetary violation. Extending the supervision of people for criminal justice debt creates an unnecessary financial burden on states and negatively interferes with public safety.

A few states have statutes, regulations, or policies that do not permit the extension of probation or parole due to failure to pay criminal justice debt. Ohio also has a rule explicitly prohibiting extended supervision for people who are unable to pay fees and fines.[99] Virginia passed a bill in 2009 that prohibited keeping people under supervised probation solely because of a failure to make complete payment of fees, fines, or costs.[100] The new law stemmed from the recommendations of a 28-member task force on non-violent offenders. The panel included judges, police chiefs, corrections officials and budget analysts.[101] According to the panel's report, the annual cost to incarcerate a person was about $25,000 in 2009.[102] (By contrast, Virginia spent about $11,300 per pupil in its education system in the same year.)[103] And, of all the people admitted to Virginia prisons in 2008, about 13 percent of the approximately 13,503 people incarcerated were there for "technical probation and parole violations."[104] The average expected length of stay for these people was 31 months.[105]

The state was spending about $43 million each year to incarcerate people who had committed non-violent technical violations while on probation or parole (instead of educating the students of Virginia).

In addition, the report noted that there were about 4,500 offenders still under supervision for their failure to pay fines, fees and restitution.[106] If those who owed fees and fines were freed from probation, "[T]hen probation and parole officers would have more time and resources to supervise more serious and higher-risk offenders. In addition, it would reduce the number of technical violators brought back to court and returned to prison."[107] As the Virginia report makes clear, this collision between rising costs and limited resources provides legislators with a powerful rationale for ending the practice of extending probation and parole simply because of failure to pay.

Good fiscal notes can be crucial to the passage of criminal justice debt reform legislation. Unfortunately, official state estimates of the savings or cost of proposed reforms often lack the information necessary for good decision-making, or are not produced at all.[108] Advocates must therefore both seek fiscal reviews of proposed policies, and then be ready to challenge them if the reports are incomplete or inaccurate.

MODEL LANGUAGE – END SUPERVISION FOR FAILURE TO PAY

a. No defendant shall be kept under supervision, parole, or probation solely because of a failure to make full payments of fees, fines, or costs.

b. No supervisee shall have supervision, parole, or probation extended solely because of a failure to make full payments of fees, fines, or costs.

Cancelling Writs, Arrest Warrants, and Summonses for Those Unable to Pay

Missing debt payments or failure to appear at debt-related proceedings triggers arrests in many jurisdictions. In some jurisdictions, a missed payment automatically triggers an arrest warrant, while in others probation officers seek arrest warrants when people fall behind on payments.[109] In some jurisdictions, arrests and pre-hearing incarceration occur prior to any assessment of the person's ability to pay.[110] Using arrest as a collections practice raises due process and constitutional questions since it effectively creates criminal punishment for poverty.

Florida allows courts to arrest people unable to pay court fees and fines.[111] However, two Florida counties have recently recognized the enormous costs associated with trying to capture and punish poor people incapable of paying criminal justice debt.

Success Story: Cancelling Writs in Florida

The Brennan Center partnered with local public defender offices in two counties in Florida to successfully advocate for the cancellation of thousands of arrest warrants issued for people in nonpayment. Since 1996, Florida has added more than 20 categories of criminal justice fees and fines.[112] Examples of new fees included a "$40 fee imposed for contesting alleged violation of local ordinances in county court" and a $30 surcharge for criminal traffic violations.[113] Since 2004, legislators have required that courts substantially support their operating expenses through fee levies.[114] Increasing the number of fees made it more likely that persons going through the judicial system would end up with a great deal of debt.

Following the publication of the Brennan Center's report, *The Hidden Costs of Florida's Criminal Justice Fees* (2010), Florida Collections Courts in Leon County and Orange County made changes to stem the growing tide of debtors' prisons. The report revealed that in one year, from October 1, 2007 to September 30, 2008, Leon County spent $62,085 attempting to capture and punish indigent people while it only received $80,450 of a possible $347,084 in revenue. For this $18,365 windfall, which represents a generous estimate,[115] "the manpower required for record-keeping along with the physical housing and storage of [warrants for arrest placed] a tremendous burden on the Clerk of Court and [interfered] with the efficient administration of justice."[116] By using their time to locate and arrest these persons, "law-enforcement officials [used up] resources needed to pursue violent offenders."[117]

To reduce this inefficiency in Leon County, Chief Judge Charles A. Francis closed the collections court and, as a result, terminated approximately 8,000 outstanding arrest warrants for nonpayment.[118] Judge Francis has expressed his concerns about what he calls "fee justice."[119] He worries that "the 'haves' will unfairly get better deals than the 'have nots.'"[120]

In Orange County, outstanding writs issued between January 1, 2007 and May 13, 2010 were canceled for people deemed transient.[121]

The Florida system still has limitations. The law places burdens on a potentially indigent litigant to know of the existence of payment plans and to request them, when the person may not have the knowledge or legal resources to do so. Litigants can only set up partial payments through payment plans if they raise the issue.[122] Further, payment plans are presently "presumed to correspond to the person's ability to pay if the amount does not exceed 2 percent

of the person's annual net income…divided by 12."[123] This system assumes an ability to pay solely based on income without an assessment of other financial obligations or limitations.

However, the bold step of cancelling thousands of writs is still important in combating modern day debtors' prisons.

Right to Counsel

In the absence of ending outright the practice of incarcerating people who owe criminal justice debt, advocates should work to establish the right to counsel in nonpayment hearings that could result in incarceration or an extension of probation or parole.

The presence of counsel at enforcement proceedings can make a huge difference for an indigent defendant. Attorneys can collect and present evidence regarding defendants' abilities to pay, help them navigate confusing rules for altering payment plans or debt loads, and ensure that their rights are protected and that they understand the implications of any future payment commitments.[124] Guaranteeing the right to counsel can thus help protect people from being incarcerated for debt just because they are poor.

The Constitution guarantees a criminal defendant the right to counsel.[125] Furthermore, the Supreme Court ruled in *Gagnon v. Scarpelli*[126] that state courts must determine whether appointment of counsel is necessary at probation and parole revocation hearings.

A recent decision by the Washington State Court of Appeals affirmed a defendant's right to counsel at enforcement proceedings for payment obligations arising from his criminal sentences. In *Washington v. Stone*, James Stone appealed a trial court's orders imposing jail time for his failure to make criminal justice debt payments. Stone was tried in Jefferson County, which has a policy of placing defendants who owe criminal justice debt on a "pay or appear" calendar and requiring them to defend themselves without appointment of counsel. The Court of Appeals found that enforcement proceedings for criminal justice debt that can lead to incarceration are criminal in nature, not civil, and trigger the fundamental right to counsel. Furthermore, the court held that Stone's due process rights were violated when he was charged with jail time without a finding as to his ability to pay.

Conduct Meaningful Willful Failure to Pay Determinations

The process of collecting criminal justice debt is difficult to decipher for those at its mercy.[127] Courts have generally treated the concept of "willful failure to pay" as ill-defined and amorphous, exacerbating existing confusions. This lack of structure makes it easier for judges to act on a whim rather than investigate claims.

Advocates should consider researching and compiling local or state-based standards of indigence, to help people prove an actual inability to pay.

There is also a lack of structure in the terms of an indigent person's incarceration. According to a report in Washington state there were occasions when "incarceration was reported to be a sanction for nonpayment that in some cases increased [the indigent person's] debt," while "in other cases, serving time in jail was reported to have been a means of reducing [an indigent person's debt.]"[128] Finally, the collateral consequences associated with a willful failure to pay may include the loss of federal benefits upon the issuance of a bench warrant for people dependent upon these benefits.[129]

Rhode Island has a willful failure to pay statute listing a series of conditions that constitute prima facie evidence of a defendant's indigency and limited ability to pay. These include qualification for or receipt of Temporary Assistance for Needy Families, Supplemental Security Income, public assistance, or food stamps. Outstanding court orders for other kinds of debt, such as outstanding restitution, child support payments, or outstanding payments for counseling resulting as a condition of sentence, also constitute prima facie evidence of inability to pay.[130]

Key Reform 5: Focus On Rehabilitation through Meaningful Workforce Development

Dolphy Jordan, a 38-year-old Washington State resident, was released from prison in April 2010 after being incarcerated for 21 years. Upon release, Mr. Jordan found out that he had about $2800 in criminal justice debt to pay off. He became involved with a nonprofit called The Post Prison Education Program in Seattle, which helped connect him to educational opportunities and reentry support. Mr. Jordan worked two part-time jobs, slept on his mother's couch to save rent money, pursued a post-secondary degree as a student, and managed to pay off his debts in a year. "It was very stressful… I'm getting released after all this time with nothing, with the stigma of being a convicted felon, and I'm already starting out in debt… I was willing to sacrifice other things just to pay that off. And that was my ultimate goal. I think it has a big impact on pretty much everything — I'm a lucky case because I really didn't owe that much money — but I've heard outrageous amounts of money and interest that guys would never be able to pay off, no matter what. And [I] just don't get it."[131]

Meaningful community service and workforce development alternatives can provide people with the skills and experience necessary to obtain jobs while also allowing them to avoid the cycles of debt, poverty, and re-incarceration that accompany criminal justice debt. Compulsory community service can interfere with employment or job training, but time-limited voluntary community service that is directly tied to job training and placement is a useful model for addressing criminal justice debt.

For those who cannot pay, statutes in several states currently provide for at least limited community service options.[132] However, courts often limit or altogether avoid their implementation, leaving many people without access to these options in practice. In Florida, for example, judges are permitted to convert statutory financial obligations into court-imposed community service for those unable to pay, but the courts seldom take advantage of this option. Only 16 of 67 counties converted any mandatory criminal debt imposed in felony cases into community service.[133] In Georgia, community service is generally only offered to offset particular categories of financial obligations, such as fines.[134] This can leave poor people saddled with significant amounts of debt in other categories.

Even in states where community service alternatives or work programs are offered and implemented, poor program design can stymie potential rehabilitative effects. When community service is a mandatory alternative to paying fees and fines, defendants who are unable to pay and should be exempt from incurring debt are being coerced into community service that may actually hinder rehabilitation efforts, by interfering with time that could be spent looking for a job. Similarly, when community service alternatives are not paired with job training and placement programs, people are forced to spend time performing labor that could otherwise be spent looking for jobs or building skills that could result in employment. Finally, when community service is not a pre-set duration and is instead tied to an hourly wage, people facing thousands of dollars in criminal justice debt may end up performing community service indefinitely. Successful community service and workforce development models should be voluntary, focused on skill-building, and of a time-limited duration resulting in debt forgiveness.[135]

Success Story: Massachusetts

The Clapham Set, a pilot program in Suffolk County, Massachusetts, shows how a voluntary workforce development program can encourage rehabilitation and financial independence. The founder of the program, a former prosecutor named Robert Constantino, sought to address the myriad negative impacts that criminal justice debt has on people, and reform existing community service alternatives that did not address the underlying rehabilitative needs of poor participants. In collaboration with community partners and the Roxbury Division of the Boston Municipal Court, The Clapham Set offered young, unemployed men a curriculum designed to discourage underground employment, and encourage occupational skill development. The program helped participants work on a resume, complete job training, go on job interviews, and attend mental health or substance abuse counseling. In exchange for participation, they received credit towards outstanding court costs, fees and fines.[136]

The program collaborated with the Black Ministerial Alliance of Greater Boston, as well as StreetSafe Boston, two organizations already deeply involved with the local populations involved in the criminal justice system. Through persistent outreach efforts, it cultivated strong partnerships with local businesses that were potential employers for program participants. Participation in the program was entirely voluntary. People who obtained employment during the course of the program were exempt from participation during hours that conflicted with their jobs, and were still eligible for credit towards their criminal justice debt.

Men enrolled in the program voluntarily, motivated by the opportunity to earn credit towards fines and fees that they would otherwise be unable to pay. The credit system incentivized them to maintain strong program participation. The court offered successful participants credit towards all financial obligations except restitution. Appropriate credit amounts were determined by judges on a case-by-case basis.

In its three-year pilot period, about 26 men went through the program. Eleven men completed the program and received full credit for the amount they owed. Others did not complete the class but received partial credit from the judge. About 20 found work during the course of the program, though a smaller number were able to maintain long-term employment. Only five of the 26 are known to have reoffended, which is promising considering that just over half of all people with prior convictions reoffend in the first three years in Massachusetts.[137]

The Clapham Set model emphasizes a few key elements that are crucial to a well-designed alternative to legal financial obligations: collaborations with various stakeholders in the system; community-based connections; and a focus on enhancing economic mobility. By involving judges, prosecutors, and correctional officers in the development phase of the program, it gained legitimacy and prominence in the courtroom. By partnering with local, community-based programs, it capitalized on existing connections and trust networks within the community to help rehabilitate ex-offenders. Finally, by making economic mobility its top priority, the program enhanced the employment prospects of its participants and helped them overcome the negative reentry impacts of criminal justice debt.

CONCLUSION

States are increasingly forcing poor people to fund the criminal justice system. The imposition of criminal justice debt is a short-sighted effort to generate revenue. These policies exact unforeseen costs on governments, communities, taxpayers, families, and the indigent people caught up in the system. Advocates can create meaningful solutions to the problem of criminal justice debt by challenging the unsound fiscal assumptions such policies are based upon, providing creative alternatives to incarceration and supervision, and building coalitions with other advocates who are fighting to reform such practices. Such reform-minded actions can stem the rising tide of the new debtors' prisons.

Endnotes

1 In 2008 the Rhode Island Family Life Center conducted interviews of people managing court debt and facing debt-based incarceration. The Rhode Island Family Life Center was renamed OpenDoors R.I. in 2010. Harold Brooks' interview is available here http://opendoorsri.org/courtdebtreform.

2 R.I. Family Life Ctr., Jailing the Poor: Court Debt and Incarceration in R.I. 2 (2008), *available at* http://opendoorsri.org/sites/default/files/brief_debt.pdf.

3 *See, e.g., Bearden v. Georgia*, 461 U.S. 660 (1983); *Williams v. Illinois*, 399 US 235 (1970).

4 Fees, fines and related court proceedings go by various names in different jurisdictions. This Toolkit refers to fees and fines as criminal justice debt and legal financial obligations. Proceedings to collect fees and fines may be referred to as collections proceedings, nonpayment hearings, or enforcement proceedings. Fees and fines are generally referred to in the toolkit as criminal justice debt.

5 Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, Brennan Ctr. for Justice, Criminal Justice Debt: A Barrier to Reentry 4 (2010), *available at* http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf.

6 *Id.*

7 Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 Am. Soc. Rev. 339, 344-354 (2009).

8 Bannon et al., *supra* note 5 at 7.

9 Carl Reynolds et al., A Framework to Improve How Fines, Fees, Restitution, and Child Support are Assessed and Collected from People Convicted of Crimes (2009), *available at* http://www.courts.state.tx.us/oca/debts/pdf/TexasFinancialObligationsInterimReport.pdf.

10 *Id.* at 21; *see also* Eric Dexheimer, *Even Court Officials Find Fees Hard to Untangle*, Statesman, Mar. 3, 2012, http://www.statesman.com/news/statesman-investigates/even-court-officials-find-fees-hard-to-untangle-2215171.html?cxtype=rss_ece_frontpage.

11 Bannon et al., *supra* note 5 at 7.

12 *Id.* at 15.

13 Bannon et al., *supra* note 5 at 4.

14 *Id.* at 4.

15 *Id.* at 11.

16 *Id.* at 22.

17 *Id.*

18 *Id.* at 26.

19 *Id.*

20 *Id.* at 60.

21 *Id.* at 5.

22 42 U.S.C. § 608(a)(9)(A); 7 U.S.C. § 2015(k)(1); 42 U.S.C. § 1437d(1)(9); 42 U.S.C. § 1382(e)(4)(A)(ii).

23 Bannon et al., *supra* note 5 at 29.

24 Katherine A. Beckett et al., Wash. State Minority and Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State 4-6 (2008), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

25 Richard Luscombe, *Cash-Strapped Jails Begin Charging Inmates for Snacks—Even Room and Board*, Christian Sci. Monitor, May 15, 2009, http://www.csmonitor.com/USA/2009/0515/p25s10-usgn.html.

26 *Dean v. Lehman*, 143 Wash.2d 12, 43 (Wash. 2001) (Alexander dissenting).

27 Bannon et al., *supra* note 5 at 21.

28 *Id.* at 22.

29 *Id.* at 23.

30 *Andrews v. Walton*, 428 So.2d 663 (Fla. 1983).

31 *Adkins v. Adkins*, 248 S.E.2d 646 (Ga. 1978).

32 *In re Calhoun*, 350 N.E.2d 665 (Ohio 1976).

33 *See Garfield Hts. v. Stefaniuk*, 712 N.E.2d 808, 809 (Ohio Ct. App. 1998) (There is a conflict in the appellate decisions concerning whether a contemnor in a *civil* contempt proceeding is entitled to *appointed* counsel).

34 *Washington v. Stone,* 268 P.3d 226 (Wash. Ct. App. 2012).

35 *Allen v. Leis*, 213 F.Supp.2d 819 (S.D. Ohio 2002).

36 R.I. Family Life Ctr., Jailing the Poor: Court Debt and Incarceration in R.I. 2 (2008), *available at* http://opendoorsri.org/sites/default/files/brief_debt.pdf.\

37 Report of the Special Comm'n to Study the Feasibility of Establishing Inmate Fees, Inmate Fees as a Source of Revenue: Review of Challenges 96 (2011), *available at* http://www.prisonpolicy.org/scans/inmate_fee_final_7-1-11.pdf.

38 2010 Mass. Acts Ch. 131 §177, *available at* http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter131.

39 *Id.*

40 Report of the Special Comm'n to Study the Feasibility of Establishing Inmate Fees, Inmate Fees as a Source of Revenue: Review of Challenges 27 (2011), *available at* http://www.prisonpolicy.org/scans/inmate_fee_final_7-1-11.pdf.

41 *Id* at 50.

42 *Id.* at 4.

43 *Id.*

44 *Id.*

45 Press Release, Pew Ctr. on the States, Pew Applauds Ky. Leaders for Comprehensive Pub. Safety Reforms (Mar. 3, 2011), *available at* http://www.pewcenteronthestates.org/news_room_detail.aspx?id=328572.

46 S.C. Code Ann. § 2-7-74.

47 R.I. Family Life Ctr., Court Debt and Related Incarceration in Rhode Island from 2005 through 2007 4 (2008), *available at* http://www.opendoorsri.org/sites/default/files/CourtDebt.pdf.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 12.

52 *Id.* at 16-18.

53 R.I. Gen. Laws § 12-6-7.1; R.I. Gen. Laws § 12-18.1-3; R.I. Gen. Laws § 12-19-34; R.I. Gen. Laws § 12-20-10; R.I. Gen. Laws § 12-21-20; R.I. Gen. Laws § 12-25-28.

54 Telephone Interview by Meghna Philip with Michaela Connors, Intake Coordinator, RIPD (Feb. 8, 2012, 11:00 AM).

55 R.I. Family Life Ctr., Just Savings: The Success of Court Debt Reform 1 (2009). On file with authors.

56 *Id.*

57 Carlos Campos, *Poverty Keeps Woman Jailed, Lawsuit Says*, Atlanta J.-Const., Sept. 19, 2006, http://www.schr.org/articles/hurley.

58 H.R. 2668, 2010 Gen. Assemb., Reg. Sess. (Kan. 2010)., 2010 Kan. Sess. Laws Ch. 136, Conn. Gen. Stat. § 53a-30(e); Ohio Admin. Code 5120:1-1-02 ; Haw. Rev. Stat. § 706-648; Haw. Rev. Stat. § 706-605; Haw. Rev. Stat. § 706-641.

59 Haw. Rev. Stat. § 706-648; Haw. Rev. Stat. § 706-605(6).

60 *Bearden v. Georgia*, 461 U.S. 660, 662 (1983).

61 Rebekah Diller, Testimony to Md. House of Delegates on Fixing Parole Fee Exemption Sys. (Mar. 1, 2011), *available at* http://www.brennancenter.org/content/resource/testimony_to_maryland_house_of_delegates_on_fixing_parole_fee_exemption_sys/.

62 *Id.*

63 Md. Code Ann., Corr. Servs. § 7-702 (2008)

64 Rebekah Diller, Judith Greene, & Michelle Jacobs, Brennan Ctr. For Justice, Maryland's Parole Supervision Fee: A Barrier to Reentry 26 (2009), *available at* http://brennan.3cdn.net/fbee4fbc0086ec8804_4tm6bp6oa.pdf.

65 *Id.*

66 Rebekah Diller, Testimony to Md. House of Delegates on Fixing Parole Fee Exemption Sys. 3 (Mar. 1, 2011), *available at* http://www.brennancenter.org/content/resource/testimony_to_maryland_house_of_delegates_on_fixing_parole_fee_exemption_sys/.

67 *Id.*

68 Md. Code Ann., Corr. Servs. § 7-702.

69 MD H.D. Roll Call Vote, 2011 Sess. H.B. 749, H.R. 749, 2011 Gen. Assemb., Reg. Sess. (Md. 2011)., Md. Code Ann., Corr. Servs. § 7-702 (West 2012).

70 Md. Code Ann., Corr. Servs. § 7-702 (West 2012); *See also Governor's Press Release, Bills be Signed by the Governor on May 10, 2011.* SB 362 signed into law. http://www.governor.maryland.gov/documents/billssigned110510.pdf (last visited April 25, 2012)

71 Telephone Interview by Roopal Patel with Pam Reid (Apr. 16, 2012 12:00 PM).

72 *Id.*

73 *Id.*

74 Telephone Interview by Meghna Philip with Nick Allen, Equal Justice Fellow, Wash. Columbia Legal Servs. (Nov. 17, 2011, 4:00 PM).

75 Telephone Interview by Meghna Philip with Pam Reid (Feb. 24, 2012, 3:00 PM).

76 Bannon et al., *supra* note 5 at 17,18. (Some of these fees are flat charges, such as a one-time $300 charge in California. Cal. Penal Code § 1214.1 (A). Others are late charges repeatedly levied every time defendants make late payments. States also authorize exorbitant "collection fees," frequently payable to private debt collection firms, as well as fees levied on people for entering into payment plans, without exemptions for poverty. Payment plan fee amounts in New Orleans can be as high as $100).

77 *Id.* at 17.

78 Telephone Conversation with American Express Customer Service, 1-800-528-4800 (Mar. 3, 2012).

79 Bannon et al., *supra* note 5 at 18.

80 In some states, some interest or charges may not be subject to judicial alternation, such as restitution-related charges.

81 Wash. Rev. Code § 10.82.090; Wash. Rev. Code § 4.56.110(4); Wash. Rev. Code § 19.52.020.

82 Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood From Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. of Soc. 1753, 1759 (2010).

83 Prison Policy Initiative, Section III: The Prison Economy, http://www.prisonpolicy.org/prisonindex/prisonlabor.html (last visited Feb. 15, 2012).

84 Telephone Interview by Meghna Philip with Nick Allen, Equal Justice Fellow, Wash. Columbia Legal Servs. (Nov. 17, 2011, 4:00 PM).

85 Harris *et al.*, *supra* note 82 at 1776.

86 Rebekah Diller, Brennan Ctr. For Justice, The Hidden Costs of Florida's Criminal Justice Fees 20-21 (2010), *available at* http://www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1 (explaining that people whose licenses are suspended for failure to pay court fees face felony charges punishable by up to five years in prison and a $5000 fine).

87 *See* Margy Waller, Jennifer Doleac, & Ilsa Flanagan, Brookings Inst., Driver's License Suspension Policies 2 (2005), *available at* http://www.aecf.org/upload/publicationfiles/license_all_reports.pdf. *See also* Diller, *supra* note 87 at 21. ("a valid driver's license was a more accurate predictor of sustained employment than a General Educational Development (GED) diploma among public assistance recipient");

88 *See* Sandra Gustitus, Melody Simmons, & Margy Waller, The Mobility Agenda, Access to Driving and License Suspension Policies for the Twenty-First Century Economy 9 (2008), *available at* http://www.policyarchive.org/handle/10207/bitstreams/20441.pdf.

89 N.J. Motor Vehicles Affordability and Fairness Task Force, Final Report 9 (2006), *available at* http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf.

90 *Id.*

91 Margy Waller et al., *supra* note 86 at 2.

92 *City of Redmond v. Moore*, 151 Wash. 2d 664, 667 (Wash. 2004).

93 Md. Code. Ann., Transp. § 12-202.

94 Ind. Code § 9-24-15-6.7 (West 2012).As amended by Ind. Legis. Serv. P.L. 125-2012 (S.E.A. 257) (WEST 2012)

95 Margy Waller et al., *supra* note 88 at 57. (describing a workforce study in Louisville, Kentucky, where hardship licenses are only available to drivers whose licenses were suspended for driving under the influence).

96 Name changed to protect anonymity.

97 Email from Rebecca Vallas, Staff Attorney, Community Legal Services of Philadelphia, to Meghna Philip (Mar. 15, 2012, 16:37 EST) (on file with author).

98 Bannon et al., *supra* note 5 at 25.

99 Ohio Admin. Code 5120:1-1-02(K).

100 H.R. 2309, 2009 Gen. Assemb., Reg. Sess. (Va. 2009)., Va. Code Ann. § 19.2-305 (West 2012).

101 The Va. Alts. for Non-Violent Offenders Task Force, Report and Recommendations 28 (2009), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/498947535ad4eee38525769a00568143/$FILE/RD430.pdf.

102 *Id.*

103 Va. Dep't of Educ., Superintendent's Annual Report 3 tbl. 15 (2008-09), http://www.doe.virginia.gov/statistics_reports/supts_annual_report/2008_09/table15.pdf (last visited April 25, 2012).

104 The Va. Alts. for Non-Violent Offenders Task Force, Report and Recommendations 6 (2009), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/498947535ad4eee38525769a00568143/$FILE/RD430.pdf.

105 *Id.*

106 *Id.* at 19.

107 *Id.*

108 Michael Leachman, Inimai M. Chettiar, & Benjamin Geare, ACLU and Ctr. On Budget and Policy Priorities, Improving Budget Analysis of State Criminal Justice Reforms: A Strategy for Better Outcomes and Saving Money 1 (2012), *available at* https://www.aclu.org/files/assets/improvingbudgetanalysis_20120110.pdf.

109 Bannon et al., *supra* note 5 at 23.

110 *Id.*

111 *Id.*

112 *Id.* at 5.

113 *Id.* at 5-6.

114 *See* John Schwartz, *Pinched Courts Push to Collect Fees and Fines,* N.Y. Times, Apr. 6, 2009, http://www.nytimes.com/2009/04/07/us/07collection.html?pagewanted=all.

115 Diller, *supra* note 87 at 19.

116 ADMIN. ORDER RECALLING CERTAIN ACTIVE COLLECTION COURT WRITS ISSUED BETWEEN JANUARY 1, 2007 AND MAY 13, 2010, Circuit Court of the Ninth Judicial Circuit, Orange County Florida, (June 29, 2010)

117 Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, Wall St. J., Mar. 17, 2011, http://online.wsj.com/article/SB10001424052748704396504576204553811636610.html?KEYWORDS=priso.

118 *Our Opinion: Cash-Register Justice*, TALLAHASSEE DEMOCRAT, (Dec. 29, 2010) http://www.brennancenter.org/page/-/Leon%20County%20op-ed_122910.pdf

119 *See* Jan Pudlow, *Should Floridians Care About Court System Funding?*, Florida Bar News (Oct. 15, 2008),

http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/df13571af5c04aef852574da00497250!OpenDocument (last visited April 25, 2012).

120 *Id.*

121 ADMIN. ORDER RECALLING CERTAIN ACTIVE COLLECTION COURT WRITS ISSUED BETWEEN JANUARY 1, 2007 AND MAY 13, 2010, Circuit Court of the Ninth Judicial Circuit, Orange County Florida, (June 29, 2010)

122 Fla. Stat. § 28.246(4).

123 *Id.*

124 Bannon et al., *supra* note 5 at 22.

125 U.S. Const. amend. VI.

126 *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

127 Katherine A. Beckett et al., Wash. State Minority and Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State 47-52 (2008), *available at* http://faculty.washington.edu/kbeckett/Legal%20Financial%20Obligations.pdf.

128 *Id.* at 44.

129 *Id.* at 46.

130 RI Gen. Laws §§ 12-20-10; 12-21-20

131 Telephone Interview by Meghna Philip with Dolphy Jordan (Feb. 24, 2012 4:15 PM).

132 Bannon et al., *supra* note 5 at 15.

133 *Id.* at 23.

134 *Id.* at 15.

135 While alternative courts and community courts do not directly address the issue of combating fees and fines, the alternative sentencing structures they create could be adopted to help produce meaningful community service that results in employment. For example, the Midtown Community Court in Manhattan, with assistance from East Harlem Employment Services, a non-profit leader in workforce development, partners with Time Square Ink to create a 10 week job readiness program. The program has an 85 percent placement rate, and 73 percent of graduates are still working after one year. *Community Court,* Ctr. for Court Innovation (Feb. 15, 2012), http://www.courtinnovation.org/research/job-training-times-square-ink?mode=4&url=research%2F4%2Farticle; Homeless courts also use voluntary community service and participation in social services to dismiss misdemeanor convictions and help reduce homelessness amongst persons.

136 Telephone Interview by Meghna Philip with Robert Constantino, Former Executive Dir., Clapham Set (Nov. 11, 2011, 1:00 PM).

137 Tina Rosenberg, *Paying For Their Crimes, Again,* N.Y. Times, June 6, 2011, http://opinionator.blogs.nytimes.com/2011/06/06/paying-for-their-crimes-again/.

NEW & FORTHCOMING BRENNAN CENTER PUBLICATIONS

Facing Foreclosure Alone: The Continuing Crisis in Legal Representation
Nabanita Pal

Donor Diversity Through Public Matching Funds
Elisabeth Genn, Sundeep Iyer, Michael J. Malbin, and Brendan Glavin

Democracy & Justice: Collected Writings, Volume V
Brennan Center for Justice

Voting Law Changes in 2012
Wendy R. Weiser and Lawrence Norden

National Survey: Super PACs, Corruption, and Democracy
Brennan Center for Justice

Voter Registration Modernization: A National Reform Proposal
Wendy R. Weiser and Jonathan Brater

Design Deficiencies and Lost Votes
Lawrence Norden and Sundeep Iyer

The New Politics of Judicial Elections: 2009-10
Brennan Center for Justice, Justice at Stake Campaign,
and the National Institute of Money in State Politics

Reducing Overclassification Through Accountability
Elizabeth Goitein and David M. Shapiro

Promoting Fair and Impartial Courts through Recusal Reform
Adam Skaggs and Andrew Silver

Money, Politics, and the Constitution: Beyond Citizens United
Edited by Monica Youn

A Media Guide to Redistricting
Erika Wood and Myrna Peréz

Start Now: Holistic Defense Practices Ready to Implement
Thomas Giovanni, Jeffery Oakley, and Shayla Silver-Balbus

For more information, please visit www.brennancenter.org

BRENNAN
CENTER
FOR JUSTICE

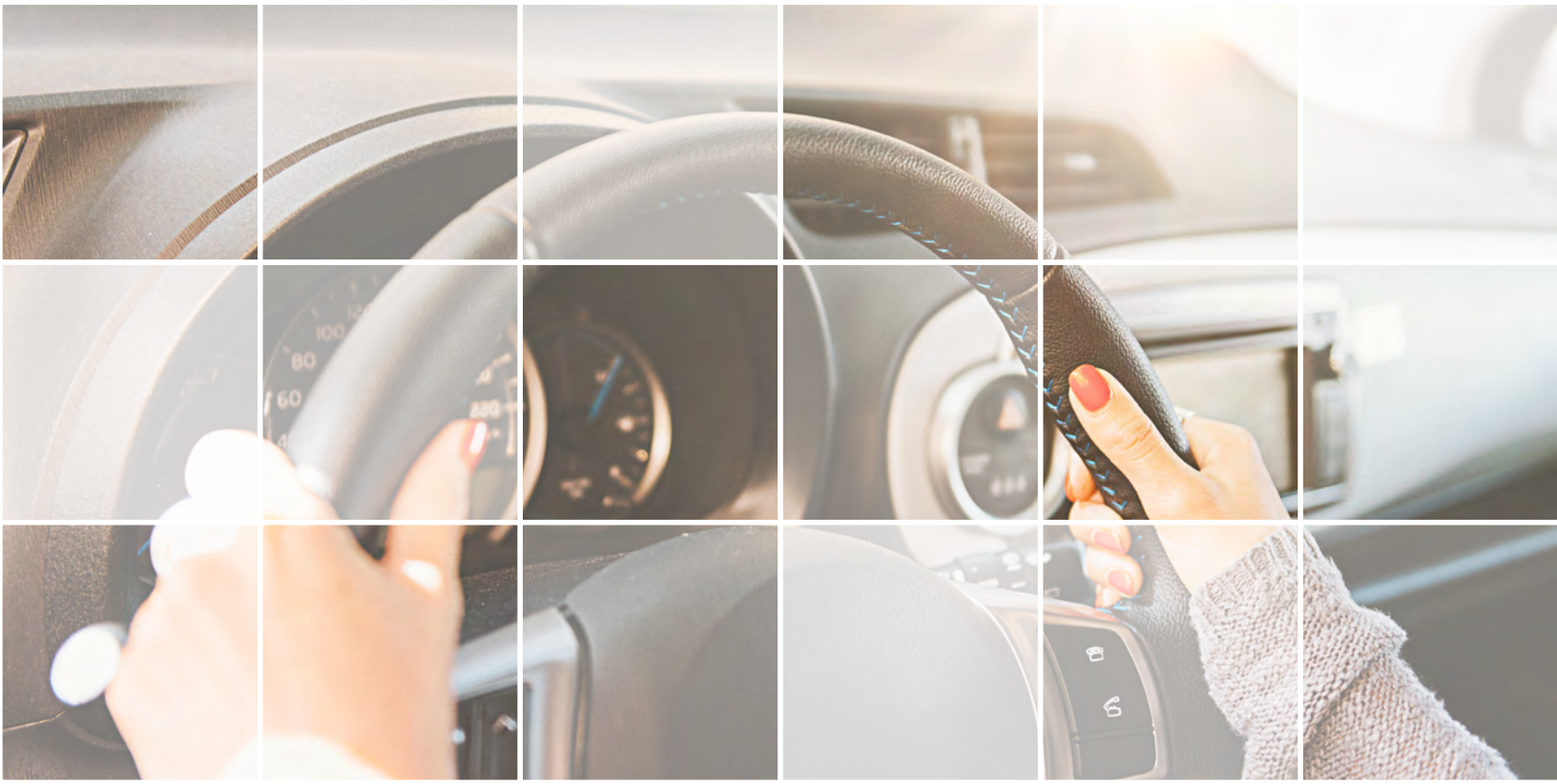
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
www.brennancenter.org

DRIVEN BY DOLLARS

A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt

Authored by Mario Salas and Angela Ciolfi



LEGAL AID
JUSTICE CENTER

ACKNOWLEDGEMENTS

Work on this project was made possible by a grant from the Laura and John Arnold Foundation. Points of view or opinions in this document are those of the authors and do not necessarily represent those of the Laura and John Arnold Foundation.

We are grateful to University of Virginia School of Law student volunteers Clayton Pasley, Katherine Mann, Shivani Patel, and Steven Weiser, who researched and compiled state laws, and to LAJC attorneys Pat Levy-Lavelle and Amy Woolard, who reviewed multiple drafts.

We are also thankful for the contributions of a national community of advocates, especially those who consulted with us and verified our research: Caren Short, Southern Poverty Law Center (Alabama, Georgia, Louisiana, Mississippi, South Carolina); Nikole Nelson, Alaska Legal Services Corporation (Alaska); Catherine Sevcenko, Equal Justice Under Law (Arkansas, Michigan, Montana, Pennsylvania, Washington); Rebekah Evenson, Bay Area Legal Aid (California); Becca Curry and Denise Maes, American Civil Liberties Union of Colorado (Colorado); Anne Louise Blanchard, Connecticut Legal Services, Inc. (Connecticut); Sarah Hollender, Tzedek DC (Washington, D.C.); Benjamin Stevenson, American Civil Liberties Union of Florida (Florida); Howard Beloduff, Idaho Legal Aid Services (Idaho); Jody Blaylock, Heartland Alliance (Illinois); Adam Mueller, Indiana Legal Services, Inc. (Indiana); Alex Kornya, Iowa Legal Aid (Iowa); Jack Comart, Maine Equal Justice Partners, and Meagan Sway, American Civil Liberties Union of Maine (Maine); Amy Hennen, Maryland Volunteer Lawyer Service (Maryland); Anna Odegaard, Minnesota Asset Building Coalition (Minnesota); Ken Smith, Nebraska Appleseed Center for Law in the Public Interest (Nebraska); Jon Sasser, Washoe Legal Services (Nevada); Lynne Parker, New Hampshire Legal Assistance (New Hampshire); Demelza Baer, New Jersey Institute for Social Justice (New Jersey); Juan Martinez, New Mexico Center on Law and Policy (New Mexico); Helen Syme, Monroe County Public Defender's Office (New York); Daniel Bowes, North Carolina Justice Center (North Carolina); Mike Brickner and Elizabeth Bonham, American Civil Liberties Union of Ohio, and R. Orion Danjuma, American Civil Liberties Union (Ohio); Ed Wunch, Legal Services of Oklahoma (Oklahoma); Andrew Christy, American Civil Liberties Union of Pennsylvania (Pennsylvania); John Willumsen-Friedman, Rhode Island Center for Justice (Rhode Island); Claudia Wilner, National Center for Law and Economic Justice (Tennessee); Mary Schmid Megler, Texas Appleseed Criminal Justice Project (Texas); Kate White, Legal Aid of West Virginia (West Virginia); and Vicky Selkowe and Molly Gena, Legal Action of Wisconsin (Wisconsin). Thanks also to Gavin Kearney, Ambar Roberts, and Kevin Herrera with the Sargent Shriver National Center on Poverty Law and Alex Gulotta of Bay Area Legal Aid for helping to connect us with local practitioners.

Although we made every attempt to verify the results of our research with local practitioners, any remaining errors are ours, and ours alone.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Across the country, millions of people have lost their licenses simply because they are too poor to pay, effectively depriving them of reliable, lawful transportation necessary to get to and from work, take children to school, keep medical appointments, care for ill or disabled family members, or, paradoxically, to meet their financial obligations to the courts.

State laws suspending or revoking driver's licenses to punish failure to pay court costs and fines are ubiquitous, despite the growing consensus that this kind of policy is unfair and counterproductive. Forty-three states and the District of Columbia use driver's license suspension to coerce payment of government debts arising out of traffic or criminal convictions. Most state statutes contain no safeguards to distinguish between people who intentionally refuse to pay and those who default due to poverty, punishing both groups equally harshly as if they were equally blameworthy.

License-for-payment systems punish people—not for any crime or traffic violation, but for unpaid debts. Typically, when a state court finds a person guilty of a crime or traffic violation, it orders the person to pay a fine or other penalty along with other administrative court costs and fees. If the person does not pay on time, the court or motor vehicle agency can—and in some states, must—punish the person by suspending his or her driver's license until the person pays in full or makes other payment arrangements with the court.

By cutting people off from jobs, license-for-payment systems create a self-defeating vicious cycle. A state suspends the license even though a person cannot afford to pay, which then makes the person less likely to pay once he or she cannot drive legally to work. The person now faces an unenviable choice: drive illegally and risk further punishment (including incarceration in some states), or stay home and forgo the needs of his or her family. In this way, license-for-payment systems create conditions akin to modern-day debtor's prisons.

Despite their widespread use, license-for-payment systems are increasingly drawing critical scrutiny from motor vehicle safety professionals, anti-poverty and civil rights advocates, and policymakers. New state-

MILLIONS OF DRIVERS ACROSS THE COUNTRY HAVE LOST THEIR DRIVER'S LICENSES BECAUSE OF COURT DEBT.

Although we do not have nationwide data, we know that the individuals whose licenses are currently suspended or revoked for failure to pay court debt number in the millions. Indeed, just five states account for over 4.2 million people:

- 1.8 million Texans[1]
- Almost 1.2 million North Carolineans;[2]*
- 977,000 Virginians;[3]
- 146,000 Tennesseans;[4]
- 100,000 Michiganders;[5]

*Data from North Carolina include drivers suspended for failure to appear as well as failure to pay.

based advocacy campaigns across the country have produced reforms by way of the courts, legislatures, and executive agencies.

To provide national context for these efforts, we analyzed license-for-payment systems in all 50 states and the District of Columbia to generate conclusions about the prevalence and uses of license-for-payment.

Our key findings include:

- 43 states (and D.C.) suspend driver's licenses because of unpaid court debt;[6]
- Only four states require an ability-to-pay or "willfulness" determination before a license can be suspended for nonpayment;
- 19 states—almost 40% of the nation—have laws imposing mandatory suspension upon nonpayment of court debt; and,
- Virtually all states that suspend for unpaid court debt do so indefinitely, with rules that prevent reinstatement until payment is satisfied.

All over the country, people are struggling to earn a livelihood and meet the needs of their families while their licenses remain indefinitely suspended because of court debt they cannot pay. At a time of historic income and wealth inequality, states should urgently reexamine whether the policy's immense costs to individuals, communities, and states overwhelm its benefits. At a minimum, license-for-payment states should review their policies to ensure their systems provide due process, with adequate safeguards in place to make certain no person is punished because of poverty.

THE PROBLEM WITH LICENSE-FOR-PAYMENT

It is often said that driving is a privilege. But for most people, the ability to drive legally to jobs, medical appointments, places of worship, and the grocery store is no more a privilege than it is to work, eat, pray, and care for their families. Indeed, as the U.S. Supreme Court wrote nearly 50 years ago in *Bell v. Burson*, a driver's license "may become essential in the pursuit of a livelihood."[7]

Across the country, however, most states see the need to drive as a court debt collection opportunity: Pay what you owe, or else lose your license.

These license-for-payment systems are unfair and harmful to individuals, needlessly perpetuate involvement with the criminal justice system, and are costly and counterproductive for states and communities. Without adequate safeguards to prevent people from being punished for their poverty, they may also be unconstitutional.

UNFAIR AND HARMFUL

License-for-payment systems have a disproportionate impact on low-income people. People in this group have fewer available resources to divert to paying court debt, and are therefore at greater risk of losing their licenses for nonpayment. While wealthier drivers have little difficulty covering court debt, people living paycheck-to-paycheck with little or no savings and families to support may not be able to pay in a lump sum or consistently make payments on installment plans.

People already on shaky financial grounds and saddled with court debt are likely to suffer a wide range of harms after losing the ability to drive legally.[8] Unsurprisingly, driver's license suspension is correlated with job loss[9] and missed job opportunities.[10] Without the ability to drive, most jobs are virtually inaccessible to people living in many of the country's largest urban areas.[11] Inaccessibility is likely to be an even larger issue in rural areas lacking public and other alternative transportation. Even if a workplace is just a short drive or

A REAL EXAMPLE OF THE COURT DEBT CYCLE

Demetrice Moore is a certified nursing assistant (CNA) and mother of two children. In 2002, she was convicted of grand larceny, and sentenced to jail and to pay court costs, including the cost of the lawyer appointed to represent her because she was indigent. She served her jail time, but was unable to pay the court costs she owed, which resulted in the automatic suspension of her Virginia driver's license.

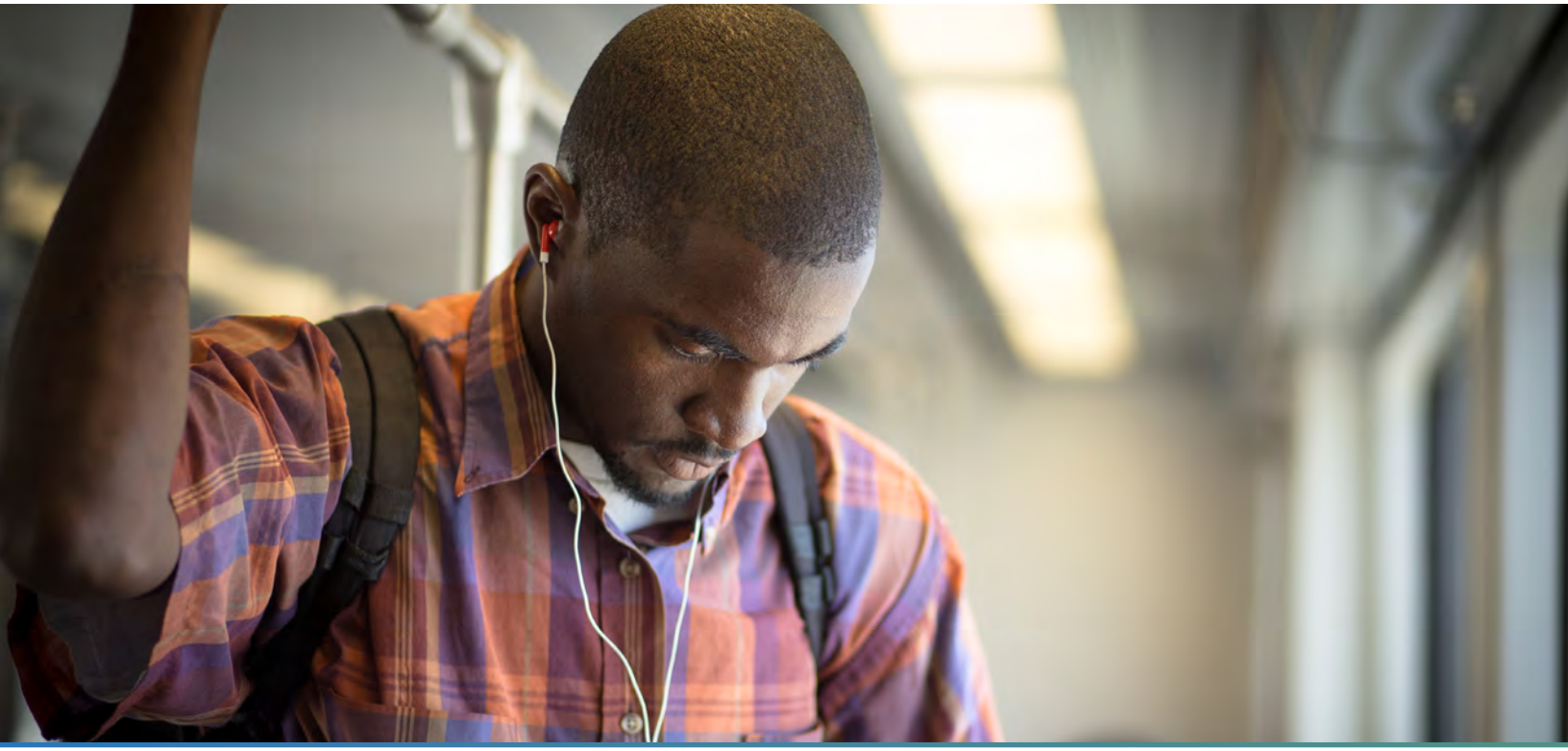
As a CNA, she had to drive extensively to care for elderly and disabled patients in their homes. Consequently, she was convicted several times for driving on a suspended license, and was jailed for that offense for 23 days in 2016. She stopped working as a CNA because of the required driving. Her court debt from the multiple convictions and accumulated interest ballooned to almost $4,500, and she could not afford the $100 per month payment plan offered by one of the courts. Having been stripped of her license for over a decade, Ms. Moore and the family she supports have been punished, far beyond the terms of her sentencing 15 years ago, because she is poor.

bus ride away from the worker's home, lacking a valid driver's license can make getting to and from work or carrying out a job search far more time-consuming and unreliable. On average, commutes for people who use public transportation are about twice as long as commutes for people who drive.[12] Jobs that cannot be accessed by public transportation at all may become entirely unreachable without unfailing support from friends or family.

Transportation limitations aside, many jobs require a valid license, such as delivery services, commercial trucking, and operating forklifts and other construction equipment. Moreover, even when driving is not part of the job duties, many employers often ask whether job applicants have a valid driver's license, viewing licensure as an indicator of stability and reliability.[13]

In these ways, license-for-payment systems irrationally tend to deprive vulnerable people of the means by which they can pay their debts and take care of themselves and their families, and create a vicious cycle. People cannot afford to pay, so they lose their licenses. When they lose their licenses, they cannot legally drive to work, so they lose their jobs or cannot find jobs. Even those who find another job may experience a decrease in pay.[14] All of these forces result in people being less likely to pay court debts, which can lead to additional court involvement.

License-for-payment systems are also problematic because they result in enforcement disparities to the detriment of historically vulnerable groups. For example, recent data from California show a strong positive correlation by zip code between black populations and driver's license suspension for nonpayment or nonappearance at related court hearings.[15] In Virginia, too, data suggest black people disproportionately suffer driver's license suspension for nonpayment.[16] This group also appears to suffer a disproportionate rate of convictions for driving with a suspended license when the underlying suspension is due to nonpayment.[17] Similar disparities have been documented in Wisconsin.[18]



THE VICIOUS COURT DEBT CYCLE

Jane gets a ticket for speeding to pick up her son from school. Jane is convicted and assessed court costs and fines.

Jane earns $7.25/hour and has no savings. After paying for rent, food, and utilities, she lacks the $50 down payment required to establish a payment plan.

Jane does not pay in 30 days, and her license is suspended.

Jane is pulled over for a minor traffic infraction, a broken taillight, that she can't afford to fix. She is also charged with driving on a suspended license.

Jane returns to court and is convicted of driving with a suspended license. She is assessed additional fines and costs.

Jane does not have access to public transportation, but needs to pay the rent for herself and her son. She continues to drive to work and is caught two more times.

The third time that Jane is convicted of driving with a suspended license, she is sentenced to 10 days in jail. She is assessed additional fines and costs, including the cost of her court-appointed lawyer.

She is released from jail with several convictions, more fines, no license, and no job. But she continues to drive and look for work to support her family.

PROLONGED COURT INVOLVEMENT

Under license-for-payment policies, people struggling to satisfy court debt and reinstate their licenses are at heightened legal risk. Often, people who lose their driver's licenses have to choose between losing their jobs (by not driving) and driving illegally in order to maintain employment. Faced with the choice between job loss and the risk of being pulled over, most people continue to drive.[19] For a suspended driver, a routine traffic stop may turn into a prolonged police encounter. It can also result in vehicle impoundment. After a vehicle is impounded, police may conduct an administrative "inventorying" of its contents, which may expose the driver to more criminal liability if incriminating evidence is found. Drivers who receive convictions for driving with a suspended license may also face steep fines, more court costs, additional time-based periods of suspension, or even mandatory incarceration.[20]

Even if a person subject to a driver's license suspension never suffers these penal consequences, the suspension largely confines the person to his or her home unless public or other transportation is available. This limitation on movement resembles house arrest or incarceration, especially in rural or other isolated areas. Thus, conditioning one's lawful ability to drive on repayment functions as a hidden consequence of violating a traffic or criminal law, a footnote to the formal sentence that may be far more long-lasting, punitive, and destructive than the original penalty.

For many of these reasons, license-for-payment policies drew unflinching criticism from the United States Department of Justice in its exhaustive report on the abusive traffic and criminal court system in Ferguson, Missouri.[21] There, the Department catalogued and condemned the discriminatory practices at play at all levels of the system, designed to prey upon low-income black residents by trapping them in a cycle of fees, fines, driver's license suspension, and incarceration. These kinds of policies and practices exacerbate existing disparities by further limiting economic opportunities, along with increasing and prolonging exposure to criminal or traffic court penalties for these groups. Furthermore, they may heighten tensions between targeted communities and law enforcement as contact increases and trust deteriorates.

COSTLY TO COMMUNITIES

When courts are used as revenue generators and debt collection policies rest on the false assumption that everyone can afford to pay, communities suffer as well. From a fiscal standpoint, state and local officials often feel pressure to increase revenues. However, license-for-payment policies may be no more effective at enforcing the obligation to pay than other debt collection practices, such as garnishments or liens.[22] Additionally, critics have identified a host of hidden costs and consequences of license-for-payment policies that further call their effectiveness into question.[23] States and localities must divert resources toward administering criminal and traffic systems that become even more pressured by an influx of suspended drivers and their ever-growing court debts.[24]

Communities also suffer because of new threats to public safety from the costs of enforcing laws against driving with a suspended license. The number of drivers with suspended licenses due to court debt is shockingly large in many states—roughly 1 in 6 drivers in Virginia, for example.[25] Stopping, citing, and potentially arresting a person for driving on a suspended license diverts police officers from focusing on dangerous driving behaviors and otherwise promoting public safety.[26] Courts are forced to process additional cases.[27] Jails house inmates who are guilty of nothing more than "driving while poor," and communities bear these unnecessary costs.[28]

UNCONSTITUTIONAL

In several states, civil rights advocates have filed lawsuits challenging the constitutionality of license-for-payment laws.[29] Essentially, these lawsuits contend that automatic license suspension violates the Due Process and Equal Protection Clauses by punishing people for their poverty. According to the U.S. Department of Justice, which filed a statement of interest in support of plaintiffs challenging Virginia's automatic suspension statute, drivers have a fundamental "due process right to establish inability to pay" when a state or locality seeks to suspend driver's licenses for nonpayment of court debt.[30] Typically, violations of court orders are punished via contempt proceedings, and a person cannot be punished without a hearing to determine whether the violation was intentional. Without an ability-to-pay hearing, automatic license suspension is essentially a contempt proceeding—without the proceeding.

From a practical standpoint, drivers are often blindsided by license suspensions for court debt. Many states do not provide meaningful opportunities for drivers to prevent or resolve a license suspension by showing inability to pay the underlying debt. Disturbingly, many states even require people to pay when their sole income is Social Security, TANF, or other need-based assistance.[31] Because court debt can arise from traffic infractions or low-level misdemeanors that do not carry the possibility of a significant fine or jail time, many if not most low-income people proceed through court without the aid of lawyers. Drivers in this group likely do not know about the consequences for nonpayment and the available constitutional protections, and in any event are ill-positioned to assert them. Furthermore, as the U.S. Department of Justice observed, "in addition to being unlawful, to the extent that these practices are not geared toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents."[32]

VIRGINIA'S AUTOMATED SYSTEM RAISES CONSTITUTIONAL CONCERNS

In Virginia, roughly 65% of all outstanding suspension and revocation orders result from unpaid court debt. In fact, nearly one million Virginia drivers have licenses suspended for nonpayment of court debt.[33] Virginia is one of 19 states in which driver's license suspension is a mandatory consequence for nonpayment. State law does not allow for an ability-to-pay determination prior to suspending the debtor's license. Virginia's system is also highly automated. In almost all jurisdictions, court computer systems electronically transmit a record of nonpayment to the Department of Motor Vehicles (DMV) shortly after the payment due date. Upon receiving this record, DMV immediately flags the license as suspended. For these reasons, Virginia's automatic and mandatory license-for-payment system is highly problematic under the Due Process and Equal Protection Clauses. Its system lacks adequate checks against suspensions that result from inability to pay and, as a result, punishes people simply for their poverty.[34]

FINDINGS

We reviewed statutes governing licensing consequences for nonpayment of court debt in all 50 states and the District of Columbia.[35] A detailed state-by-state analysis is compiled in Appendix A to this report. We found:

1. License-for-payment systems are ubiquitous.

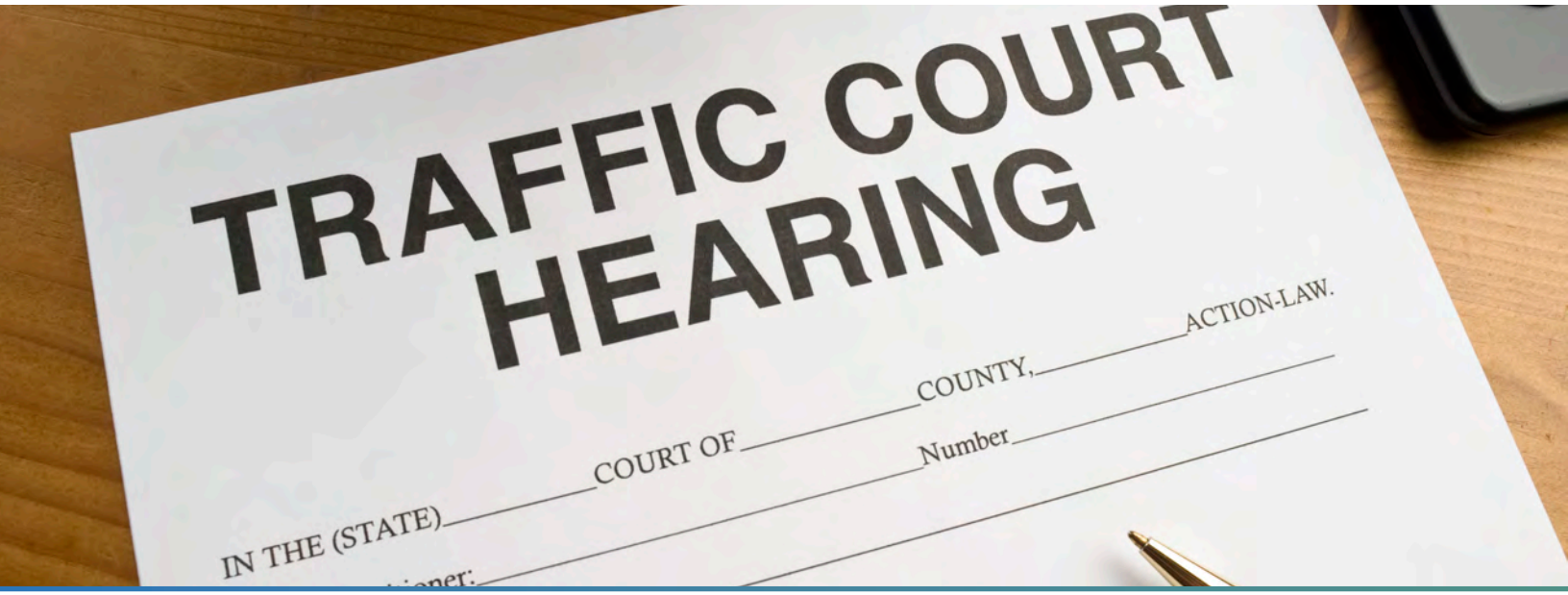
Almost all states suspend driver's licenses because of unpaid court debt despite the harms this practice inflicts on both individual debtors and their communities. Forty-three states and the District of Columbia use driver's license suspension to enforce court debt. Three other states have laws that prevent renewals for expired driver's licenses in some cases of unpaid court debt.[36] Only four states—California,[37] Kentucky, Georgia, and Wyoming—do not suspend for unpaid court debt at all.

2. License-for-payment systems punish people just for being poor.

Troublingly, in 40 states, driver's licenses may be suspended without regard to the driver's ability to pay at the time of suspension. Only four states—Louisiana, Minnesota, New Hampshire, and Oklahoma—require a determination that the person had the ability to pay and intentionally refused to do so.

3. In many states, driver's license suspension is a mandatory consequence anytime a person does not pay court debt on time.

Nineteen states—almost 40% of the nation—have rules that *require* driver's license suspension following a missed court debt payment deadline. Of these states, only New Hampshire requires a court to first determine that the debtor has the ability to pay; suspension is mandatory if a court determines the debtor has the ability to pay.[38]



In Virginia, drivers suspended for safety reasons can often reinstate their licenses faster than those suspended for nonpayment. For example, a person convicted of reckless driving risks no more than a six-month suspension of his or her license,[40] while a suspension for failure to pay commonly lasts for years.

In 24 other states and the District of Columbia, driver's license suspension laws contain technical provisions permitting discretion. However, anecdotally, practitioners report that these "discretionary" suspensions may actually occur without much deliberation, or even without human intervention at all. As state governments modernize methods of internal communication and link their agency databases, suspensions in these states become even easier to automate and routinize. In reality, the discretion afforded by state law may just be an empty promise, replaced by bureaucracies that instead produce driver's license suspensions just as mechanically as the 19 states with laws requiring them for nonpayment.

4. Suspensions for nonpayment are typically indefinite.

Of the 44 jurisdictions that suspend driver's licenses for unpaid criminal or traffic court debt, 39 do so indefinitely. In other words, in these states, driver's licenses remain suspended until the state is satisfied concerning payment, or until statutes of limitation on debt collection rules prevent the state from pursuing debts any longer.[39] Only five states—Idaho, Minnesota, New Mexico, Vermont, and Wisconsin—have laws limiting the length of these suspensions.

5. Licensing consequences are not confined to debts for traffic-related convictions.

Although most jurisdictions (29 states and D.C.) employ license-for-payment systems to punish nonpayment of debt incurred for traffic convictions only, more than one-quarter (14) of states suspend licenses for nonpayment of both traffic and criminal court debt.[41]

Of the 14 states that apply license-for-payment to both traffic and criminal justice debt, five—Delaware, Florida, Maine, Michigan, and Virginia—employ mandatory indefinite suspension without regard to ability to pay.

REINSTATEMENT FEES

Once a person's license is suspended, they typically must pay reinstatement fees—on top of monies owed to the courts—in order to get their license back. Reinstatement fees can be hefty:

- Alabama: $100
- Michigan: $125 (+ $500 Driver Responsibility Fee if convicted of driving while suspended)
- New Hampshire: $100
- Nebraska: $125
- Virginia: at least $145
- Washington: $129

CONCLUSION AND RECOMMENDATIONS

Enforcing debts against people who can't afford to pay puts them in a perpetual state of punishment.[45] They can never atone, especially compared to wealthier people who can just write a check and be back in good standing.

Given the devastating fallout from systems that condition driver's licenses on court debt repayment—the everyday and abstract harms inflicted upon human beings, communities, and governments—decision-makers ought to abandon them in favor of existing civil means of collecting debts. Some states already pursue unpaid court debts without resorting to driver's license suspension,[46] eliminating the danger that vulnerable people will lose a critical means of supporting themselves and their dependents because of inability to pay.

There is an emerging consensus that driver's license suspension is a misguided and counterproductive tool for collecting court debt. The American Association of Motor Vehicle Administrators (AAMVA) has stated that driver's license suspension should not be used for punishing social non-conformance, but should instead be limited to taking dangerous drivers off the road.[47] Similarly, the U.S. Department of Justice has written that such suspensions "raise significant public policy concerns" and that governmental authorities should "avoid suspending driver's licenses as a debt collection tool, reserving suspension for cases in which it would increase public safety."[48]

Several states have taken steps to reduce or eliminate the use, or impact, of court debt suspensions. In addition to California's decision to cease suspending additional licenses for court debt (see below), Colorado earlier in 2017 amended existing law, reducing the misdemeanor of driving on a suspended license (punishable by up to six months of jail time) to a traffic infraction carrying no jail time in cases where the license was suspended due to court debt.[49] Likewise, these counterproductive suspension policies are gaining attention from a broad range of advocates and receiving strong bipartisan scrutiny—groups as diverse as the ACLU and legal aid organizations to Right on Crime[50] and the Institute for Justice[51] have recognized that these laws need to change.

ADVOCATES WIN REFORMS TO CALIFORNIA'S FAILED LICENSE-FOR-PAYMENT SYSTEM

In June 2017, California ended its license-for-payment system. AB 103, which took effect July 1, 2017, bans driver's license suspension for outstanding traffic fines going forward.[42] This policy change came on the heels of coordinated advocacy by Back on the Road California and its affiliated organizations, including litigation brought on behalf of suspended drivers by ACLU of Northern California, Bay Area Legal Aid, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Services for Prisoners with Children, Pillsbury Winthrop Shaw Pittman LLP, and Western Center on Law & Poverty. Litigation remains pending, however, because the parties dispute whether reforms provide relief to the hundreds of thousands of drivers who suffered under the discarded policy.[43]

Governor Jerry Brown wrote, in endorsing reform, that license-for-payment suspension "places an undue burden on those who cannot afford to pay. . . . Often, the primary consequence of a driver's license suspension is the inability to legally drive to work or take one's children to school."[44]

States and localities opting to maintain these systems must bring them into compliance with the U.S. Constitution by developing enough internal checks to ensure that no one is punished for his or her poverty. No license should be suspended without: notice of the alleged default; an opportunity to be heard as to whether such default was intentional or was instead due to financial inability, incapacity, or some other reason; and a judicial determination that the default was willful. Given the consequences that flow from these proceedings, states should provide lawyers for these ability-to-pay determinations.

In turn, state executive agencies should monitor civil rights consequences of license suspension for nonpayment, seeking out any disparities based on race and economic status. They should also work across agencies to identify unnecessary barriers to driver's license reinstatement. For example, driver's license reinstatement fees[52] should be reasonable in light of ability to pay, with flexible options such as installment or deferred payment plans.

More broadly, states and localities should also carefully reevaluate existing rules on court costs and fines, and explore alternative programs. They should reconsider relying so heavily on so-called "user fees" to fund their court systems. Indeed, setting aside concerns about how revenue generation may taint the possibility of dispassionate justice, much of the debt that court systems assess may never result in actual revenue.[53] At a minimum, courts should tailor costs to align with a person's ability to pay by engaging a defendant in a colloquy regarding his or her financial position, broadly conceived to include all reasonable and regular expenses for self and dependents. As it concerns fines, courts should also explore non-traditional sentencing options such as community service, day fines,[54] and enrichment or skill-building programs.[55] Courts should have a role in setting fair penalties that take into account people's ability to pay, but they should not have ongoing responsibility for collecting debts.[56]

When driver's license suspension is an automatic, mandatory, and indefinite consequence for missing a payment deadline for any reason—as it is in many states—drivers living paycheck-to-paycheck or relying on public assistance because of disability or poverty are particularly at risk. Since virtually all of these systems also lack built-in safeguards to prevent suspensions against drivers who simply do not have the means to pay on time, they arbitrarily and unapologetically equate poverty with defiance. Most states are set up to suspend the license first and leave the driver to sort it all out afterwards. Low-income people thrown into this system are trapped in a perpetual state of indebtedness to the state, stripped of the very means they would use to generate the resources needed to clear the debt, and in a far worse position to care for themselves and their families.

ENDNOTES

1. Andrea M. Marsh, Nat'l Ctr. on State Courts, *Trends in State Courts: Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, at 21 (2017).
2. N.C. Div. of Motor Vehicles, Response to FOIA Request (Aug. 10, 2017).
3. Complaint at 5, Stinnie v. Holcomb, No. 3:16-cv-44 (W.D. Va. July 6, 2016), *available at* https://www.justice4all.org/wp-content/uploads/2016/07/Complaint-Drivers-License-Suspension-for-Court-Debt.pdf (last visited Sept. 6, 2017).
4. Complaint at 2, Thomas v. Haslam, No. 3:17-cv-05 (M.D. Tenn. Jan 4, 2017), *available at* http://www.tennessean.com/story/news/2017/01/05/lawsuit-tennessee-drivers-license-law-punishes-poor/96204462/ (last visited Sept. 6, 2017) (approximately 146,000 Tennesseans have lost their licenses for failure to pay court debt since the Tennessee license-for-payment system went into effect in 2012).
5. Complaint at 2, Fowler v. Johnson, No. 2:17-cv-114411 (E.D. Mich. May 4, 2017).
6. This report defines "court debt" as court costs and fines that arise out of convictions for violating traffic and criminal laws. For purposes of this report, court costs are generally assessed and imposed around the time of sentencing in a traffic or criminal case, amounting to the administrative fees the defendant incurs in his or her contact with the court system. Jurisdictions charge defendants—most typically, only those who have been convicted —these fees to recoup the administrative costs of processing the case. Some examples of court costs include: public defender fees, jury fees, courthouse use and maintenance fees, and incarceration fees. Fines are purely punitive, seeking to exact retribution for the offense and deter future wrongdoing by forcing the losing defendant to pay the state or locality some amount of money. This report does not include an analysis of driver's license suspension for nonpayment of restitution, another form of court debt that is ordered in some cases to obligate the defendant to pay for the harm caused. Some states suspend driver's licenses for nonpayment of restitution. *See, e.g.,* Va. Code § 46.2-395(A) ("Any person, whether licensed by Virginia or not, who drives a motor vehicle on the highways in the Commonwealth shall thereby, as a condition of such driving, consent to pay all . . . restitution . . . assessed against him . . . .").
7. 402 U.S. 535, 539 (1971). *See also* Vanita Gupta & Lisa Foster, Civil Rights Div., U.S. Dep't of Justice, "Dear Colleague" Letter, at 6 (March 14, 2016) (hereinafter "Dear Colleague Letter"), *available at* https://www.justice.gov/crt/file/832461/download (last visited Sept. 2, 2017) (noting, "[r]esearch has consistently found that having a valid driver's license can be crucial to individuals' ability to maintain a job, pursue educational opportunities, and care for families.").
8. Restricted licenses for people who owe court debt, which are authorized in the laws of some states, are sometimes cited as a viable alternative that allow debtors to drive for limited purposes such as to and from work. However, they may rarely be viable in practice. In Virginia, for example, numerous statutory restrictions make them inaccessible in practice to most court debtors. Va. Code §§ 18.2-271.1(E), 46.2-395(E) (among other requirements and limitations, applicant must show "written verification of employment" in addition to one or more approved purposes for using the restricted license).
9. *See* Jon A. Carnegie et al., N.J. Dep't of Trans., *Driver's License Suspensions, Impacts and Fairness Study*, at 66 (2007).
10. Alana Semuels, *No Driver's License, No Job*, The Atlantic (Jun. 15, 2016), *available at* https://www.theatlantic.com/business/archive/2016/06/no-drivers-license-no-job/486653/ (last visited Sept. 2, 2017).
11. Adie Tomer et al., *Missed Opportunity: Transit and Jobs in Metropolitan America*, at 12 (2011), *available at* https://www.brookings.edu/research/missed-opportunity-transit-and-jobs-in-metropolitan-america/ (last visited Sept. 2, 2017) ("Across all neighborhoods served by some form of transit in the 100 largest metro areas, the typical working-age resident can reach about 30 percent of metropolitan jobs within 90 minutes of travel time.").
12. Mike Maciag, *Riding Transit Takes Almost Twice as Long as Driving*, Governing (Feb. 2017), *available at* http://www.governing.com/topics/transportation-infrastructure/gov-transit-driving-times.html (last visited Sept. 2, 2017).
13. Back on the Road California, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, at 27 (2016) (hereinafter "Stopped, Fined, Arrested"), *available at* http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf (last visited Sept. 2, 2017). *See also* Semuels, *supra* note 10.
14. See Carnegie, *supra* note 9 at 56 (finding that 42 percent of survey respondents, New Jersey licensees suspended for court debt, lost their jobs as a result of suspension; 45 percent of those that lost their jobs could not find another job; 88 percent of those who did find another job reported a decrease in income).
15. Stopped, Fined, Arrested, *supra* note 13, at 6.
16. Brief of Va. State Conference of the NAACP as Amicus Curiae Opposing Defendant's Motion to Dismiss, Affidavit of Aaron Bloomfield, Stinnie, et al. v. Holcomb, Civ. No. 3:16-cv-44 (W.D. Va. Nov. 3, 2016), *available at* https://www.justice4all.org/wp-content/uploads/2016/11/VA-NAACP-Amicus-Brief-Opposing-Motion-to-Dismiss.pdf (last visited Sept. 2, 2017).
17. *Id.*
18. *See, e.g.,* Univ. of Wis. Milwaukee Emp. & Training Inst., Driver's License Issues and Recommendations (2015), *available at* http://www4.uwm.edu/eti/2015/DriversIssuesJune2015.pdf (last visited Sept. 2, 2017).
19. Suspended/Revoked Working Grp., Am. Ass'n of Motor Vehicle Adm'rs, *Best Practices Guide to Reducing Suspended Drivers*, at 4-5 (2013) (hereinafter "AAMVA"), *available at* http://www.aamva.org/Suspended-and-Revoked-Drivers-Working-Group/ (last visited Sept. 2, 2017).
20. E.g., Va. Code § 46.2-301(C).
21. Civil Rights Div., U.S. Dep't of Justice, Investigation of the Ferguson Police Department (2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (last visited Sept. 2, 2017).
22. *See* Office of Program Policy Analysis & Government Accountability, Fl. Leg., *Clerks of Court Generally Are Meeting the System's Collections Performance Standards*, Report No. 07-21 (Mar. 2007), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0721rpt.pdf (last visited Sept. 2, 2017).
23. *See, e.g.*, Rebekah Diller, Brennan Center for Justice, N.Y.U. Sch. of Law, *The Hidden Costs of Florida's Criminal Justice Fees*, at 9 (2010), *available at* https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf (last visited Sept. 2, 2017).
24. AAMVA, *supra* note 19 at 12-15.
25. Angela Ciolfi et al., Legal Aid Justice Center, *Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors*, at 7 (2016), *available at* https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf (last visited Sept. 2, 2017).
26. AAMVA, *supra* note 19 at 13.
27. *Id.* at 14.
28. *Id.* Data from Virginia are illustrative. In 2015, roughly 88% of Virginia convictions for driving with a suspended license were rooted in an underlying suspension due to unpaid court debt. Va. Dep't of Motor Vehicles, Response to FOIA Request (July 6, 2016) (on file with authors). In Virginia, driving with a suspended license is a common reason for incarceration. Courts are authorized to sentence offenders to jail on the first offense, and three convictions within a 10-year period carries a mandatory minimum jail sentence of 10 days. Va. Code § 46.2-301(C). According to the Albemarle-Charlottesville Regional

Jail, incarcerating a person costs approximately $90 per inmate per day. Christian Henrichson et al., Vera Institute of Justice, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, at 27 (2015), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf (last visited Sept. 2, 2017).

29. *E.g.*, Hernandez v. Cal. Dep't of Motor Vehicles, No. RG16836460 (Super. Ct. of Alameda Cnty., filed Oct. 25, 2016), *available at* http://ebclc.org/wp-content/uploads/2016/11/Hernandez-et-al-v.-CA-DMV-Complaint.pdf (last visited Sept. 6, 2017) (California); *Fowler*, No. 2:17-cv-114411 (Michigan); DiFrancesco v. Bullock, No. CV-17-66-BU-SEH (D. Mont., filed Aug. 31, 2017), *available at* http://equaljusticeunderlaw.org/wp/wp-content/uploads/2017/08/1-Complaint.pdf (last visited Sept. 6, 2017) (Montana); *Thomas*, No. 3:17-cv-00005 (Tennessee); *Stinnie*, No. 3:16-cv-44 (Virginia).
30. Dear Colleague Letter, *supra* note 7, at 6.
31. *See, e.g.,* City of Richland v. Wakefield, 186 Wash. 2d 596, 380 P.3d 459 (Wash. 2016) (reversing denial of court debtor's request to modify her obligation to pay costs due to indigence, in part because "federal law prohibits courts from ordering defendants to pay [court debt] if the person's only source of income is social security disability."). "Under the Social Security Act, 'none of the moneys paid' as part of social security disability benefits 'shall be subject to execution, levy, attachment, garnishment, *or other legal process*, or to the operation of any bankruptcy or insolvency law.'" *Id.* at 607-08 (citing 42 U.S.C. § 407(a)) (emphasis in original).
32. Dear Colleague Letter, *supra* note 7, at 2 (citing Conference of State Court Administrators, 2011-2012 Policy Paper, *Courts are Not Revenue Centers* (2012), *available at* https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf (last visited Sept. 2, 2017)).
33. Complaint at 5, *Stinnie*, No. 3:16-cv-44.
34. *See id.* at 46-53.
35. We asked local practitioners to verify our analysis of their state's laws. We were unable to identify local practitioners to verify our analysis in the following states: Arizona, Delaware, Hawaii, Massachusetts, Missouri, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Wyoming.
36. These states are: Hawaii (H.C.T.R. Rule 15(b)), Illinois (625 I.L.C.S. § 5/6-306.6), and Texas (Tex. Transp. Code Ann. §§ 706.002, 706.004).
37. California, *supra* note 3.
38. N.H. Rev. St. § 263:56-a.
39. "Indefinite" means subject only to limitations on collections for purposes of enforcing money judgments. These periods may be incredibly long. For example, in Virginia, court debt is enforceable for at least 10 or 20 years depending on the court in which it originated. Va. Code § 19.2-341.
40. Va. Code § 46.2-392.
41. Louisiana law allows for driver's license suspension for court debt associated with felonies only. Act of June 15, 2017, No. 260, art. 885.1 2017 La. Sess. Law Serv. (West).
42. S.B. 185, 2017-18 Leg., Reg. Sess. (Cal. 2017)
43. *Hernandez et al.,* No. RG16836460.
44. Edmund G. Brown, Jr., *2017-2018 California State Budget*, at 35 (2017), *available at* http://www.ebudget.ca.gov/FullBudgetSummary.pdf (last visited Sept. 2, 2017).
45. *See generally* Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor (2016) (describing how monetary sanctions "symbolically, physically, and perpetually punish[] the poor").
46. *See, e.g.*, Ga. Code Ann. § 17-10-20(c).
47. AAMVA, *supra* note 19 at 5. The AAMVA's Suspended/Revoked Working Group, in the Best Practices Guide, focuses on failure to pay court debt for non-moving violations (as well as for other failures to pay such assessments as taxes, child support, and alimony), and does not speak specifically to failure to pay for moving violations.
48. Dear Colleague Letter, *supra* note 7 at 7.
49. H.B. 17-1162, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).
50. *See, e.g.,* Marc Levin & Joanna Weiss, *Suspending driver's licenses creates a vicious cycle*, USAToday (Feb. 21, 2017), *available at* https://www.usatoday.com/story/opinion/2017/02/21/driver-license-suspension-court-debt-reform-column/98016910/ (last visited Sept. 2, 2017).
51. *See, e.g.,* Brief of Institute for Justice as Amicus Curiae Supporting Appellant's Opening Brief at 1, Stinnie v. Holcomb, Case No. 17-1740 (4th Cir. 2017) (pending), *available at* https://www.justice4all.org/wp-content/uploads/2017/08/22-Amicus-Institute-for-Justice.pdf (last visited Sept. 6, 2017) (describing Virginia's court debt suspension law, in penalizing drivers for being poor, as "irrational and unconstitutional").
52. Reinstatement fees in Virginia, for example, are at least $145. Va. Dep't of Motor Vehicles, *DMV Fees*, at 2 (July 1, 2017), *available at* https://www.dmv.virginia.gov/webdoc/pdf/dmv201.pdf (last visited Sept. 2, 2017).
53. For example, Virginia's Auditor of Public Accounts documented that between 2008 and 2012, Virginia's courts actually collected only about half of the debt assessed each year. Auditor of Public Accounts, Comm. of Va., Commonwealth Court Collections Review, at 1 (2013), *available at* http://www.justice4all.org/wp-content/uploads/2014/12/APA-Report-CourtsAccountsReceivableSR2012.pdf (last visited Sept. 2, 2017).
54. Day fines are unlike traditional one-size-fits-all fines because they are "income-calibrated," meaning they are based on the offender's net income minus deductions for dependents, fixed obligations, and basic living expenses. Edwin Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, at 1 (2010), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/230401.pdf (last visited Sept. 2, 2017).
55. E.g., Roopal Patel & Meghna Philip, *Criminal Justice Debt: A Toolkit for Action*, at 24 (2012), *available at* https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf (last visited Sept. 2, 2017).
56. The National Task Force on Fines, Fees, and Bail Practices published a bench card for judges, identifying a variety of possible sanctions (including these) that courts "should consider" when debtors lack the ability to pay. *See* Nat'l Task Force on Fines, Fees, and Bail Practices, Nat'l Ctr. for St. Cts., *Lawful Collection of Legal Financial Obligations* (Feb. 2, 2017), *available at* http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx (last visited Sept. 2, 2017).

APPENDIX A

STATE-BY-STATE ANALYSIS OF LICENSE-FOR-PAYMENT LAWS

Jurisdiction	License suspensions for nonpayment of court debt	Does state law require consideration of ability to pay before suspension?	Is suspension mandatory or discretionary?[1]	Time between payment deadline and suspension of license[2]	Duration of suspension[3]	Primary legal citation
Alabama	Yes	No	Discretionary	0 - 30 days	Indefinite	A.R.Cr. P. Rule 26.11(i)(3)
Alaska	Yes	No	Discretionary	0 - 30 days	Indefinite	Ak. St. § 28.15.181(g)
Arizona	Yes	No	Discretionary	0 - 30 days	Indefinite	A.R.S. § 28-1601(A)
Arkansas	Yes	No	Discretionary	0 - 30 days	Indefinite	A.C.A.S. § 16-13-708
California	No	N/A	N/A	N/A	N/A	N/A
Colorado	Yes	No	Mandatory	0 - 30 days	Indefinite	C.R.S.A. § 42-2-122
Connecticut	Yes	No	Mandatory	0 - 30 days	Indefinite	C.G.S.A. § 14-140
District of Columbia	Yes	No	Discretionary	0 - 30 days	Indefinite	18 D.C.M.R. § 304
Delaware	Yes	No	Mandatory	0 - 30 days	Indefinite	21 Del. Code §§ 2731(b); 2732(b)
Florida	Yes	No	Mandatory	0 - 30 days	Indefinite	Fla. Stat. Ann. §§ 322.245; 322.251
Georgia	No	N/A	N/A	N/A	N/A	N/A
Hawaii	No[%]	N/A	N/A	N/A	N/A	N/A
Idaho	Yes	No	Discretionary	0 - 30 days	Definite[a]	Id. Code § 49-1505
Illinois	No[%^]	N/A	N/A	N/A	N/A	N/A
Indiana	Yes	No	Discretionary	0 - 30 days	Indefinite	In. Code §§ 9-30-3-8, 9-30-11-3, 9-30-11-4, 9-30-11-5
Iowa	Yes	No	Mandatory	More than 30 days	Indefinite	I.C.A. § 321.210a
Kansas	Yes	No	Mandatory	More than 30 days	Indefinite	Kan. Stat. Ann. § 8-2110
Kentucky	No	N/A	N/A	N/A	N/A	N/A
Louisiana	Yes[~]	Yes	Discretionary	More than 30 days	Indefinite	Act of June 15, 2017, No. 260, art. 885.1 2017 La. Sess. Law Serv.
Maine	Yes	No	Mandatory	0 - 30 days	Indefinite	14 M.R.S. § 3141; 29-a M.R.S. § 2608
Maryland	Yes	N/A	Discretionary	0 - 30 days	Indefinite	Md. Code, Trans. § 27-103
Massachusetts	Yes	No	Mandatory	More than 30 days	Indefinite	M.G.L.A. 90C § 3
Michigan	Yes	No	Mandatory	0 - 30 days	Indefinite	M.C.L.A. § 257.321a
Minnesota	Yes	Yes	Discretionary	0 - 30 days	Definite[b]	Minn. St. Ann. § 171.16
Mississippi	Yes[@]	No	Discretionary	0 - 30 days	Indefinite	Miss. Code Ann. § 63-1-53
Missouri	Yes	No	Mandatory	More than 30 days	Indefinite	Mo. Ann. St. § 302.341
Montana	Yes	No	Discretionary	0 - 30 days	Indefinite	M.C.A. § 61-5-214
Nebraska	Yes	No	Mandatory	More than 30 days	Indefinite	Neb. Rev. St. § 60-4, 100
Nevada	Yes	No	Discretionary	0 - 30 days	Indefinite	N.R.S. §§ 176.064, 484A.900

Suspensions for nonpayment of traffic court debt only

New Hampshire	Yes	Yes	Mandatory	0 - 30 days	Indefinite	N.H. Rev. St. § 263:56-a
New Jersey	Yes	No*	Discretionary	0 - 30 days	Indefinite	N.J.S.A. §§ 2B:12-3, 39:4-139.10
New Mexico	Yes	No	Discretionary	0 - 30 days	Definite[c]	N.M.S.A. § 66-5-30
New York	Yes	No	Discretionary	More than 30 days	Indefinite	N.Y. Veh. & Traf. § 510(4-a)
North Carolina	Yes	No	Mandatory	More than 30 days	Indefinite	N.C.G.S.A. §§ 20-24.1, 20-24.2
North Dakota	Yes	No	Discretionary	0 - 30 days	Indefinite	N.D.C.C. §§ 39-06-32, 39-06-33, 39-06-35
Ohio	Yes	No	Discretionary	0 - 30 days	Indefinite	Oh. Cd. Ann. § 4510.22
Oklahoma	Yes	Yes	Discretionary	0 - 30 days	Indefinite	22 Okl. St. Ann. § 983, 47 Okl. St. Ann. § 6-206
Oregon	Yes	No	Discretionary	0 - 30 days	Indefinite	O.R.S. § 809.210
Pennsylvania	Yes	No	Mandatory	0 - 30 days	Indefinite	75 Pa. C.S.A. § 1533
Rhode Island	Yes	No	Discretionary	0 - 30 days	Indefinite	RI ST § 31-11-25
South Carolina	Yes	No	Discretionary	0 - 30 days	Indefinite	S.C. Code Ann. § 56-25-20
South Dakota	Yes	No	Discretionary	0 - 30 days	Indefinite	S.D.C.L. § 32-12-49
Tennessee	Yes	No	Mandatory	0 - 30 days	Indefinite	Tenn. Code Ann. §§ 40-24-105(b), 40-24-104(b)
Texas	No[%]	N/A	N/A	N/A	N/A	N/A
Utah	Yes	No	Discretionary	0 - 30 days	Indefinite	U.C.A. § 53-3-221; U.A.C. R708-35
Vermont	Yes	No	Mandatory	0 - 30 days	Definite[d]	4 V.S.A. § 1109
Virginia	Yes	No	Mandatory	0 - 30 days	Indefinite	Va. Code Ann. § 46.2-395
Washington	Yes	No	Mandatory	More than 30 days	Indefinite	R.C.W.A. §§ 46.20.245, 46.20.289
West Virginia	Yes	No	Mandatory	More than 30 days	Indefinite	W. Va. Code §§ 17B-3-3a, 17B-3-3c
Wisconsin	Yes	No	Discretionary	0 - 30 days	Definite[e]	Wi. St. § 345.47, 800.095
Wyoming	No	N/A	N/A	N/A	N/A	N/A

1: "Mandatory" means driver's license suspension is a required consequence for nonpayment of traffic and/or criminal court debt, subject in some states to a finding of willfulness. "Discretionary" means driver's license suspension may follow nonpayment of traffic and/or criminal court debt, within the discretion of the court or motor vehicle agency. According to anecdotal reports from local practitioners we consulted, many states and localities regularly apply suspensions automatically even though it is not required by law.

2: Jurisdictions vary considerably with respect to the timing of a driver's license suspension following a missed payment deadline. For simplicity and ease of reference, we separated this information into two broad categories. In general, states in the "more than 30 days" category have policies causing a person to lose his or her driver's license within 60 to 90 days of a missed payment deadlines.

3: "Indefinite" means subject only to limitations on collections for purposes of enforcing money judgments. These periods may be incredibly long. For example, in Virginia, court debt is collectable for at least 10 or 20 years depending on the court from which it originated. Va. Code § 19.2-341.

~: Suspensions for nonpayment of felony criminal court debt only

^: In Chicago, licenses may be suspended for nonpayment of 10 or more parking tickets. Driver's License Suspension, City of Chicago, available at https://www.cityofchicago.org/city/en/depts/fin/supp_info/revenue/boot_tow_information/driver_s_licensesuspension.html (last visited Sept. 2, 2017).

%: Nonpayment of court debt may prevent the debtor from renewing the driver's license if it expires. However, under Texas' "Driver Responsibility Program" (DRP) certain traffic offenses carry surcharges imposed by the Department of Public Safety in addition to court-imposed costs and fines. If a person required to pay a DRP surcharge does not pay on time, his or her driver's license is automatically suspended." Texas Appleseed, *Pay or Stay: The High Costs of Jailing Texans for Fines & Fees* (February 2017), *available* at https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf (last visited Sept. 15, 2017).

@: Pursuant to a settlement agreement, as of January 2017 the Mississippi Department of Public Safety has rescinded its policy of suspending licenses for failure to pay fines under Miss. Code Ann. § 63-1-53.

a: 90 days max, but license may not be reinstatement until court debt satisfied

b: 30 days or until court notifies motor vehicle agency that the debt has been paid

c: 1 year or until amount due is paid, whichever is earlier (but motor vehicle agency has discretion to extend indefinitely)

d: 30 days or until debt satisfied, whichever is earlier

e: maximum 1 year

LEGAL AID JUSTICE CENTER

The Legal Aid Justice Center (LAJC) fights injustice in the lives of individual Virginians while rooting out exploitative policies and practices that keep people in poverty. LAJC uses impact litigation, community organizing, and policy advocacy to solve urgent problems in areas such as housing, education, civil rights, immigration, healthcare and consumer finance. LAJC's primary service areas are Charlottesville, Northern Virginia, Richmond and Petersburg, but the effects of their work are felt statewide.

Charlottesville
1000 Preston Avenue, Suite A
Charlottesville, VA 22903
Phone: (434) 977-0553
Fax: (434) 977-0558

Northern Virginia (Falls Church)
6066 Leesburg Pike, Suite 520
Falls Church VA 22041
Phone: (703) 778-3450
Fax: (703) 778-3454

Richmond/Petersburg
123 East Broad Street
Richmond, VA 23219
Phone: (804) 643-1086
Fax: (804) 643-2059

Toll-free: 800-763-7323 (clients only) | International: 1-800-892-1751 (In Mexico, dial 001 first)

www.justice4all.org

TO BE SEALED

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DISTRICT COURT

FINANCIAL STATEMENT

State of Rhode Island **v.** **Defendant**	**Case Number** **Court Location**

Name:	**Age:**	**Marital Status:** ☐M ☐S ☐D ☐W
Address:	**Number of Dependents and Ages:**	
City and State:		
Telephone:		
Social Security Number:		

Employed: ☐ Y ☐ N ☐ Full-time ☐ Part-time	**How Long:**
Employer(s):	
Address:	**City and State:**

Monthly Income		**Monthly Expenses**	
Gross Monthly Income (Self)	$		$
Gross Monthly Income (Spouse)	$	Mortgage or Rent	$
Unemployment Benefits	$	Utilities	$
Social Security	$	Vehicle Payments	$
Retirement/Pension Benefits	$	Insurance (Vehicle/Health/Life)	$
Child Support	$	Other Loan Payments	$
Alimony	$	Child Support/Alimony	$
Disability	$	Medical Payments	$
Veteran's Benefits	$	Food	$
Interest/Dividends	$	Other:	$
Other:	$	Other:	$
Total Income	**$**	**Total Expenses:**	**$**

Checking Balance:	**Real Property:**
Savings Balance:	**Other (IRA, CD, Trusts, Stocks, Bonds):**

I hereby certify that the information provided is truthful, complete, and accurate to the best of my knowledge.

_____

Signature of the Defendant/Parent/Guardian

TO BE SEALED

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

SUPERIOR COURT

FINANCIAL STATEMENT

State of Rhode Island **v.** **Defendant**	**Case Number** **Court Location**

Name:	**Age:**	**Marital Status:** ☐M ☐S ☐D ☐W
Address:	**Number of Dependents and Ages:**	
City and State:		
Telephone:		
Social Security Number:		

Employed: ☐ Y ☐ N ☐ Full-time ☐ Part-time	**How Long:**
Employer(s):	
Address:	**City and State:**

Monthly Income		**Monthly Expenses**	
Gross Monthly Income (Self)	$		$
Gross Monthly Income (Spouse)	$	Mortgage or Rent	$
Unemployment Benefits	$	Utilities	$
Social Security	$	Vehicle Payments	$
Retirement/Pension Benefits	$	Insurance (Vehicle/Health/Life)	$
Child Support	$	Other Loan Payments	$
Alimony	$	Child Support/Alimony	$
Disability	$	Medical Payments	$
Veteran's Benefits	$	Food	$
Interest/Dividends	$	Other:	$
Other:	$	Other:	$
Total Income	**$**	**Total Expenses:**	**$**

Checking Balance:	**Real Property:**
Savings Balance:	**Other (IRA, CD, Trusts, Stocks, Bonds):**

I hereby certify that the information provided is truthful, complete, and accurate to the best of my knowledge.

_____

Signature of the Defendant/Parent/Guardian

TO BE SEALED

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

SUPERIOR COURT

FINANCIAL STATEMENT

State of Rhode Island **v.** **Defendant**	**Case Number** **Court Location**

Name:	**Age:**	**Marital Status:** ☐M ☐S ☐D ☐W
Address:	**Number of Dependents and Ages:**	
City and State:		
Telephone:		
Social Security Number:		

Employed: ☐ Y ☐ N ☐ Full-time ☐ Part-time	**How Long:**
Employer(s):	
Address:	**City and State:**

Monthly Income		**Monthly Expenses**	
Gross Monthly Income (Self)	$		$
Gross Monthly Income (Spouse)	$	Mortgage or Rent	$
Unemployment Benefits	$	Utilities	$
Social Security	$	Vehicle Payments	$
Retirement/Pension Benefits	$	Insurance (Vehicle/Health/Life)	$
Child Support	$	Other Loan Payments	$
Alimony	$	Child Support/Alimony	$
Disability	$	Medical Payments	$
Veteran's Benefits	$	Food	$
Interest/Dividends	$	Other:	$
Other:	$	Other:	$
Total Income	**$**	**Total Expenses:**	**$**

Checking Balance:	**Real Property:**
Savings Balance:	**Other (IRA, CD, Trusts, Stocks, Bonds):**

I hereby certify that the information provided is truthful, complete, and accurate to the best of my knowledge.

_____

Signature of the Defendant/Parent/Guardian

2019 -- H 5196

========
LC000892
========

S T A T E O F R H O D E I S L A N D

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2019

A N A C T

RELATING TO CRIMINAL PROCEDURE - COSTS

Introduced By: Representatives Blazejewski, Diaz, Ruggiero, Barros, and Slater

Date Introduced: January 25, 2019

Referred To: House Judiciary

It is enacted by the General Assembly as follows:

SECTION 1. Section 12-20-10 of the General Laws in Chapter 12-20 entitled "Costs" is hereby amended to read as follows:

12-20-10. Remission of costs -- Prohibition against remitting restitution to victims of crime -- Ability to pay -- Indigency.

(a) The payment of costs in criminal cases may, upon application, be remitted by any justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken. Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment or other costs of prosecution, provided no order of restitution shall be suspended by the court.

(b) For purposes of §§ 12-18.1-3(d), 12-21-20, 12-25-28(b), 21-28-4.01(c)(3)(iv) and 21-28-4.17.1, the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay:

(1) Qualification for and/or receipt of any of the following benefits or services by the defendant:

(i) temporary assistance to needy families

(ii) social security including supplemental security income and state supplemental payments program;

(iii) public assistance

(iv) disability insurance~~; or~~

(v) food stamps; or

(vi) qualifying for the services of the public defender as an "indigent person" pursuant to § 12-15-8 of the general laws.

(2) Despite the defendant's good faith efforts to pay, outstanding court orders for payment in the amount of one-hundred dollars ($100) or more for any of the following:

(i) restitution payments to the victims of crime;

(ii) child support payments; or

(iii) payments for any counseling required as a condition of the sentence imposed including, but not limited to, substance abuse, mental health, and domestic violence.

(3) When the procedures prescribed by § 12-21-20 to determine a defendant's ability to pay are not performed by the court.

SECTION 2. Section 12-21-20 of the General Laws in Chapter 12-21 entitled "Recovery of Fines, Penalties, and Forfeitures" is hereby amended to read as follows:

12-21-20. Order to pay costs and determination of ability to pay.

(a) If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law. No order requiring payment shall enter unless and until the procedures prescribed by this section to determine a defendant's ability to pay are performed by the court.

(b) In superior court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing by use of the procedures specified in this section.

(c) In district court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of the procedures specified in this section.

(d) The defendant's ability to pay and payment schedule shall be determined by use of standardized procedures including a financial assessment instrument. The financial assessment instrument shall be:

(1) based upon sound and generally accepted accounting principles;

(2) completed based on a personal interview of the defendant and includes any and all relevant information relating to the defendant's present ability to pay including, but not limited to, the information contained in § 12-20-10; and

(3) made by the defendant under oath.

(e) The financial instrument may, from time to time and after hearing, be modified by the court.

(f) When persons come before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of the procedures specified in this section.

(g) Nothing in this section shall be construed to limit the court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information.

SECTION 3. This act shall take effect upon passage.

========
LC000892
========

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

A N A C T

RELATING TO CRIMINAL PROCEDURE - COSTS

***

This act would provide that a defendant's qualification for the services of the public defender constitutes prima facie evidence of their indigency and their limited ability to pay court costs and that no costs shall be ordered unless procedures for determining ability to pay are followed.

This act would take effect upon passage.

========
LC000892
========

HEARING NOTES: House Judiciary Committee, Wednesday, 2/6/19

House Bill # 5088 Witness:	***House Bill # 5196*** Witness:
Rep. Barros: • Good summary of the bill • overview of the money bail system in RI and across the country • types of bail and bail bondsman's role • fees and return $ at the end of the case • research of the Justice Policy Institute (may be Pre-Trial Justice Institute also?) • $9 billion spent annually on bail in USA • enhanced role of Pre-Trial Services Unit (PTSU) • acknowledges that the language on "risk screen" / "risk assessment" on p. 4 may be erroneous (willing to delete this and other erroneous language perhaps regarding domestic crimes)	Mike DiLauro (RIPD): • Detailed background regarding the 2008 legislative reforms – copy and summary given and explained to the committee • adding public defender eligibility as a factor in determining ability to pay • costs of locking up folks for failure to pay v. amount of $$$$ realized • Family Life Center research that resulted in 2008 legislation and the subsequent research done by Brown University graduate student • anecdotal research regarding whether or not the "Financial Assessment Instrument" (FAI) is being completed by judges and clerks at the end of the case – answer = "NO" (with very limited exceptions)
Mike DiLauro (RIPD): • Similar to 2018—H 7599 • this bill does most if not all that that 2018—H 7599 did • relationship to JRI and its reliance on evidence based practices	Elizabeth Suever (Judiciary): • The Judiciary opposes the legislation for 2 reasons: 1) adding RIPD qualification is a bad idea because the definition of "indigency" is lax while the others (SSI, SNAP, etc.) are stringent requiring detailed proof citing the RIPD statute and 2) "the RIPD's anecdotal research is the exact opposite of what I heard from The

• best available information provided to the judge at the time of the initial bail system • money bail system changes across the country via litigation (Equal Protection & Due Process), legislation, and court rule changes in 17 different states • review of the RIPD's APRA request to RIDOC and results; language regarding risk assessment being done "time permitting" causes concern but that was part of JRI 2 years ago • cooperation of RIAG	Judiciary" - we don't need this because we do it already is what I was told • important to the system that these monies be collected • "will look into the RIPD's allegations that it is not being done and get back to you" • (DiLauro corrects her regarding what he said regarding anecdotal research) • *She then says that the bill allows restitution to victims be waived and they have a right to be made whole!!!!*
<u>Elizabeth Suever (Judiciary)</u>: • Signed up to testify not "Pro" or "Con" but just to express concerns about the unfunded mandate created by the creation of a Superior Court Diversion Unit • "no thoughts on the actual substance of the bill" • manpower shortages is why the "time permitting" language is necessary	<u>Nick Horton (Family Life Center)</u>: • Detailed background regarding the 2008 legislative reforms and costs of locking up folks for failure to pay v. amount of $$$$ realized….both costly and ineffective / inefficient • constitutional issues • 17% of all commitments are for failure to pay approx….2500 people / year • 11% of these committed for a week or more • incarceration Costs = much greater than $ realized • subsequent research done by Brown University graduate student
<u>Steve Brown (RI ACLU)</u>: • Issue being dealt with across the country	<u>Rachel Black (Brown Grad Student):</u> • See written materials submitted and

both by courts and state legislatures • some concerns about the language regarding home confinement • explanation of "risk assessment" and role of JRI	conclusions, infra. [1] • 16% of all commitments are for failure to pay approx. 1500 people / year • approx. 50% met eligibility criteria of FAI • Courts are still not systematically evaluating ability to pay – done via Q/A in court • Need for Judicial Education?
Ryan Holt (RIAG): • Financial status should not determine pre-trial release • more holistic approach needed with input from all criminal justice stakeholders • language concerns as stated in the RIAG's letter ("specific threat" and "real and	Jordan Seabury (ISPNV): • Summarizing the testimony of others who had to leave early and the legal issues involved. • Fairness • Community impact

[1] Rachel Black Conclusions:

- *"The judiciary has not adopted a financial assessment instrument for use during ability-to-pay determinations that includes the criteria in §12-20-10. While clerks and magistrates consistently inquire into arrested debtors' employment status and occasionally probe for other details about their lives (for example, their housing situation), they rarely ask for information pertaining to public benefits receipt or the presence of other debt obligations. Perhaps due to limited use of the legislature's ability-to-pay criteria, magistrates abated the costs of just 3% of arrested debtors in 2015. The fact that roughly half of arrested debtors in 2015 received food stamps indicates that magistrates do not exercise their authority to abate court costs for a majority of those who are eligible."*

- *"In light of my research, I support H5196 because it would fulfill the promise of the original law by ensuring that the courts systematically assess defendants' ability to pay and ensuring that defendants will not be arrested or incarcerated if this ability to pay assessment has not taken place. Passage of this bill will ensure Rhode Island continues to be a nationwide leader in preventing modern-day debtor's prison and helping citizens transition back out of the justice system and into productive-crime free lives."*

present threat") which appears a # of times in the bill • committed to working with anyone interested in the issue	• "The Beloved Community" (MLK)
	<u>Lauren Smith (see written testimony)</u> <u>Steve Brown</u>: Simply ensures that court does what it was required to do in 2008. <u>Randall Rose</u>: Pretty clear that The Judiciary is not doing what the General Assembly said it should do.

The Washington Post

After prison, more punishment

They did their time. But as the formerly incarcerated reenter the workforce, will their past be held against them?

Meko Lincoln conducts security checks during his overnight manager shift at Amos House, where he had been paroled when he was released from prison in December.

By Tracy Jan Photos by Toni L. Sandys Video by Jorge Ribas and Darian Woehr
Sept. 3, 2019

PROVIDENCE, R.I. — He had spent 17 of his 46 years behind bars, locked in a pattern of addiction and crime that led to 16

Prison terms. Now, Meko Lincoln pushed a cart of cleaning supplies at the reentry house to which he had been paroled in December, determined to provide for his grandchildren in a way he failed to do as a father.

"Keep on movin', don't stop," Lincoln sang, grooving to the British R&B group Soul II Soul on his headphones as he emptied trash cans and scrubbed toilets at Amos House. He passed a bulletin board plastered with hiring notices — a line cook, a warehouse worker, a landscaper — all good jobs for someone with a felony record, but not enough for him.

Lincoln, who is training to be a drug and alcohol counselor, wants those lost years to count for something more.

"I lived it," he said. "I understand it. My past is not a liability. It's an asset. I can help another person save their life."

Yet because regulations in Rhode Island and most other states exclude people with criminal backgrounds from many jobs, Lincoln's record, which includes sentences for robbery and assault, may well be held against him.

Across the country, more than 10,000 regulations restrict people with criminal records from obtaining occupational licenses, according to a database developed by the American Bar Association. The restrictions are defended as a way to protect the public. But Lincoln and others point out that the rules are often arbitrary and ambiguous.

Licensing boards in Rhode Island can withhold licenses for crimes committed decades ago, by citing a requirement that people display "good

moral character," without taking into account individual circumstances or efforts toward rehabilitation.

Such restrictions make it challenging for the formerly incarcerated to enter or move up in fast-growing industries such as health care, human services and some mechanical trades, according to civil liberties lawyers and economists. These include the very jobs they've trained for in prison or in reentry programs like Lincoln's. And without jobs, many of those released could end up back in jail, experts say.

Lincoln's hope of getting licensed as a chemical dependency clinician will be a vivid test of how much the system is willing to forgive.

His 16 prison terms resulted from charges including narcotics possession, resisting arrest, obtaining money under false pretense, malicious destruction of property and assaulting police as well as repeated parole violations for returning to drugs, according to the Rhode Island Department of Corrections.

Post Reports | Podcast **Subscribe**

After prison, a different kind of punishment

0:00 15 15 29:06

Lincoln said his crimes were committed while he was intoxicated or high, or trying to obtain heroin and crack cocaine. He would buy drugs, dilute

them and resell them to other people with addictions, actions that resulted in robbery charges. He sold fake drugs to undercover police and hit a drug dealer's car with a crowbar.

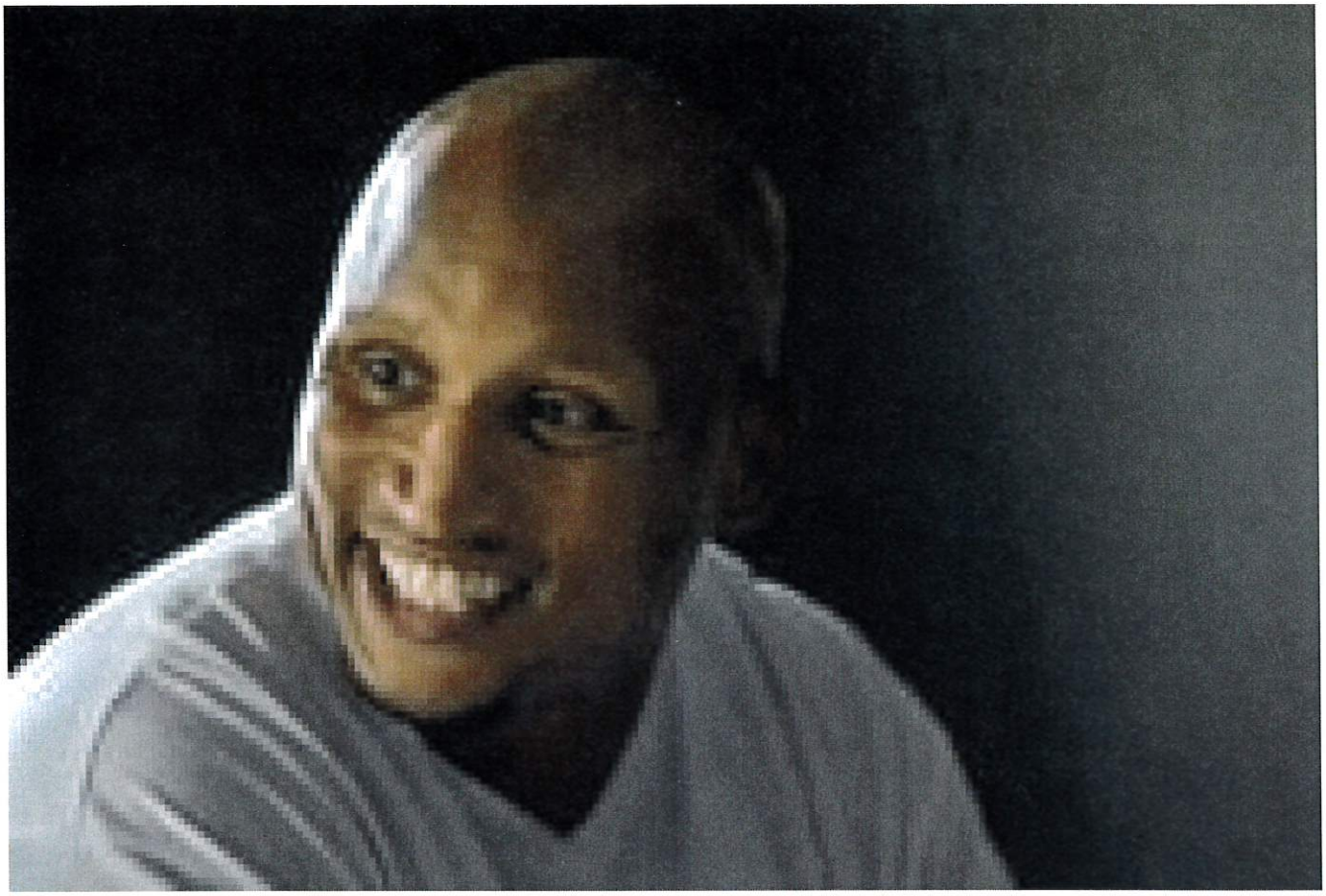
Licensing restrictions are among the many obstacles to establishing a stable economic footing after prison. Incarceration carries a stigma, and many employers are leery of hiring people who have spent time in prison.

But states with the strictest licensing barriers tend to have higher rates of recidivism, according to research by Stephen Slivinski, an economist at the Center for the Study of Economic Liberty at Arizona State University.

"In many states, a criminal record is a stain that you can't wash off," Slivinski said. "There is no amount of studying that can take away this mark in your past if a licensing board wants to use it against you."

Even Rhode Island, a state on the forefront of sentencing reform, has some of the nation's most restrictive licensing regulations, according to separate analyses by the liberal National Employment Law Project and the libertarian Institute for Justice.

For Lincoln, obtaining a license could mean the difference between the $25,000-a-year job as a "peer recovery coach" he's being trained for at his reentry program at Amos House and the $50,000 he could earn a year as a chemical dependency clinician — a licensed drug and alcohol counselor who can treat people with addictions, not just mentor them.



Meko Lincoln, 46, wants to be a licensed chemical dependency clinician, but his years in prison could work against him. Partaja Spann-Taylor, 34, wants to be a licensed social worker, but her felony record may be a barrier.

"Licensing legitimizes us as somebody," he said. "It's recognition."

And there is a need for more black counselors like Lincoln as the share of minorities dying of opioid overdoses rises in Rhode Island and across the country.

"He has the life experience that would allow somebody else to say, 'Well, if Meko can do it, I can possibly do it, too,' " said Amos House chief executive Eileen Hayes, who offered Lincoln the chance to train as a recovery coach after witnessing his progress.

In May, as instructors passed out certificates during a ceremony on the last day of Lincoln's recovery coaching class, he tried to focus on all that he's accomplished in the six months since his release from prison.

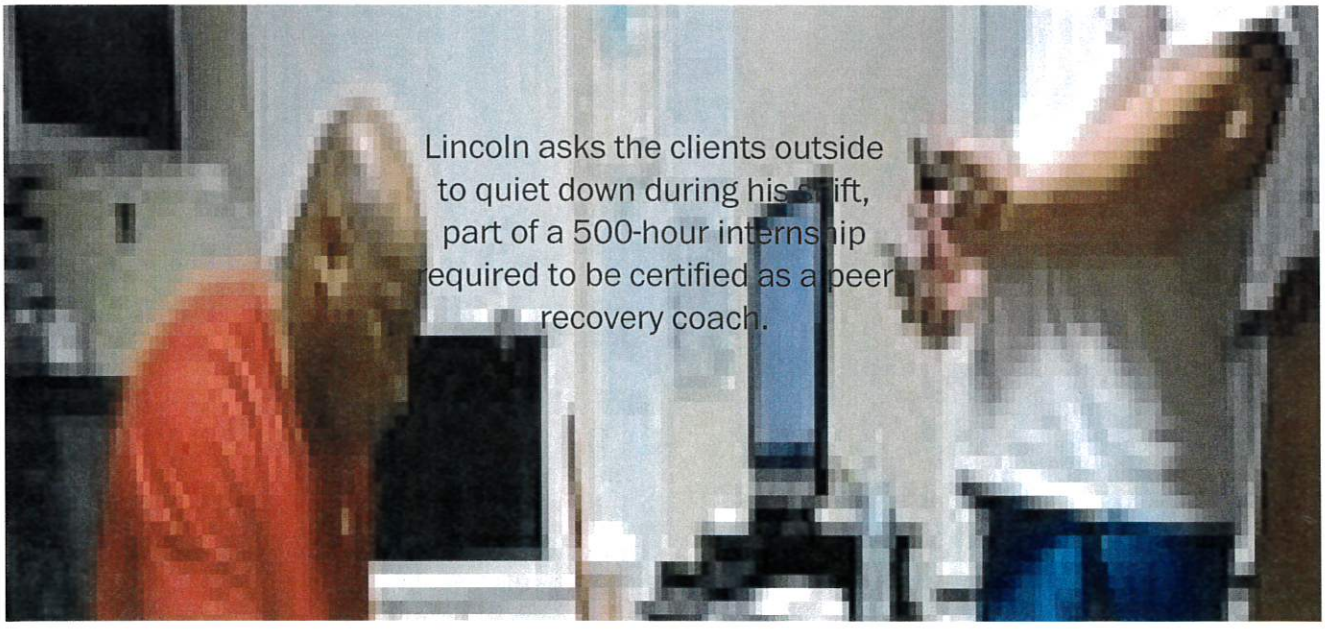
He had stayed clean through a 90-day rehab program. Moved from the bottom bunk in the rooming house he shared with 19 other guys into his own basement apartment nearby. Got a job, making $11 an hour as a custodian.

Soon he would start a paid internship as the weekend night manager of the men's residency at Amos House, where he had lived until February.

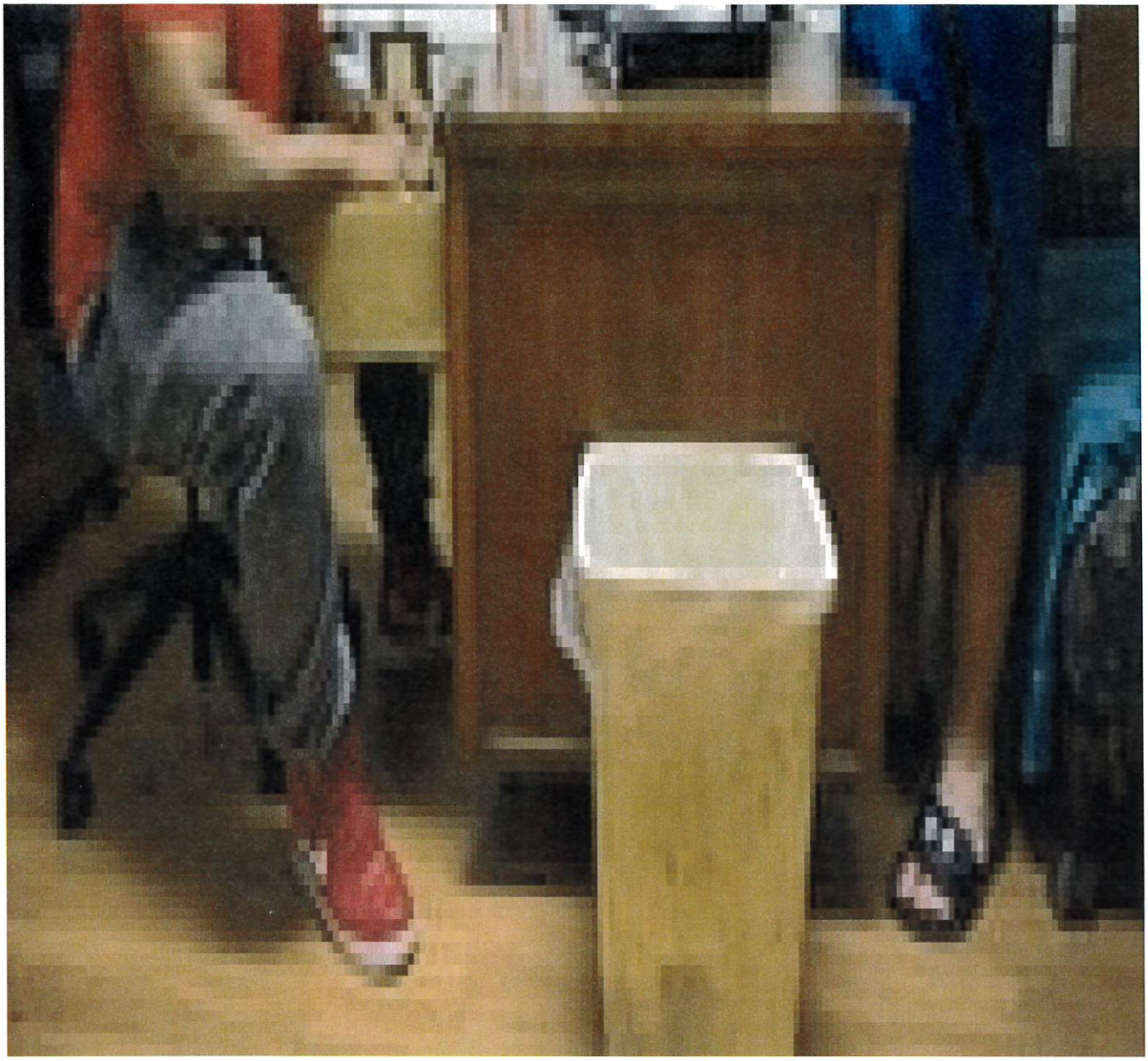
Amid his classmates' cheers and applause, anxiety crept in.

What if this is as good as it gets?

Lincoln collects the cellphone of a client at the men's shelter run by Amos House at the start of his overnight shift as house manager.



Lincoln asks the clients outside to quiet down during his shift, part of a 500-hour internship required to be certified as a peer recovery coach.



Lincoln cleans a bathroom at Amos House, where he works as a custodian for $11 an hour while training to be a peer recovery coach.

Justin Thomas hangs new job notices at Amos House. Employment specialists say it has become easier for people with criminal records to find entry-level work, but not living-wage careers.

One day this summer, Lincoln ambled through the crowded Amos House cafeteria dispensing hugs, elbow bumps and compliments in Spanish and English. Bald, cleanshaven except for a short goatee, with 18-inch biceps bulging beneath his shirt sleeves, Lincoln was unrecognizable from the skeleton he used to be in the depths of his addiction.

"I see something nice! You blinging!" he shouted to a woman with a new set of teeth.

He wrapped his arms around a man in his 60s who was recently back from detox and snagged a piece of his cinnamon roll.

A guy in line for chili and Spanish rice who knew Lincoln from prison called out to him: "I just got out. I got no ID. No transportation. No nothing."

The people seeking food, job training, counseling and shelter here are a constant reminder to Lincoln of how quickly sobriety can unravel.

This was his second pass through Amos House, a social service agency whose clientele include the homeless, people seeking help with addiction and the formerly incarcerated.

The first time, Lincoln relapsed soon after completing the 90-day program, availing himself of the drugs being sold just blocks away. He returned to prison for three years for heroin possession, stealing drugs and beating up a drug dealer.

"Instead of facing life on its terms, I kind of folded like a lawn chair," he said.

Rhode Island Superior Court Justice Kristin E. Rodgers told Lincoln during his 2016 sentencing hearing that he could not blame his relapse on the pressures of sobriety or his difficult childhood.

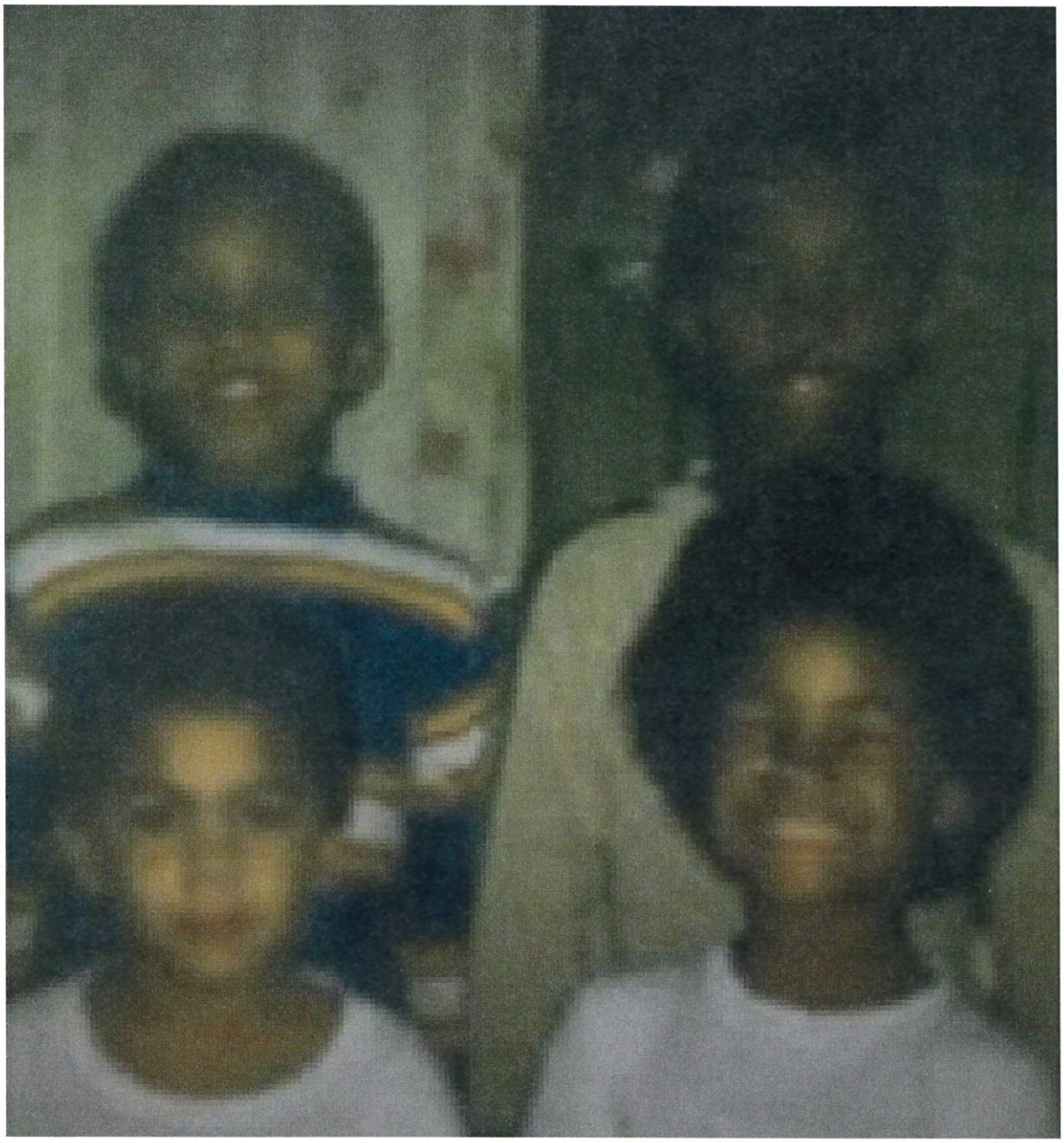
"The problem with you, Mr. Lincoln, is that when you go to the dark side, you go big," Rodgers said, according to the court transcript. "And you have victims that are out there. There are robberies, there's drug dealing. These are not victimless crimes, sir."

Lincoln responded that his crimes were driven by the disease of addiction, committed largely against others in similar situations.

"I never . . . take anything from anybody that ain't taken something from me," he told the judge. "And when I'm on drugs, it's the people that's using drugs."

Lincoln grew up in a south Providence neighborhood surrounded by poverty, drugs and violence. His father was in prison for murder and

struggled with his own addiction. His mother raised four boys largely on her own.



Clockwise from top left: Meko Lincoln, about age 7, with his brothers, Tyrone, Derek and Darryl.

He said he began drinking and smoking marijuana with older teens at age 12 — then started using crack cocaine and selling it, picking up his first possession charge at 14.

He said he was talented enough at football that he was approached by college scouts, but that dream evaporated in a string of arrests and stints in juvenile detention. He dropped out of high school his junior year.

He was homeless, high and just 19 when his first daughter, Janelle Hazard, was born. At 21, Lincoln served his first term in prison — 14 months for robbing a drunk man of a bottle of liquor in 1994.

Hazard ended up in foster care, begrudgingly getting to know her father in weekly prison visits during a 10-year sentence — Lincoln's longest — for a 2002 robbery conviction. While serving that sentence, he learned he had a second daughter; the two remain estranged.

Lincoln said the 2002 conviction resulted from a false accusation by a Providence narcotics detective. Public records show the detective pleaded guilty to charges related to drug dealing in 2010 as part of a larger cocaine operation.

Over his years in prison, an older inmate taught him to read and write. He got his GED. He read the Koran and embraced Islam, a religion he said taught him how to forgive — himself and others.

During his last stint, Hazard brought her own two boys for Saturday visits. Her sons developed a bond with their grandfather, throwing mini footballs in the visiting room decorated with Disney characters. Her third child, a girl, was born while Lincoln was imprisoned.

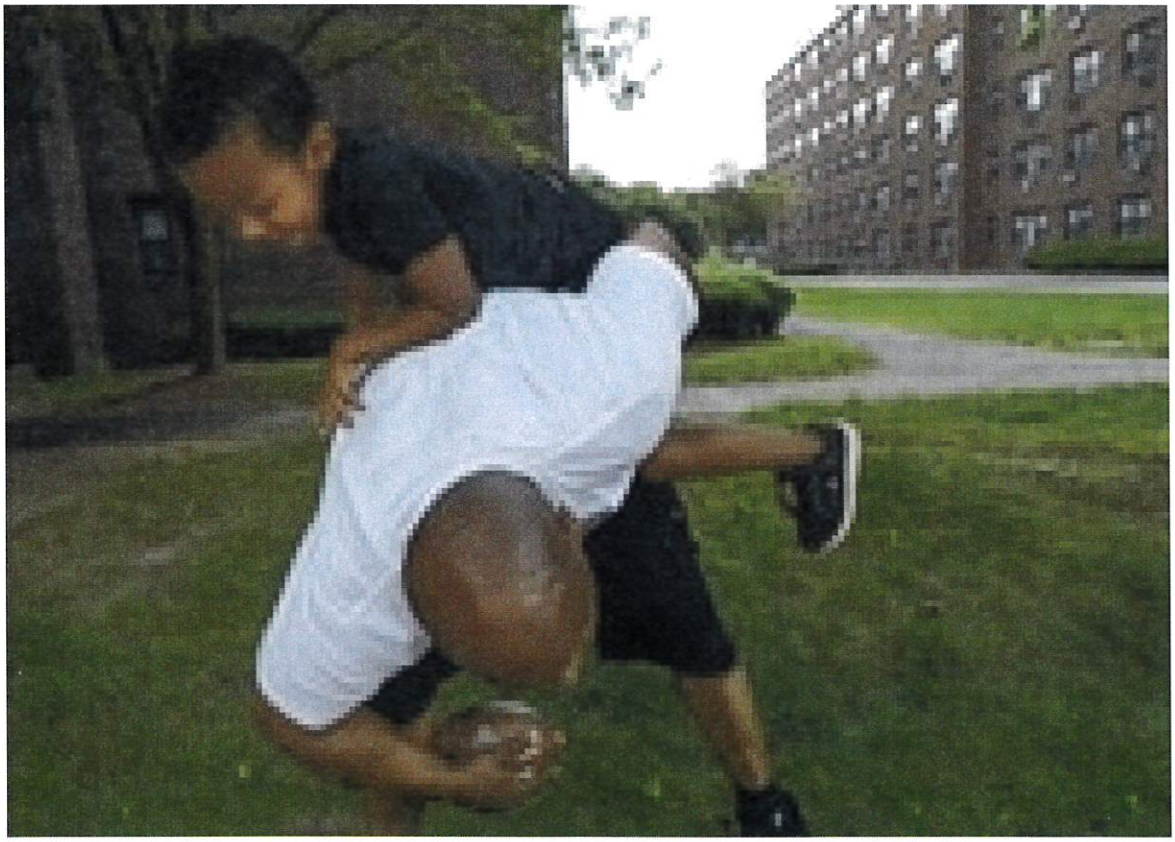
Lincoln would mail his grandchildren CD recordings of his voice reading them books.

He wants to be a model for them, in the way he was not for their mother.

"When she was being raised and needed me, I wasn't there," Lincoln said. "I wanted to present them with proof that they could one day become something they want to be."

He participated in behavioral therapy and entered a chemical dependency program, which inspired him to consider counseling as a career.

In his last six months of incarceration, he recalled propping a folded paper name tag on a table in the day room. As guys around him played cards and chess, Lincoln played therapist.



Lincoln plays with his 7-year-old grandson, Jahvon. He wants to provide for his three grandchildren in a way he failed to do as a father.

"I was trying a shoe on to see how it would fit," he said, "acting as if I had an office."

Other inmates made fun of him. But some sat down to talk, venting about their cellmates or corrections officers.

In October, two months before he was paroled, Lincoln wrote a letter on a piece of notebook paper to the coordinator of the men's program at Amos House. "If given the opportunity to be released back there, I will not repeat the cycle," he wrote.

When he got out, Lincoln had been sober for three years — the longest he'd been clean in decades.

Hazard, now 27, picked him up, driving him to his grandsons' school. He jumped out of the SUV in his blue prison-issued sweatsuit, yelling, "Surprise!" Then Hazard and the boys, now 8 and 7, dropped him off at Amos House, hopeful it would be the last time.

Lincoln committed to daily 12-step meetings. Worked through childhood feelings of abandonment during group therapy. Coped with feeling insecure, powerless, useless. Through it all, his urine tests remained clean.

In July, Lincoln embarked on accumulating the 500 internship hours he needs to be certified as a peer recovery coach — his first step toward his goal of becoming a licensed drug and alcohol counselor — while holding onto his afternoon cleaning shift.

On a recent Friday as Lincoln headed to an afternoon prayer service at his mosque, an unshaven man with matted hair stopped him on the steps of Amos House.

"I've missed you, man," slurred Lincoln's childhood friend, his face drawn and pupils constricted, as he pulled Lincoln in for an embrace. "You know how sometimes you feel like you're walking around and you've got no soul?"

Lincoln asked if he wanted to get clean.

His friend did not answer. Instead, he asked, "You don't got no five dollars? No bud on you?"

Lincoln shook his head no. "I love you."

Inmates at the Rhode Island Department of Corrections in Cranston can shave time off their sentences by participating in job training, but some may encounter licensing barriers upon release.

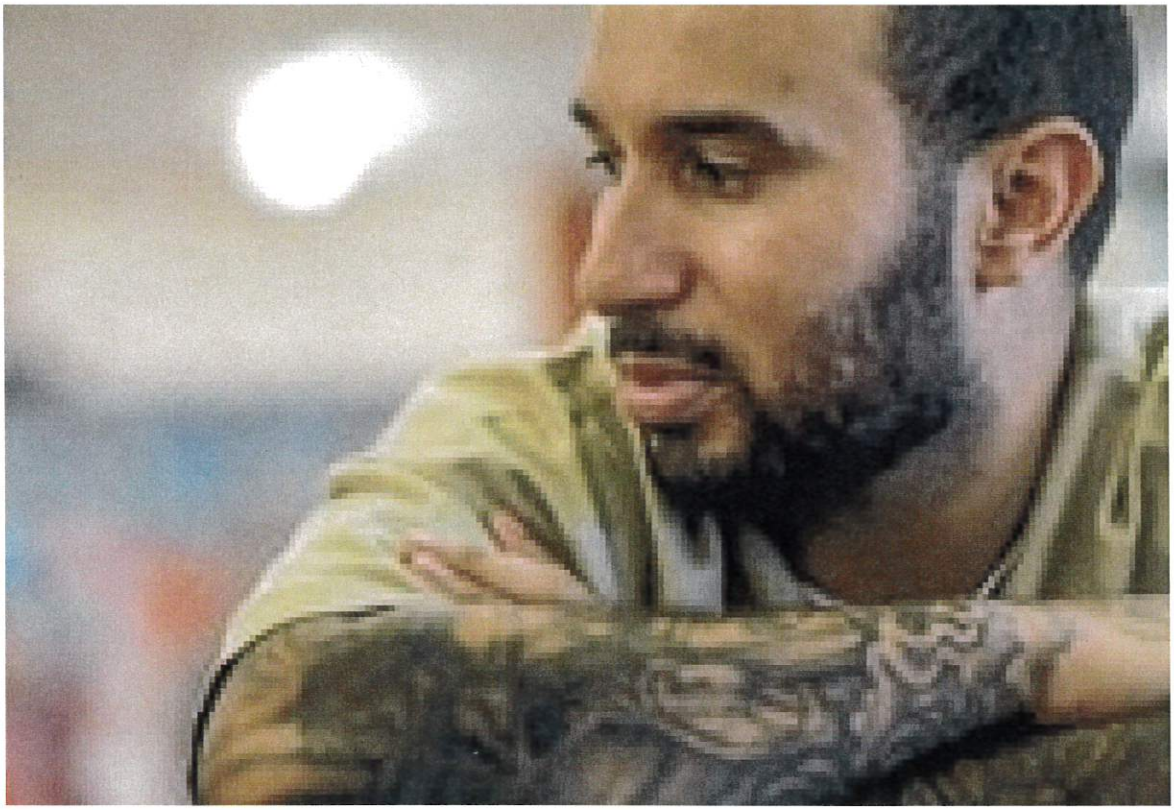
The entirety of Rhode Island's state prison population is confined to one square mile in Cranston, where 2,640 inmates are divided among six facilities surrounded by barbed wire and armed guards.

Rhode Island reduced its prison population by 23 percent between 2008 and 2016, in part by giving inmates time off their sentences for participating in academic classes, rehabilitative programs, paid work or job training.

Jorge Henriquez shaved more than one year off his five-year sentence for dealing cocaine by taking classes and working in the prison auto body shop.

The 32-year-old father of two is halfway through a course in heating and air conditioning, a fast-growing field, and is excited about the prospects of a lucrative — and legal — career.

"When you have a record, there's not a lot of good-paying jobs out there," said Henriquez, who is scheduled for parole in February.



Jorge Henriquez, 32, who is scheduled for parole in February, cut more than a year off his five-year sentence for dealing cocaine by taking classes and working in the prison auto body shop.

Rhode Island does not officially bar people with criminal histories from being licensed in HVAC, but under state law, licenses in HVAC and other mechanical trades can be revoked or suspended for felony convictions.

Bill Okerholm, the HVAC instructor, said that the union of plumbers, pipe fitters and refrigeration technicians accepts people with records as apprentices on a case-by-case basis. But of the 250 men he's trained at the prison in the past five years, Okerholm can't recall anyone who has been licensed after their release.

"Guys like Jorge deserve a second chance," said Okerholm, noting Henriquez's enthusiasm and attention in the course. "There's a great need in these trade jobs for someone like him."

With a quarter of the U.S. workforce in a licensed occupation, compared with just 5 percent in the 1950s, more than two dozen states have begun to loosen licensing restrictions — but Rhode Island is lagging behind.

While opponents say current licensing regulations are ambiguous and inconsistent, supporters of the licensing regime say undoing the restrictions would usurp the authority of state boards and create additional burdens for agencies. More important, supporters say that the regulations are aimed at protecting public health and safety, and that it would be irresponsible to let people with criminal records, especially those involving violent offenses, enter certain professions.

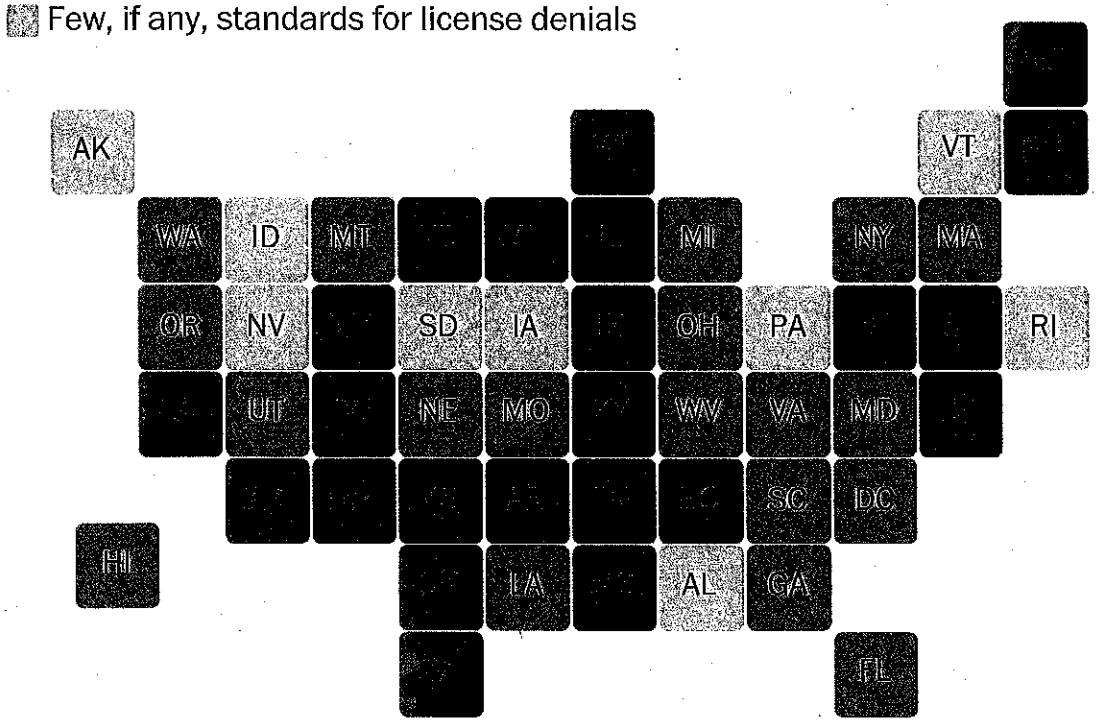
An attempt at change — with a bill that would have limited licensing denials to people whose crimes directly relate to an occupation — died in the Rhode Island General Assembly in June when the House introduced an amendment excluding those convicted of a violent crime. The broad definition, which included robbery, larceny and burglary, would have excluded people like Lincoln.

"Some state agencies expressed concerns that were valid and can't be disregarded," Rhode Island House Speaker Nicholas A. Mattiello (D) said in a statement. Mattiello declined to be interviewed but said the House would revisit the issue when a new legislative session begins in January.

Criminal justice policy analysts say the licensing barriers discourage people with records from applying in the first place because they are routinely told their convictions make them ineligible.

The state of occupation licensing

States across the country deny occupational licenses to people based on their criminal records. About half of them outline clear standards for how licensing boards should consider criminal records.



Sources: Collateral Consequences Resource Center, Institute for Justice
THE WASHINGTON POST

Few states collect this type of data, but in Texas, 15 percent of prospective applicants to the state Department of Licensing and Regulation in the past four years were deemed ineligible through a criminal history evaluation letter — an optional preliminary review of their convictions, the agency said.

In many of those cases, determinations were based on decades-old convictions or crimes irrelevant to the licenses being sought, according to letters obtained by the Texas Criminal Justice Coalition. The department said that those who wish to be reevaluated may do so effective this month under new criteria established by lawmakers that only crimes directly related to the job can be grounds for denial.

About a dozen states have enacted more-modest reforms, according to the Institute for Justice. California's 2018 bill requires convictions be "substantially related" to an occupation for licenses to be denied. Florida, New York and Iowa recently eased licensing restrictions for a limited number of occupations.

Meanwhile, bills introduced this year in South Carolina, Louisiana, Missouri and other states failed to advance.

At a Juneteenth celebration in Providence, Anusha Alles, an organizer at Direct Action for Rights and Equality, talks about a bill for "fair chance licensing" that later died in the legislature.

Partaja Spann-Taylor, one of Lincoln's classmates in his recovery coaching course, is a reminder to Lincoln of the barriers to developing a career post-incarceration. The 34-year-old — whose criminal record is far slighter than his — pursued jobs in health care and social services when she got out of prison a decade ago — only to be met by rejection after rejection because of her criminal background.

Spann-Taylor was charged with delivering cocaine and reckless driving in 2006 when her then-boyfriend made a drug delivery. She was released on

bail after two weeks in jail and got five years of probation and a suspended sentence.

In 2008, when she was four months pregnant, she was incarcerated for 30 days after her friends got into a fight at a nightclub. She was charged with assault, even though she said she did not participate, because her presence violated the terms of her probation.

After her release, Spann-Taylor tried to enroll in a free training program to become a certified nursing assistant.

She was rejected. Her felony record disqualified her, she was told — shutting her out not only from future licensing but from training as well.

"A lot of people would say, 'Well, stick with the retail and the food service industries. They're the most forgiving in terms of your background,' " Spann-Taylor said. "But I needed to make a living for me and my daughter."

She considered a career in physical therapy. But that, too, has licensing barriers. She said an admissions officer at New England Institute of Technology told her that she would need to pass a criminal-background check for clinical placement or employment.

So Spann-Taylor waitressed at a steak house while getting her associate degree in human services and then a bachelor's degree in social work.

After graduating from college in 2013, she got a job as a court advocate for domestic violence victims, but the offer was rescinded before she could even start when her felony conviction showed up in a background check. A

second job offer, a teaching position at a prison, was also rescinded because of her criminal record.

It took five more years of waitressing before Amos House offered her a job getting homeless, drug-addicted women off the streets of Providence.

In May, Spann-Taylor, now a married mother of two, enrolled part time in a master's program to become a clinical social worker — even though her felony record could end up disqualifying her from licensing.

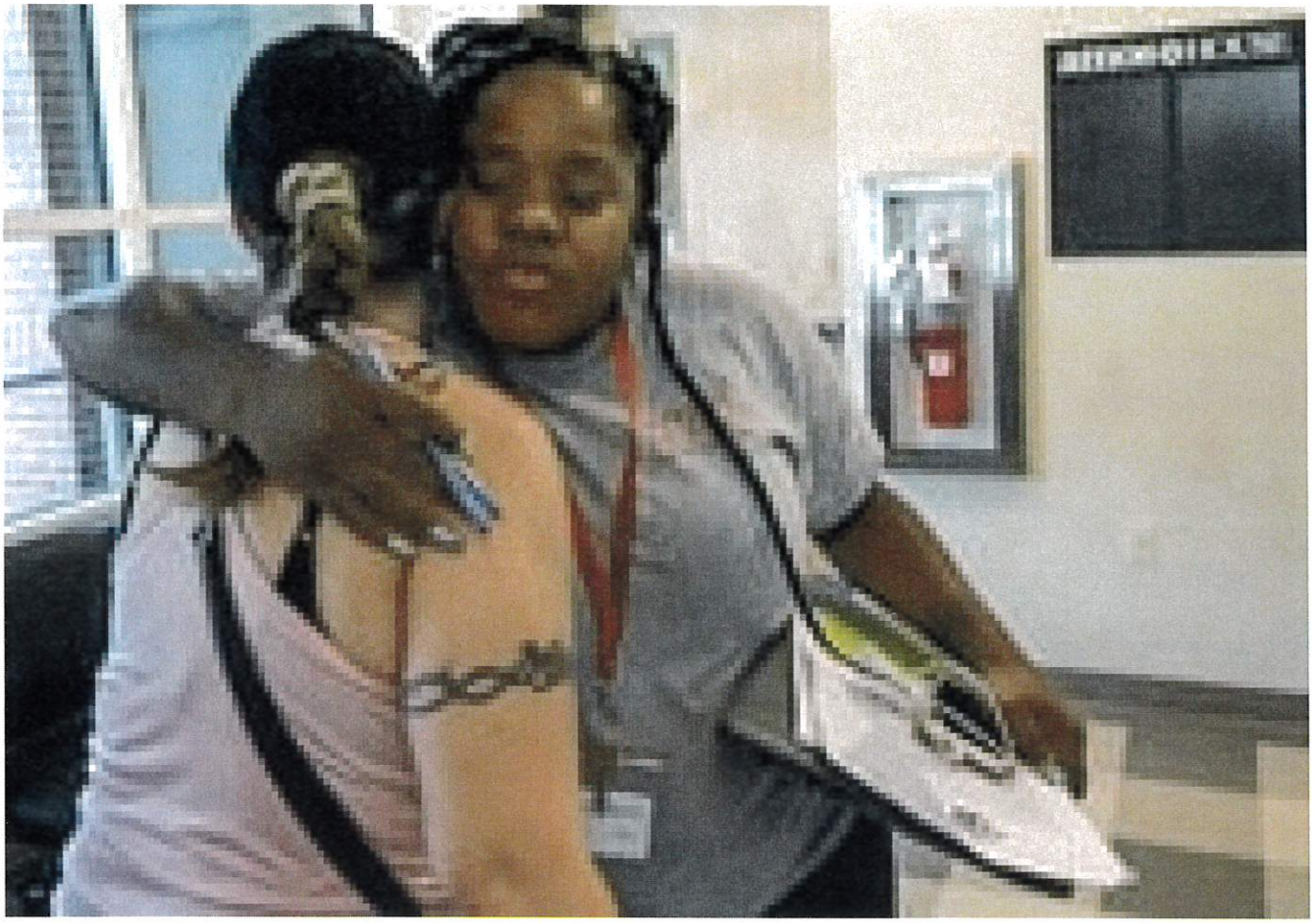
Under Rhode Island law, licensed clinical social workers must be free of felony convictions — unless the professional board determines those previous convictions aren't a risk to public safety. The state Health Department said it has no record of anyone with a felony conviction applying for a license in social work or chemical dependency counseling in the past five years.

Spann-Taylor knows she will struggle to persuade the licensing board to overlook her record.

Even if she obtains her license, some major health insurers will not contract with providers with felony backgrounds. At times, she wonders whether the $40,000 she's accumulated in student loan debt will be worth it.

Still, she feels she has little choice.

"People lose hope when the door keeps closing in your face," she said. "I got frustrated thinking I was just going to be a waitress for the rest of my life. I'll keep trying to bust through these doors until they open."



Spann-Taylor hugs a client at Amos House. Getting homeless, drug-addicted women off the streets inspired her to pursue a master's in social work, even though she is likely to face licensing barriers because of her criminal record.

Lincoln knows that with his lengthier prison sentences, he faces even higher career hurdles. So he focuses on what he can control — learning as much as he can about counseling, piecing together as many internship hours as possible, staying clean and making things right with his family.

His "training ground" — as Lincoln calls it — was the red three-story house where he spent the first three months after his release, learning how to abide by rules and routine outside prison walls and how to feel the emotions he buried while he was incarcerated or high.

"Once you put the drugs down, all those feelings you were trying to numb come rushing back — you sold yourself short, neglected your family, the guilt," Lincoln said. "I didn't know how to be a dad. I didn't even know how to be a human. I just existed. I breathed. I ate."

Freedom felt confusing at first. He relished showering alone, eating with a fork rather than a spork, opening the windows and seeing squirrels and birds. Yet, he was anxious being in public spaces like restaurants, buses and grocery stores, fearing judgment from strangers. Anxious about his future and the pressure to get himself together.

And there were moments of regret and shame.

It hurt to hear his 8-year-old grandson use "crackhead" as a playground insult. It hurt when the boy tried to dig in his pockets for a dollar and Lincoln pulled out a wallet devoid of bills because payday wasn't until the next day. It hurt to admit he was secretly relieved when his grandchildren came down with pinkeye, because he didn't have the $70 to take them to Chuck E. Cheese as they'd planned.

Lincoln met his fiancee, Andrea Heath, 33, shortly after his release from prison. "I've never met someone who's been so motivated and makes me want so much more in life," she says.

Now he talks about his feelings. His daughter said they've never been closer. But it's still early. Her mind won't ease until he's stayed out of prison for at least a year.

"He's never pushed this hard," Hazard said. "I'm afraid he's going to give up — because of the past. I don't want my kids to go through what I went through. I don't want them to experience the heartbreak that I felt."

At his kitchen table one recent evening, Lincoln pored over a chart of Freud, Jung, Piaget and Erickson he'd drawn as a study aid for an Introduction to Counseling course. He's 15 credits shy of his associate degree.

In August, his fiancee, Andrea Heath, moved into his one-bedroom apartment from the sober house where she had been living. They met at Amos House, shortly after his release from prison. He was borrowing a suit for a job interview. She was drawn to the bounce in his step.

"My first thought was wow, this guy is going places," said Heath, 33, who makes $10.75 an hour manufacturing defibrillators. "I've never met someone who's been so motivated and makes me want so much more in life."

They've talked about having children in a year or two.

Every day, Lincoln drives the mile from their apartment to Amos House, traveling the same roads he used on, passing the corner where he was last arrested.

Heroin addicts shoot up on porches, and bundles of dope are sold in the open. Lincoln keeps a bag of naloxone in his glove compartment — and another in the trunk — in case someone overdoses.

In one week alone, Lincoln learned of two deaths: a childhood friend and a neighbor's boyfriend who just got out of prison.

"It's a stark reminder that I have these opportunities," he said, "but at any given moment, this disease can attack anybody."

Lincoln and Heath, right, spend time with Lincoln's daughter Janelle Hazard and her children, Jae-Quan, 8, Jahvon, 7, and Jazlynn, 3, at a playground in Hazard's housing complex.

Lincoln greets old friends as he drives through the West End neighborhood. In one week alone, he says, he learned that two people he knew died of overdoses.

A childhood friend on his way to get breakfast at Amos House stops to say hello as Lincoln finishes his overnight shift at the men's shelter.

Just before midnight on a recent Saturday, Lincoln returned to the "men's house" — this time as the overnight manager. The eight-hour shift would count toward his training as a counselor.

He arrived with a plastic grocery bag containing his prayer rug and a library book: "The New Jim Crow," Michelle Alexander's account of the permanent second-class status of black men who have been incarcerated.

"The real punishments begin when we are released from prison," Lincoln said.

He hopes to pick up more shifts at the house, helping men like himself restart their lives and, in doing so, helping himself stay on the right path.

"It's a good reminder that I don't want to be here again," he said.

By 2 a.m. the house was still, the television off. Lincoln climbed two flights of stairs to conduct his hourly head counts, peeking into each of the four bedrooms with no locks. The only sound was snoring.

Upon returning to the brightly lit office by the front door, Lincoln cracked the window and savored the cool, fresh air.

Just before 4 a.m., he unfurled his green prayer rug and pointed it east. He removed his red Nike high-tops, loosened his belt and rolled up the legs of his jeans. Then he knelt, trying not to think about the mouse he'd seen scurrying across the room earlier in the night.

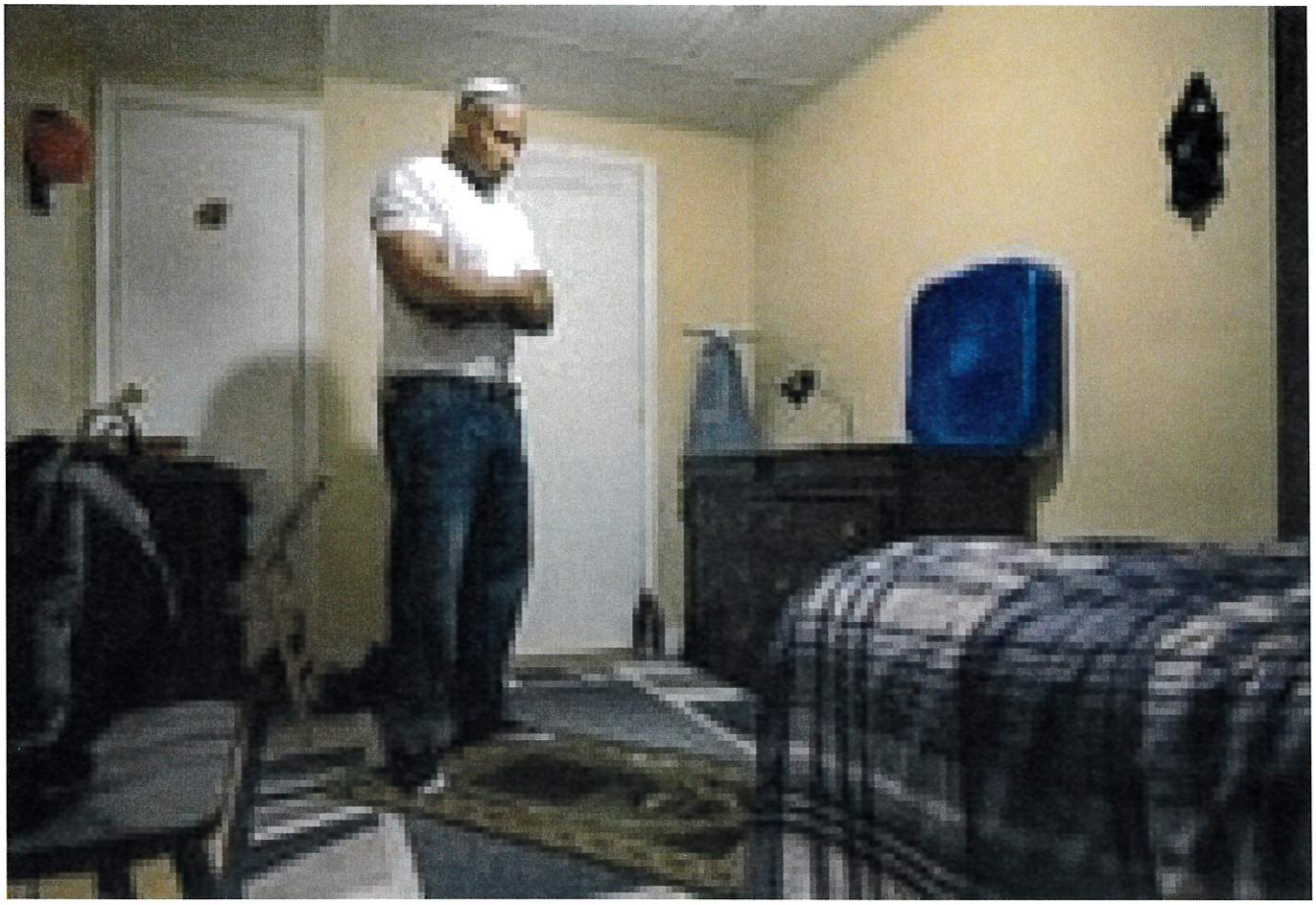
In an hour, the men would start to wake, groggily rolling into the office with cigarettes tucked behind their ears and seeking permission to step out for a smoke.

Lincoln would open the top right drawer of the desk and distribute the cellphones that had been confiscated for the night so that no one would be tempted to text their dealer. He would unlock the closet where baskets of medication are kept, logging how many doses of Suboxone were swallowed by clients to help manage their addictions.

And he would say goodbye to a lanky guy with long hair who was asked to leave because he could not stay clean, just as Lincoln failed to stay clean three years ago.

But for the next three minutes, Lincoln recited the dawn prayer, touching his forehead to the rug — grateful, in this moment, that he'd made it to the other side.

Alice Crites contributed to this report.



Lincoln, a convert to Islam, prays in his basement apartment. He says the religion taught him how to forgive — himself and others.

Tracy Jan

Tracy Jan covers the intersection of race and the economy for The Washington Post. She previously was a national political reporter at the Boston Globe.

Toni L. Sandys

Toni Sandys is a photographer at The Washington Post, primarily covering sports at all levels – high school, college, professional.

Jorge Ribas

Jorge Ribas is a video journalist on the National desk at The Washington Post. He joined the Post in 2014 after having spent five years at Discovery as a science reporter. Jorge has documented immigration, health care and maternity leave issues as well as covered major breaking news events.

Darian Woehr
Darian Woehr is a video journalist for The Washington Post.

Design and development by Clare Ramirez. Photo editing by Annaliese Nurnberg.

111 Comments

More stories

Four years after Michael Brown was shot, the neighborhood where he was killed still feels left behind

Only a fraction of the pledges for Ferguson reached the neediest parts of town. All the corporate goodwill - and millions in investments – were not enough to overcome a long legacy of racial discrimination and economic exclusion. Residents of Canfield Green, where Brown was shot and killed, say they feel abandoned.

Ben Carson's HUD dials back investigations into housing discrimination

Secretary Carson has used his power to fight systemic bias only once in the past two years — to continue a Facebook probe that began under the Obama administration.

TO: **OPD Attorneys & RIACDL Members**

FROM: **Mike DiLauro**

DATE: **7/15/08**

RE: **Legislative News #2**
Comprehensive Reform To The Way In Which Rhode Island Courts Assess, Collect & Waive Court Costs, Fines, Fees, Assessments Or Other Costs Of Prosecution Including Ordered Restitution In Criminal Cases

This second piece of legislation is detailed and comprehensive. It reforms procedures for the assessment, collection, and waiver of court costs, fines, fees, assessments, or other costs associated with the prosecution of criminal cases, including court ordered restitution.

The legislation amends a number of different statutes including:

- *RIGL Sec. 12-6-7.1* (service of arrest warrants)
- *RIGL Sec. 12-18.1-3* (court costs)
- *RIGL Sec. 12-19-34* (restitution payments)
- *RIGL Sec. 12-20-10* (remission of costs)
- *RIGL Sec. 12-21-20* (order to pay costs)
- *RIGL Sec. 12-25-28* (special indemnity account for criminal injuries compensation)

This legislation requires that the courts do a number of things, including preparation and implementation of a financial assessment instrument (FAI). The FAI must be completed by the defendant [redacted] sometime after the conclusion of every criminal case (that time differs between District and Superior Courts). The legislation also enhances the court's power to waive court costs, fines, fees, assessments, or other costs associated with the prosecution of criminal cases. It does so by standardizing procedures, clarifying a number of different provisions of law, and bringing others into conformity with one another. The legislation prohibits the waiver of court ordered restitution.

What follows is additional information about the legislation that should be everything you need to "educate" judges and others about it. I would very much appreciate hearing about your experiences using it. My contact information is at bottom. Included in the following order are:

- Two (2) page bullet point summary of the legislation.
- The legislation itself which can be cited as *2008 Public Law, Chapter 326* & *2008 Public Law, Chapter 297* (had been Senate Bill #2008-2234, Substitute A, As Amended & House Bill #2008-8093, Substitute A, resp.). These were enacted into law on 7/8/08 and 7/5/08, resp.
- Legislative History

SUMMARY OF
2008 Public Law, Chapter 326 & 2008 Public Law, Chapter 297

COURT'S AUTHORITY TO WAIVE OR REMIT MONIES OWED

- Amends *RIGL Sec. 12-20-10. Remission of costs*, by adding the following strong, controlling, and superseding language

  Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment, or other costs of prosecution, provided no order of restitution shall be suspended by the court.

- When statutorily mandated court costs, fines, fees, assessments, and other costs of prosecution are waiveable in cases of indigency[1], qualification for and/or receipt of the following serves as *prima facie* evidence of indigency and limited ability to pay:
  - Temporary Assistance To Needy Families
  - Social Security including SSI and State Supplemental Payments Program
  - Public Assistance
  - Disability Insurance
  - Food Stamps
  - Despite the defendant's good faith efforts to pay, there are outstanding court orders for payment in the amount of $100.00 or more for any of the following
    - Restitution payments for victims of crime
    - Child support
    - Payments for any counseling required as a condition of the sentence imposed including but not limited to counseling for substance abuse, mental health, and domestic violence.

- Allows the court to waive victim's indemnity fund assessments upon a finding of indigency.

- Allows the court to waive court costs and victim's indemnity fund assessments on all counts or charges after the first two (2). [Prior law allowed waiver only after the first three (3)].

PROCEDURES TO DETERMINE A DEFENDANT'S ABILITY TO PAY & WAIVER OF COURT COSTS, FINES, FEES, ASSESSMENTS & OTHER COSTS OF PROSECUTION

---

[1] The following sections relating to the imposition of court costs, fines, fees, assessments, and other costs of prosecution that are waiveable in cases of indigency are specifically referenced:

1) *RIGL Sec. 12-18.1-3(d)*(Probation & Parole Support Act)
2) *RIGL Sec. 12-21-20*(recovery of fines, penalties, forfeitures, and costs relating to prosecution)
3) *RIGL Sec. 12-25-28(b)(as amended)*(special indemnity account for criminal injuries compensation)
4) *RIGL Sec. 12-28-4.01(c)(3)(iv)*(sic, should read *RIGL Sec. 21-28-4.01(c)(3)(iv)*(fees and assessments for violations of the Uniform Controlled Substances Act)
5) *RIGL Sec. 21-28-4.17.1*(assessment for drug education, counseling, and treatment)

- Superior Court – Judge makes a preliminary assessment of defendant's ability to pay immediately after sentencing by use of prescribed procedures.

- District Court - Judge makes a preliminary assessment of defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of prescribed procedures.

- Prescribed Procedures:

    - Must be standardized and include a Financial Assessment Instrument (FAI). The FAI must:

        - Be based on sound and generally accepted accounting principles
        - Be completed based on a personal interview of the defendant
        - Include information that relevant to a *prima facie* finding of indigency, *supra*.
        - Be made under oath
        - May from time to time and after hearing be modified by the court

    - When before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of these same prescribed procedures.

    - The court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information, shall not be limited.

ARREST ON WARRANTS & HEARINGS

- If the court is in session those arrested on a warrant must be brought before the court "immediately" – if not in session then at its "next session".

- If the court is in session those arrested on a warrant issued for to failure to pay must be afforded an ability to pay hearing within 48 hours of arrest - if not in session then at the time of the first court appearance consistent with the 48 hour requirement.

PRIORITY & DISPERSAL OF MONIES COLLECTED

- Monies collected on account shall be dispersed as follows:

    - 1st, court ordered restitution to victims shall be dispersed until the court's order is satisfied then

    - 2nd, court costs, fines, fees, assessments, and other costs of prosecution

Chapter 326
2008 -- S 2234 SUBSTITUTE A AS AMENDED
Enacted 07/08/08

A N A C T
RELATING TO CRIMINAL PROCEDURE -- WARRANTS FOR ARREST

Introduced By: Senators Metts, Pichardo, C Levesque, Issa, and Goodwin
Date Introduced: February 06, 2008

It is enacted by the General Assembly as follows:

SECTION 1. Section 12-6-7.1 of the General Laws in Chapter 12-6 entitled "Warrants for Arrest" is hereby amended to read as follows:

12-6-7.1. Service of arrest warrants. -- (a) Whenever any judge of any court shall issue his or her warrant against any person for failure to appear or comply with a court order, or for failure to make payment of a court ordered fine, civil assessment, or order of restitution, the judge may direct the warrant to each and all sheriffs and deputy sheriffs, the warrant squad, or any peace officer as defined in section 12-7-21, requiring them to apprehend the person and bring him or her before the court to be dealt with according to law; and the officers shall obey and execute the warrant, and be protected from obstruction and assault in executing the warrant as in service of other process. The person apprehended shall, in addition to any other costs incurred by him or her, be ordered to pay a fee for service of this warrant in the sum of one hundred twenty-five dollars ($125). Twenty-five dollars ($25.00) of the above fee collected as a result of a warrant squad arrest shall be divided among the local law enforcement agencies assigned to the warrant squad. Any person apprehended on a warrant for failure to appear for a cost review hearing in the superior court may be released upon posting with a justice of the peace the full amount due and owing in court costs as described in the warrant or bail in an other amount or form that will ensure the defendant's appearance in the superior court at an ability to pay hearing, in addition to the one hundred twenty-five dollars ($125) warrant assessment fee described above. Any person detained as a result of the actions of the justice of the peace in acting upon the superior court cost warrant shall be brought before the superior court at its next session. Such monies shall be delivered by the justice of the peace to the court issuing the warrant on the next court business day.

(b) Any person arrested pursuant to a warrant issued by a municipal court may be presented to a judge of the district court, or a justice of the peace authorized to issue warrants pursuant to section 12-10-2, for release on personal recognizance or bail when the municipal court is not in session. The provisions of this section shall apply only to criminal and not civil cases pending before the courts.

(c) Any person arrested pursuant to a warrant issued hereunder shall:

(1) be immediately brought before the court;

(2) if the court is not in session then the person shall be brought before the court at its next session;

(3) be afforded a review hearing on his/her ability to pay within forty-eight (48) hours; and

(4) if the court is not in session at the time of the arrest, a review hearing on his/her ability to pay will be provided at the time for the first court appearance, as set forth in subsection (c)(3) of this section.

SECTION 2. Section 12-18.1-3 of the General Laws in Chapter 12-18.1 entitled "Probation and Parole Support Act" is hereby amended to read as follows:

12-18.1-3. Court costs. -- (a) The court shall assess as court costs, in addition to those otherwise provided by law, against all defendants charged with a felony, misdemeanor, or petty misdemeanor, and who plead nolo contendere or guilty or who are found guilty of the commission of those crimes, as follows:

(1) Where the offense charged is a felony and carries a maximum penalty of five (5) or more years imprisonment, three hundred dollars ($300) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater;

(2) Where the offense charged is a felony and carries a maximum penalty of less than five (5) years imprisonment, one hundred eighty dollars ($180) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater; and

(3) Where the offense charged is a misdemeanor, sixty dollars ($60.00) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater.

(b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be remitted by the court.

(c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above ~~three (3)~~ two (2).

(d) If the court determines that the defendant does not have the ability to pay the costs as set forth in this section, the judge may by specific order mitigate the costs in accordance with the court's determination of the ability of the offender to pay the costs.

SECTION 3. Section 12-19-34 of the General Laws in Chapter 12-19 entitled "Sentence and Execution" is hereby amended to read as follows:

12-19-34. ~~Restitution payments~~ Priority of restitution payments to victims of crime. -- (a) (1) If a person, pursuant to sections 12-19-32, 12-19-32.1, or 12-19-33, is ordered to make restitution in the form of monetary payment the court may order that it shall be made through the administrative office of state courts which shall record all payments and pay the money to the person injured in accordance with the order or with any modification of the order; provided, in cases where court ordered restitution totals less than two hundred dollars ($200) payment shall be made at the time of sentencing if the court determines that the defendant has the present ability to make restitution.

(2) Payments made on account when both restitution to a third-party is ordered, and court costs, fines, and fees, and assessments related to prosecution are owed, shall be disbursed by the administrative office of the state courts in the following priorities:

(i) court ordered restitution payments to person injured until such time as the court's restitution is fully satisfied; and

(ii) court costs, fines, fees, and assessments related to prosecution after the full payment of restitution.

(3)~~(2)~~ Notwithstanding any other provision of law, any interest which has been accrued by the restitution account in the central registry shall be deposited on a regular basis into the violent crime indemnity fund, established by chapter 25 of this title. In the event that the office of the administrator of the state courts cannot locate the person or persons to whom restitution is to be made, the principal of the restitution payment shall be deposited into the general fund.

(b) The state is authorized to develop rules and/or regulations relating to assessment, collection, and disbursement of restitution payments when any of the following events occur:

(1) The defendant is incarcerated or on home confinement but is able to pay some portion of the restitution; or

(2) The victim dies before restitution payments are completed.

(c) The state may maintain a civil action to place a lien on the personal or real property of a defendant who is assessed restitution, as well as to seek wage garnishment, consistent with state and federal law.

SECTION 4. Section 12-20-10 of the General Laws in Chapter 12-20 entitled "Costs" is hereby amended to read as follows:

12-20-10. ~~Remission of costs~~ Remission of costs-Prohibition against remitting restitution to victims of crime-ability to pay-indigency. – (a) The payment of costs in criminal cases may, upon application, be remitted by any justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken. Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment or other costs of prosecution, provided no order of restitution shall be suspended by the court.

(b) For purposes of sections 12-18.1-3(d), 12-21-20, 12-25-28(b), 12-28-4.01(c)(3)(iv) and 21-28-4.17.1, the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay:

(1) Qualification for and/or receipt of any of the following benefits or services by the defendant:

(i) temporary assistance to needy families

(ii) social security including supplemental security income and state supplemental payments program;

(iii) public assistance

(iv) disability insurance; or

(v) food stamps

(2) Despite the defendant's good faith efforts to pay, outstanding court orders for payment in the amount of one-hundred dollars ($100) or more for any of the following:

(i) restitution payments to the victims of crime;

(ii) child support payments; or

(iii) payments for any counseling required as a condition of the sentence imposed including, but not limited to, substance abuse, mental health, and domestic violence.

SECTION 5. Section 12-21-20 of the General Laws in Chapter 12-21 entitled "Recovery of Fines, Penalties, and Forfeitures" is hereby amended to read as follows:

12-21-20. ~~Order to pay costs~~ Order to pay costs and determination of ability to pay. – (a) If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law.

(b) In superior court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing by use of the procedures specified in this section.

(c) In district court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of the procedures specified in this section.

(d) The defendant's ability to pay and payment schedule shall be determined by use of standardized procedures including a financial assessment instrument. The financial assessment instrument shall be:

(1) based upon sound and generally accepted accounting principles;

(2) completed based on a personal interview of the defendant and includes any and all

relevant information relating to the defendant's present ability to pay including, but not limited to, the information contained in section 12-20-10; and

(3) made by the defendant under oath.

(e) The financial instrument may, from time to time and after hearing, be modified by the court.

(f) When persons come before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of the procedures specified in this section.

(g) Nothing in this section shall be construed to limit the court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information.

SECTION 6. Section 12-25-28 of the General Laws in Chapter 12-25 entitled "Criminal Injuries Compensation" is hereby amended to read as follows:

12-25-28. Special indemnity account for criminal injuries compensation. -- (a) It is provided that the general treasurer establish a violent crimes indemnity account within the general fund for the purpose of paying awards granted pursuant to this chapter. The court shall assess as court costs in addition to those provided by law, against all defendants charged with a felony, misdemeanor, or petty misdemeanor, whether or not the crime was a crime of violence, and who plead nolo contendere, guilty or who are found guilty of the commission of those crimes as follows:

(1) Where the offense charged is a felony and carries a maximum penalty of five (5) or more years imprisonment, one hundred and fifty dollars ($150) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(2) Where the offense charged is a felony and carries a maximum penalty of less than five (5) years imprisonment, ninety dollars ($90.00) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(3) Where the offense charged is a misdemeanor, thirty dollars ($30.00) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be waived by the court unless the court finds an inability to pay.

(c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above ~~three (3)~~ two (2).

(d) Up to five percent (5%) of the state funds raised under this section, as well as federal matching funds, shall be available to pay administrative expenses necessary to operate this program. Federal funds for this purpose shall not supplant currently available state funds, as required by federal law.

SECTION 7. This act shall take effect upon passage.

Chapter 297
2008 -- H 8093 SUBSTITUTE A
Enacted 07/05/08

A N A C T
RELATING TO CRIMINAL PROCEDURE -- WARRANTS FOR ARREST

Introduced By: Representative J. Patrick O`Neill
Date Introduced: March 27, 2008

It is enacted by the General Assembly as follows:

SECTION 1. Section 12-6-7.1 of the General Laws in Chapter 12-6 entitled "Warrants for Arrest" is hereby amended to read as follows:

12-6-7.1. Service of arrest warrants. -- (a) Whenever any judge of any court shall issue his or her warrant against any person for failure to appear or comply with a court order, or for failure to make payment of a court ordered fine, civil assessment, or order of restitution, the judge may direct the warrant to each and all sheriffs and deputy sheriffs, the warrant squad, or any peace officer as defined in section 12-7-21, requiring them to apprehend the person and bring him or her before the court to be dealt with according to law; and the officers shall obey and execute the warrant, and be protected from obstruction and assault in executing the warrant as in service of other process. The person apprehended shall, in addition to any other costs incurred by him or her, be ordered to pay a fee for service of this warrant in the sum of one hundred twenty-five dollars ($125). Twenty-five dollars ($25.00) of the above fee collected as a result of a warrant squad arrest shall be divided among the local law enforcement agencies assigned to the warrant squad. Any person apprehended on a warrant for failure to appear for a cost review hearing in the superior court may be released upon posting with a justice of the peace the full amount due and owing in court costs as described in the warrant or bail in an other amount or form that will ensure the defendant's appearance in the superior court at an ability to pay hearing, in addition to the one hundred twenty-five dollars ($125) warrant assessment fee described above. Any person detained as a result of the actions of the justice of the peace in acting upon the superior court cost warrant shall be brought before the superior court at its next session. Such monies shall be delivered by the justice of the peace to the court issuing the warrant on the next court business day.

(b) Any person arrested pursuant to a warrant issued by a municipal court may be presented to a judge of the district court, or a justice of the peace authorized to issue warrants pursuant to section 12-10-2, for release on personal recognizance or bail when the municipal court is not in session. The provisions of this section shall apply only to criminal and not civil cases pending before the courts.

(c) Any person arrested pursuant to a warrant issued hereunder, shall:

(1) be immediately brought before the court;

(2) if the court is not in session then the person shall be brought before the court at its next session;

(3) be afforded a review hearing on his/her ability to pay within forty-eight (48) hours; and

(4) if the court is not in session at the time of the arrest, a review hearing on his/her ability to pay will be provided at the time for the first court appearance, as set forth in subsection (c)(3) of this section.

SECTION 2. Section 12-18.1-3 of the General Laws in Chapter 12-18.1 entitled "Probation and Parole Support Act" is hereby amended to read as follows:

12-18.1-3. Court costs. -- (a) The court shall assess as court costs, in addition to those otherwise provided by law, against all defendants charged with a felony, misdemeanor, or petty misdemeanor, and who plead nolo contendere or guilty or who are found guilty of the commission of those crimes, as follows:

(1) Where the offense charged is a felony and carries a maximum penalty of five (5) or more years imprisonment, three hundred dollars ($300) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater;

(2) Where the offense charged is a felony and carries a maximum penalty of less than five (5) years imprisonment, one hundred eighty dollars ($180) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater; and

(3) Where the offense charged is a misdemeanor, sixty dollars ($60.00) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater.

(b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be remitted by the court.

(c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above ~~three (3)~~ two (2).

(d) If the court determines that the defendant does not have the ability to pay the costs as set forth in this section, the judge may by specific order mitigate the costs in accordance with the court's determination of the ability of the offender to pay the costs.

SECTION 3. Section 12-19-34 of the General Laws in Chapter 12-19 entitled "Sentence and Execution" is hereby amended to read as follows:

12-19-34. ~~Restitution payments~~ Priority of restitution payments to victims of crime. -- (a) (1) If a person, pursuant to sections 12-19-32, 12-19-32.1, or 12-19-33, is ordered to make restitution in the form of monetary payment the court may order that it shall be made through the administrative office of state courts which shall record all payments and pay the money to the person injured in accordance with the order or with any modification of the order; provided, in cases where court ordered restitution totals less than two hundred dollars ($200) payment shall be made at the time of sentencing if the court determines that the defendant has the present ability to make restitution.

(2) Payments made on account when both restitution to a third-party is ordered, and court costs, fines, and fees, and assessments related to prosecution are owed, shall be disbursed by the administrative office of the state courts in the following priorities:

(i) court ordered restitution payments to person injured until such time as the court's restitution is fully satisfied; and

(ii) court costs, fines, fees, and assessments related to prosecution after the full payment of restitution.

(3)~~(2)~~ Notwithstanding any other provision of law, any interest which has been accrued by the restitution account in the central registry shall be deposited on a regular basis into the violent crime indemnity fund, established by chapter 25 of this title. In the event that the office of the administrator of the state courts cannot locate the person or persons to whom restitution is to be made, the principal of the restitution payment shall be deposited into the general fund.

(b) The state is authorized to develop rules and/or regulations relating to assessment, collection, and disbursement of restitution payments when any of the following events occur:

(1) The defendant is incarcerated or on home confinement but is able to pay some portion of the restitution; or

(2) The victim dies before restitution payments are completed.

(c) The state may maintain a civil action to place a lien on the personal or real property of a defendant who is assessed restitution, as well as to seek wage garnishment, consistent with state and federal law.

SECTION 4. Section 12-20-10 of the General Laws in Chapter 12-20 entitled "Costs" is hereby amended to read as follows:

12-20-10. ~~Remission of costs~~ Remission of costs-Prohibition against remitting restitution to victims of crime-ability to pay-indigency. – (a) The payment of costs in criminal cases may, upon application, be remitted by any justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken. Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment or other costs of prosecution, provided no order of restitution shall be suspended by the court.

(b) For purposes of sections 12-18.1-3(d), 12-21-20, 12-25-28(b), 12-28-4.01(c)(3)(iv) and 21-28-4.17.1, the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay:

(1) Qualification for and/or receipt of any of the following benefits or services by the defendant:

(i) temporary assistance to needy families

(ii) social security including supplemental security income and state supplemental payments program;

(iii) public assistance

(iv) disability insurance; or

(v) food stamps

(2) Despite the defendant's good faith efforts to pay, outstanding court orders for payment in the amount of one-hundred dollars ($100) or more for any of the following:

(i) restitution payments to the victims of crime;

(ii) child support payments; or

(iii) payments for any counseling required as a condition of the sentence imposed including, but not limited to, substance abuse, mental health, and domestic violence.

SECTION 5. Section 12-21-20 of the General Laws in Chapter 12-21 entitled "Recovery of Fines, Penalties, and Forfeitures" is hereby amended to read as follows:

12-21-20. ~~Order to pay costs~~ Order to pay costs and determination of ability to pay. – (a) If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law.

(b) In superior court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing by use of the procedures specified in this section.

(c) In district court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of the procedures specified in this section.

(d) The defendant's ability to pay and payment schedule shall be determined by use of standardized procedures including a financial assessment instrument. The financial assessment instrument shall be:

(1) based upon sound and generally accepted accounting principles;

(2) completed based on a personal interview of the defendant and includes any and all

relevant information relating to the defendant's present ability to pay including, but not limited to, the information contained in section 12-20-10; and

(3) made by the defendant under oath.

(e) The financial instrument may, from time to time and after hearing, be modified by the court.

(f) When persons come before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of the procedures specified in this section.

(g) Nothing in this section shall be construed to limit the court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information.

SECTION 6. Section 12-25-28 of the General Laws in Chapter 12-25 entitled "Criminal Injuries Compensation" is hereby amended to read as follows:

12-25-28. Special indemnity account for criminal injuries compensation. -- (a) It is provided that the general treasurer establish a violent crimes indemnity account within the general fund for the purpose of paying awards granted pursuant to this chapter. The court shall assess as court costs in addition to those provided by law, against all defendants charged with a felony, misdemeanor, or petty misdemeanor, whether or not the crime was a crime of violence, and who plead nolo contendere, guilty or who are found guilty of the commission of those crimes as follows:

(1) Where the offense charged is a felony and carries a maximum penalty of five (5) or more years imprisonment, one hundred and fifty dollars ($150) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(2) Where the offense charged is a felony and carries a maximum penalty of less than five (5) years imprisonment, ninety dollars ($90.00) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(3) Where the offense charged is a misdemeanor, thirty dollars ($30.00) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be waived by the court unless the court finds an inability to pay.

(c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above ~~three (3)~~ two (2).

(d) Up to five percent (5%) of the state funds raised under this section, as well as federal matching funds, shall be available to pay administrative expenses necessary to operate this program. Federal funds for this purpose shall not supplant currently available state funds, as required by federal law.

SECTION 7. This act shall take effect upon passage.

Senate Bill No.2234 SUB A as amended
Chapter 326
BY Metts, Pichardo, Levesque C, Issa, Goodwin
ENTITLED, AN ACT RELATING TO CRIMINAL PROCEDURE -- WARRANTS FOR ARREST
(amend the procedures for collection of fines, fees, costs, assessments and restitution in criminal cases/set a priority of payments/set forth a procedure for standardizing a determination of a defendant's ability to pay)
{LC880/1/A}
02/06/2008 Introduced, referred to Senate Judiciary
06/05/2008 Scheduled for hearing and/or consideration
06/05/2008 Committee recommends passage of Sub A
06/11/2008 Placed on Senate Calendar
06/17/2008 Senate passed Sub A as amended (floor amendment)
06/18/2008 Placed on House Calendar
06/20/2008 House passed Sub A as amended in concurrence
06/30/2008 Transmitted to Governor
07/08/2008 Effective without Governor's signature

House Bill No.8093 SUB A
Chapter 297
BY O`Neill
ENTITLED, AN ACT RELATING TO CRIMINAL PROCEDURE -- WARRANTS FOR ARREST
{LC2588/1/A}
03/27/2008 Introduced, referred to House Judiciary
04/24/2008 Scheduled for hearing and/or consideration
04/24/2008 Committee recommended measure be held for further study
06/17/2008 Scheduled for hearing and/or consideration
06/17/2008 Committee recommends passage of Sub A
06/17/2008 Placed on House Calendar
06/19/2008 House passed Sub A
06/19/2008 Placed on the Senate Consent Calendar
06/20/2008 Senate passed Sub A in concurrence
06/27/2008 Transmitted to Governor
07/05/2008 Effective without Governor's signature

CONTACT INFORMATION // OFFICE

Michael A. DiLauro
Assistant Public Defender //
Director of Training & Legislative Liaison
Office of the Public Defender
160 Pine Street
Providence, RI 02903
401-222-3492 // 401-222-1526 [PRIVATE LINE]
401-487-3644 [CELL] // 401-222-3289 [FAX]
mdilauro@ripd.org [E-MAIL // WORK]
madpd2001@yahoo.com [E-MAIL // WORK]
====

YOUR SOURCE FOR ALL THINGS LOCAL

motif

APR 4 - APR 18, 2019

MOTIFRI.COM

FREE!

Law We Plead the Fifth

4/4 4/18

4 THE FRONT

We didn't do it, nobody saw us do it, you can't prove anything! Our rule of thumb at *Motif* is to never put anything in writing. But you sure did in our cannabis poll! Check out the results. We also give you the scoop on Record Store Day and provide a friendly reminder to vote in our tattoo awards. Sorry guys – prison tattoos is not a category. Enjoy our second annual legal issue, and shout out to all those letter writers from prisons near and far!

GO TO MOTIFRI.COM FOR MORE

PUBLISHER Mike Ryan **EDITOR-IN-CHIEF** Emily Olson
LAYOUT DESIGN Will Stiles **SOCIAL MEDIA** Rob Smith **MUSIC EDITOR** Marc Clarkin
THEATER EDITOR Terry Shea **FOOD EDITOR** Jenny Currier
SALES Bruce Allen, Kelly Cannone
PR Amadeus Finlay **ASSOCIATE PUBLISHER** Greg Ferland **DISTRIBUTION** Mike Bilow

PHONE 401-312-3305 **WEB** motifri.com
EMAIL news@motifri.com for news · getout@motifri.com for events
/motifri /motifri
OFFICES 65 BLACKSTONE AVE, PAWTUCKET, RI 02860

COVER: Illustration by CRAIG HOLLAND
CREDITS: ERMINIO PINQUE/BIG NAZO (Monster Of The Month), ROB SMITH, TESS LYONS, KLEO SINCERE (Listings), MICHAEL BILOW, WILL STILES, KLEO SINCERE (Photos)

ON THE WEB

WRITERS FLOCK

DID YOU EVER SEE the episode of "The Simpsons" where Lisa Simpson (the most intellectual member of the family) gets invited to join the Springfield chapter of Mensa? That's how it felt to walk into Providence's What Cheer Writers Club (WCWC).

If that reference falls flat for you, Lisa (often treated like the black sheep due to her intelligence) finally feels at home when she attends a private club for Springfield's brightest and most insightful townsfolk. It's a safe haven for the town's gifted and talented to listen to classical music, top each others' palindromes and discuss local library policy. I'm not comparing myself to Lisa Simpson in this scenario, but I would certainly compare What Cheer Writers Club to the Springfield Mensa chapter (minus Principal Skinner). *For more, motifri.com/writers-flock* - Chuck Staton

DELAY ALZHEIMER'S DISEASE?

I WATCHED MY FATHER turn from a marathon runner and 11-time elected public official into a shrunken, lost soul, as transluscent as wax. At the assisted living home where he finally landed, he believed he was in a hotel and getting ready to move on to the next destination. His vacant eyes, and the total lack of recognition in them, was disturbing. I could carry the gene for Alzheimer's disease myself, so this is a question that I keep close to heart: Has medical science made any advances at all in curing this relentless disease?

Alzheimer's disease is an irreversible, progressive brain disorder that slowly destroys memory and thinking skills. Eventually, one loses the ability to carry out the simplest tasks. Scientists are still playing a guessing game as to the cause, but a combination of genetics, lifestyle and environmental factors seem to influence when Alzheimer's disease begins and how it progresses. The markers can start long before the onset of the disease – if a person has problems remembering, learning, concentrating or making decisions, they may be more likely to develop Alzheimer's. Myriad other factors may influence the onset as well, including early head injuries. *For more, motifri.com/alzheimers-disease* - Cathren Housley

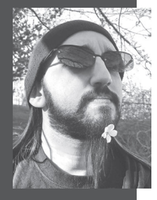
ON THE COVER

ILLUSTRATOR **CRAIG HOLLAND** is the genius behind this issue's cover depicting **David Cicilline, Gina Raimondo** and **Nicholas Mattiello** peering at their victim – maybe you? – in a car trunk. We talked to Holland a bit about his illustration style.

"It's a mix of comics and impressionism. I like the crisp shapes of comics and the bold colors of impressionism. I like to find things that don't go together and make it work, and often use textures, such as bark leaves and water ripples."

To see more of Holland's work, go to his website at craighollandillustration.com or follow him on Facebook at Craig Holland Illustration or on Instagram and Twitter: @Chollandart. He also has a coloring comic book called Color Me Reggie available on Amazon.

CONTRIBUTORS



CRIMSON AL-KHEMIA has been *Motif*'s go-to writer for everything slightly off the beaten path for as long as we've known him. He's been a roller derby announcer and commentator for WFTDA, MRDA and JRDA for seven years and often is asked to emcee rock concerts and burlesque shows, among other events. He's a triple threat: a musician, author and former pro wrestler, and regularly fundraises for causes close to his heart, including homelessness, domestic violence support, mental health organizations, opioid recovery programs and LGBTQ groups.

CHUCK STATON is a filmmaker who works for the guys from AMC's "Comic Book Men" and TruTV's "Impractical Jokers" on their podcasts, Tell Em Steve Dave. Chuck does his own podcast, "The Chuck and Brad Podcast," and is the lead singer of punk band Senior Discount. He also thinks the RI food scene is "wicked good."

the front

FINDING THE EDGE

The Gamm wraps up Season 34 (and the first year in their new space in Warwick) with Sam Shepard's gritty (is there any other way to describe Shepard?) *True West*. Alternately hilarious and horrifying, Shepard's script is a study in toxic masculinity – this is Cain and Abel through the lens of modern-day America. Lest anyone be turned off by what sounds like a bro-fest, director **Tony Estrella** has collected a cast that is more than up to the subtle challenges of roles that have come to be associated with some of the premier male actors of our time. **Steve Kidd** (recently seen as Astrov in *Uncle Vanya*) and **Anthony Goes**, who turned heads as Stanley in *A Streetcar Named Desire*, play the feuding brothers whose delicate relationship combusts in a frenzy of male angst, petty burglary, compasses and ... screenwriting.

Estrella said, "Shepard earned the title 'poet laureate of America's emotional badlands' by delving into the bleakest corners of family life. In this truly American classic, he seems to be asking, 'What is the true west? Where is the edge of American civilization?' Shepard locates that frontier in each of us, animating the thin veneer that separates savagery from civility." Noting that The Gamm's very first production (35 years ago) was Shepard's inscrutable one-act, *Cowboy Mouth*, Estrella calls *True West* "one of the all-time greatest American plays and the first Shepard work we have embarked on in too long of a time."

In this story of the estranged brothers, Austin and Lee, Shepard gives us a brutal, yet naturalistic, dark comedy. Loosely tied to some of his other work, *True West* stands alone as a play that seems deceptively simple but unspools over time, providing all of the ingredients for sublime performance opportunities. It is that very opportunity that should draw audiences to *True West*, and we'll see if Kidd and Goes are up to the challenge. Also featuring **Richard Donelly** (another Gamm favorite) and the estimable **Rae Mancini** (whose recent performance in WomensWork's *My Left Breast* was a standout), The Gamm has upped the odds for what promises to be a stunning season closer. – Terry Shea

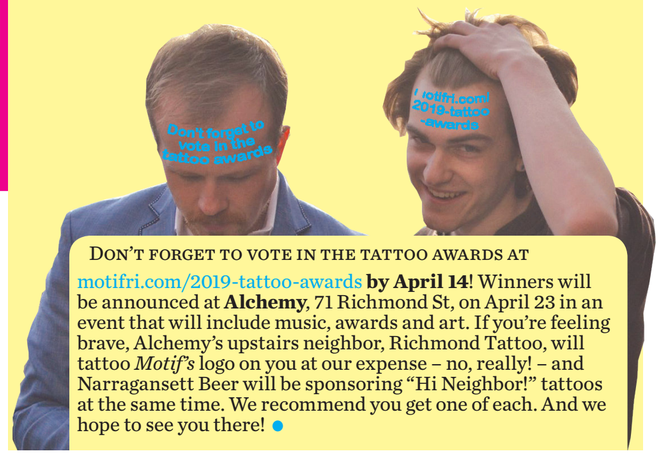
Sam Shepard's True West, directed by Tony Estrella, runs Apr 11 - May 5 at The Gamm Theatre, 1245 Jefferson Blvd, Warwick. For tickets, call 401-723-4266 or order at gammtheatre.org.

Record Store Day is fast approaching on April 13, so mark your calendars! This celebration comes 'round once a year to recognize the important role independent record stores play in their communities and the lives of people who love music. A quick download has nothing on the tactile experience of flipping through albums, having access to knowledgeable salespeople who can point you toward something new and having proximity to fellow audiophiles that takes place in a brick-and-mortar shop. Find out how your favorite local shop is celebrating by searching for it on recordstoreday.com. Happy hunting! ●

* including medical homegrowing.

To set the reecord straight, Will made the record graphic.

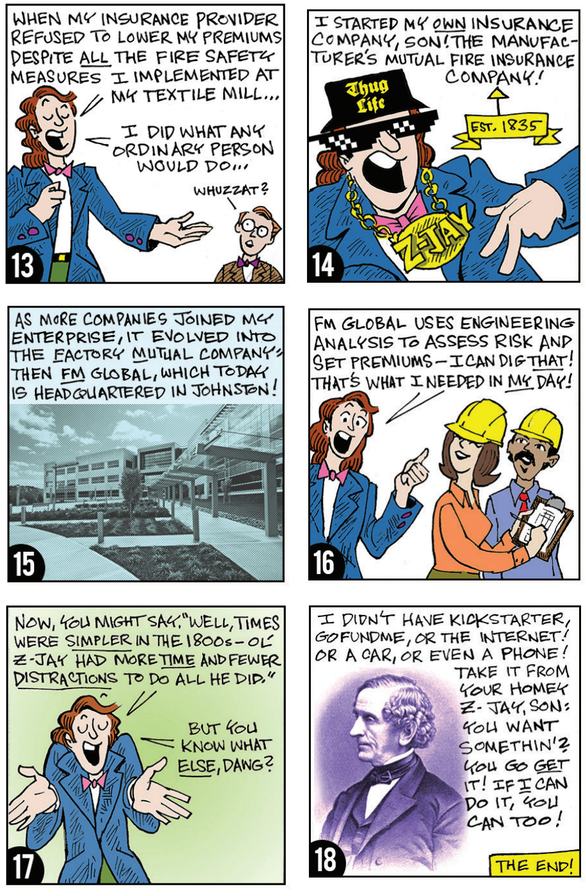
We thought about inking this on our foreheads, but decided to ink it in this issue instead.



Don't forget to vote in the tattoo awards at motifri.com/2019-tattoo-awards **by April 14**! Winners will be announced at **Alchemy**, 71 Richmond St, on April 23 in an event that will include music, awards and art. If you're feeling brave, Alchemy's upstairs neighbor, Richmond Tattoo, will tattoo *Motif's* logo on you at our expense – no, really! – and Narragansett Beer will be sponsoring "Hi Neighbor!" tattoos at the same time. We recommend you get one of each. And we hope to see you there! ●

FEST BY TIM LEMIRE

TRUE TALES OF RHODE ISLANDERS



PHILLIPE & JORGE'S COOL, COOL WORLD!

THROW AWAY THE KEY!

Honestly ... what is going on around here?

BLAMELESS OR SHAMELESS?

PHILLIPE & JORGE CAN BARELY MAKE space to comment on the cascading affronts to decency, honesty and intelligence offered up by our conman/cheat/racist president and his toadies. And the level of outright corruption in Washington, DC, must make disgraced authoritarians like Venezuela's President Maduro whinny in delight that our presidency is as despicable as his own.

Nowhere is there a better example of kissing dictators' asses for money than Paul "Burning Tire" Manafort. Known as "the torturer's lobbyist," he is a perfect accomplice for President Lying Crybaby, given the latter's disposition to put his lips to the derrieres of such wonderful folks as North Korea's fat frog Kim Jong-un, Muhammad bin Salman from Saudi Arabia, and, of course, the delightful Vladimir Putin, who would slit your throat without batting an eye. Just don't get any blood on that Armani suit. Although, thatwould provide another opportunity to pose shirtless, eh?

In giving Manafort a slap on the wrist for his treasonous activities in cahoots with The Big Cheeto, Eastern District of Virginia Court Judge TS Ellis III said in explanation of his leniency, "He's lived an otherwise blameless life." (Note: Keep a running eye on Ellis' bank account, investments and future employers. As Robert DeNiro's character said when he went ballistic after the JFK heist in *Goodfellas,* "You don't buy your wife a fucking mink coat" two weeks after divvying up the cash.)

Blameless? Excuse me? Manafort represented some of the vilest international political leaders ever, who looted their countries' treasuries to the tune of millions of dollars while keeping a foot perched on the throats of the nation's poorest. At the top of the batting order were former President Suharto of Indonesia, Ferdie Marcos of the Philippines, Mobutu Sese Seko of Zaire (now Congo) and Sani Abacha of Nigeria. Burning Tire working for these Goon Squad idols would be like being employed by Benito Mussolini and saying, "Boy, those trains sure run on time," as every cent at the turnstiles went into his pocket.

P&J have seen this firsthand in Indonesia. Once Suharto was disposed for flagrant thievery and being a bully boy, folks there would still only speak about him in very hushed tones. Life's cheap in those places, so even disposed ghosts can haunt you. And if you think our voting system is a train wreck, how about casting a vote in an already rigged election while a soldier with an AK-47 looks over your shoulder?

Manafort should be imprisoned for the rest of his life for those assaults on humanity, nevermind his wet work for Donald Trump. Blameless, indeed. And shameless?

Take a bow, Judge Ellis.

SOCIALIST LUBRICATION

THAT SHOWER OF ASSHOLES we know as the Republican party thinks they have latched on to a great negative buzzword for their Democratic opponents: socialist. These lying, delusional, supposedly keen GOP political strategists think that as long as they can grab the phrase "Democratic socialists" that Bernie Sanders made popular in 2016, they can convince everyone that "socialism" means societally tainting white folks into forced interaction with the great unwashed, blacks/Latinos/WOGs of all sorts, and eventually will lead to Josef Stalin's picture adorning a wall in the Oval Office.

Thus, P&J have an offer to make to these reactionary chowderheads. If you or any of your relatives (like elderly Mom and Dad) are currently availing themselves of Social Security, Medicare or Medicaid, tell the government to stop subsidizing them with these kinds of socialist programs. Take away that monthly SS check and their oxygen tanks, hit them up for $40 per prescription and when they run out of money, well, you may as well shove them off a cliff. Oh, we almost forgot. Start paying for Sissy and Junior's K-12 education straight out of pocket with no federal help. That, ladies and gentlemen, in a basic sense, is socialism, but the GOP idiots don't even know it. (Cue Springsteens's "Born in the USA" and the Village People's "YMCA," which the Republicans embarrassingly dance – badly – to every time they get together without a clue as to what the lyrics mean.) So if you are taking advantage of any of these life-saving programs while calling Bernie Sanders a commie, get stuffed. And put dear old Mom and Dad out on the curb with this week's trash barrels.

ANOTHER OPPORTUNITY TO POSE SHIRTLESS

And if you are a crotchety old man or woman (we know a little about this), let's talk about another dastardly socialist scheme: the GI Bill. One of America's greatest post-war moves was the GI Bill that was socialistic and a key to building a large middle class. (P&J's fathers both fought in the war, and were able to avail themselves, to one degree or another, of this grand and uncontested entitlement.) This equity and job opportunity builder was a lifesaver for many courageous young men and women who served their country. And, as the GOP suggests, if you say "socialism" means communism and dictatorship, you are about as dumb as P&J have already bet you are. Honestly, as our mothers would say.

ANOTHER TALE OF LOCAL GREED

SADLY, WE SEE STORIES like this on a regular basis but, since in the not-too-long-ago past P&J actually dined at both of these joints, we feel it incumbent on us to alert our readers to this story.

According to a *Providence Business News* story dated March 25, the US Department of Labor has filed a lawsuit against the owners of two East Providence restaurants (**Madeira Restaurant** and **Al's Waterfront Restaurant and Marina**) for allegedly screwing 11 employees out of rightfully earned wages (basically failure to pay overtime wages for hours worked over their 40 hour work weeks).

One Department of Labor official referred to the failure to pay as a "fraudulent scheme." Your superior correspondents will no longer patronize these establishments and suggest you do the same. ●

Catch our food award nominees in the next issue! Most often sued is not a category.

OPINION

alt-facts

MUELLER...? MUELLER...?

Don't take a bunk day on seeing the truth

BY NEWSPAPER COWBOY

MULLING MUELLER

DONALD TRUMP MAY HAVE been partially exonerated by the Mueller report, but that does not stop many – this column included – from continuing to find the president entirely unsuitable for office. According to William Barr, Mueller stopped short of reporting that the president is guilty of obstruction of justice. Despite the partial exoneration, we must not lose sight of the bigger – and far more concerning – picture. The mere fact that a sitting president is so highly suspect that his pre-office activities spurred an investigation into treasonous conduct with a foreign power is in itself utterly damning. And let's not forget that five of those individuals closest to Mr. Trump on the campaign trail are now in prison for their actions, with a further two awaiting sentencing and yet more (including 26 Russian nationals and officials) also charged with seditious activity.

And then there is the expectation that a president should be presidential, not a capricious bigot with a temper. Nor should anyone ever mock the disabled, or employ chauvinism as a matter of fact, particularly when they are in a position of power where the burden is to lead by example. By incorrectly claiming that the president achieved full exoneration, those in MAGA hats believe that the report somehow validates the actions of the president as *carte blanche* acceptance, and that sets a very dangerous precedent indeed. In short, we must not allow Trumpeteers to interpret the Mueller report as a victory, nor support the notion that the findings are permission to install hatred as the foundation of American politics. Donald Trump is a megalomaniac propped up by ideological sycophants; he must not become the low bar against which future political figures are measured. Rather, he must be viewed for what he really is: a dishonest and capricious opportunist who is utterly unfit to be the president of these United States.

THOSE IN MAGA HATS BELIEVE

RUNNING FREE, YEAH!

GOOD NEWS FOR AFRICAN AMERICANS! Earlier in the month, our northern neighbors at the Massachusetts Supreme Judicial Court ruled that black people running away from police is no longer inherently suspicious. In what has been heralded as a positive step toward the modern era, the Bay State also exonerated Jesse Owens and Usain Bolt for all their distrustful behavior in the public eye, while continuing to remind the rest of the world just how great Massachusetts is at everything progressive. Whether a further law will come to pass requiring the police to stop considering being born black as inherently suspicious is still very much up in the air.

THE SEVENTH RING

Intercourse, Fla. – New England Patriots owner (oft-confused for a cheese magnate), Bob "Red Wine" Kraft, was recently caught in the company of a group of prostitutes at a "massage parlor" in Florida's Palm Beach County.

According to local sources, search warrants had been issued to the police with the directive of installing video cameras in the facility, and "on two occasions [they] saw [Kraft] pay cash and receive sex acts." But the man who owns Tom Brady hasn't lost any favor with longtime pal and fellow womanizer Donald "Golden Showers" Trump. In fact, the president is set to be going ahead with his plan to bring the Superbowl winners to the White House in April (whether any show up is another matter). Commenting on the allegation, old Donnie predictably commented that he was "surprised" by the allegations before going on to emphasize that the 77-year-old oligarch "has denied" all wrongdoings. Eager to get the real story, *Motif* met with an anonymous source from inside the Patriots organization who claimed, "With all the clamor around our sixth Superbowl win, and with Gronk retiring, Mr. Kraft went to Florida simply to ensure our fans, through him, get to enjoy a seventh ring." ●

Whatever happened to trumped up charges?

FEATURE

IRONSIDE

Langevin talks about what led him to serve

BY BILL BARTHOLOMEW


James Langevin

James Langevin is the United States Representative for Rhode Island's second congressional district, a post he has held since 2001. Langevin served in several key roles in state government before his election to Congress, where he is a member of the House Armed Services and Homeland Security Committees. Congressman Langevin is a legacy figure in RI and beyond. He's the first quadriplegic to serve in Congress, and became the first quadriplegic appointed Speaker Pro Tempore during the 116th Congress.

He became quadriplegic following an accident involving a gun, which occurred while he was a high school summer cadet with the Warwick Police Department. Following the accident, Langevin pivoted his passion for law from law enforcement to law and policy-making, and has been a respected and credible RI leader for the better part of the last three decades.

During an extensive conversation conducted with Representative Langevin for *The Bartholomewtown Podcast*, the Congressman offered revealing insights into his motivation to serve.

James Langevin: Unfortunately, things don't always turn out as we think they will. In my case, unfortunately, I was in that police locker room with two police officers. One of them had a new weapon that he had purchased, and the other officer didn't realize there was a bullet in the pipe. He pulled the trigger to test it, and the bullet ricocheted off of a locker, went into my neck and separated my spinal cord. So, I've been paralyzed ever since. That was in 1980, and you could imagine what it did to my dream of law enforcement. It was a challenging time – a difficult time to go through a transition.

I had to make adjustments, both physical and otherwise. And one of the biggest things was that I was asking myself, "What am I gonna do with my life?"

I was very fortunate to have an incredibly supportive community that rallied around me and my family at a time that we needed it the most, and that had a profound impact on me. It showed me what people can do when they care about making a difference in someone's life. I guess that is the essence of what public service is all about: How do we make a difference in our community? For myself, I said, "You know what? If I can ever do something to give back, I would want to do that and to try to jump at the chance." And it happened that one thing led to another and I started getting more and more interested in government and public service. It was suggested that I might want to try my hand at running for political office.

Bill Bartholomew *(Motif)*: You've been an elected official in RI for a good while. You're an old guard Rhode Islander. What's that experience like?

JL: Thank you. I'm very honored to have the trust and support of the people who elected me and reelected me time and again. The responsibility is never lost on me, and I'm grateful for people believing in me and supporting me.

THE ESSENCE OF WHAT PUBLIC SERVICE IS

I have a great relationship with my colleagues in the RI Congressional Delegation. **Senator Reed**, who's been in the Congress, thankfully longer than I have [he laughs] – he's the most senior of all us. We always have Rhode Island's interest at heart. Generally, on all issues, we're pulling in the same direction. I'm fortunate in that respect, so it makes my job easier.

BB: The proximity of all of us in RI, obviously there are four congressional delegates, and you have a constituency that has above average access to each of you at any given point in time.

JL: Sure. I mean, the fact that RI is such a small state makes it so everyone kind of knows each other or are related to each other. That's one of the benefits of a small state, that you have access to the top elected officials. You know, when they say, "The next time I see the, you know, the governor or congressman, a senator, I'm going to let them know how I feel;" for good or bad, Rhode Islanders are able to do that.

It's an accountability factor. Accountability is another reason why I come back to RI every weekend with rare exception. Sometimes I'm traveling on business or I have to stay in Washington, but almost every weekend, now, I'm back home. It's important to stay in touch with the people I represent. ●

To hear the complete Bartholomewtown Podcast featuring Congressman Langevin, listen on your favorite podcast app or bartholomewtown.com

Photo courtesy of Wikimedia Commons

OPINION

WE THE PEOPLE

Establishing the rule of law

BY MICHAEL BILOW

Civilization is the product of rule of law – respect for life, equality of individuals, protection of the weak from the strong – that separates us from the alternative, the so-called "law" of the jungle that is complete absence of law. An absolute monarch or dictator "whose word is law" exercises naked power where "might makes right" in the absence of law. By definition, rule of law is the principle that law is superior to the will or whim of any individual.

In our society, we have come to expect rule of law. This does not mean that we do not also expect some law-breaking, but we understand it as deviation from the norm. What has the potential to truly destroy the world as we know it is if law-breaking and disregard for the law become the new normal.

Disabusing our overconfidence that classical liberal ideals valuing individual freedom and liberty had become irreversibly ascendant everywhere, we have been shocked by entire nations backsliding toward authoritarianism. Turkey has degenerated under Recep Tayyip Erdoğan from secular multiparty democracy to Islamist dictatorship, imprisoning thousands for alleged treason. Hungary has gone under Viktor Orbán from an emerging democracy escaping communist oppression to a sham democracy where cronies use government cash to buy up industrial concerns and opposition press. The Philippines under Rodrigo Duterte is engaging in (apparently politically popular) extra-judicial murders of accused criminals without trial. Venezuela under Hugo Chávez and successor Nicolás Maduro continues to pursue ruinous socialist policies that cause mass starvation and economic devastation. Even Israel, a liberal democracy where such a thing would have been unthinkable a few years ago, is about to hold an election where Benjamin Netanyahu, the incumbent prime minister, may still win despite facing criminal indictment for corruption. Russia under Vladimir Putin reversed its liberalizing course after the end of the Cold War and instead has returned to outright fascism where political opponents, including journalists, are openly assassinated. Perhaps most disturbing of all overseas, Xi Jinping of China has consolidated power in a way not seen since Mao Zedong, explicitly expressing hostility to principles of liberalism and pluralism that have always been understood in the West as prerequisite to a modern economy, insisting upon an alternative model of political theory that has been officially termed "Xi Jinping Thought."

Yet it has been Western democracies, and the United States specifically, that have for centuries been the leading exponents and advocates for rule of law. In the United States, we have fallen into the habit of exceptionalism, pretending that we have a magical exemption from the lessons of history. We don't. At the close of the Constitutional Convention in 1787, Benjamin Franklin was asked what kind of government had been decided, and he famously answered, "A republic, if you can keep it." I reiterated that point myself a week before the 2016 election: "Once surrendered, freedom is very hard to get back." (motifri.com/decency "Donald Trump: At Long Last, Have You No Sense of Decency?", Nov 2, 2016).

As much as George Washington made it his priority to establish and preserve rule of law, Donald Trump makes it his priority to undermine it. Trump has very different motivations from his supporters, to say the least, but they share one overriding thing in common: They have lost confidence in the rule of law, if they ever had any.

Trump lacks real ideology, but he does have an existential belief that he should do whatever he can get away with. He benefited in the 1990s from tax evasion by his father in connection with the transfer of almost half a billion dollars from father to son, and then repeatedly lied about it. He appointed family members with no qualifications as senior advisers and overrode regulations to get them security clearances. Over 350 Trump appointees were lobbyists, of whom 50 work directly in the Executive Office of the President and 200 were appointed to regulate the industry for which they lobbied. He has been accused of sexual assault by at least 20 different women.

BELIEF THAT HE SHOULD DO WHATEVER HE CAN GET AWAY WITH

Trump appealed to voters who lost faith and confidence in the American Dream, who believed that they followed all of the rules and still were treated unfairly. Rather than try to restore faith and confidence in rule of law – to literally Make America Great Again – Trump shared and exploited that lack of faith and confidence, ushering in a cynical kleptocracy. Many people intuit that by doing this Trump is playing with fire, but few appreciate how big the conflagration could grow.

Historian Timothy Snyder said in an interview with *Salon*: "The Greeks understood that democracy is likely to produce oligarchy because if you don't have some mechanism to get inequality under control then people with the most money will likely take full control. With Trump, one sees the new variant of this where a candidate can run by saying, 'Look, we all know – wink, wink, nudge, nudge – that this isn't really a democracy anymore.' He doesn't use the words but basically says, 'We all know this is really an oligarchy, so let me be your oligarch.'"

Snyder in 2015 published *Black Earth: The Holocaust as History and Warning*, in which he makes the radical assertion that the conscious goal of Adolf Hitler and Nazism was to destroy civilization to unleash a struggle for survival of the fittest. I am not saying that Trump is a Nazi, and I am especially not saying that any significant numbers of Trump supporters are Nazis, but I am saying that what ultimately stops America, like everywhere else, from the risk of backsliding into fascism is rule of law and a social consensus that maintains faith and confidence in it. ●

FEATURE

THE PRICE OF JUSTICE

Does wealth influence the legal system?

BY AMADEUS FINLAY

On the evening of June 15, 2013, Breanna Mitchell's SUV broke down on the side of a country road in rural Texas. Fortunately for Mitchell, local mother and daughter Hollie and Shelby Boyles stopped to help, as did passing youth pastor Brian Jennings. With things looking up, the newfound friends exchanged pleasantries as they worked to get Mitchell back on her way. But none of them would ever move from that spot. Moments later, 16-year-old Ethan Couch came barreling around the corner at 70 miles per hour, his father's Ford F-350 pickup loaded with stolen beer. Couch lost control and plowed into Mitchell's SUV before colliding with Jennings' parked car. Mitchell, Jennings and both Boyles were killed instantly. In custody three hours later, Couch had a blood alcohol content three times the legal limit and tested positive for marijuana and Valium. With prosecutors seeking the maximum 20-year jail sentence for manslaughter and assault, the judge ruled that the son of millionaire Fred Couch was a product of "affluenza" and would be sentenced to attend rehabilitation at his parents' expense instead. A portmanteau of affluence and influenza, affluenza is an inability to understand the consequences of actions due to financial privilege, coupled with an inability to understand that actions bear consequences due to the conviction that wealth buys immunity.

Also aged 16 at the time of her conviction was Cyntoia Brown. The abandoned daughter of a Tennessee crack addict, Brown fled the horrors of home only to be groomed by a local pimp, Garion L. McGlothen, and sent to the streets. On the night of August 6, 2004, Brown was solicited by Johnny Michael Allen, a 43-year-old army veteran. During the course of the evening, something went wrong and Brown shot Allen with a .40 caliber handgun. Promptly convicted, Brown was handed a life sentence with the earliest possibility of parole in 60 years. Only after his resignation from office did outgoing Tennessee Governor Bill Haslam grant Brown clemency. Sixteen years into her life sentence, Brown will be released in August, but still will be required to fulfill 10 years of probation.

Can two anecdotes prove that wealth influences the legal system? No, but these two incidents are indicative of the relationship between crime and wealth as a whole. The system is littered with prejudice and privilege, the playground of multi-millionaires infected by affluenza. And that is because grappling with the law is expensive, regardless of your guilt or lack thereof. Average lawyer fees range from $255 to $520 per hour, depending on your part of the country you're in. Even a minor case settled outside the courts can cost several thousand dollars, which means if you can hire a good lawyer, you have a great chance of beating the system.

Take the acquittal of the heir to the $14.5 billion du Pont family fortune, Robert H. Richards IV. In 2009, Richards was convicted of multiple charges of rape against his daughter when she was a toddler. Facing an extensive jail sentence, Richards' high-priced lawyers got the charges reduced to a fourth-degree rape plea, normally associated with statutory rape, and switched an eight-year prison sentence for probation on the basis that Richards would not "fare well" in prison.

On the flip side of Robert H. Richards IV are those who cannot afford to challenge their accusers, which includes many more of us. African Americans are, on average, the poorest racial group in the country, and innocent black people are seven times more likely to be convicted of murder than innocent white people. And it gets worse. African Americans make up only 13% of the American population, yet report the highest incidence of innocent defendants wrongfully convicted; a staggering 47% of the exonerations listed in the National Registry of Exonerations relate to members of the African American community.

WEALTH BUYS IMMUNITY

Things aren't much better in the next poorest group in the country. Indigenous Americans are subject to seemingly endless abuses, with gender being one of the most troubling drivers of violence. Indigenous women are disproportionately affected by all forms of violent crimes; 84% experience trauma in their lifetime. In Canada, this group is significantly overrepresented among female Canadian homicide victims, and they are more likely than other women to be abducted. Back in the States, Chippewa activist Leonard Peltier rots in prison for a crime he did not commit, but was placed behind bars nonetheless in order to break the spirit of civil rights group AIM (American Indian Movement), of which Peltier was a key leader.

Unconvinced? Just remind yourself of the ridiculous theater going on in the White House. If there ever was an example of wealth and privilege manipulating the law, it's the Trump Administration. And the sad thing is, this behavior is increasingly being considered normal. ●

So, how many crimes will $2 buy us?

NEWS

AT WHAT COST

RI has legislation limiting court fees and the courts largely ignore it BY MIKE RYAN

What crime do you think is most likely to land you in jail in Rhode Island? Murder? Jaywalking? If you guessed court debt, give yourself a gold star. The most common reason people go to jail in RI is because they couldn't pay their court costs – not because their original crime merited jail time.

It's a bit like a modern debtors prison, although the terms are shorter than the debtors prisons of yore. Most are incarcerated for a few days or a week, but roughly 17% of jailings are because of inability to pay court costs associated with a lesser offence. Of the many complicated ways in which income can affect legal outcomes – education about the system, the ability to consult more experienced attorneys, the ability to present oneself well in court – this has got to be the most direct. You are literally jailed for having less means than others.

"There is a clear racial disparity among inmates at the ACI. Income definitely has something to do with it as well." Steve Brown of the RI Chapter of the ACLU, which has supported legislative reform to address these disparities, told us. "People of color as a whole tend to have less income, so they're less able to hire their own attorneys," he added, explaining why race and income are difficult to disentangle when examining statistics. "A study looking at traffic stops for drug possession found that people of color are stopped more and searched more, although the police don't find anything more, on a proportional basis," said Nick Horton of Open Doors. "There is significant racial and income disparity that is fundamental to our criminal justice system at every level. You see that in the data, and you see that anecdotally," he added.

"FAILURE TO PAY COURT COSTS IS THE NUMBER ONE REASON A PERSON ENDS UP IN THE ACI."

The ACLU recommends the adoption of racial impact statements to accompany proposed legislation that involve making any activities illegal. These statements would analyze the repercussions of a proposed law to see if it would impact different racial communities differently, and could call out potential problems early, allowing them to be corrected before legislation is passed. "There are about a half dozen states that have adopted this," says Brown. "If you don't think about it in advance, it's hard to correct it afterward."

Our elected officials did attempt to address some causes of income disparities. In 2008, the state legislature passed a law applying a need-based sliding scale to court costs. S2234/H8093 became § 12-20-10, which includes several provisions to help those in financial difficulty and allows the court to remit court costs at the court's discretion under a variety of hardship scenarios. These include cost consideration for a person's ability to pay, accepting smaller amounts of bail for people picked up on warrants, reducing the maximum jail sentence for unpaid costs and providing alternative ways, beside incarceration, to enforce collection efforts.

Pretty forward thinking of RI, isn't it? Go legislature! Except for two things.

First, the legislature also sets the costs in the first place. In RI, the court costs associated with the average felony are $300 per charge. In Connecticut, it's $20 (2016 data). In Massachusetts, each case is capped at $500, even if there are multiple charges, whereas in RI they can just go up and up.

"We have pretty high court costs in this state, compared to the rest of New England. So we're assessing poor people a lot of money that they can't pay and then ... we lock them up. Sometimes repeatedly for the same court fees," Horton explains. These aren't punitive fees we're talking about, but rather the charges assessed by the court to cover the costs of court.

Second, a new study reveals that the court system may not actually be implementing the provisions of S2234/H8093. "There's supposed to be a process for determining what a person can afford. The courts, as far as we can tell, just ignore that. Not all of them, but most of them," Horton says.

In her thesis in Public Policy and American Institutions, titled *Protecting vs. Policing: Indigent Defendants in Rhode Island's Court Debt Collection Regime*, Brown University student Rachel Black found that "During observation of 25 debt-related hearings across the 3rd and 6th District and Providence Superior courts, I did not witness any magistrate ask any defendant about any criteria for determining ability to pay that the legislature laid out in § 12-20-10." Her 124-page thesis includes interviews with court personnel that "implies that, while Rhode Island judges are certainly aware of the legislature's criteria, the Judiciary has not yet adopted a tool for magistrates to use that ensures uniformity ... or includes any documentation or recording procedures." Her report also states, "Once arrested, delinquent debtors were at risk of falling victim to an array of procedural injustices in the debt collection system, from a lack of police communication about the nature of their arrest to the denial of a phone call while in jail."

It seems new processes are needed within the court system to bring the good intentions of the 2008 legislature to fruition. ●

FEATURE

WE'RE GONNA LOSE IT!

RI likely to lose one of two US House seats after 2020

BY MICHAEL BILOW

RI has had at least two seats in the US House of Representatives since 1792, following the nation's first census of 1790. Due to population shifts expected in the upcoming census of 2020, RI is widely anticipated to lose one. Because the US Constitution provides that each state must have at least one seat, RI would be reduced to the minimum. The change would take effect with the 2022 election.

The loss raises the prospect of a primary fight, if both seek reelection in 2022, between Democrats James Langevin, serving RI's 2nd district since 2001, and David Cicilline, serving RI's 1st district since 2011. (Neither responded by press time to invitations for comment.)

Analysts have been predicting the loss of one of the two seats for more than a decade; RI narrowly escaped it in the 2010 census. In March 2018, state Rep. Carlos Tobon, who represents District 58 covering Pawtucket, made national news by proposing that RI pay families of three or more $10,000 to move to the state, controversially limiting eligibility to those with household incomes over $100,000, the intention being to balance the cash payments with increased tax revenue that would have been paid to another state had the family not relocated. Tobon said that his goal was to bring 30,000 more people into RI. Despite considerable ridicule directed at Tobon, other places throughout the country do offer cash for relocation, usually due to labor shortages; Vermont, with a very low unemployment rate of 2.8% as of March 2018, will pay people up to $10,000 to relocate there.

The generally recognized authority on Congressional apportionment statistics, Kimball Brace, president of consulting firm Election Data Services, in December 2018 published estimates of the effect of the 2020 census on reapportionment. Brace predicts a gain of a seat each for Arizona, Colorado, Montana, North Carolina and Oregon; a gain of two seats for Florida; and a gain of three seats for Texas. He predicts a loss of a seat for Alabama, Illinois, Michigan, Ohio, Pennsylvania, Rhode Island and West Virginia; a loss of one seat for either California or Minnesota; and a loss of two seats for New York. Montana would increase from the minimum of one seat to two.

Because the number of votes in the Electoral College that decides the presidency and vice-presidency of the United States is based on the sum of members of the Senate (always two per state) and the House, RI would be reduced from four to the minimum three electoral votes beginning with the 2024 election. On a national basis, Brace found that the result of no recent presidential election would have changed using the expected 2020 numbers, but the Electoral College would have been more favorable for Republicans: Trump in 2016 would have had two more electoral votes, Obama in 2012 would have had five fewer and – most strikingly – Bush in 2000 would have had 20 more.

"The change in administration, the lack of a census director, shortness of funds appropriated to the bureau, and how well individual states conduct their own Complete Count campaigns could have a profound impact on how well the 2020 census is conducted, and therefore the counts that are available for apportionment," Brace wrote. Major events have affected reapportionment, such as Hurricane Katrina in 2005 driving people to leave Louisiana, unexpectedly costing it a seat.

Governor Gina Raimondo issued an executive order on December 28, 2018, establishing a RI Complete Count Committee, the mechanism recommended by the National Conference of State Legislatures to promote census participation.

The State of Rhode Island and the cities of Providence and Central Falls are plaintiffs in a federal court case against the US Department of Commerce and its Census Bureau brought by 14 cities and counties, 18 states, the District of Columbia and the US Conference of Mayors, challenging the decision to ask census respondents whether they are US citizens, a question not asked since 1950. Providence was the site of the only full test of the 2020 census before actual rollout, but the citizenship question was added too late for inclusion in the test, bypassing the usual careful evaluation process, a point raised in the lawsuit. The "Enumeration Clause" of the Constitution explicitly requires that the "whole number of persons" be counted regardless of citizenship or legal status, and the plaintiffs argue that the real reason for the citizenship question is to scare minorities, especially Latino and Hispanic minorities even if they are legal immigrants, away from answering the census, thereby undercounting them. In January 2019, a federal judge in New York ruled that US Secretary of Commerce Wilbur Ross had substantially lied to the court about how and why the citizenship question had been added to the census and enjoined its use. Another federal judge in Maryland ruled similarly, and a federal judge in California ruled that the addition of the citizenship question, regardless of the process used to decide to include it, was an unconstitutional violation of the Enumeration Clause. On an emergency basis, the US Supreme Court agreed to consider direct appeals, bypassing the usual Circuit Courts, because the census questions need to be finalized no later than June 2019; oral argument is scheduled for April 23.

The Constitution requires a census every 10 years so the number of seats in the House of Representatives can be apportioned fairly among the states, but historically the process has usually been chaotic. When the Constitution went into effect in 1789, each House member represented about 35,000 constituents; today that number averages 720,000.

Until 1913, the House simply got bigger as population increased and more states were admitted to the union, and the membership had grown to 435; that year, on the basis of the 1910 census, RI increased its (then) two seats to three. A political crisis ensued following the 1920 census, which, using the traditional process, would have increased the size of the House to 483, a number deemed too large for the body to function effectively (as well as exceeding the physical seating capacity of the chamber), leading to a failure to adopt any reapportionment despite the constitutional mandate to do so. The House continued using the 1913 apportionment until 1929, when in anticipation of the 1930 census it was decided to fix the number of seats at the then-current 435 and reallocate them among the states; as a result, in 1933 RI went back down to two seats where it has remained ever since.

Over time, four different and complicated methods of rounding to account for allocating whole numbers of seats among fractions of population have been employed. In 1941, the law was changed to prevent a recurrence of the 1920 crisis, providing for automatic reapportionment following the census, specifying the rounding method, and this law remains in force today.

Until the census is concluded, it's impossible to be certain what it will mean to RI or how many new Rhode Islanders it would take to hold onto our representative seats. But if you do have any relatives thinking of moving here, it's likely every head will count. ●

RI's rep is at stake!

KEEP ON MOVING

music

PENN SULTAN'S NEW LEGS

Sultan delivers the first chapter of many

BY JAKE BISSARO

PENN SULTAN'S MUSEUM LEGS – TRAVERSING THE FLAT CIRCLE

Museum Legs is a new project from **Penn Sultan**, best known as the frontman for indie folk outfit **Last Good Tooth**, a live favorite in the area for the better part of a decade. Their first album, *Giving the Clock Its Weight, Its Sway*, wrestles with the colossal subject of time on a sonically smaller scale than his previous work.

Originally from NYC, Sultan attended RISD and decided to stick around. *Giving the Clock Its Weight, Its Sway* is the first of three albums that were a product of five years of writing and recording. "I was quietly amassing all these songs, thinking they'd probably be for Last Good Tooth. But as I began to complete them, I figured 'what the hell' and made it my own project," said Sultan. Last Good Tooth has slowed down as of late because the band members are split between Providence and NYC.

In many ways, *Giving the Clock* is the best outcome for someone with Penn's resume, showing true growth and a new range of influences. Sultan's unmistakable dulcet baritone infuses everything, and the songs sound like a mix of the symphonic folk of the Barr Brothers and the noir of Neko Case. The interlocked guitar parts in "Column of Words" play off each other, creating a swaying, reggae feel. The opener, "Inherent Habits," chugs along with a bit of twang, reminiscent of The Handsome Family.

"I had been listening to a lot of African music and synth-based Asian psychedelic music that featured sort of crazy arrangements," said Sultan. "For some reason, I really took to the droning, repetitive element of it." The trancelike nature works to inform the subject matter but, for the modern-day, shrunk-down attention spans, this element may be too much. "Films and Proofs" essentially plays off the same pattern the whole time, and the album has long run times, sometimes more than six minutes.

Providence has a crowded field of folk artists these days, but this is truly an original sound, a product of the freedom of DIY bedroom recording; he recorded it all layer by layer with just a laptop, an interface and "pretty much just one microphone." The one guest is **MorganEve Swain** of The Huntress and Holder of Hands and Last Good Tooth, who provided backing vocals and viola.

"Because I was doing this recording myself, I had all the time in the world to just add or take away things," said Sultan. He plays almost all the instruments on *Giving the Clock*, his talent for arranging apparent throughout. All songs are guitar-based, but full of clever, sparse instrumentation; a small cymbal flourish here and there or some organ in the background gives it a lo-fi, but orchestral, quality.

In a fragmented world, it's a huge accomplishment to make something as cohesive as a themed album. "I tend to think of albums as chapters in a bigger book," said Sultan. He said there's no specific influence for this, but he's always been drawn to the idea of a full album instead of just a compilation of songs. "The approach helps me to get things completed and out of my system."

Though Sultan describes the process modestly, what's a weightier topic than the passage of time? And it really isn't a stretch; the songs do a great job conveying the enigma and agitation that comes from even attempting to consider the concept of minutes, years and moments soaring past.

The resonant ballad, "Pendulum," asks, "When will the day hide the ripple of last night?" and "Inherent Habit" describes running your day through your head: "At home and undercover, playing all the moments backward/the burden starts again in the morning." The inspired seven-minute epic, "Belt Hole Calendar," examines the masochistic mindset of people who spend their days toiling away at artistic pursuits: "What was the song that made me want to waste my time on this?"

To fully realize the project, Sultan has put together a six-piece band, including Swain, that has been practicing for about a month. "I'm really having fun again with the collaborative element, and the musicians have been really receptive to the material," said Sultan. "Sitting around in your room is only fun for so long." Museum Legs' two other albums are basically ready to go, and Sultan plans to space them out, likely releasing the second before the end of this year.

Right now, the band is gearing up for their first performance later this month at AS220, and Sultan says he's having fun putting his bedroom recordings in the context of a six-piece band. In the end, everything does come back to the time crunch for Sultan. "I essentially booked the show as a deadline to force myself to actually get this music out there. I had been talking about it for years."

Giving the Clock Its Weight, Its Sway can be purchased at: museumlegs.bandcamp.com/album/giving-the-clock-its-weight-its-sway

Museum Legs performs their first show at AS220 on Apr 17 at 9pm with Wildflower, Cyrus Gengras, and Glenna Van Nostrand.

THE BARTHOLOMEWTOWN PODCAST

This isn't an editorially mandated plug, but I've been listening to and enjoying the excellent Bartholomewtown Podcast (check out excerpts in *Motif*), hosted by Bill Bartholomew. The high-profile political guests (the Whitehouses, the Elorzas, the Heims, and what have you) may draw more attention, but Bartholomew has been featuring some engaging interviews with local musicians and other creative people talking about the craft. He recently posted an episode with **Z Boys** and **Heather Rose in Clover**, and previously talked to artists **Dan Blakeslee** and **Roz Raskin**. ●

Check out the podcast at the link below, or wherever you get 'em: btown.buzzsprout.com

The Sultan of trance-folk

E-NNOYING!

Those highway signs should hit the road

BY JOHN FUZEK

Okee dokee folks... Have you noticed the illuminated message signs along our major highways and the annoyingly punny sayings on them? Personally, I think that these signs should be used for one thing only: emergencies. Instead, they visually shout stupidity at you as you pass. They are such a turn-off because they never seem to be turned off so I TRY to ignore them, which is exactly the opposite of what they are there for. Last month, with St. Paddy's approaching, they constantly flashed out messages like, "Make your own luck, drive sober" and "You're someone's pot of gold, drive sober." Yes, I agree, drive sober, but a driver has to take their eyes off the road to read the message. If you don't know enough to drive sober, I seriously doubt that this electronic conscience is going to influence your imbibing, especially with puerile quips such as these. Other examples read: "Use yah blinkah," "That seat belt looks good on you" and "Santa sees you when you're speeding." Maybe the sign people just aren't getting enough emergencies to light-write about. Maybe they should become songwriters and hit the open mics; they might be less annoying this way. Am I alone? Read on...

Ding, Da-Ding, Ding, Ding, Ding, Ding, Ding... Does that sound familiar? Ha! Well, it's the plucking banjo intro of the instrumental "Dueling Banjos" from the motion picture, *Deliverance*. The film was about four friends taking an ill-fated canoe trip through northern Georgia and starred Burt Reynolds, Jon Voight, Ned Beatty and **Ronny Cox**. This marked the movie debut of Ronny Cox who secured the role because he could play guitar. Cox used his guitar skills in the Deliverance "Dueling Banjos" scene that featured that bizarre banjo boy. After this movie, he went on to star in other films including *Beverly Hills Cop 1 & 2, Total Recall* and *RoboCop*.

Although he spent a good deal of his life acting, he has always been a singer-songwriter. These days he spends most of his time playing music at festivals and concert venues. He captivates his audiences with stories, sometimes spoken, sometimes sung. He likes to connect with his audience and share his original songs as well as those of others. Cox will be performing in RI as part of the Route 44 Music Series at the Harmony Lodge in Glocester on Thursday, Apr 11 at 7:30pm. RI's own **Lainey Dionne** will be playing a short, mid-show set. Tickets are available in advance at Brown Paper Tickets or at the door. *For more about the show, "Slow Train" over to hearinrhodeisland.com*

You Can Tune a Piano But You Can't Tuna Fish!

This was the 1978 breakout album for **REO Speedwagon** and launched their hits "Time for Me to Fly" and "Roll with the Changes." Three years later, the multi-platinum *Hi-Infidelity* recording gave us "Take It on the Run" and "Keep On Loving You" while the *Wheels Are Turning* album produced the #1 hit "Can't Fight This Feeling." Over the years the hits softened, lead guitarist Gary Richrath died and the band's roster changed many times. For a while, lead singer Kevin Cronin was peddling Time-Life CDs on late night infomercials. The band teamed up with other bands such as Styx, Chicago, Tesla and


REO Speedwagon

Def Leppard and embarked on nostalgia-type tours across the country. On April 12, REO Speedwagon rolls into the Event Center at Twin River in Lincoln for an evening of their timeless tunes. *For more, "Keep Pushin'" to twinriver.com*

MAYBE THEY SHOULD BECOME SONGWRITERS

I have watched the rockumentary *Chicago: Now More Than Ever* many times over. *Chicago's Greatest Hits* was one of my early favorite albums. I remember getting it for Christmas in 1975 and having my father complain about their music. Ironically, a few years back I took my parents to see **Chicago** in concert and they absolutely loved the show! Jimi Hendrix thought the band's horn section sounded like "one set of lungs" and was wowed by the guitar mastery of Terry Kath. When Kath died of an accidental gunshot in 1978, it was a massive blow to the band. They continued on and had many more hits that tended to feature Peter Cetera, and he exited the band for a solo career in 1985. Chicago was never a one-lead-vocalist kind of band, nor was the focus meant to be on one, and the line-up has changed over the 50 years of the band's life. Original members Jimmy Pankow and Robert Lamm, who wrote most of the band's most enduring songs, are still with Chicago as is trumpet player Lee Loughnane. I have seen them a couple of times over the past few years and the band still has it. Don't miss your opportunity to hear the legendary sound live when they take the stage at PPAC on April 19. I spoke with longtime Chicago band member **Keith Howland** last week, and you can read that interview at **motifri.com/howland**. *For more about the show, go to ppacri.org*

We have the School of Rock, now how about the School of Folk? Well, Pump House Music Works in Peacedale now presents **Folk Music Night** every Tuesday night. At 6pm is a Clawhammer Banjo Workshop where you can learn to play in the old southern mountain style. At 7pm it's the Acoustic Guitar Workshop. The Folk Ensemble Workshop starts at 8pm and here you will learn to play music with other people. You can build a song list of folk classics together, one song at a time. Beginners are welcome to them all. There is only one charge of $10 for the entire evening. Take one workshop or all three. *For more, vandal the handle to pumphousemusicworks.com* ●

That's it for now. Thanks for reading. JohnFuzek.com

"Annoyingly punny" sure sounds like an oxymoron to us.

MUSIC AWARD WINNERS

BY BEN SHAW, JAKE BISSARO, MARC CLARKIN, DAN SHAY, JOHN FUZEK, EMILY OLSON, CRIMSON AL-KHEMIA, WONGO OKON. WINNERS SELECTED BY 6,143 OF YOU, OUR READERS. THANK YOU!

ROCK BREAKTHROUGH ACT: BENJI'S

Our 2019 Breakthrough Act's first EP came out four years ago, but the RI community is finally starting to take notice. Much like religious minorities seeking liberty, founders Maryssa Morse and Philip Geronimo came to PVD in 2014 from LA. Their music reminds me of surfy Pixies mixed with early 2000s Franz Ferdinand. Catch the Benji's on April 16 at the News Café. - JB

LIVE ROCK ACT: THE SILKS

What else is there to say about these local heavyweights and previous winners? They're probably known best for the guitar pyrotechnics of Tyler-James Kelley, but this band hasn't gotten where they are by dragging dead weight. Uncle Sam Jodrey on drums, Jonas Parmelee on bass and Johnny Trama on rhythm and lead guitar bring it all together beautifully. Folks in the Boston area have now seen the Silks' Swampy, bluesy rock 'n' roll that takes no prisoners. - JB

ROCK – FAVORITE FEMALE VOCALIST: TAI AWOLAJU (BOO CITY)

Tai Awolaju is the backbone of Boo City along with guitarist Andrew Moon Bain. Her show-stealing voice keeps the band's diverse mix of soul, rock and reggae moving in the right direction. Throw in a dynamic and commanding stage presence, and this *Motif* award comes as no surprise to those already hip to Boo City. - JB

FAVORITE PUNK ACT: THE MCGUNKS

Previous winners of the award back in 2012, The McGunks have been tearing through New England since 2003 with their brand of rollicking singalongs about barrooms and beers in the vein of Social D and the Dropkick Murphys. Check out their music live at the Midway Café in Jamaica Plain, Mass, on May 4. - JB

FAVORITE POP PUNK ACT: THE CALLOUTS

Pop punk is not a lost art, and The Callouts prove it in convincing fashion. Their second album, *give up*, just out in January, shows no signs of a sophomore slump, with hook machines like "Amelia" and "Reverse Clooney." Catch The Callouts at Rob Duguay's Birthday Bash April 19 at the News Café. - JB

FAVORITE POST PUNK ACT: HOPE ANCHOR

It's the second win in a row in this category for Hope Anchor, who played a killer set at last year's *Motif* Music Awards. The crew made up of Paul Everett, Terry Linehan, Ray Memery, Robbie Shaggs and Paul Myers was described by Marc Clarkin as "indie rock that reminds me of some descendant of Echo & the Bunnymen and Wire." And with maybe the hardest-reppin' RI band name out there, what's not to like? - JB

FAVORITE FEMALE SINGER / SONGWRITER: AMANDA SALEMI

Amanda Salemi's words and music are the secret sauce that gives Consuelo's Revenge its signature eclectic folk gypsy punk vibe. Listen to the beautiful "Teri's Song" or the barnstorming "The Palatine Light" to see what I mean. While CR has another album on the way, Salemi is reportedly working on her first solo album, which likely means more *Motif* awards to come. You can see Salemi in the flesh at one of Rob Duguay's turnt up Birthday Benefit Bashes, April 19 at the News Café. motifri.com/amanda-salemi-profile/ - JB

FAVORITE HOUSE BAND: NICK-A-NEE'S HOUSE BAND

Props to the house band at everyone's favorite dive bar! The band includes keyboardist John Juxo, Hawk Rocco, Jim Morgan and Jim Kelley, and they take the stage every Monday night at Nick-a-Nee's on South Street in the Jewelry District. - JB

FAVORITE REGGAE ACT: HOPE ROAD

Hope Road are a tribute to Bob Marley and The Wailers, and they play a vital role in breathing new life into those songs. I'm not sure why they got cast in reggae vs tribute, but since they do both, it isn't really a big deal. You can catch Hope Road when they bring the rasta jams to the Ocean Mist on April 20. 4/20 and all. - MC

FAVORITE SKA BAND: THE COPACETICS

The dynasty continues as once again The Copacetics take home the honors for "Favorite Ska Act" for lord only knows how many years in a row. I'm guessing at least six years, but even that could be selling them short. They dominate this category as if they were the Beatles of local ska. The Copaceptics are next in action at Askew on May 17. - MC

FAVORITE GARAGE BAND: ERIC AND THE NOTHING

This has been a huge year for Eric and the Nothing as they released their debut self-titled debut, which sounds great – highly recommend that you pick it up in vinyl. Eric and the Nothing are more of a throwback to '50s Buddy Holly-style rock 'n' roll than traditional garage rock, but hey, I'm good with whatever you kids want to vote for. These guys deserve it. Eric and the Nothing are next in action at AS220 as part of a killer bill on April 24. - MC

FAVORITE HARCORE/METAL ACT: RHODE KILL

Rhode Kill has been cranking out loud blasts of metal and punk since 2005 and are showing no signs of slowing down. These guys have paid their dues and then some. Rhode Kill recently posted that they have some heavy new jams in the works, which I look forward to hearing. - MC

FAVORITE NOISE BAND: DROPDEAD

Dropdead has been pounding a mix of political hardcore and thrash since 1991. They have released albums and traveled the world and really mean too much to so many people around the world to be a local band. I didn't think Dropdead really needed a nomination, but sometimes people don't listen to me. I was excited to see Dropdead recently post photos with the caption stating they had 20-something plus new jams that they are working on. Can't wait to hear them; singer Bob Otis is a needed voice in these Trumpian times. - MC

FAVORITE JAM BAND: THE COSMIC FACTORY

I caught The Cosmic Factory recently and it was a haze of funk-fueled mind-bending rock. The Cosmic Factory have a couple of upcoming gigs, including one at The Oasis Pub in New London, Conn, on April 5 and in PVD at AS220's Psychic Readings on April 18. - MC

FAVORITE TRIBUTE ACT: DIRTY DEEDS

Speaking of dynasties, how about Dirty Deeds who are another band that has to be close to at least five consecutive wins? Next year I'm going to suggest adding a new category called Favorite Non-AC/DC Tribute act just to give another band a chance. Dirty Deeds are an interesting story; they have been cranking out those classic AC/DC riffs so long that the band has two generations of family members. Dirty Deeds are at The Whiskey Republic in Providence on May 4. - MC

FAVORITE DANCE NIGHT: SOUL POWER

Speaking of dynasties, Soul Power is working on its own by taking top honors for at least the fifth year in a row. DJs John O'Leary and the dance commander himself, Ty Jesso, bring the party to Dusk twice a month on the second and last Fridays of the month. I've been going to Soul Power for the last 15 years and will keep going for another 15 as long as they do it and I'm still around. Soul Power brings the best of mostly '60s soul, go-go, mod, garage, funk and a truckload of fun! - MC

FAVORITE ROCK FESTIVAL: PVD FEST

I can't name one act that played last year's PVD Fest and a year from now I probably won't be able to name an act from this coming year's fest. That really isn't what PVD Fest is about. PVD Fest is a celebration of arts and culture in the city. It is just fun to walk through and stop by the different stages and experience all the different genres of music melded together. This year's PVD Fest will take place June 6 - 9 all over downtown PVD. - MC

FAVORITE COVER BAND: SYBIL DISOBEDIENCE

It's just another year in the life of Sybil Disobedience. I hope they have commissioned a trophy case for all these awards, because this is Sybil's fourth *Motif* trophy in a row, an impressive achievement. Sybil is the go-to cover band that goes from top 40 to classic rock, and keeps the party going all over RI. - JB

FAVORITE ROCK ALBUM AND FAVORITE MALE ROCK VOCALIST: BLACKOUT DE-LUXE BY RAVI SHAVI - RAFAY RASHID

On *Blackout Deluxe*, Ravi Shavi expanded their palette to include psychedelic and funk sonic waves while retaining plenty of the high-energy alterna-punk that has long been their calling card. Singer/Guitarist Rafay Rashid, who took the honors for "Favorite Male Vocalist," has a solo show coming up at the Columbus Theatre on April 4 as part of the WHEM 2-Year Anniversary show, opening for The Horse-Eyed Men. - MC

FAVORITE ROCK ACT: TALL TEENAGERS

Despite being neither tall nor teenagers, Tall Teenagers come as advertised if it's dingy post-punk/alternative rock with harmonies that is on the label. Tall Teenagers have two releases out of low-fi unsettling pop that reminds me of Podera Breeders meets Ty Segall at the Rock & Bowl on Saturday night. Next up for these giants is rocking out at the one year anniversary of Askew in Providence on April 20 with The Low Cards and Barn Burning. - MC

FAVORITE SOUND PERSON: KRIS HANSEN

It's one of those jobs that you don't notice if it's done well, but you definitely notice when it's not. Well, voters are noticing you, Kris Hansen! Hansen is a true pro and has done sound at just about every club in Rhode Island. If your favorite band sounds particularly good one night, you just might have him to thank. - EO

FAVORITE WEDDING BAND: BRASS ATTACK

Once the I do's are done, the real party starts, and Brass Attack is this year's favorite among voters who like to get down on the dance floor to woo that cute bridesmaid or groomsman. Tying the knot this year? Make sure your ring isn't brass, but your band is. - EO

FAVORITE PHOTOGRAPHER: ERIC JOHNSON

Eric Johnson started photographing live shows for local act Sybil Disobedience, then began getting calls to shoot other band's shows. He said of his work that "I make enough money to put pizza in my belly and pay for my big camera." What more could a photographer ask for? - EO

FAVORITE MUSIC VIDEO: "VICTIMS" BY MASS OF MAN

This is a new category in the Music Awards. Check out Mass of Man's winning video that accompanies his emotionally jarring, hard-hitting song here: youtu.be/kgvK_66Jh1w. - EO

FAVORITE JAZZ ACT: GREG ABATE / TAKE IT TO THE BRIDGE

Favorite Jazz Act was a split this year between the miscategorized Take It to the Bridge, who are really an "R&B, top '40s and funk cover band," but whose fans nonetheless voted them up in droves, and repeat winner and perennial favorite Greg Abate. "We would prefer a jazz artist accept the award," TITTB wisely opined. You can catch them live at the Last Resort on Fri, Apr 12.

Those keeping an eye on the local scene have undoubtedly felt the presence of saxophonist Abate who, between stints touring around the world, has called RI home and remains a constant fixture in the area, leading the charge of bebop excellence around the state. Dig his latest release *Road to Forever* and learn more at gregabate.com. - BS

FAVORITE R&B ACT: STEVE SMITH AND THE NAKEDS

The sound of a full band playing truly American rock 'n' roll is harder and harder to find, but not if Steve Smith and his crew have anything to do with it. Sporting a full, robust sound, Steve Smith and the Nakeds do it right. Tight horn hits punctuate jangling piano, rollicking guitar and Smith's hollering, joyous vocals. A mix of originals and well-advised covers blare out with unapologetic intensity at every turn. - DS

FAVORITE COUNTRY ACT: RI REDNECKS

It's easy to forget that just about three-quarters of our tiny state is agricultural land, but the RI Rednecks will help you remember. These old boys have the look of a country band down pat — big hats, leather boots and good American blue jeans. More importantly, they have the sound. Jangling Telecaster and warbling vocals coming together over a solid shuffle in tune after tune. Suitable for all your yeehaw needs and available right here in town. - DS

FAVORITE MATH ROCK / PROG ROCK: DAVID TESSIER

It's rare that an album name sells a mood so well as David Tessier's *Dreams in Hyperspace*. Crunchy synths, metal-inspired guitar riffing and rapid-fire drumming give way in turn to gentle, swelling, thoughtful ballads like "Hey Mary." Tessier's harmonized vocals traverse the sometimes-unruly, sometimes-majestic backing music. Somewhere between Queen and King Crimson, deep into hyperspace you'll find the sound that Tessier has managed to lock down so well. - DS

FAVORITE BLUEGRASS BAND: HOLLOW TURTLE

Hollow Turtle bucks the trend of folk rock moving into the world of saccharine, overly commercial pop ballads. Old-school style brings new-world grief to light in their careening, tightly wound vocal harmonies. Relentless strumming and plucking from the string section lifts the harrowed singing to great heights. Even the most steadfast bluegrass disparager will find their foot tapping when Hollow Turtle gets to it. - DS

FAVORITE WORLD MUSIC: GNOMES

Gnomes' mythic name it seems is no accident. The band's music channels old-world, fantastical folk. Penny whistle? Plenty of it. Plunking, thick bass lines? But of course. Accordion? Applied liberally. That's not to say Gnomes' catalog is all dusted-off, ancient tunes – somewhere in the studio and on the stage, a modern liveliness finds its way into the music. Whether any given song is Hasidic, Celtic, Slavic, African or even of some vague sea shanty origin, each brings something new and distinct to the table. - DS

AMERICANA – FAVORITE FEMALE VOCALIST: ALLYSEN CALLERY

The mood of much of Allysen Callery's music is pleasantly dark. Her dappling, vamping chords provide fertile soil for her winding, explorative lyrics. Not all music needs to be cheerful and someone certainly let Callery in on that fact — her tunes are best suited for deep pondering, rainy days, cups of coffee gone cold and remembrances of days long past. And that's a good thing. Her songs tell the kinds of stories that make you think, make you feel and make your eyes a little misty. - DS

FAVORITE LOCALLY BASED NATIONAL ACT: ROOMFUL OF BLUES

There aren't a lot of bands who manage to be contemporary now and when my parents were kiddos long ago. Roomful of Blues manages to hold that down and has done so for decades. Having played in virtually every venue across the state and many around the world and boasting a staggering array of talent, this band is dear to fans of the blues in a way that few others ever have been. They touch every corner of the the genre with a no-fuss, big band sound that has earned them the status of legends. - DS

FAVORITE AMERICANA ACT: CACTUS ATTACK

Cactus Attack is able to mix cheery music with sour subject matter. It's a skill that's essential for a good country band, and Cactus Attack has mastered the blend. They avoid any overstuffing, even with strings upon strings plucking and bowing out all together. A deep-rooted coordination rules over the music. Hairpin turns and changes reveal not a single misplaced note. A prime example of the music of previous generations making its way seamlessly into the hearts and minds of that elusive millennial generation. - DS

FAVORITE MALE SINGER/SONGWRITER: NATE COZZOLINO

There's comfort in Nate Cozzolino's raspy singing. Even as his subject matter is often dark, a warmth permeates his music, thanks in no small part to his supremely talented backing band, The Lost Arts. There's quiet triumph in here, told in the form of subtle bass runs and drum fills, all moving in perfect unison to Cozzolino's cozy chord progressions. With a sound of important news from far away told in the form of a song, Cozzolino has found his niche. - DS

FAVORITE STREET BAND: BIG NAZO

The Big Nazo band is its own experience. Not often enough do you get to see people in beautifully crafted and slightly creepy costumes getting their groove on over a brash, big-band sound. This crew has been around in one form or another for years, taking their unique PVD vibe around the world and holding down classic PVD staples like PVD Fest and Foo Fest when they can. If you're thinking of GWAR for the whole family, you're not too far off. - DS

FAVORITE OPEN MIC: TUESDAY AT THE PARLOUR
FAVORITE KARAOKE NIGHT: FRIDAY AT THE PARLOUR

The Parlour has great music just about every night, so it's no surprise that their Tuesday open mic is no different. A revolving cast of familiar and new faces plays to an enthusiastic crowd each week. Great sound production and drink prices are sure to please (nothing goes with cheap drinks like a no-cover event). If you like what you see on Tuesdays, come back any other night of the week for a different theme and a different vibe, all in the same place. - DS

FAVORITE CHORAL ACT: PROVIDENCE GAY MEN'S CHORUS

Full of hope and wonder, the Providence Gay Men's Chorus truly knows how to work as a group. The combined sound of so many voices is full and rich, often teetering toward tear-inducing. Representing a slice of our city's many LGBTQI folk, each song is an anthem of hope and inclusivity, told in many voices. Catch this huge ensemble whenever you can to take in the lush vocals and snappy attire. - DS

FAVORITE FOLK ACT: THE QUAHOGS

Sometimes you want to go out and barroom brawl your troubles and sorrows away. Sometimes you just want to hear about someone else doing it. Steve Delmonico and the Quahogs behind him can help you do either, or probably both. Rowdy and raunchy, the band blasts out good old crunchy rock music that is welcome home anywhere from beautiful Olneyville warehouses to the stripmall bars of Warwick. - DS

AMERICANA – FAVORITE MALE VOCALIST: STEVE DELMONICO

Steve Delmonico has the rare gift of singing with passion while still sounding tired of it all. His world-weary swagger is the gleaming shine on top of the Quahog's sound, inviting listeners to take in his tales of worry and woe. He varies between outright howling and more ponderous crooning, with an occasional big "woo" thrown in for good measure. Big woos are good for morale, both for the band and the listener alike. - DS

FAVORITE AMERICANA ALBUM & FAVORITE BLUES ACT: NEAL & THE VIPERS

There's a solid comfort in blues-rock arranged in 12 bars. It goes where you want it to, does what you came for and puts a smile on your face the whole time. Songs of exhaustion, the man, romantic partners who just don't understand – you'll get it all from Neal & The Vipers on their album *One Drunken Kiss*. They rock, they roll, they take big, loud solos whenever possible. They do everything you want them to and they do it well. - DS

FAVORITE AMERICANA BREAKTHROUGH ACT: MY MOTHER

According to their own words, My Mother is too intense to be called folk but too graceful to be labeled grunge. I'd be willing to say that's true. The guitar is thick and confident, never wavering in its purpose of propelling dynamic and often chilling vocal harmonies that careen through unexpected but welcome melodies. Now that they've broken through, we're all excited to see where this duo goes, all while walking such a fine line of genres. - DS

FAVORITE LOCALLY PRODUCED FESTIVAL: RHYTHM AND ROOTS

If you would like to see what a REAL music festival is like then you should check out this year's *Motif* award winner for Favorite Locally Produced Festival, The Rhythm and Roots Festival. This one has all the ingredients of a perfect festival experience: multiple music stages, camping, food, after hours jamming, dancing and much, much more. This festival has been happening at Ninigret Park in Charlestown every Labor Day weekend for more than 20 years and has presented performers such as Steve Earle, Little Feat, Natalie McMaster, Bruse Hornsby, Roseanne Cash, The Mavericks, Keb Mo, Los Lobos, Lake Street Dive, Lucinda Williams and many, many others! For more, zydego-go to rhythmandroots.com - JF

FAVORITE EDM DJ: DJ LEUCISTIC

DJ Leucistic infuses Breakz, Electro, DubNWubz, Hard Trap and maybe some Hardstyle and Future House in what he calls a high energy open format. See him spin at FreQ Fridays at Alchemy. - EO

We stitched together five photos John Fuzek took from the stage at the Motif Music Awards. Look for evidence of our stitching! Do you see someone with an extra arm or two? Maybe some guy has a twin he never knew about? If you spot something, take a pic and send it to us on Facebook.

MUSIC AWARD WINNERS

FAVORITE GOTH NIGHT: PHANTASM AT ALCHEMY

Phantasm was conceptualized about six years ago and has been going on for five years. Joey Electric runs the evenings, and he had this to say: "I don't feel that Phantasm is different from other goth nights in New England. We champion the notion that music is a universal force that brings us all together. We come together at Phantasm to share the love of dark music, art and culture. We just love to dance to music with atmospheric synth, and this ideal is evident at other goth nights all over New England." - CA-K

FAVORITE CLUB DJ: PAULY DANGER

Pauly Danger has been spinning music since 2002 when he had his first radio show as an undergrad at UVM, and he started playing in clubs in Burlington around 2006. His biggest inspirations include local DJs and radio personalities DJ A-Dog, Melo Grant, Nastee, Big Dog & Demus, DJ Cr-8, Fattie B and Selector Dubee. Follow him on Twitter @DJPaulyDanger to see where he'll be performing. - CA-K

BREAKTHROUGH HIP-HOP ACT: $WIFTY

$wifty has a knack for fast-paced freestyling, and he's continuously improved his craft since his high school days. From rapping in a close friend's basement and Honda Odyssey (ask him about it, he'll tell you) to better-equipped studios and time in Los Angeles, he's never lost his unrelenting desire to progress upward on the mountain of success.

$wifty struck gold with his late 2017 single, "Cyclone," which elevated his musical status and introduced him to a wider audience. The success continued as he fired off his next single, "Shame," alongside labelmate Mags. At the top of 2018, $wifty dropped his debut project, *Show & Tell*, a 10-song effort, which showed audiences his artistry, 10 years in the making.

If you thought he had any plans of slowing down, you are quite mistaken. Standing strong with rappers Mags & Young Sen on their newly established label, Problem Child Records, $wifty recently released a five-track EP titled *Realest Out* alongside producer Guccydior. - WO

FAVORITE HIP-HOP ACT: TOAD AND THE STOOLIGANS

Bands are a rarity in the hip-hop world, but Toad and the Stooligans are determined to lead the charge to break that norm. Repping my hometown of PVD, the five-member group is composed of frontman Mike Jencks, guitarist Dan Pomfret, bassist Alex Caimano, drummer Matt O'Brien and keyboardist Daniel Hill.

First coming together in early 2015, the five members joined to bend the general rules of hip-hop as much as possible. Funk and jazz are just a few of the genres that appear in their music and all these elements are carefully placed paint strokes that create the landscape that is their sound.

The band launched their official start in the last quarter of 2017 with *Very Handsome*. Sporting 12 tracks, the album effectively introduced their unorthodox take on the genre. Since its release, the group has stayed under the radar aside from their 2018 track, "Trap Song." Hopefully, that just means they're hard at work on a new project that we'll see in the near future. - WO

WRITER'S CHOICE: CHUCK WENTWORTH

Chuck Wentworth received his award because of his long-time, behind-the-scenes commitment to music in RI and beyond. His company, Lagniappe Productions, produces the annual Rhythm and Roots Festival in Charlestown, The Mardi Gras Ball at Rhodes on the Pawtuxet and more. He was also involved in other out-of-state festivals, such as the Grey Fox Bluegrass festival in upstate New York. In his earlier days, he also produced cajun and zydeco dances at community halls and festivals at Stepping Stone Ranch in Escoheag. In addition to all of this, he was a DJ and the head of the Folk Radio at WRIU for more than 30 years. While he recently retired from WRIU he still works tirelessly to promote music through Lagniappe Productions. - JF

WRITER'S CHOICE: DAN LILLEY

Dan Lilley received his critic's Choice Choice Award because of his 45 years of performing in the RI music scene. Dan is a music warrior and stills plays just about every Friday and Saturday night, as a solo, in a duo or in a band somewhere in RI. Over the years his bands have included: Sane; Tyger, Tyger; The Flying Ditchdiggers; Lovetrain; Dan Lilley and the Keepers; Dan Lilley and Scatman; and Forever Young. He channels his soul into every performance whether it is for three people at the bar or a thousand at a theater. Lilley is also a songwriter and has recorded several albums of his own music. His song "Hey, Josephine" was the inspiration for the Rhode Island Songwriters Association to release an album of the Songwriters in the Round shows. Other songs he has written like "Jealous Heart" and "Home Fires" should have been hits, but like the music of many local performers, it never received the right exposure. Nevertheless, he keeps playing and playing for you. In addition to his dedication to music, he has been an English teacher at Central High School in Providence for more than 30 years. - JF

SPECIAL RECOGNITION VOCALIST: MEAGHAN CASEY

Meaghan Casey is a singer-songwriter who earned multiple nominations in this year's awards. Casey was narrowly edged out coming in 2nd, but adding up all the categories she was nominated in, she got more votes than some of the winners. She is obviously a local favorite so we wanted to recognize this very talented artist. You can catch Meaghan Casey at the Galactic Theatre in Warren on April 7 opening for Hollow Turtle. - MC

CRITIC'S PICK FOR FAVORITE ALBUM: JAY BERNDT & THE ORPHANS LIFE, LOVE, & LOSS

The long awaited debut album from Jay Berndt & The Orphans, *Life, Love, & Loss*, more than lived up to the hype the band's electrifying live shows have generated. There is a heavy Springsteen influence running throughout the album between the mix of rockers and ballads with tasteful horns. My favorite jam on this one is "Sweet Marie" but *Life, Love, & Loss* is a rare album that I'll tend to listen all the way through when I pop it on. Jay Berndt & The Orphans will be rocking out at the News Café in Pawtucket on April 19. - MC

CRITIC'S PICK ROCK: 123 ASTRONAUT

123 Astronaut bolted on the scene with the release of their debut EP, *The Friction*. 123 Astronaut play guitar-dominated alterna-indie rock that culls from across the decades and quite possibly the galaxies considering singer/guitarist Jeff Robbins' taste for space wear. 123 Astronaut recently finished recording a follow-up EP, which is currently being mastered and should be out in a few months. - MC

LOCALE PROFILE

eating

PERFECT DAY!

Take a stroll down Main to The Perfect Sweet

BY CHUCK STATON

Strolling down Main Street in Warren is an almost-every-day occurrence for me. When your job demands hours in front of a computer all week long, having a pleasant place to stretch your legs outside is a godsend.

There are a lot of little restaurants surrounding downtown Warren that are perfect stops for a mid-stroll snack or a full meal – **Nectar de la Vida, the Coffee Depot, Federal Hill Pizza, Revival**, the institution **Rod's Grille** – the list goes on. One of the newest additions is **The Perfect Sweet**, a delicious bakery that focuses on handmade macarons.

The Perfect Sweet took flight from **Hope & Main**, a nonprofit on Main Street that serves as an incubator for culinary businesses. The shop is the ideal place for a sunny day stop-in. They have tons of multicolored macarons to choose from; my favorites are the cookie-dough-based Cookie Monster and the Fluffernutter. But I've walked in and been delighted by some surprise flavors like the Harry Potter-inspired Butterbeer and the adorable donut-centric Macar-onuts, which have to be seen to be believed.

After a few visits to their new brick-and-mortar location, I sat down with **Tracy Woodard**, owner and operator of The Perfect Sweet, to learn how the business was born. "When my husband first got into financial planning, I joined him on some business trips," she said. "They really fed them well! They always had these little round, colorful sandwich cookies that I had never had before. I was hooked. After the third trip, I was determined to find everything there was to know about these unique little sweet creations, and when we went back home, I did just that.

"I started with Hope & Main in March or April 2017. I started selling at their summer market every Sunday! The staff at Hope & Main, from founder, **Lisa Raiola**, and her husband **Waterman Brown** to **Luca, Ali, Ric** and all the others who make things works over there – I can't say enough about them. Lisa had a brilliant idea and it has been fully executed by her amazing staff. We are so lucky to have them."

Woodard continued about the community aspect of her business. "I love what Warren has become. I grew up in Barrington. Back then, it was a bit of a different town. What I've found recently, though, is that all of these little artisan makers, from amazing food entrepreneurs to organic skin care products, book stores and other unique shops have really made it a true walking town, especially with the bike path running parallel to Main. Being just over two miles from my house is what sealed the deal.

"For those who know and understand macarons, they are beyond thrilled to not only have macaron accessibility in little ol' Warren, but quality and authenticity to boot. Because I had a following from Hope & Main, I had already established a wholesale base and people knew they could order special occasion macarons from me, whether they be towers or wedding favors in boxes or bags, etc., so I was able to introduce my other sweet products."

THE IDEAL PLACE FOR A SUNNY DAY STOP-IN

The Perfect Sweet also offers tons of other decadent and delicious baked goods, including brownies, cupcakes, cookies and Rice Krispie treats using housemade marshmallow. "I actually got my baking-business start in a very small way as a cake decorator. I used to do it from my home. Now that I have my bakery location, I can make all of the other things that I have been making for years and I'm learning new techniques and skills every day. I'm also working diligently to become a full chocolatier."

But there was one question I NEEDED to ask. As someone who is occasionally surrounded by lovable food snobs, I know that it can be frustrating when people refer to "macarons" (the light French cookie sandwich) as "macaROONs" (a dollop of coconut-flavored cookie) because they are an entirely different baked good. How does Woodard deal with what must be a constant occurrence?

She laughed. "It was not a very thoughtful person who decided to name a completely different confection with a nearly identical name. I try to be understanding."

The Perfect Sweet: 16 Joyce St, Warren
theperfectsweet.com • 401-289-0277

OPEN AND CLOSED

OPEN

Feeling the need for more baked goods? **Knead** is opening a new bakery to roll out more dough. Their new 5,000 square foot facility will be where Pilotworks incubator usedtabe, inside Providence Kitchen Collaborative at 55 Cromwell Street. Right next door will be the greatly anticipated new home of Long Live Beerworks – so you can have brew with your donuts! May is the month to watch for these.

CLOSED

Thee Red Fez, esteemed bastion of mysterious signage and great mac and cheese, and the go-to hangout for many downcity, is closing after a run of a few decades (since 2001). What will come next at 49 Peck St, in the heart of the parking lot district, is still unclear (our guess: condos), as is whether some fancy hat action will sprout up anywhere else. Their last day was Mar 30.

Four Corners Coffee: Affectionately called the square donut shop, this geometrically challenged Warwick purveyor of sweet treats has rolled off into the sunset. 63 Airport Rd, Warwick.

E & O Café: Just a year after a heroic GoFundMe effort to save this beloved neighborhood dive bar, it has quietly closed its taps. We don't know if it's last call yet, but you can't drown your errors and omissions here for the time being. 289 Knight St, PVD, near the West Side's famous Avery triangle.

Alas, time to get a new hat.

IMBIBE

THE CALENDAR SAYS SPRING, BUT THE WEATHER SAYS WINTER

BY KIM KINZIE

Spring is a confusing time for cocktails. My mind is on gin and tonics and summer ales with an ocean view, but the chilly nights keep me craving bourbon and red wine. When the temperature still gets below freezing and I'm seeing dirty gray piles of snow in every grocery store parking lot, I can't get down with cool icy drinks.

Bars provide no solace, as most bartenders have yet to switch to their spring menus. I'm still seeing those drinks with figs, black walnut liqueur and apple cider. Like my boots and big sweaters, I'll always love them, but it's time for them to go away for a while.

The only solution was to hit my kitchen and experiment. Not being a lover of vodka, I decided to stick with bourbon but lighten it up with some citrus and berries. I landed on a cocktail I'm calling **The Sprinter**, as we sprint to the finish line of cold, ice and snow. The bourbon will keep the heart warm, but the fruit will guide us to better weather – perfect for those disappointing days between winter and true spring.

Go Get:

- 2 ounces of your favorite bourbon or whiskey (I'm still loving Ethan Craig Bourbon)
- .5 ounce Cointreau
- .5 ounce mint simple syrup (1 part sugar, 1 part water, 5 or 6 mint leaves, boiled and cooked down till slightly thick; then remove mint leaves and chill)
- A dash of freshly squeezed lemon juice
- A handful of blackberries
- Mint leaf for garnishing

Make It:

At the bottom of your glass, muddle the blackberries. Add ice.

Combine bourbon, Cointreau, simple syrup and a dash of lemon juice to a cocktail shaker. Pour it over the ice and muddled blackberries, and garnish it with a mint leaf and a blackberry.

If you prefer your drinks straight up, put all the ingredients right into the cocktail shaker (including the muddled berries) and strain.

got beer? THE PLOT THICKENS

Foolproof's Forecast Chapter 5 is a beerfast of champions BY PETER LARRIVEE

Foolproof continues to expand its versatility, and there's no better example of that than the Forecast series. This series of limited edition brews is full of unique and interesting offerings, almost always breaking some kind of mold, and as Part 77 of my infinity part series looking at locally made craft beer, I decided to try some Forecast Chapter 5.

In books, Chapter 5 is usually where the plot starts to pick up speed, so when I saw that this brew was labeled a "New England Breakfast Ale," I thought to myself, "Well, there's a twist!" It's always nice to see a special brew that isn't just a double IPA with an obscure hop hybrid, but I wondered just what a New England breakfast would be considered. Dunkin' Donuts coffee and a bagel? The scent of fresh pine and ice as one carves their car out of a snow bank in the morning?

The label says it's made with allspice, vanilla and maple. I was surprised that coffee didn't make the list, but then I thought about it, and while I love coffee beers, I also love creativity and deviating from the norm. So let's dive in.

It pours a reddish amber with delicate lacing and smells mostly of maltiness with some vanilla and a hint of maple. The first taste is exactly what I was promised, but with a little of the spice lingering on the palate after the beer has gone down. I'm reminded of caramel, molasses, dark brown sugar, maple and other sweet flavors one usually associates with a pile of pancakes. It's quite delicious, actually, and drives home the point that not every "breakfast" beer needs to be a thick oatmeal coffee milk stout with a high ABV. This brewed confection comes in at a modest 5%, and while that might not be what you're looking for, I remind you that this is breakfast, and a little moderation is justified.

I think what I like best about this beer is how smooth it is, while still being complex and interesting. If one were bold enough to do a beer breakfast, as opposed to a beer dinner, I'd consider deviating from the label's advice of pairing it with bacon and eggs. Instead, I think it would be amazing with French toast, pancakes or waffles, or perhaps even reduced into a syrup for the aforementioned plates.

I suppose it could stand on its own, but I'd pair it with food. After all, I'm not in college anymore; I can't have beer for breakfast and then roll into astronomy class half in the bag, giggling helplessly at the name Uranus. I have to be an adult. So instead, I'll have a full breakfast, go to work, and giggle endlessly at the name "Peter."

Muddled berries lead to muddled brains.

theater

ANYTHING AND EVERYTHING

In Constellations, all possibilities are possible

BY MICHAEL BILOW

At each moment in time, all possible paths forward can be regarded as superposed together in an infinite "multiverse" of universes, and we as residents of one particular universe can observe only our own, with no knowledge of or visibility into the others. To us, and to the denizens of each universe, the path we have traveled seems, looking backward, to have been inevitable. But what happens if we could see those others?

The brilliant conceit of *Constellations* by Nick Payne is to make a selection of disjoint universes from the multiverse visible through the art of theater. What if that person we met at a cookout involved nothing more than sharing a hot dog and exchanging names, but we never saw them again? What if that person we met at a cookout became a romantic partner and we married? It is the theatrical version of Cubism, where we get to see all of the sides of something simultaneously so that it looks nothing like what it seems to the casual observer.

Two characters, Marianne (**Rachel Dulude**) and Roland (**Josh Short**), meet at a cookout and we see a number of possibilities from that meeting: they barely notice each other and part company, they chat but never see each other again, they remember each other and meet again later, they get into a romantic relationship and marry. We see some of these timelines progress, each with its own myriad forks of possibilities. Both Dulude and Short are called upon to give virtuoso acting performances, playing the same action over and over again until the instant when one universe branches off from another we have previously seen. The point of the play, then, is to make us question: What would have happened if everything, or even one tiny thing, had been different?

Among the most effective techniques Dulude and Short use, as the only two actors ever on the stage, is a carefully choreographed motion in relation to each other, sometimes exactly repeating the same patterns and sometimes trading off so that each repeats the motions of the other. The subtlety of their interactions is so complete that the play has no opening or beginning in the conventional sense: The traditional briefing about where the fire exits are and so forth occurs when audience members are handed their ticket and enter the area of the stage, at which time the more observant will notice Dulude and Short moving in a seemingly haphazard way in the far reaches of a wonderfully creative set consisting of nothing more than banners hanging from the rafters and artwork on the floor. Watching carefully in the dim light, it becomes apparent that their motions are not haphazard at all but are a recurring dance of moving forward, stopping, partially reversing, and then moving forward again, slowly progressing closer and closer to the audience in a way reminiscent of Brownian motion. Perhaps aided by Maxwell's demon, the action of the play spontaneously starts.

The deceptively bare set comes alive with projections, almost like an abstract planetarium, with scenes of star fields and astronomical objects such as nebulae projected onto the white banners. Director **Aubrey Snowden** told me when I asked that her intention was to evoke "the majesty of space," and she does that with extraordinary effectiveness. Snowden credited the impressive set to a collaboration among set designer **Max Ponticelli**, projection designer **Andy Russ** and light designer **Kelly Lipsey**. The set is truly original and gives the show a depth and resonance that has to be seen in person to be appreciated.

One need not have any knowledge of quantum mechanics or multiverse theory to enjoy a play that is ultimately about human relationships and how they go right or wrong because of uncountable decision points. One of the characters, Marianne, is a quantum astrophysicist studying the origins and structure of the cosmos, while the other, Roland, is a beekeeper – both of them worried about how a lot of small things compose a whole. As counter-intuitive as quantum mechanics is, everyone understands intuitively that the path we walk could have been another. That is certainly not a new concept; it has been the subject of the song "Ripple" by the Grateful Dead, which references the 18th century poem "Kubla Khan" by Samuel Taylor Coleridge, which was echoed a few decades later in the 19th century poem "The Rubiyat of Omar Khayyam" and its most famous quatrain on the inevitable unidirectionality of time:

The Moving Finger writes; and, having writ,
Moves on: nor all thy Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.

The acting and directing are outstanding, enhanced by an excellent combination of set, projection and lighting. *Constellations* at Wilbury is an enjoyable, profound, thoughtful and intriguing exploration of, well, everything. ●

Constellations, by Nick Payne, directed by Aubrey Snowden, performed by Wilbury Theatre Group, 40 Sonoma Ct, PVD. Through Apr 14. One act, about 1h15m with no intermission. Refreshments available. Handicap accessible. Free on-street parking. thewilburygroup.org

TERPENE DAYDREAM

Learn how this powerful plant part contributes to healing

BY JAYNA GRANT

Terpenes, fondly referred to as "terps," are fragrant compounds in plants, and in the case of cannabis, they can be found alongside THC and CBD inside the plant's trichome glands. They contribute to the plant's medicinal properties and, along with flavonoids, are responsible for the aromas that plant gives off. In fact, terpenes are the primary components of the plant's essential oils. The function of the odiferous hydrocarbons can be to either ward off potential predators or help attract pollinators in order to facilitate reproduction – the intrinsic end-game of all species.

In order to get the most out of your cannabis, a non-fractionated combination of terpenes, cannabinoids and flavonoids result in the most powerful and efficient delivery system famously called "the entourage effect." With their powers combined, the healing properties of these cannabis compounds are more effective than when used independently (though it's worth noting that they still have significant medicinal benefits on their own). Additionally, THC and CBD work better when administered together.

The levels of specific terpenes present in each cannabis plant are determined predominantly by that strain's genetics. Each genotype has a unique terpene profile that helps identify the healing properties of a particular strain. The potential health benefits of terpenes include anti-cancer, anti-tumor, antimutagenic, anti-inflammatory, analgesic (pain relief), anti-epileptic, anti-seizure, anti-convulsive, anti-spasmodic, sedative, anti-anxiety, anti-depressant, anti-psychotic, anti-bacterial and anti-fungal ... just to name a few.

Many people are probably already familiar with some of the terpenes in cannabis and their uses. For example, the commonly known lavender plant's calming and relaxing properties are largely attributed to a terpene called linalool. This stress-reducing terpene can also be found in certain strains of cannabis!

A terpene near and dear to this writer's heart, linalool is an impressive, multitalented super-terp that can be found in genetics like **Grand Daddy Purps, Lavender Jack** and **Amnesia Haze**. Studies on linalool show that it can act on the central nervous system to suppress muscle contractions and convulsions related to epilepsy. It is also a powerful anti-inflammatory. In a 2016 study on mice with Alzheimer's disease, administering linalool every 48 hours resulted in improved learning and spatial memory, as well as improved risk assessment when they made their way through their mazes. This reversal of the disease is theorized to only be possible because of the inflammation reduction found in the brains of the linalool-treated mice.

Limonene is one of the most easily identifiable terpenes due to its distinctive citrusy scent. Within the top five most prevalent terpenes in cannabis, limonene has anti-cancer properties on top of being a strong anti-bacterial and anti-fungal. When ingested, limonene has been found to inhibit cancer progression by encouraging cell apoptosis (also known as "programmed cell death" where a tumor cell sets into motion a set of processes that ultimately lead to its own orchestrated demise without leaving anything behind to harm other cells). Limonene is also thought to function as a protectant against some carcinogens found in cannabis smoke, and when inhaled, limonene vapor increases serotonin and dopamine in areas of the brain where a deficit is associated with anxiety, depression and OCD. A few strains known to be high in limonene include **Purple Punch, Strawberry Cough** and **White Fire OG**.

The single most prevalent terpene found in cannabis is myrcene (β-Myrcene). It is known for contributing to the relaxing, sedative effect of many strains. Also found in ripe mangos (the riper the better), ylang-ylang and hops, myrcene has anti-inflammatory, anti-tumoral, anti-mutagenic, anti-bacterial, anti-psychotic, anti-spasmodic and analgesic properties. Both limonene and myrcene aid in the absorption of cannabinoids, flavonoids and other terps by increasing the permeability of the blood-brain barrier, which allows these healing compounds to work their magic more efficiently.

A TERPENE CALLED LINALOOL

Delta-3-carene is another beloved super-terp. Paradoxically, it could also be largely responsible for your dry-mouth and red, dry eyes. As unpleasant as that parched mouth may be, if you are sick and need some congestion relief, delta-3-carene can come to your rescue! It can be found in many haze and hashplant strains, contributing to their sweet, pungent smells. Furthermore, it has been proven to be a powerful anti-fungal agent when applied topically.

The healing powers of terpenes cannot be ignored. They have been found to work synergistically or antagonistically with one another as well as with cannabinoids. Their ability to work with cannabinoids to directly alter brain function and increase/inhibit certain processes makes them powerful system regulators, and once researched properly and harnessed, they might prove to be safe, natural alternatives to synthesized pharmaceuticals that are typically laden with unpleasant side effects. Cannabis and its terps have the potential to contribute to re-inventing how we approach health in the west.

Recently, there has been a rise in US patent applications related to cannabis and considering the clear relationship between the two, terpenes may not be far behind! The more countries and states that make the informed decision to legalize, the more research on how cannabinoids, terpenes and other compounds in cannabis can work together to prevent and treat some of humanity's most obstinate maladies. ●

Turpene time. To make cleaning easier.

Fun & Art

Where In Our World?

This is probably where the man of steel landed when he jumped over the Supeman building "in a single bound."

249 Roosevelt Ave, Pawtucket RI

TRIVIA

Doin' Time, Keeping Rhythm

Where would music be without some of these law breakers?

1) What appropriately named singer spent 59 days in jail for stabbing his girlfriend Nancy in the abdomen, causing her to bleed to death?

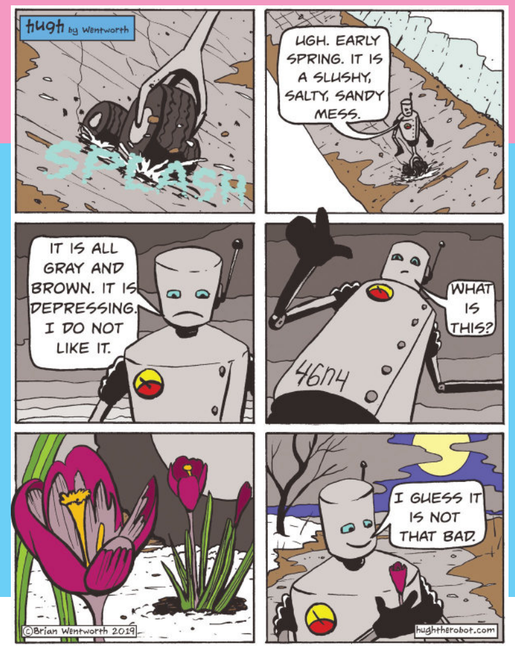
2) Only one musician has released an album that became number one while he was in prison. Name him.

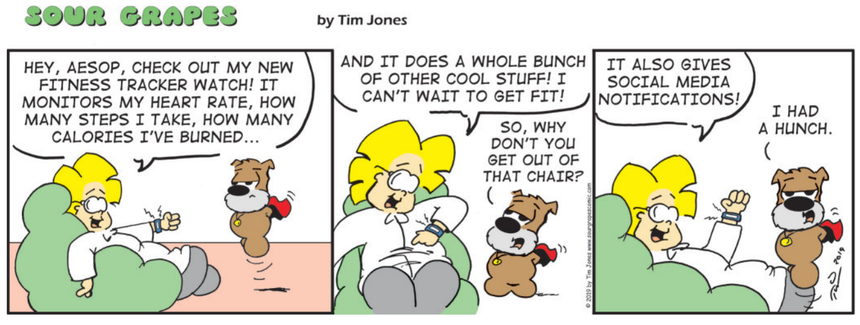
3) This musician attacked his mother with a hammer before fatally stabbing her. Oh, and he also co-wrote "Layla." Sure is a great song...

4) This artist spent three years in prison in 1949 for stealing clothes from parked cars. He's got soul, but that's super bad.

5) Someone must have given this singer a miseducation on tax law, because she spent some time in prison for tax evasion.

1) Sid Vicious
2) Tupac Shakur
3) Jim Gordon
4) James Brown
5) Lauryn Hill





Walking in the footsteps of giants. In Pawtucket. Put it on your bucket list.

Doodlebox by Lizzie Devlyn

EVENTS

Event-ual Releases

April 4 - April 18

Motif-Pick · Alcohol · Food · Film · Comedy · Fitness · Kid-Friendly · Green

APRIL

THU 4 - SUN 7

RI Home Show: For those three millenials out there who actually make enough to buy a home. RI Convention Center, 1 Sabin St, PVD. ribahomeshow.com

THU 4

Duke Robillard: Blues. 7:30pm. Zeiterion Performing Arts Center, 684 Purchase St, New Bedford, Mass. zeiterion.org

Sasquatch/ Jamie Craighead Duo/ Matt York: Alt rock and the return of the Sasquatch. 8pm. Askew, 150 Chestnut St, PVD. fb.com/Askewprov

90.7 WXIN Presents: Rock Hunt Night 3: Battle of the Bands. 9pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

URI Big Band: Jazz. 7pm. Pump House Music Works, 1464 Kingstown Rd, Wakefield. fb.com/pumphousemusicworks

Lewis Black: The yelling guy from "The Daily Show." 8pm. The Garde Arts Center, 325 State St, New London, Conn. gardearts.org

FRI 5

Kung Fu/ The New Motif: No relation. And grasshopper rock. 8pm. The Met, 1005 Main St, Pawtucket. themetri.com

Seatbelt/ Mr. Airplane Man/ Bryan Minto: Indie rock. 9pm. AS220, 115 Empire St, PVD. as220.org

2Cellos: One cup? 8pm. Mohegan Sun, 1 Mohegan Sun Blvd, Uncasville, Conn. mohegansun.com

Hayley Thompson-King/ The Quahogs: Rock 'n' roll 'n' Americana. 8pm. Askew, 150 Chestnut St, PVD. fb.com/Askewprov

Eliza Beals: Detroit blues rock. 8pm. Chan's, 267 Main St, Woonsocket. chanseggrollsandjazz.com

Andy Lampert Band/ Foul Weather Friend: Indie rock. 9:30pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

AGO 2019: Bands and dance music. 9pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

Wyclef Jean: Hip-hop. 7:30pm. FMH, 103 Dike St, PVD. fetemusic.com

Live Bait: True stories open mic where speakers' names are drawn from a fishbowl. This month's theme is bullshit. AS220 Black Box, 95 Empire St, PVD. as220.org

Rocky Horror Picture Show Live: We prefer *Muppet Treasure Island* Tim Curry, but Dr. Frank-N-Furter is good, too. 8pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

FRI 5 - SUN 14

Art & Design Film Festival: Films about the impact of the arts on you and me and society. In PVD the first week, in Newport the following week. The Columbus, 270 Broadway, PVD. columbustheatre.com

Newport Restaurant Weeks: With more than 45 local East Bay places participating. This year's focus is on farms and their relationships to the local food industry. discovernewport.org/newport-restaurant-week

SAT 6

Ze Carlos: Hip-hop. 9pm. The Strand, 79 Washington St, PVD. thestrandri.com

Whole Lotta Heart: Heart tribute. 8:30pm. The Met, 1005 Main St, Pawtucket. themetri.com

THOU/ Emma Ruth Rundle/ MJ Guider: Metal, songwriting and more. 9pm. AS220, 115 Empire St, PVD. as220.org

Boundaries/ Distinguisher/ Church Tongue: Metal. The last act may cross the first one. 5:30pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Justin Sane: Level-headed metal. 7pm. FMH, 103 Dike St, PVD. fetemusic.com

Tooth Fest: Bedroom punk and noise pop with bite. 1:30pm. Askew, 150 Chestnut St, PVD. fb.com/Askewprov

Haunt the House/ Bernard John/ Brian McKenzie/ Zack Slik: Americana. 7:30pm. Askew, 150 Chestnut St, PVD. fb.com/Askewprov

3 Ravens: Folk. 8pm. Blackstone River Theatre, 549 Broad St, Cumberland. riverfolk.org

Jason Ricci and the Bad King: Blues. 8pm. Chan's, 267 Main St, Woonsocket. chanseggrollsandjazz.com

Bob Kendall Band: Singer Songwriter. 1pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

Jonathan Edwards: This is an old white guy with a guitar, not the failed philandering presidential hopeful from '08 or the anal retentive religious preacher from the 1600s or the psychic from the 00s or the MLB pitcher. 8pm. Courthouse Center for the Arts, 3481 Kingstown Rd, West Kingston. courthousearts.org

The Day Is Done: Church choir. 7:30pm. St Martin's Church, 50 Orchard Ave, PVD. sinenominechoir.org

The Stone Road Band/ Umbrella Company/ Sorry Suns: Indie rock. 8pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Sundance: Cover act. 9pm. Ocean Mist, 895 Matunuck Beach Rd, Wakefield. oceanmist.net

The Original Harlem Globetrotters: But not the original, original guys 'cuz it'd just be a bunch of skeletons. 2pm & 6pm. Dunkin Donuts Center, 1 LaSalle Sq, PVD. dunkindonutscenter.com

An Evening Uncorked: So much wine, you'll think you're Frasier Crane for a night. Proceeds benefit RI PBS. 7pm. Pawtucket Armory, 172 Exchange St, Pawtucket. ripbs.org

Wine, Art & Music at Tapped: Brian Brown plays the music while his wife Beth shares her art work, accompanied by local fermentations. Tapped Apple Winery, 37 High St, Westerly. tappedapple.com

Amenity Aid Benefit & Auction Spectacular: 5th annual event to help Amenity Aid, which provides essential hygiene products to those in need across RI. Definitely say hi to Gene. Arcade PVD, 65 Weybosset St, PVD. amenityaid.org

New London Talent Show IX: Regional showcase of talents for the youths. 7pm. The Garde Arts Center, 325 State St, New London, Conn. gardearts.org

W. Kamau Bell: Comedian who hosts United Shades of America on CNN. 8pm. Zeiterion Performing Arts Center, 684 Purchase St, New Bedford, Mass. zeiterion.org

Parking Lot Pig Out: Eat tacos in the parking lot. 2pm. Tallulah's Taqueria, 146 Ives St, PVD. tallulahstaqueria.com

Designer's Ball 2019: A gala event with a twist: designer costumes and creatures and monsters. 7pm. WaterFire Arts Center, 475 Valley St, PVD. designxri.com

SAT 6 - SUN 7

4th Annual RI Spring Festival: The snow is (hopefully) gone and it's time to celebrate. Food trucks, people selling kitschy shit, a cupcake challenge and more. Purple Cat Tavern, 11 Money Hill Rd, Chepachet. purplecatwinery.com

SUN 7

Airforce: Hard rock. 7pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Dan Moretti Sunday Jazz: Jazz. 3:30pm. Pump House Music Works, 1464 Kingstown Rd, Wakefield. fb.com/pumphousemusicworks

Four Bridges: Bluegrass. 1pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

Regional Justice Center/ Brother/ Pummel: Hardcore. 4pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Palomina/ Oceanater/ Calyx: Political emo. 8pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Chrome Waves/ Infera Bruo/ Upheaval: Prog black metal. Dusk, 301 Harris Ave, PVD. duskprovidence.com

The World of Musicals: A medley of famous musical numbers. 4pm. Zeiterion Performing Arts Center, 684 Purchase St, New Bedford, Mass. zeiterion.org

Made in RI - A Drag King Recital: Join Randy Andy and 6 new drag kings. 7pm. Askew, 150 Chestnut, PVD. askewprov.com

Mary Poppins: The film classic gets the Rocky-Horror-live-cast treatment courtesy of the Simply Enchanted Players. 1:30pm. The Greenwich Odeum, 59 Main Street, East Greenwich. greenwichodeum.com

Empire Revue: Original music and comedy at this long-revered variety show. AS220, 115 Empire St, PVD. as220.org

John Corbett: Discussing his book *Pick Up the Pieces* about '70s rock. 6pm. Riffraff, 60 Valley St Unit 107A, PVD. riffraffpvd.com

Field of Artisans: Pop-up festival with crafts and art for sale. Oh, and beer! First Sunday of March, April and May. Whalers Brewing Company, 1174 Kingstown Rd, Wakefield. fieldofartisans.com

MON 8

All-Star Stars: They're bringing David Tessier for classic covers and prog rock originals that will inspire your inner Pac Man. 9:30pm. Shelter Arcade Bar, inside FMH, 103 Dike St, PVD. shelterarcadebar.com

Void Vator/ Face First: Metal. 7pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Dougie MacLean: Scots singer-songwriter. 7:30pm. Blackstone River Theatre, 549 Broad St, Cumberland. riverfolk.org

MON 8 - SUN 14

Roving Eye Film Festival: This multi-day festival at Roger Williams University carries the theme, "The Power of Perception" this year, weaving together films long and short. film-festival.org

TUE 9

Franny Choi/ Sweetpea Pumpkin: Poetry, with occasional music. 8pm. Columbus Theatre, 270 Broadway, PVD. columbustheatre.com

Stubborn Hearts/ Panzerchocolate/ Father Card: Melodic punk. 7pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Knucklecrease/Lady Alone/ Aloe Vera: Indie pop. 9pm. AS220, 115 Empire St, PVD. as220.org

Decomp/ Video Filth/ Malleus: Hardcore punk and crust punk. 8pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

Dyer Switch Band: Bluegrass. 8:30pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

Fatto a Mano: Class on pasta making. 5:30pm. Easy Entertaining, 166 Valley St, PVD. easyentertainingri.com

Whose Line Is It Anyway?: Drew Carey emerges from "The Price is Right" to do the famous improv show you watched YouTube clips of, live on stage. 8pm. Zeiterion, 684 Purchase St, New Bedford, Mass. zeiterion.org

David Sedaris: New stories, Q&A & signing. 7:30pm. The Vets, One Avenue of the Arts, PVD. thevetsri.com

PPL Friends at Flatbread: Flatbread donates part of the evening's proceeds to the PVD Public Library, and you meet a roomful of bibliophiles. 161 Cushing St, PVD. flatbreadcompany.com

EVENTS

THEATER

Plays in the House

The American Century: CCRI, Liston Campus Room 1120, 1 Hilton St, PVD. ccri.edu A son time-travels back to post-WWII America to give his parents a sly, humorous taste of 20th century Americana. But will his spoilers produce a grandfather paradox? *Runs Apr 11 - 14*

American Drag: Epic Theatre Company @ Theatre 82, 82 Rolfe Sq, Cranston. epictheatreri.org Greek gods come to America to start a new religion – through drag. *Runs Apr 12 - 27*

Clothes Encounters: Newport Playhouse, 102 Connell Highway, Newport. newportplayhouse.com A misdirected and broken shower wreaks havoc on some homebuyers. *Runs Apr 4 - May 25*

Constellations: Wilbury Theatre Group, 40 Sonoma Ct, PVD. thewilburygroup.org Multiple timelines crossed with *When Harry Met Sally*. It's a rom-com with a zillion permutations. *Runs thru Apr 14 See review page 22*

The Diary of Anne Frank: Arctic Playhouse, 117 Washington St, West Warwick. thearcticplayhouse.com Long before there was instagram, there were diaries. And Nazis. *Runs Apr 4 - 20*

The Game's Afoot: Granite Theatre, 1 Granite St, Westerly. granitetheatre.com At a house party during The Great Depression an actor assumes the role of Sherlock Holmes. *Runs thru Apr 7*

Goblin Market: Head Trick Theatre @ AS220 Black Box, 95 Empire St, PVD. headtricktheatre.org Two sisters have a harrowing adventure buying produce. *Runs Mar 29 - Apr 7 See page 26.*

Godspell: Academy Players @ James and Gloria Maron Cultural Arts Center, 180 Button Hole Dr, Bldg #2, PVD. academyplayersri.org Classic musical features a lot of God, relatively little spelling. *Runs Apr 18 - 28*

Gypsy: Contemporary Theater Company, 327 Main St, Wakefield. contemporarytheatercompany.com As their medium dies, three vaudevillians make one last push to make it big in this revered Sondheim musical. *Runs Apr 10 - 13*

Gypsy: Salve Regina University Theatre, Casino Theatre, 10 Freebody St, Newport. salve.edu Classic musical about the price of fame and the dawn of burlesque dancer Gypsy Rose Lee in the '30s. *Runs Apr 19 - May 11*

The Happy End: The Wilbury Group, 40 Sonoma Court, PVD. thewilburygroup.org Smacking of the surreal, this story-with-no-story celebrates the escape, if only in their minds, of creative people conscripted to service in Cubicletopia. *Runs Apr 6 & 13*

High School Musical: Academy Players @ James and Gloria Maron Cultural Arts Center, 180 Button Hole Dr, Bldg #2, PVD. academyplayersri.org The Disney Channel cultural juggernaut musical on stage. *Runs Apr 4 - 14*

Immortal Thirst: Outloud Theatre @ Mathewson St United Methodist Church, 4th Fl, 134 Mathewson St, PVD. A new work from Outloud exploring our undying preoccupation with all things immortal. *Runs April*

A Little Night Music: J Studio Theatre, URI Fine Arts Center, 105 Upper College Rd, Kingston. uri.edu A little Sondheim musical adapted from an Ingmar Bergman film. *Runs Apr 18 - 28*

Little Shop of Horrors: Trinity Rep, 201 Washington St, PVD. trinityrep.com The merry musical about a simple, hometown carnivorous plant and her thirst for blood and world domination. *Runs Apr 11 - May 12*

#MeThree: RISE, 142 Clifton St, Woonsocket. ristage.org Lenny Schwartz's new (original, locally written) play. Hope it doesn't make us all go 'yikes' *(ed - except it's supposed to). Runs Apr 18 - 27*

Moon Over Buffalo: PC, 1 Cunningham Sq, PVD. providence.edu Travelling actors give Frank Capra films a try. *Runs Apr 5 - 14*

The Most Massive Woman Wins: Liston Campus Room 1120, 1 Hilton St, PVD. ccri.edu. Four women explore their body issues while waiting for their liposuction appointments. *Runs Apr 11 - 14*

Our Town: Burbage Theatre, 249 Roosevelt Ave, Pawtucket. burbagetheatre.org The life and death of the American small town. *Runs thru Apr 7*

The Rocky Horror Show: The theatrical realization of the classic subversive rock opera. RIC, Roberts Hall, 600 Mt. Pleasant Ave, PVD. ric.edu *Runs Apr 11 - 14*

Song of Summer: Trinity Rep, 201 Washington St, PVD. trinityrep.com The sweet, complex origin story for the literal song of the summer. *Runs thru Apr 14*

The Sonic Life of a Giant Tortoise: Brown University, Leeds Theatre, 83 Waterman St, PVD. People dream in the city, and this drama explores what lies beneath their seemingly comfortable lives. *Runs Apr 4 - 14*

This Beautiful City: Performing Arts Center, 1 Old Ferry Rd, Bristol. rwu.edu Musical about evangelical Christians. *Runs Apr 12 - 26*

True West: Gamm Theatre, 1245 Jefferson Blvd, Warwick. gammtheatre.org Cain and Abel, but in suburban California and they're screenwriters. *Runs Apr 11 - May 5*

DANCE

Ballet Hispanico: Zeiterion Performing Arts Center, 684 Purchase St, New Bedford, Mass. zeiterion.org Exploring and celebrating Latino cultures through dance. *April 12*

Cinderella: Stadium Theatre, 28 Monument Sq, Woonsocket. stadiumtheatre.com Ballet. *Apr 6 only*

From Bach to Bowie: PPAC, 220 Weybosset St, PVD. ppacri.org Dance and ballet set to modern music. *Runs Apr 17 only*

Up Close on Hope: Festival Ballet Providence, 823 Hope St, PVD. festivalballet.com *Runs Apr 5 - 14*

AUDITIONS

2019-2020 Gamm Auditions: Gamm Theatre, 1245 Jefferson Blvd, Warwick. gammtheatre.org Gamm is looking to fill dozens of roles in next year's season. Auditions will be between 3 and 5 minutes long. Prepare a 1- to 2-minute monologue; if auditioning for *Assassins* (a musical) prepare 16 bars of a song. Sing a capella or bring your own recording. *Apr 13 - 15*

Honky Tonk Laundry: Little Theatre, 340 Prospect St, Fall River. littletheatre.net Prepare a pop or country song that will show off your singing chops. *Apr 15 & 17, 6pm.*

Open Call for Young Actors: Theatre by the Sea, 364 Cards Pond Rd, Wakefield. theatrebythesea.com Looking for a few roles across three summer shows. Bring a current headshot and a resume. Prepare 16 - 32 bars of a song. Seeking non-equity actors only. *Fri, Apr 5, 3pm*

Goblin Market courtesy of HeadTrick

Every Week

ONGOING

MONDAYS

The Parlour's Reggae Night: Upsetta International, the Natural Element Band and guests. 9pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

Madcap Mondays Open Mic: Join Nate Cozzolino for a free open mic and art night. 7pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

The House Combo: Live Americana played by an ever-changing roster of musicians. 9pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

Julians' Scrabble Night: Beginners and everyone in between are welcome. Work your way up to playing the Big Kahuna. 7pm. Julians, 318 Broadway, PVD. juliansprovidence.com

TUESDAYS

Parlour Open Mic Night: All are welcome at this *Motif* award-winning open mic. 7:30pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

Sandywoods Open Mic Night: Gary Fish hosts music, spoken word and other performances. 7 - 10pm. Sandywoods, 43 Muse Way, Tiverton. sandywoodsmusic.com

Tuesday Ticket Madness: South County's big weekly reggae party. Ocean Mist, 895 Matunuck Beach Rd, Wakefield.oceanmist.net

WEDNESDAYS

Norey's Music Night: Regional bluegrass, Americana, blues and rock. 9pm. Norey's, 156 Broadway, Newport. noreys.com

Pub on Park VRBE: An R&B night with the Vintage Rhythm & Blues Ensemble and guests. Swing dance lessons at 6:30pm. Music starts at 8pm. Pub on Park, 661 Park Ave, Cranston. pubonpark.com

The Bluegrass tHrOED-OWN: A night dedicated to bluegrass (& folk & Americana & country & roots). Nick-A-Nee's, 75 South St, PVD. 8:30 - 11:30pm. fb.com/nickanees

DJ Shzz Mack Presents Wayback: Expect strictly vinyl, Motown and funk. No cover. 7:30 - 9pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

The Funky Autocrats: For those from the young and carefree to the grown and sexy. 9pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

Knickerbocker's Let's Dance Wednesday: Doors 6pm. Free dance lessons 7pm. Local bands, music 7:30pm. Knickerbocker Café, 35 Railroad Ave, Westerly. knickmusic.com

Ballroom Dance Lessons at The Towers: Dance ballroom, salsa, tango and Latin. No experience necessary. 6 - 10pm. The Towers, 35 Ocean Rd, Narragansett. southcountyri.com

Newport Vineyards Live Music: Local musicians bring a wine tasting to another level. 909 E Main Rd, Middletown. newportvineyards.com

THURSDAYS

Thursday Vibes with Superdope: DJing hip-hop, funk and electronica. 10pm. The Salon, 57 Eddy St, PVD. thesalonpvd.com

StrangeCreek Battle of the Bands: One way StrangeCreek fest picks its bands. Three bands enter, one band leaves. 9pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

Knickerbocker's Open Mic: Three songs and a free CD recording of your performance. Different host each week. Doors at 7pm. The Knickerbocker Café, 35 Railroad Ave, Westerly. knickmusic.com

Live Jazz at Norey's: Different bands weekly. 8pm. Norey's, 156 Broadway, Newport. noreys.com

Jokey & Ha-Ha's Open Mic. 7:30pm. The Salon, 57 Eddy St, PVD. thesalonpvd.com

Loving Openly: A support group for people navigating polyamorous and open relationships. The Center for Sexual Pleasure and Health, 10 Davol Sq, PVD. thecsph.org

Weekly Drag: Drag show at EGO, 9pm. 73 Richmond St, PVD. egopvd.com

FRIDAYS

The Beachcomber: Happy Hour Band, 5:30pm. DJ or live music, 9pm. 506 Park Ave, Portsmouth. thebeachcomberri.com

The Parlour Karaoke Night: No cover, endless covers. 9pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

Live Nights at Tavern on Broadway: Live music with The Copacetics reggaeing out every fourth Friday. 10pm. Tavern on Broadway, 16 Broadway, Newport. fb.com/tavernonbroadwaynewport

SOL Friday Night Flights: Local spirits. 4:30 - 7:30pm. Sons of Liberty Distillery, 1425 Kingstown Rd, South Kingstown. solspirits.com

Wage House Improv Comedy: Improv with new troops and players complementing experienced comediennes. 8pm. 560 Mineral Spring Ave, Pawtucket. wagehouse.com

Bring Your Own Improv (BYOI): Family-friendly shows at 7pm. Adult shows at 9pm. hosted by the Warwick Museum of Art, 3259 Post Rd, Warwick. bringyourownimprov.com

Ratskeller: The German American Cultural Society of RI welcomes all who appreciate a good Brat, hard-to-find German brew, and authentic German music. GACS, 78 Carter Ave, Pawtucket. gacsri.org

Friday Night Hardcore Comedy: With host Brian Beaudoin and hardcore guests. 18+. 10:30pm. Comedy Connection, 39 Warren Ave, East Providence. ricomedyconnection.com

FRIDAYS & SATURDAYS

Live Music at Wood River Inn: Rock out! 9:30pm. Wood River Inn, 1139 Main St, Wyoming. fb.com/woodriverinnri

Providence Improv Guild: Inspired ways to make you laugh. 8pm. 393 Broad St, PVD. improvpig.com

The Bit Players Improv Comedy: A large cast of improvisers. Fridays at 8pm, Saturdays at 8 and 10pm. The Firehouse Theater, 4 Equality Park Pl, Newport. bitplayers.net

FRIDAYS & SUNDAYS

Micetro Improv: Improvisers compete for the title of Micetro. Fri 9:30pm and Sun 5pm. Contemporary Theatre Company, 327 Main St, South Kingstown. contemporarytheatercompany.com

SATURDAYS

Salon Saturdays Upstairs: Charlie Tunes the first Saturday of each month, Squad Up with Superdope the second, All Out with DJ Nick Bishop the third and Heavy Rotation the fourth. 10pm. The Salon, 57 Eddy St, PVD. thesalonpvd.com

Java's Musical Chairs with Al Keith: Test new material and meet (& play with) other musicians! 2 - 5pm. Java Madness, 134 Salt Pond Rd, Wakefield. javamadness.com

Island Saturdays: Weekly reggae dance party, 18+. 10pm - free before 11pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Hope & Main Schoolyard Market: Classes on different culinary topics. 11am - 3pm. Hope & Main, 691 Main St, Warren. facebook.com/HopeandMain

SATURDAYS & SUNDAYS

Americana Expo Flea Market: Includes a family-friendly arcade and snack bar. 9am - 5pm, rain or shine. 740 Plainfield St, PVD. fb.com/Americana-Expo-Center-108203775887376

SUNDAYS

OMist Sunday Funday: Live every Sun. 3:30 - 6:30pm. Ocean Mist, 895 Matunuck Beach Rd, Wakefield. oceanmist.net

The Beachcomber: Angry Farmer Band and Neal Vitullo, 4:30 - 8pm. 506 Park Ave, Portsmouth. thebeachcomberri.com

Open Mic – Blues Jam: Hosted by the Rick Harrington Band. 3 - 7pm. 2168 Putnam Pike, Chepachet. cadystavern.com

Jazz Piano Sunday Brunch at the Clarke Cooke House: With Bobby Ferreira. 12:30 – 3:30pm. 24 Bannister's Wharf, Newport. bannistersnewport.com

Bluegrass at Wood River Inn: Live bluegrass. 6:30pm. Wood River Inn, 1139 Main St, Wyoming. fb.com/woodriverinnri

WED 10

Mutter/ Npore/ Gash: Punk. 8pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

Lobotomizer/ Insect Politics/ Will Mk: Harsh noise, experimental rock and riff rock. 9pm. AS220, 115 Empire St, PVD. as220.org

Dudemanbro: Rock reggae. 4pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

STIG/ Good Trees River Band: Hi-fi funk and jam rock. 8pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Cocktails for a Cause: Benefiting the Leukemia and Lymphoma Society of RI. 6pm. The River Social, 200 Exchange St, PVD. theriversocial.com

THU 11

Smoochyface/ So Over It: Indie rock; or the full life-cycle of a relationship in one night. 9pm. AS220, 115 Empire St, PVD. as220.org

Dan Blakeslee: Alternative Folk. 7:30pm. Pump House Music Works, 1464 Kingstown Rd, Wakefield. fb.com/pumphousemusicworks

Nghtswm/ Calamity Company: Modern emo punk. 8pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Ronny Cox/ Lainey Dionne: The well known actor has, of late, been forging a folk singer-songwriter career. The Harmony Lodge, 102 Putnam Pike, Harmony. hearinrhodeisland.com

FLAW/ Mendenhall Experiment/ Black Water Rising: Metal. 7pm. FMH, 103 Dike St, PVD. fetemusic.com

90.7 WXIN Presents Rock Hunt Night 4: A battle 4 the bands night. 9pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

Neil Hilborn: Slam poet. 9pm. The Met, 1005 Main St, Pawtucket. themetri.com

Sweet Little Variety Show: A monthly feminist, anti-racist, queer-positive and body-positive cabaret. Now at Askew, 150 Chestnut St, PVD. sweetlittlevarietyshow.com

AHA!: New Bedford's famed art fest returns with a sustainable south coast theme. 5pm. Downtown New Bedford. ahanewbedford.org/calendar.php

THU 11 - SUN 14

Art & Design Film Festival: Films about the impact of the arts on you, me & society. This week at Jane Pickens, 49 Touro St, Newport. janepickens.com

FRI 12

Walter Trout: Grandpa rock you can fish to. 8pm. The Met, 1005 Main St, Pawtucket. themetri.com

John Popper: The Blues Traveler musician, sans penguins. Ocean Mist, 895 Matunuck Beach Rd, Wakefield. oceanmist.net

REO Speedwagon: Dad rock (Sorry John Fuzek). 8pm. Twin River, 100 Twin River Rd, Lincoln. twinriver.com

Murphy's Law: Hardcore. 8pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Professor Roots: The PVD Parlour reggae staple visits the other Parlor. Parlor Newport, 200 Broadway, Newport. parlornewport.com

And the Kids: Indie rock. 9pm. Columbus Theatre, 270 Broadway, PVD. columbustheatre.com

David Tessier and Friends: Musical theater, covers & originals, featuring multiple artists presented by 75orless records. 8pm. Askew, 150 Chestnut St, PVD. fb.com/Askewprov

Method Man/ Red Man: Hip-hop. 9pm. The Strand, 79 Washington St, PVD. thestrandri.com

Jeff Pitchell: Blues. 8pm. The Knickerbocker, 35 Railroad Ave, Westerly. knickmusic.com

GrandEvolution: Original alt-rock. Cady's Tavern, 2168 Putnam Pike, Chepachet. cadystavern.com

Arc Iris: Electronic indie-rock. 7:30pm. Pump House Music Works, 1464 Kingstown Rd, Wakefield. fb.com/pumphousemusicworks

Steve Smith and Vital Information NYC Edition: Jazz fusion and R & B. 8pm. Chan's, 267 Main St, Woonsocket. chanseggrollsandjazz.com

Goon Planet/ Baylie's Band/ Picnic Lunch: Punk rock noises. 9pm. AS220, 115 Empire St, PVD. as220.org.

Greg Sherrod Music Company: Bluegrass. 9pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

New Urban Arts Birthday Bash: Fundraising and celebrating 22 years of after-school arts programs. 705 Westminster St, PVD. newurbanarts.org

Printmaking Workshop: Learn the ins and outs of monotype. 6:30pm. Made in Warren, 476 Main St, Warren. madeinwarren.com

FRI 12 - SAT 13

Stomp: The International Percussion Sensation: Everything-but-conventional percussion. PPAC, 220 Weybosset St, PVD. ppacri.org

SAT 13

Buckethead: Metal guitarist, not to be confused with the perennial candidate for MP over in the United Kingdom. 9:30pm. The Met, 1005 Main St, Pawtucket. themetri.com

Justin Timberlake: Former Mouseketeer embarks on another solo tour. 7:30pm. Mohegan Sun, 1 Mohegan Sun Blvd, Uncasville, Conn. mohegansun.com

David Furlong and The Honk: Easy-listening solo work. 7:30pm. Pump House Music Works, 1464 Kingstown Rd, Wakefield. fb.com/pumphousemusicworks

Lil Baby: Hip-hop. 9pm. The Strand, 79 Washington St, PVD. thestrandri.com

Ballroom Thieves: Indie rock. 8pm. The Knickerbocker, 35 Railroad Ave, Westerly. knickmusic.com

Atwater-Donnelly Trio: Folk. 8pm. Blackstone River Theatre, 549 Broad St, Cumberland. riverfolk.org

Popa Chubby: NYC blues. 8pm. Chan's, 267 Main St, Woonsocket. chanseggrollsandjazz.com

The McGunks, Jason Bennett+the Resistance, The Essays, Nate Shaw: Punk, including a few *Motif* award winners. 8pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Pickin' Pear: Folk rock. 1pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

Oppositional Defiance: Rock. 6pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

A Night at the Opera: If you were hoping for a Marx brothers movie or Queen album, we're sorry to disappoint you. It's classical music. 8pm. The Vets, 1 Ave of the Arts, PVD. thevetsri.com

Leland Baker Quartet: Jazz. 9pm. Askew, 150 Chestnut St, PVD. fb.com/askewprov

Stone Rose Band: Bluegrass. 4pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

Tight Crew's Sonic Mania: EDM night with a hedgehog twist. 6pm. FMH, 103 Dike St, PVD. fetemusic.com

Touch-A-Truck: In addition to the display of fire, rescue, transit and construction vehicles, there will be activities like face-painting. Noon - 4pm. Warwick Mall, 400 Bald Hill Rd, Warwick. jlri.org

RI Robot Block Party: A free family-friendly festival including hands-on robotics activities, demonstrations and exhibits. Support Skynet! See website for locations. Noon - 4pm. Brought to you by Brown's Computer Science Dept. Noon. WaterFire Arts Center, 475 Valley St, PVD. risf.net

REVELFEST '19: Interactive dance, art, pop! People, facepainting, circus tricks, a runway challenge and B-52s tribute band B-Hive all in an '80s themed fundraiser for the REVEL Factory. 249 Roosevelt Ave, Pawtucket. revelfactory.org

Southside Community Land Trust Urban Agriculture Kick-off: Interested in growing a green thumb? Free organic seeds and low-cost fertilizer. 11am. See southsidectl.org/urban-ag-kickoff/ for complete list of locations.

Best Bloody Mary: Feats of bartending to determine who makes the best boozy tomato drink for people too hipster to drink mimosas. 11am. Roger Williams Park Casino, 1000 Elmwood Ave, PVD. eventbrite.com

RI Spring Festival: Easter kids fest. Bunnies, flowers, candy and vague feelings of guilt. Because Easter's Catholic. Y'know, just Rhody things. Noon. West Warwick Civic Center, 100 Factory St, West Warwick. fb.com/communitymarketingri

Funny4Funds: Comedy fundraiser to benefit the Irish Ceilidhe Club. 7pm. Irish Ceilidhe Club, 50 America St, Cranston. riirishclub.org

The Price of Everything: Doc on the contemporary art world and its commodification. Tickets are $10. 12:30pm. Jane Pickens, 49 Touro St. Newport. janepickens.com

SUN 14

Jess Tora Jazz Trio: Palm Sunday jazz. 2pm. Grace Note Farm, 969 Jackson Schoolhouse Rd, Pascoag. gracenotefarmweb.com

Dave Murphy Jazz Trio: Jazz. 8pm. The Grange, 166 Broadway, PVD. providencegrange.com

Aborted/ Cryptopsy/ Hideous Divinity: Holy Metal! 6pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Dave Schneider Quartet: Acoustic instrumentals. 1pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

Benny Banning: Classic rock hits. 4pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

Desmond Jones: Rock. 8pm. Askew, 150 Chestnut St, PVD. fb.com/askewprov

Jumping into Jonnycake: Concert fundraiser for the Jonnycake Center. 2pm. The Knickerbocker, 35 Railroad Ave, Westerly. knickmusic.com

Steve Smith and the Nakeds: Local favorites. 3:30pm. Ocean Mist, 895 Matunuck Beach Rd, Wakefield. oceanmist.net

From Scratch: The long-running exploration of short devised theater, featuring Vatic Kuumba and Esteban Coronado. Black Box, 95 Empire St, PVD. as220.org

H. Jon Benjamin/ Eugene Mirman: The voices from Bob's Burgers. 7pm. The Ryan Center, 1 Lincoln Almond Plaza, Kingston. theryancenter.com

John Mulaney and Pete Davidson: The funny tall guy from the Netflix specials and the weirdo from SNL who keeps dating out of his league. 7pm. PPAC, 220 Weybosset St, PVD. ppacri.org

Outdoor Art Market: A springtime flea. 2pm. News Café, 43 Broad St, Pawtucket. newscaferi.com

Double B Burlesque's Villains and Heroes: Burlesque. 7pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

TUE 16

Rat Ruckus/ Liam Dailey/ Morgan Johnston: Folk, singer-songwriters and jam. 9pm. AS220, 115 Empire St, PVD. as220.org

Joe Potenza Trio: Bluegrass. 9pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

WED 17

Graham Stone Music: Singer-songwriter. 1pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

Flipturn/ Grizzlies: Rock. 8pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

Squirrel Hunters: Bluegrass using acorns as bait. 8:30pm. Nick-A-Nee's, 75 South St, PVD. fb.com/nickanees

Museum Legs: Genre defying electronic folk. AS220, 115 Empire St, PVD. as220.org. **See story page 13**

FirstWorks Turns 15: Glitter and glam, music entertainment, hors d'oeuvres and cocktails including *Star Dust*, a tribute to David Bowie by Complexions Contemporary Ballet, and music from Bach to Bowie. 5pm. PPAC, 220 Weybosset St, PVD. first-works.org

Caren Beilin: Memoir of the author during her time in Spain. 7pm. Riffraff, 60 Valley St Unit 107A, PVD. riffraffpvd.com

THU 18

Marc Rebillet: One man show. 9pm. The Met, 1005 Main St, Pawtucket. themetri.com

Too Many Zooz/ Moon Hooch: Rock and brass. 8pm. FMH, 103 Dike St, PVD. fetemusic.com

Peelander-Z: Punk, rock, pop. 8pm. Alchemy, 71 Richmond St, PVD. alchemyri.com

Graham Stone & Littleboybigheadonbike: Country and bluegrass-inspired singer-songwriter with DIY, lo-fi folk. 7:30pm. Pump House Music Works, 1464 Kingstown Rd, Wakefield. fb.com/pumphousemusicworks

Circuitry: 40 Years of Electronic Music: Retro historical dance night. 9pm. Dusk, 301 Harris Ave, PVD. duskprovidence.com

Habibi/ Cherry Pit: Spooky surf rock. The Columbus, 270 Broadway, PVD. columbustheatre.com

Feminist & Queer Happy Hour PVD: A safe, non-patriarchal networking space. Saint Monday, 393 West Fountain St, PVD. jhagen.squarespace.com

Scratch Series Brewery Favorites: Learn how to make pretzels and other bar snacks as good as your favorite dive's. 6pm. Newport Vineyards, 909 E Main Rd, Middletown. newportvineyards.com

Double-O-Larry's: The Larry's Lounge Variety Show brings you the best in RI spycraft with its 007 themed music, comedy and more. Come early; this tends to sell out. 8pm. The Parlour, 1119 N Main St, PVD. theparlourri.com

GALLERIES

These folks were framed

Gallery Nights: These are a free (in our region) and fun way to get your feet wet in your local art scene!

Providence: One Regency Plaza, PVD. gallerynight.org On the third Thursday of every month, two-hour tours depart from 5:30 - 7pm, complete with guides, celeb guides and tour buses. Each hits four or five galleries, each tour hitting different spots. gallerynight.org

New Bedford, Mass: **AHA!,** the free arts and culture celebration, is a gallery night and often a lot more, with performances and music often integrated with the art viewings. It happens on the second Thursday of each month. ahanewbedford.org

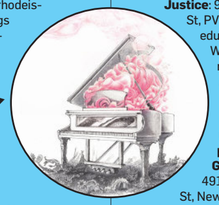
Newport: Stroll around the downtown collection of galleries on the second Thursday of the month. newportgallerynight.com

Bristol / Warren: Celebrate art night in these bayside towns on the last Thursday of the month. artnightbristolwarren.org

Artists' Cooperative Gallery of Westerly: 7 Canal St, Westerly. westerlyarts.com "Crossing Boundaries," Line, Shape & Edges. *Runs thru Apr 27*

AS220: as220.org
MAIN GALLERY @115 Empire St. "Landscape Lab" by Henry Brown; "Pet Sitting" by David Dvorchak
PROJECT SPACE @ 93 Mathewson St. "One Step Forward Two Steps Back" by Brandon Aguiar
READING ROOM @ 93 Mathewson St. "Botanic" by Kate Aitchison
RESIDENT GALLERY @ 131 Washington St. "Fruition" by PPHO x ASMR
Opening Reception Sat, Apr 6, 5 - 7pm. *Runs Apr 6 - 27*

BankRI Pitman Street Gallery: 137 Pitman St, PVD. fb.com/bankrhodeisland "Paintings by Angel Cajigas-Arbelo," *Runs thru May 1*



BankRI Turks Head Gallery: One Turks Head Pl, PVD. fb.com/bankrhodeisland "Waking, Sleeping, Dreaming: Ball Point Pen Drawings by Kyle Machado." *Runs thru May 1*

BankRI North Kingstown Gallery: 1140 Ten Rod Rd, N Kingstown. fb.com/bankrhodeisland "Spring Banners," by Robin Halpren-Ruder. *Runs thru Jun 5*

The BRT (Blackstone River Theatre) Art Gallery: 549 Broad St, Cumberland. riverfolk.org "Take A Look Around," Photography by Kevin Southwood. *Runs thru Apr 8*

Bristol Art Museum: 10 Wardwell St, Bristol. bristolartmuseum.org "Seeds of Inspiration." *Runs thru Apr 28*

Brown: List (Albert and Vera) Art Building, David Winton Bell Gallery: 62-64 College St, PVD. brown.edu "Recent Acquisitions Photography and Abstraction." *Runs thru May 26*

Brown: Gallery at the Center for the Study of Slavery and Justice: 94 Waterman St, PVD. brown.edu "Memory Works," by Renold Laurent. *Runs thru May 10*

Coastal Contemporary Gallery: 491 Thames St, Newport. coastalcontemporarygallery.com "Into the Fold," Artists On-Kyeong Seong and Sarah Meyers Brent. *Runs Apr*

DeBlois Gallery: 134 Aquidneck Ave, Middletown. debloisgallery.com "Three Guys," Shawndavid Berry/ JR Lynch/ Ed Znosko. *Runs Apr 6 - 28*

Dryden Gallery: 27 Dryden Ln, PVD. providencepictureframe.com
GRAND GALLERY "Wild Things." *Runs thru May 25*
RED GALLERY "Through My Eyes," photography by Justin Case. *Runs thru May 21*

Gallery 175: 175 Main St, Pawtucket. gallery175.com "Twisting Fibers." *Runs thru May 8*

Gallery X: 169 William St, New Bedford, Mass. fb.com/galleryxnewbedford "It's All About Me," Self portrait show. **Opening reception: Apr 6. AHA Night Apr 11.** *Runs thru Apr 28*

Gallery Z: 259 Atwells Ave, PVD. galleryzprov.com "Armenian Artists from Around the World." *Runs Apr 4 - May 26*

Hera Gallery: 10 High St, Wakefield. heragallery.org "Shame," Juried exhibition by Anna Dempsey. **Opening night reception: Apr 6. Artists talk Apr 18.** *Runs Apr 6 - May 4*

Imago Gallery: 36 Market St, Warren. imagofoundation4art.org "Migration." *Runs thru Apr 21*

Machines with Magnets: 400 Main St, Pawtucket. fb.com/machineswithmagnets "Atrium," Sculptures. *Runs thru Apr 15*

Narrows Art Gallery: 16 Anawan St, Fall River, Mass. narrowscenter.org "Through Our Eyes." *Runs thru May 4*

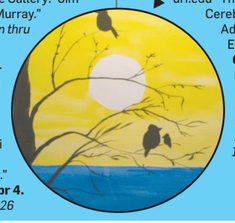
New Bedford Art Museum: 608 Pleasant St, New Bedford, Mass. newbedfordart.org
SKYLIGHT GALLERY: "Obama: An Intimate Portrait," Photographs by Pete Souza. *Runs Apr 11 - Jun 16*

Newport Art Museum: 76 Bellevue Ave, Newport. newportartmuseum.org "Gertrude Vanderbilt Whitney: Sculpture." *Runs Apr 19 - Jul 21*

Pawtucket Arts Collaborative: 560 Mineral Spring Ave, Pawtucket. pawtucketartscollaborative.org "12th Annual Pawtucket Foundation Prize Exhibition." *Runs thru May 2*

Portsmouth Arts Guild: 2679 East Main Rd, Portsmouth. portsmouthcarts.org "Memer Non-Juried Show." *Runs thru Apr 8*
"Words Inspire Images." *Runs Apr 12 - May 13*

Providence Art Club: 11 Thomas St, PVD. providenceartclub.org
MAXWELL MAYS GALLERY "Shawn Kenny/ Michael Lyons/ Michael Manni."
MARY CASTELNOVO GALLERY "Bill Comeau."
Dodge House Gallery: "Jim Bush/ Paul Murray."
All shows run thru Apr 19



RIC Bannister Gallery: 600 Mount Pleasant Ave, PVD. ric.edu "Kelli Rae Adams: work / study." **Opening: Apr 4.** *Runs Apr 4 - 26*

RI Center for Photographic Arts: 118 N Main St, PVD. riphotocenter.org "Nine Women Photographers." *Runs thru Apr 8*

RISD Museum: 20 N Main St, PVD. risdmuseum.org "Repair and Design Futures." *Runs thru Jun 30*
"Visions and Revisions." *Runs thru Aug 4*
"A Changing Reflection: Silver, Metalwork and Jewelry in the 19th Century." *Runs thru Oct 1*

South County Art Association: 2587 Kingstown Rd, South Kingstown. southcountyart.org "Earthworks: Open Juried Clay Annual." *Runs Apr 11 - May 4*

Spring Bull Gallery: 55 Bellevue Ave, Newport. springbullgallery.com "Signs of Spring." **Reception: Apr 6. Gallery Night: Apr 11.** *Runs Apr 6 - 30*

URI Feinstein Providence Campus: The Shepard Building, 80 Washington St, PVD. uri.edu "The United Cerebral Palsy Adaptive Arts Exhibit." **Gallery Night Reception Apr 18,** 5-9 pm. *Runs Apr 1 - 26*

LUNAR NOTES

Astrologer Shirley J. Prisco • shirleyprisco@cox.net • aquarianrants.blogspot.com

ARIES
MARCH-APRIL

You feel like it is a brand-new day for you – and it is. You're busy, active and at times aggressive. Beneath the surface you've got this inner dialogue going on. By mid-month you'll be able to articulate your thoughts clearly. Is there a secret romance going on? Or some relationship you want to keep quiet about for the time being?

TAURUS
APRIL-MAY

While you may feel like being a hermit, your hometown posse keeps you in the social whirl. That is fine with you for the most part because they get you into some fun stuff. Through it all, you keep your eye on the practical and don't go overboard with the spending. Something is going on with taxes, insurance and/or legacies.

GEMINI
MAY-JUNE

You startle folks when you come on a lot more aggressively than usual. Nothing wrong with asserting yourself, but you might want to tone it down a bit. When you speak, people listen. You have a natural talent for communication, so use it to your advantage. You'll catch more flies with honey than with vinegar.

CANCER
JUNE-JULY

Some people behave in ways that offend your tender sensibilities. Toughen up your crab shell and give back some of what they are dishing out. Then move on to the new, interesting and unusual folks entering your life. The sun shines bright on you now, illuminating you and bringing you into the spotlight.

LEO
JULY-AUGUST

Unexpected events bring some cash and financial issues. Get clear and be sure you know what is going on. New activities and interests open up your world. Art, science and history beckon you. Plan some visits to museums, galleries and other venues that bring joy into your life.

VIRGO
AUGUST-SEPTEMBER

Conversations delve into the mystical as you explore what is beyond the surface. Someone is wise, mystical and practical at the same time. You listen, sift through the information and come to your own conclusions. An attraction to someone different from your usual type is worth paying attention to.

LIBRA
SEPTEMBER-OCTOBER

Days are busy with the workaday tasks, as well as activities that take you out of the daily routine. You are curious about foreign cultures, art and travel. Your eye for beauty is enhanced now. An unexpected twist in your finances may provide the wherewithal to travel. Go for it!

SCORPIO
OCTOBER-NOVEMBER

Certain people in your life surprise you by behaving in an unorthodox manner. You are actually intrigued by this and look forward to some in-depth conversation with these folks. A financial windfall opens up the possibility for a major expenditure. Could be art, travel or simply a new vehicle to tool around in.

SAGITTARIUS
NOVEMBER-DECEMBER

You're in a standoff with an aggressively talkative person. No worries – you give it right back, packing the punch of truth. While you need to mind the budget, don't let it stop you from enjoying yourself. You find some romance and fun near or in your home. Things are lively in the neighborhood.

CAPRICORN
DECEMBER-JANUARY

Despite feeling like the weight of the world is on your shoulders, you manage to find some pleasantly exciting social events. A mixed bag of relationship issues moves across your landscape, from the lovey-dovey to the argumentative and troublesome. One is of a very unusual type – exciting but erratic.

AQUARIUS
JANUARY-FEBRUARY

News, information and plenty of chatter lands on your doorstep. Money issues, like taxes and insurance, require careful reading. Sporting events and outdoor activities lure you away from your books and papers. Appliance and electrical mishaps upset the domestic scene; they could simply be a blown fuse.

PISCES
FEBRUARY-MARCH

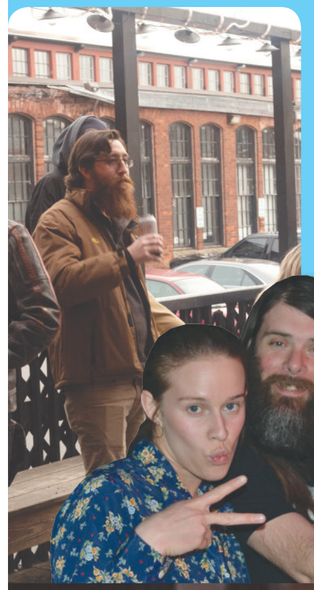
Your routine is anything but routine. You find it impossible to follow any type of schedule as someone or something always seems to throw a monkey wrench into your plans. Go with the flow and you will find that you seem to attract fun times, interesting conversation and happy social events.

FORECAST PERIOD: APRIL 4 - APRIL 18

Astrology signs illustrated by Tiana Crane

Motif Music Awards 2019

On March 25, more than 300 local musicians from multiple genres, and the fans who love them, gathered at The Met to witness and celebrate the annual *Motif* Music Awards. The place was packed and the crowd was electric as country bands rubbed elbows with club DJs and members of the old guard mingled with up-and-comers. This year, 6,143 people and zero Russian bots cast votes for their favorite musicians. We're proud of the engagement that statistic shows, and the music community deserves to be too.



Watch for the video, coming soon: "Rhody After Dark: Music Awards Special!!"

Photo Credits: Kleo Sincere, John Fuzek and Mike Bilow


SUNDAY APRIL 14 2019
KONSHENS
NORTH AMERICAN
RAW TOUR
DOORS 8PM
SHOW 9PM
$25
FT. DJ STARR & OHQ HEADTOP AMEIRA
ALSO FEATURING PAUL MICHAEL
The STRAND
BALLROOM & THEATRE
Providence, RI
79 WASHINGTON ST. • PROVIDENCE • THESTRANDRI.COM
STORYTELLER
LIVE ACOUSTIC PERFORMANCE
WEDNESDAY
05.08
KIP MOORE
KEVIN HERCHEN
METHOD MAN
REDMAN
FRIDAY
04
12
LIL BABY
THE NEW GENERATION TOUR
FEATURING
CITY GIRLS & BLUEFACE
WITH SPECIAL OPENING GUESTS
JORDAN HOLLYWOOD, RYLO RODRIGUEZ,
MARLO & 42 DUGG
SATURDAY
APRIL 13
THURSDAY, APRIL 25
LOSTKINGS
CASTAWAY
GOOD GUYS
BEFORE DAWN
FRIDAY, APRIL 26
Walker & Royce
ARDALAN
AFTER DARK
SATURDAY, APRIL 27
ACTION BRONSON
THE WHITE BRONCO TOUR
WITH SPECIAL GUEST
MAYHEM LAUREN
PROJECT MAYHEM
THURSDAY MAY 2ND
CV ENTERTAINMENT PRESENTS
TITO PARIS
WITH SPECIAL GUEST
CREMILDA MEDINA
SAT
MAY
04TH
FRIDAY,
MAY 10
SNARKY PUPPY
Beartooth
THE DISEASE TOUR
PART II
MICE MEN
HANDS LIKE HOUSES
DEAD AMERICAN
MAY 14 2019 — PROVIDENCE, RI
Burna Boy
FRIDAY
MAY
24
The STRAND
BALLROOM & THEATRE
RAISIN' HELL IN THE HEARTLAND TOUR
A DAY TO REMEMBER
FRIDAY, JUNE 28
BOSTON MANOR
CANDLEBOX
WEDNESDAY, SEPTEMBER 25

Jefferson Beauregard Sessions III
Attorney General of the United States
950 Pennsylvania Ave NW #409
Washington, DC 20530

January 18, 2018

Dear Attorney General Sessions,

NAPD members represent thousands of indigent clients across the country and have seen poor people struggle with crippling criminal justice debt in the form of court fees and taxes. So, it came as a great relief to many who work in the judicial system (and those opposed to oppressive hidden taxes) when, in March of 2016, the Justice Department issued guidance explaining existing law with regard to imposing monetary penalties and threatening incarceration for indigent citizens unable to pay.

Since Ferguson, NAPD members and allies have been able to gain momentum in the fight against crippling legal financial obligations. The work is not done, the problem is not solved, and continued pressure is needed to encourage reluctant jurisdictions to change. The DOJ's letter to the bench provided an independent source of pressure and encouragement and confirmed the problem as a national one.

The recent revocation of this guidance memo by Attorney General Sessions doesn't change the law but it sends a troubling message that the current Justice Department no longer intends to enforce existing law designed to protect one of this country's most vulnerable populations. For this reason alone, the Justice Department and Trump administration must reconsider its commitment to "law and order" and the value of clear Justice Department guidance and reissue its legal advice in the area of criminal costs and fees.

Sincerely,

Paul DeWolfe
Chair, NAPD Steering Committee

Janene McCabe
Chair, NAPD Fines & Fees Committee

cc/hard copy: Rod Jay Rosenstein, Deputy Attorney General of the United States

TIPPING THE SCALES TOWARD JUSTICE

ON BEHALF OF THE NAPD STEERING COMMITTEE

PAUL DEWOLFE, CHAIR
State Public Defender, Office of the Public Defender, Baltimore, MD

DERWYN BUNTON, VICE-CHAIR
District Defender, Orleans Public Defenders, New Orleans, LA

JEFF ADACHI
San Francisco City and County Public Defender, San Francisco, CA

MICHAEL BARRETT
State Public Defender Director, Missouri State Public Defender System, St. Louis, MO

ALEX BASSOS
Director of Training & Outreach, Metropolitan Public Defender, Portland, OR

NANCY BENNETT
Deputy Chief Counsel for the Private Counsel Division of CPCS, Boston, MA

KEIR BRADFORD-GREY
Chief Defender, Philadelphia Defender's Association, Philadelphia, PA

AMY P. CAMPANELLI
Chief Defender, Cook County Office of the Public Defender, Chicago, IL

DAWN DEANER
Public Defender, Metropolitan Nashville and Davidson County, Nashville, TN

STEPHEN F. HANLON, GENERAL COUNSEL,
Washington, D.C.

RICK JONES
Executive Director, Neighborhood Defender Services of Harlem, Harlem, NY

JOANNA E. LANDAU
Director, Utah Indigent Defense Commission, Salt Lake City, UT

JUSTINE M. LUONGO
Attorney-in Charge of the Criminal Practice, Legal Aid Society of New York, New York, NY

CARLOS J. MARTINEZ
Public Defender, 11th Judicial Circuit of Florida, Miami, FL

JANENE MCCABE
Director of Technical and Strategic Litigation, Colorado Office of the Public Defender, Denver, CO

ED MONAHAN
(Former) Public Advocate, Department of Public Advocacy, Frankfort, KY

JANET MOORE
Associate Professor of Law, University of Cincinnati Law School, Cincinnati, OH

TERI MOORE
Investigator, Federal Public Defender's Office, District of New Jersey, Trenton, NJ

NDUME OLATUSHANI
Children's Defense Fund, death row exoneree (wrongfully convicted, served 29 yrs), Nashville, TN

MARK STEPHENS
District Defender, Knox County Public Defender Community Law Office, Knoxville, TN

KEVIN TULLY
Public Defender, Mecklenburg County Public Defender's Office, Charlotte, NC

WILLIAM WARD
State Public Defender, Minnesota Board of Public Defense, Minneapolis, MN

DOUG WILSON
State Public Defender, Office of the Public Defender, Denver, CO

TIM YOUNG
Director, Ohio Public Defender, Columbus, OH

LORINDA YOUNGCOURT
Chief Public Defender, King County Department of Public Defense, Seattle, WA

NORMAN LEFSTEIN, SPECIAL ADVISOR,
Professor of Law/Dean Emeritus, Indiana University Robert H. McKinney School of Law, Indianapolis, IN

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS

Published May 13, 2015

Executive Summary

The collection of costs, fines, and fees in too many criminal courts across the United States are predatory in nature and an economic failure. These predatory practices impact poor people in catastrophic and life altering ways and are disproportionately levied against people of color.

In the criminal justice system, significant fines, fees and court costs are levied upon poor people to fund criminal justice costs, and in some instances a significant part of municipal budgets. Privatization of the criminal justice system function is also increasing, aggravating the impact. Functionally, the status of being poor has been turned into a crime, resulting in the poor being used to enrich the courts and municipalities through a cycle of debt that continually increases. The methods used to collect costs, fines, and fees are so extreme that many, if not all, practices have been outlawed when applied to predatory lenders. These court practices include:

- Usurious interest rates
- Payment plans that are harsh, unrealistic and designed to cause failure
- Hidden costs and additional fees
- Loss of freedom and repetitive arrests over nothing more than a few dollars that is increased each time an arrest is made creating a never ending cycle of debt
- Denial of access to families while in jail

Meanwhile, too many courts are ignoring their constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients, and many courts are illegally imposing jail time as a punishment for unpaid criminal justice debt.

Public policy weighs strongly against funding government on the backs of poor people. It should end now.

PRINCIPLES GOVERNING THE COLLECTION OF MONEY IN CRIMINAL CASES

1. **Fines are different than court costs and fees and must be separately accounted for and treated differently by courts when attempting to collect money.**

2. **Court costs are a civil debt and only civil debt collection methods may be used to recoup unpaid court costs in criminal cases; and civil debt collection is the only method to collect fines assessed for ordinance violations or infractions that are not criminal violations.**

3. **Non-payment of fees should be treated as a civil debt.**

4. **A court has a constitutional responsibility to find affirmatively that a person has an ability to pay fines before depriving a person of his or her liberty for non-payment.**

5. **The determination of the ability to pay should be the same as need-based assistance in other government programs.**

6. **Contempt of court is not an appropriate method to collect fines, fees or court costs.**

7. **Fines may not be made a condition of probation without regard to a person's ability to pay.**

8. **Indigent defense fees should not be collected by defense agencies.**

9. **The practice of monetary bond should be eliminated, and never be used as a means to detain or to collect unpaid fines, fees or court costs.**

10. **Ending excessive costs and fines is good public policy, serves the interests of taxpayers, and fairly treats those who come before our courts.**

NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS

Predatory collection of costs, fines, and fees has shifted the expense of essential government services to the poor. The most dramatic shift happening anywhere in government is in the third branch where the criminal justice system is funding itself through its reliance on predatory costs, fines, and fees. The greatest amounts are borne by those who can least afford it. Worse than creating more debt for the poor and acting worse than companies that prey on this vulnerable sector of our economy with pay day loans, rent-to-own, and title loans, our justice system goes beyond the tactics of these private debt agencies and uses the court system to deprive people of their liberty in the collection of debt. This is debt which was created by the very system that is now jailing them; debt that until recently was always a general revenue cost of guaranteeing our government functioned as our founders intended.

Criminal justice fines, fees and costs are significant. Today, anyone encountering our justice system is likely to face fines, fees, and costs for every aspect of his or her case. There are mandatory fines imposed for tickets, like a dog at large or disturbing the peace for playing a car stereo loudly. There are fees for applying for counsel when you are too poor to hire counsel; fees for supervision while on pretrial release; fees for filing any pleading; fees for requesting a jury, a constitutionally guaranteed right; and fees for vehicle interlocks or impounded vehicle costs, again all before ever having been found guilty of anything. And if there is a conviction, there will be court costs charged, which may include special project fees to build a new courthouse and fees for the processing of paperwork by the clerk's office. In addition, there may be a charge for every visit to probation which is required to maintain freedom, fees for every test the individual is required to take, fees for every program she is required to attend, and even fees to stay in jail.

Privatization of the criminal justice system function is increasing. On top of these government imposed fees, the courts have started to privatize many traditionally governmental functions turning clients into profit centers. Courts have contracted probation services to for profit companies. People are not just being charged for probation but they are being charged a surplus so the company can make a profit. Complain about it or fail to make the payments and the probation officer can recommend incarceration in jail. And the families of those who go to America's criminal courts are subject to extortion-like behavior from private vendors as well. Rather than operate their own phone systems, many prisons and jails make money by selling a contract to private vendors who then charge up to a $1 per minute, with the jail or prison receiving a per minute profit. This means children cannot to talk to their parents, many of whom are jailed prior to trial and are innocent of any crime or who may only be in jail because they have been unable to pay prior costs, fines, and fees. Even staying in jail can cost money. Failing to

pay for the daily cost of incarceration can result in more jail time, requiring more money.

Courts are ignoring the constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients. By ignoring an individual's ability to pay assessed fines, fees, and costs, courts routinely assess financial penalties that individuals cannot pay. If a person fails to pay, the penalties escalate with additional fines and fees, court costs, contempt rulings, arrest warrants, and often, time in jail – even though imprisonment for inability to pay (the "debtor's prison") is unconstitutional. Some jurisdictions offer payment plans, but can have an application fee, and compounding interest. Without regulation or principles, criminal justice expenses are far more predatory and far less transparent than the interest rates on personal credit cards.

Predatory collection of costs, fines, and fees is an economic failure. While courts regularly issue annual reports of how much money they collect, these reports suggest this collection is a net gain. The reality is that courts spend far more than they ever collect and there is no improvement in public safety. Courts are part of a justice system and when a court issues a warrant for someone because they owe the court $100, the court has issued a directive to numerous other justice agencies to spend money. That warrant causes the police to expend resources to arrest the person and the person is then jailed where more money and resources are expended to book them, house them, feed them, and provide necessary medical care. When the person is brought to court, the clerk has expended resources, the prosecutor has expended resources, and the public defense system has expended resources. So, while the court has collected $100, the other justice agencies have spent immeasurably more. This type of accounting is disingenuous by placing assets on one set of books and debts on another set of books and then only reporting the assets. Predatory collection is a burden on society that should end. It provides no real increase in revenue and, in fact, costs money, and it wastes valuable limited resources without any accompanying improvement in public safety.

The impact of predatory collection practices in the criminal justice system is catastrophic on poor people generally and on people of color particularly. Litigation filings throughout the country tell the stories of people threatened with or actually taken to jail – often for parking and traffic tickets that have almost no impact on public safety – because they struggle to keep up with court-assessed fees that are imposed without any consideration of ability to pay.

In 2009, in St. Louis County, Nicole Bolden was arrested for driving with a suspended license and spent two weeks in jail. Five years later, lawyers at the Arch City Defenders met with her at her kitchen table to discuss her still-outstanding fees. Ms. Bolden is the mother of four children. She has a part-time job and is in the process of studying to be a paralegal. In 2009, failure to pay fines and fees resulted in the suspension of her license, which she needed in order to drive to work so that she could support her family. She was arrested on her way to drop her children at school. After two weeks in jail without income, and the loss of her job, she was

farther behind and had new bills to pay associated with her court costs. Each month for the past five years she has struggled to pay her rent and utilities, provide for her children, maintain her transportation and have something left over to contribute to her fines and fees. Some months there is money, some months there is not. On months when the court gets paid, another bill does not. Having already been taken to jail for failure to pay her fines, she knows the consequences can be severe, but she has an absolute inability to pay. Her struggle to extricate herself from fines assessed in 2009 will take years more, creating acute hardships that will dominate the entire childhood of her children, and affect her ability to advance her work opportunities. Her experience is shared by thousands of people throughout the country.

This is the shameful truth of predatory collection practices: many individuals start with a small infraction that becomes a life-changing struggle to satisfy ever-mounting debt to the criminal justice system. Its effect can be generational, and condemns the poorest communities to persistent poverty.

PRINCIPLES GOVERNING THE COLLECTION OF MONEY IN CRIMINAL CASES

1. **Fines are different than court costs and fees and must be separately accounted for and treated differently by courts when attempting to collect money.**

The purpose of fines and court costs are different. Fines are part of the punishment levied against the individual for the infraction committed. Court costs are not intended to punish but are intended to defray the operational costs of the court. "Costs are taxed against certain litigants for the purpose of lightening the burden on taxpayers financing the court system . . . Statutory provisions for payment of court costs were not enacted to serve a punitive, retributive or rehabilitative purpose, as are fines." *Strattman v. Studt*, 20 Ohio St. 2d 95, 102 (1969). Because the purposes of fines and costs are different, the methods used to collect them must also differ.

The practice of setting numerous fines and imposing incarceration for failure to pay echoes the worst of American tradition – calling to mind Reconstruction era charges such as vagrancy that were applied predominantly to black men, punished by loss of liberty as well as insurmountably high fines and fees, and subsequently paid back through hard labor for private companies.

2. **Court costs are a civil debt and only civil debt collection methods may be used to recoup unpaid court costs in criminal cases; civil debt collection is the only method that should be used to collect fines assessed for ordinance violations or infractions that are not criminal violations.**

Not only are the purposes of court costs and fines different in criminal cases, thus mandating different methods of collection, there are constitutional restrictions in most states governing the collection of civil debt. Most state constitutions have a provision forbidding any loss of liberty for civil debt. "Imprisonment for debt.—That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law." Missouri Const., Article I, Sect. 11. "A person may not be imprisoned for civil debt." Ohio Const., Article 1, Section 15.

Because court costs are a civil debt the collection of this money must be made with constitutional guarantees in mind. Courts may only use civil debt collection methods for court costs - even when assessed in a criminal case. Pursuant to each state's constitution, under no circumstance may a person be imprisoned for failing to pay court costs.

The same is true of fines levied in non-criminal cases. "[V]iolations of municipal ordinances are civil matters but, because of the quasi-criminal nature of an ordinance, are subject to the criminal standard of proof beyond a reasonable doubt." *City of Dexter v. McClain,* 345 S.W.3d 883, 885 (Mo. App. S.D.2011). For example, in Ferguson, Missouri and surrounding St. Louis County, there are 90

municipalities with 81 separate courts that have jurisdiction only over the ordinances governing their municipality. The practice of jailing the indigent for non-payment of fines levied for infractions is unfortunately all too common. Because these fines are levied in civil matters that are only quasi-criminal because of the burden of proof, the same constitutional protections that bar imprisonment for court costs as civil debt applies to these fines based on infractions, which are a civil debt, as well.

3. Non-payment of fees should be treated as a civil debt.

Different than fines, almost all fees are the same as court costs in purpose; they are to pay to defray the costs of operating the justice system. Fees of all types have proliferated in the criminal justice system, including impound fees, filing fees, probation supervision fees, special project fees, jail fees, test fees, and even jury fees. Since the purpose of fees is to assist in the payment of the operating costs of the court they are civil in nature. Thus, the payment of fees is identical to court costs and only civil collection methods may be used. Courts must observe the constitutional restriction disallowing imprisonment for civil debt.

4. A court has a constitutional responsibility to find affirmatively that a person has an ability to pay fines before depriving a person of his or her liberty for non-payment.

A court has a constitutional duty to make an affirmative finding that a person has the ability to pay a fine before it may impose incarceration for a person's failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 662-63, 668-69 (1983). The burden of proving an individual's ability to pay is placed upon the state. A court must inquire into a person's ability to actually pay the fine because the choice between paying and going to jail is not really a choice at all for those who cannot pay and results in an equal protection violation. *Id*. This duty to inquire into the person's ability to pay is a continuing duty because a person's ability to pay may change over time. Thus, if a court is considering jail because a person has not paid a previously ordered fine, the court must again inquire whether the person can actually pay at the time the jail sentence is being considered.

5. The determination of the ability to pay should be the same as need-based assistance in other government programs.

The *Bearden* Court failed to define the term "ability to pay." As a result, the number of definitions may be as myriad as the number of judges deciding who can pay and who cannot pay every day, millions of times a year in courtrooms across this country. The one finding that makes the most sense and provides consistency and fairness across cases and jurisdictions is to use need based assistance determinations as the standard for the ability to pay. Many jurisdictions use 125% of the federal based poverty guidelines to determine eligibility for basic needs like food assistance, medical assistance, and housing assistance. If this is the level of income at which a person is entitled to assistance with fundamental basic needs like food, housing and medicine, then it would be strange, if not immoral, to have the

third branch of government taking from those who are in such need. Thus, at a minimum, courts should find that persons who meet the need based assistance calculations for other government assistance programs do not have the ability to pay. Certainly, there will still be situations where a person is above 125% of federal poverty guidelines and cannot pay based upon an examination of a person's income, assets, and debts. Courts should not limit the analysis to only those who fall below need based assistance standards.

6. **Contempt of court is not an appropriate method to collect fines, fees or court costs.**

Contempt citations and collections of fines, fees and costs have incompatible purposes. The purpose of contempt is to compel or coerce a person's compliance with a court mandate. However, collection before a hearing ensnares people who cannot comply even when they do not have the ability to pay. Proponents argue a person was ordered to pay and violated the order, which would simply make the entire holding in *Bearden* meaningless. A court cannot bypass constitutional principles, like equal protection, by reframing everything as contempt. It is an axiomatic principle of contempt that a court cannot do indirectly what it cannot do directly. *Bailey v Alabama*, 219 U.S. 219 (1911). If a person's ability to pay a fine is the constitutional threshold before a person may be jailed for not paying, a court may not bypass that threshold by reclassifying an inability to pay as contempt of court. When the money involved is court costs or fees, the state constitutional prohibitions against any jail for a civil debt also protects against an improper use of contempt of court powers.

7. **Fines may not be made a condition of probation without regard to a person's ability to pay.**

Whether a court collects money through its clerk's office or the court makes fines, fees, or court costs conditions of probation, the court must still observe the equal protection requirements granted to citizens and determine if the inability to pay fines are at issue. The court must also maintain the constitutional protection against imprisonment where court costs as a civil debt are concerned. Thus, if a person on probation does not pay the fine and payment of the fine has been made a condition of probation, the condition precedent to any revocation still must be the ability to pay. In the case of court costs and fees, no incarceration can be imposed because of the prohibition on imprisonment for a civil debt, whether made a condition of probation or not.

A number of states have programs that give citizens accused of a crime an opportunity to keep a clean criminal record. These programs are sometimes called diversion where an individual is diverted from a criminal prosecution and consequence. The inability to pay the costs and fees of diversion programs should not preclude participation. Preventing those with an inability to pay suggests that poor people are less deserving of forgiveness and opportunities in the criminal justice system than those with financial means.

8. Indigent defense fees should not be collected by defense agencies.

The constitutional right to counsel must be provided at every stage of a criminal proceeding including any setting of fines, fees, and court costs as well as the determination of an individual's ability to pay. Public policy should be made clear: No fee or cost should be associated with providing counsel to those who meet need based assistance standards. A conflict of interest is created when public defense agencies must collect from individual clients to sustain the agency so more indigent clients can be represented. By charging a fee to the poor to exercise their constitutional right to counsel, it is a barrier to those who can least afford it. State and local governments should end the practice.

9. The practice of monetary bond should be eliminated, and never be used as a means to detain or to collect unpaid fines, fees or court costs.

Our criminal justice system at present includes pretrial release for the wealthy and pretrial incarceration for the poor. There is no empirical evidence to suggest that those released after posting a cash bond are more likely to be present at trial, or are less likely to reoffend while released.[1]

Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violate the Equal Protection Clause of the Fourteenth Amendment. *See Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). It wholly fails to consider the ability of the defendant to pay fines and undermines the constitutional protections against incarceration for costs and fees which are a civil debt. It is a system that favors the wealthy who can make bail over the poor person who cannot.

A court may not use monetary bond as a savings plan to set aside funds in the event fines, fees or court costs are imposed. Requiring monetary bond to ensure payment of fines and costs later in the case has other consequences when individuals cannot pay. Whether a person can afford bail can be outcome determinative at trial or upon plea bargaining. Defendants who are detained for the entire pretrial period before their case is decided are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial. (LJAF Research Summary, November, 2013 at www.arnoldfoundation.org/research/criminaljustice). It becomes clear that the best outcomes in criminal cases are heavily skewed toward those who have money for bail, even though statistically they may be more at risk

[1] A study by VanNostrand, Lowenkamp & Holsinger found that a money-based pretrial release system enables over 50 percent of defendants who are rated a higher risk to fail to appear or reoffend to be released, while those who are rated a lower risk are more regularly detained. (International Association of Chiefs of Police Resolution, adopted at the 121st Annual Conference, Orlando, Florida, October, 2014.)

to reoffend and not come to court than their poor counterparts who have been unable to post bail.

10. Ending excessive fines and costs is good public policy, serves the interests of taxpayers, and fairly treats those who come before our courts.

Where fines, fees, and costs are assessed they must be reasonable and payable within a finite amount of time. Criminal Justice debt that places a life altering burden upon an individual is excessive. The amount is excessive if the person cannot reasonably pay it in the foreseeable future or if the amount will require the person to forgo necessities. The court system was not designed nor intended to be funded by users. It certainly was not designed to be funded primarily by the poor. But with fines, fees and court costs increasing to the hundreds, and even thousands of dollars per case, that is exactly what has happened in too many jurisdictions within the third branch of government.

incremental change — and keep going. This is perhaps the most important lesson I've learned from mentors with long experience in policy, politics, and advocacy. When I was working in Congress while the ACA was being debated and passed, I knew senior staff members who had toiled unsuccessfully for decades trying to pass universal health insurance. Rather than give up, they pushed for whatever incremental advances were politically possible at a given time. They never gave up, and finally, when their preparation coincided with a window of opportunity, they succeeded.

My hope is that the 2016 election and subsequent efforts to repeal the ACA have inspired more of my trainee colleagues to become and remain involved in advocacy. Our patients' access to care as well as their health and well-being depend on our willingness to become advocates on their behalf. Trainees need look no further than their own colleagues' successes to learn essential lessons and find inspiration regarding their own chances for successful legislative advocacy.

Disclosure forms provided by the author are available at NEJM.org.

From the Department of Internal Medicine, University of California, San Francisco, San Francisco.

This article was published on June 7, 2017, at NEJM.org.

DOI: 10.1056/NEJMp1704120

On Incarceration and Health — Reframing the Discussion

Rahul Vanjani, M.D.

What remained of Mr. P.'s hair had come undone from the tight braid he'd fastened before his last chemotherapy treatment. His facial bones now protruded, as if a sculptor had gotten carried away. There was no mirror in his cell at the maximum-security prison where Mr. P. had spent more than half his life, but he didn't need to see himself to know his body was decaying.

The smell of Mr. P.'s sweat permeated his home of 23 years, a 48-square-foot cell that was three parts concrete and one part fenestrated metal. It contained a bunk bed, a metal toilet, and a metal sink with frustratingly low water pressure. There was just enough room for me to squeeze through the cage door, my back against the wall, chest inches from the top bed's frame.

"You didn't make it to clinic today," I said. "Are you feeling sick from the chemotherapy?"

Mr. P. shook his head. I paused, deciding whether to address the issue that I knew would feel more devastating to him than his terminal cancer.

"Actually, I came by because I heard the news about your 4554. I'm really sorry."

Some weeks earlier, restrained in handcuffs per routine and exhausted after a visit with his oncologist, Mr. P. had yelled profanities at a nurse while waiting to be released from the prison's holding dock. Although she had heard and seen far worse in her time as a nurse out in the community, she recalled the prison's new-employee orientation in which staff had been instructed to report any misbehavior by inmates. So she filed a complaint, known as a 4554, with the custody office — and 3 months were added to Mr. P.'s sentence. When the nurse found out, she couldn't believe her action had such power, and she was disheartened by the outcome. Even with her limited experience working in prison, she understood that lengthening Mr. P.'s incarceration was harmful to his health.

With the rise of mass incarceration, the biomedical community has become increasingly interested in investigating such determinants of incarceration as addiction and mental health disorders. Less attention has been paid to the ways in which incarceration itself is harmful to health. This neglect is at least partly attributable to the fact that official statistics don't accurately capture the lived experiences of inmates. For example, statistics show that mortality among people living in prisons and jails is lower than that among the general adult population.[1] Though a lower risk of death may indicate that incarceration often forcibly removes people from dangerous circumstances, it does not mean that incarceration is a vehicle for improving health, despite the public health opportunities (such as infectious disease diagnosis and treatment, cancer screening, and

smoking cessation) available for prisoners.

The disconnect between statistics and lived experience is evident in the history of health care in California's prisons. In 2001, after reviewing evidence that on average one prisoner died per week because of malpractice or negligence, a district court judge ruled that the state prison system's health care violated the Constitution's ban on cruel and unusual punishment. After the state failed to adequately reform the system, its prison health care was placed in federal receivership in 2005. Although the quality of medical care undoubtedly improved thereafter, in 2011 the U.S. Supreme Court found that health outcomes remained inadequate, prompting reforms primarily aimed at reducing the prison population.

The problem is that no matter how much access and quality improve, there are less visible, but equally if not more serious, health consequences of living in prison that are related to confinement itself. Contributors to ill health include the material conditions of confinement (poor housing conditions, food inadequacy, poverty) as well as racial and other discrimination, the loss of social support, and a profound lack of control. This last factor has a particularly strong effect on the lives of my patients.

Mr. P. was wan. "They told me about the 4554 this morning," he said. "I'm just tired. It's not the chemo; it's this place — it's taken everything from me."

This refrain was a familiar one. Among the realities of living behind bars in the United States, the absence of autonomy takes a particularly brutal toll, rendering inmates weary and despondent.

This loss of autonomy also affects health, a relationship that was first identified by the Whitehall studies, a series of prospective cohort studies that examined mortality rates among British civil servants.[2] These studies were the first to definitively show that people in lower social classes had higher rates of premature death than those in higher classes, despite equal access to health care. These findings held true even after investigators accounted for differences including smoking, obesity, activity, and baseline illness. The reason lies in autonomy and social participation.

These assets are nowhere more lacking in our society than in the lives of people who are incarcerated. By virtue of their confinement, they have little control over their lives, feel disempowered by their circumstances, and lack support networks. Their lack of control is in part systemic — driven by poverty, racism, and discrimination — as it is for many people living in the community. What sets inmates apart is that their loss of control is also formalized through the conditions of incarceration and policies that mandate the removal of certain protections and rights.

So why are conditions of confinement rarely considered in our approach to the health of marginalized populations? The answer is rooted in a complex history and the way we are socialized to think about incarceration. The crux of the problem is the belief that inmates are different from the rest of us — that they are, and should be, second-class citizens. This belief is evidenced by the shift over the past half-century in the primary aim of incarceration from rehabilitation to retribution. People are now sent to prison as punishment, but also for punishment.[3]

What is immediately apparent to clinicians practicing inside a correctional setting is the urgent need to reconcile our values as patient advocates with the lens through which the correctional system — and society at large — views inmates. The prevailing belief is that current and former inmates are undeserving of equal rights, that they should lose the right to vote and equal access to employment and good health care. In correctional settings, generalizations about these second-class citizens are employed as a tool for safety — for example, "inmates are manipulative and dangerous." And they are enforced through rules that caution staff against becoming "over-familiar," a deliberately vague term that places under a microscope physical gestures such as fist pumping, hand shaking, and hugging and sensitive interactions such as visiting patients hospitalized in the community, calling the family of sick patients, and closing the door of an exam room to maintain patient confidentiality. Instead medical staff are encouraged to report any misbehavior, for example by means of a 4554. These constraints inevitably lead to substandard care, as clinicians struggle to find ways to foster meaningful relationships in the absence of intimacy, privacy, the ability to have long conversations, and the freedom to visit patients hospitalized outside the prison or to call their families when support is needed.

The resulting approach to health care is diametrically opposed to the medical ethos, in which the emphasis is on the person first and the necessity of building relationships in order to humanize and individualize care. In practice, we uphold this ethos by applying a biopsychosocial lens,

which helps us to understand the health of our patients in the context of their lives. In a sense, this lens puts us in a unique position, since it can be employed to clarify the humanity of people relegated to the underclass.

I reached out, taking Mr. P.'s calloused hand in my own.

"Your mother must be worried about you," I said. "Do you want me to give her a call?"

As his gaze rose from our hands to meet my eyes, there was a palpable sense of hopelessness in the cell. We both felt hopeless about his cancer, hopeless about his chances of seeing his mother again, and hopeless about his prospect of leaving prison alive.

He nodded. "Please tell her I love her," he said.

The views expressed in this article are those of the author and do not represent those of the San Quentin State Prison or the California Department of Corrections and Rehabilitation.

Disclosure forms provided by the author are available at NEJM.org.

From San Quentin State Prison, San Quentin, CA.

1. Noonan M, Rohloff H, Ginder S. Mortality in local jails and state prisons, 2000-2013 — statistical tables (BJS publication no. NCJ 248756). Washington, DC: Bureau of Justice Statistics, 2015.
2. Marmot M. Status syndrome. London: Bloomsbury, 2004.
3. The prison in society: values and principles. In: Travis J, Western B, Redburn S, eds. The growth of incarceration in the United States: exploring causes and consequences. Washington, DC: National Academies Press, 2014:320-33.

DOI: 10.1056/NEJMp1702373

JAILING THE POOR: COURT DEBT AND INCARCERATION IN RI

Every year, thousands of individuals sit in the Rhode Island jail not for crimes, but because they owe money to the state. Court debt is the most common reason that people are put in jail in Rhode Island—almost 2,500 times per year. This incarceration is unnecessary and overly hasty, is an inefficient use of state finances, and disrupts people's lives. Rhode Island's system of court debt is considerably more punitive, more costly to defendants, and less accommodating to indigent individuals than other New England states. Bills S2234/H8093 sponsored by Representative O'Neil and Senator Metts would reform this system and end much of this unjust incarceration in Rhode Island.

FACTS

- The most common reason people in RI are put in jail is court debt—17% of all jailings and almost 2,500 incidents a year
- One third of those jailed sit in jail for over three days and 11% spend more than a week.
- 11 people sat in jail for over two weeks in 2007 for court debt—one for 41 days.
- In 15% of the cases, the state spends more on jail time than is owed
- Total costs to the state are about $500,000 per year for incarceration of defendants
- Many of these people are homeless, mentally or physically disabled, and unemployed.

Based on FLC analysis of DOC data.
Full report available at:
http://www.riflc.org/pagetool/reports/CourtDebt.pdf

While some degree of punishment is sometimes necessary for people that refuse to pay the court even if they can, many people are incarcerated far more than is necessary. They either legitimately cannot pay their debt or could have been induced to pay through cheaper methods. Many are homeless, unemployed, or receiving income assistance. The incarcerations create significant obstacles for individuals attempting to establish a stable, prosocial life.

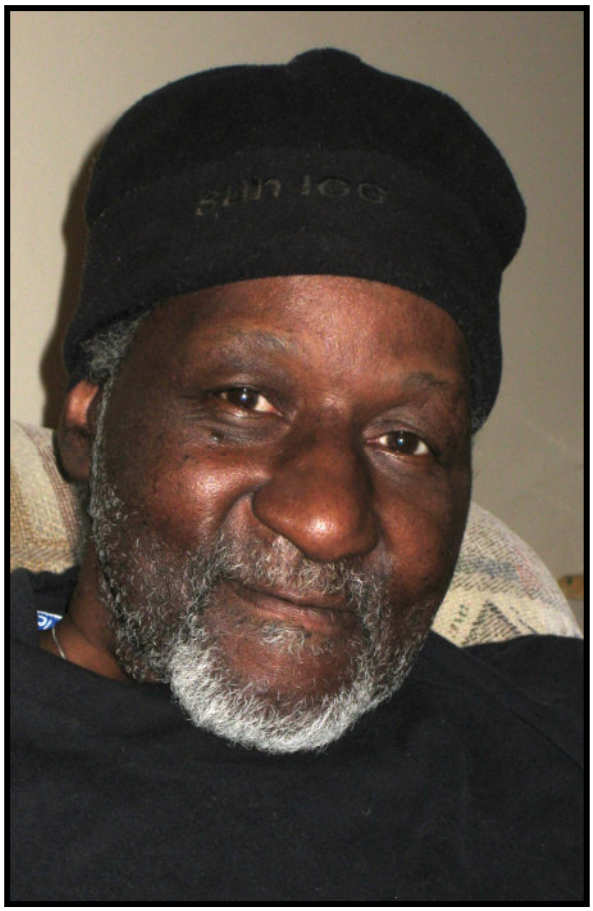
Court costs are far higher in Rhode Island than other New England states, which means that many more people have trouble paying them. And unlike other New England states, people are frequently and hastily jailed. In RI, a single offense can cost someone almost $1,000, and missing one payment date costs $150 and leads to several days in jail.

RI must act now to end this wasteful and unjust system!

Recommendations include:

- Take ability to pay into account when assessing court debt.
- Employ a variety of collection methods before resorting to incarceration.
- Accept smaller bails from individuals picked up on warrants.
- Reduce the maximum amount of time people are held in jail awaiting ability to pay hearings to 48 hours.

Harold Brooks



Harold, 58, is a veteran who is on SSI because of cancer and heart problems. Despite his recent health issues, he is now doing well. In the past, Harold struggled with substance abuse, homelessness, and related legal problems, which resulted in significant court fines. Harold was unable to keep up with the payments, and as a result was incarcerated many times for court debt, most recently for ten days.

"My court fees started in the 70's, and to get rid of them took over 30 years," Harold said in an interview, "In my life, I'd say I was in prison for court fines more than five times… enough that when I get a court date for a court fine and I know that I haven't got the funds to pay it, I get really shaky when it comes to that time. No one wants to walk around with a warrant on them, but no one wants to walk around in the ACI either… so there you go you are stuck again." I think the people up there, if they had to sit in there [the ACI] for ten days, they would change their mind about a lot of it. They would think, 'What am I doing to other human beings?'... 'cause its really rough."

Ricardo Graham

In early 2007, Ricardo was incarcerated for 40 days because he was unable to keep up with his $745 court debt. His incarceration cost the state approximately $4,000. As a result of his imprisonment, Ricardo lost his job, and fell even further behind in his payments.

It is time to end debtor's prisons in RI.

Watch interviews with Harold and Ricardo at **www.reinvestinjustice.org**

Court Debt and Related Incarceration in Rhode Island from 2005 through 2007

April 2008

RHODE ISLAND FAMILY LIFE CENTER

841 Broad Street
Providence, Rhode Island
02907

PHONE
401.781.5808

FAX
401.781.5361

www.riflc.org

The Family Life Center would like to thank several people for their assistance in this project, without whom this report would not have been possible, including Director A.T. Wall, Erin Boyar, and Terry Foley of the Rhode Island Department of Corrections. The advice of John Hardiman and Mike DiLauro of the Rhode Island Office of the Public Defender was also integral to the ideas in this report.

Family Life Center

January 2008

Report Summary

In Rhode Island individuals who owe money to the state because of past criminal convictions are frequently incarcerated because they fail to appear at 'Ability to Pay Hearings'. Every year, thousands of individuals sit in the Rhode Island jail not for crimes, but because they owe money to the state. Incarceration for court debt is the most common reason to be put in prison in Rhode Island. This report concludes that overall, there is a haste to incarcerate individuals for court debt in the state which causes unnecessary, damaging jail time, is an inefficient use of state finances, and disrupts people's lives. Rhode Island's system of court debt is considerably more punitive, more costly to defendants, and less accommodating to indigent individuals than other New England states.

The debt to the court is either from a fine that is part of a previous sentence or is from court costs which are assessed in all criminal convictions to generate revenue for the state. Individuals with outstanding debt are put on payment plans and if they fail to appear for a hearing a warrant is put out for their arrest. Once apprehended, they are given another hearing date. They are often put in jail with a bail equal to the total debt until the hearing. This study was undertaken in order to determine the extent to which incarceration is used as a means to collect debt and to determine why people end up in prison for fines.

Department of Corrections and Judiciary data from 2005 through 2007 was analyzed and twenty five interviews with individuals in the Intake Service Center of the Adult Correctional Institute were completed.

This study found that incarcerations for court debt comprise 18% of all commitments in the state of Rhode Island. In both 2005 and 2006, on average there were 24 people each day incarcerated at the ACI for court debt. This number has continued to go down since a new law went into affect in late 2006, and averaged 18 in the last six months. In 2007, individuals were incarcerated for an average of three days and pay bail in only 17% of the incidents. The average amount owed is $826 while a reasonable estimate for the cost of the incarceration is $505. 13% of the incarcerations cost the state more than the amount owed by the individuals. The state spends an estimated $489,919 per year on per diem inmate costs, prison staff, court, and police costs combined.

Although Sixth District Court deals with a much larger quantity of cases than any other court in Rhode Island, it generates a disproportionate amount of the incarcerations. 67% of the money spent to incarcerate people for court debt is spent by the Sixth District Court. People incarcerated by Sixth District Court for court debt spend an average of four days in jail.

Most of the individuals interviewed should not have been incarcerated for as much time as they spent in jail. They either legitimately could not pay their debt or could have been induced to pay through cheaper methods. In addition, the incarcerations create significant obstacles for individuals attempting to establish a stable, prosocial life.

This report recommends the passage of S2234/H8093, including five central reforms to decrease unnecessary incarcerations for court debt: 1. Reduce the maximum amount of time people are held in jail awaiting ability to pay hearings to 48 hours. 2. Take ability to pay into account when assessing court fines and costs initially and throughout the payment plans. 3. Employ a variety of collection methods before resorting to incarceration. 4. Accept smaller bails from individuals picked up on warrants. 5. Reduce the warrant fee for people brought in on warrants for failure to appear.

Background Information

Protocol for the Assessment and Collection of Fines and Costs

Debt to the court can be accrued in multiple ways: child support payments which must be made to family court; fines levied as part of a sentence or ticket; restitution levied as part of a sentence, and court costs* which are levied much like user fees to pay for a service.

Individuals that owe restitution have their restitution debt pooled with debt from fines and costs. People who owe restitution are given separate restitution review hearings. Because of the slightly different nature of restitution debt and because it could be identified separately in the analysis, incarceration for restitution will be discussed separately.

Many criminal charges allow fines to be used in addition to or instead of prison time. For example, sentences for possession of marijuana can include fines of between $200 and $500. Sentences for loitering for indecent purposes can include fines between $250 and $1,000. Sentences for driving without a license, first offense, can carry a $250-$500 fine. In addition, some crimes allow for restitution as part of a sentence. All of these fines are punitive.[1]

In contrast to the punitive nature of court fines, the court costs system is a way for the courts to use their authority for the purpose of collecting revenue to help fund their operation and other functions related to the criminal justice system. Based on Rhode Island state law, people who are found guilty or plead no contest to a crime in Rhode Island state court are assigned a fee that is owed to the court.

If the crime is only a misdemeanor, then under current law the defendant owes $93.50 for each charge for which he or she is convicted. Of that money, $60 goes to the general revenue (Section 12-18.1-3), $30 goes to a fund that is used to compensate victims of violent crime (Section 12-25-28), and $3.50 goes to the jurisdiction of the police department or state agency that filed the charge (Section 12-20-6). For a felony charge, which is any criminal offense that carries a maximum punishment of more than one year of imprisonment or a fine of more than $1,000, the amount is over $270, and for felonies which carry a maximum penalty of over 5 years, it totals over $450. Those who face multiple charges end up owing several times this amount, though the court may reduce the amount somewhat for defendants with four or more charges (Section 12-18.1-3). See Appendix 1 for a breakdown of court fines.

Additionally, many specific types of charges carry additional fees, such as a $25 cost for each domestic violence charge (Section 12-29-5), which is paid into the state's general revenue. Anyone who is apprehended on a warrant is assessed a $125 fee (Section 12-6-7.1), $25 of which is paid to the arresting agency. Most drug charges carry an additional fee of $400(21-28-4.01-c.3.iii).

The state also imposes laboratory fines which are combined with court costs as part of a defendant's total debt to the state (Section 23-1-3(g),(h)). Most drug related convictions carry a lab fee of $118 and most serious non-drug related felonies carry an extra lab fee of $100. These fines go into the general fund. As a result of combined fees individuals with one felony drug possession charge end up with a total of at least $788 in court fees.

Debt from punitive fines is combined with court costs when determining an individual's overall debt to the state and it is collected in the same fashion. In contrast, traffic tickets are civil offenses and are assessed and collected separately in a separate court and cannot independently result in incarceration.

The courts' practice is to allow people to gradually repay the amount owed through regular payments. The courts have claimed the power to enforce the collection of this debt by

* These 'user fees' are generally referred to as 'court costs' in Rhode Island statute. They are alternately called fees or surcharges in other states but they will be referred to as 'costs' throughout this document.

[1] A full list of all of these fines has not been provided because of the large number of offense types. They are located in Chapters 12, 31 (driving related), and 21-28 (controlled substances) of the Rhode Island General Laws.

temporarily incarcerating anyone who can afford the payment but fails to pay, though in practice they rarely exercise this authority. More commonly, judges use the power of the court to issue court orders that require people who owe fines or costs to appear before the court on assigned payment dates. Failure to appear on a court ordered date results in a bench warrant and is sufficient cause for being held in the state's prison system. The courts regularly exercise this authority.

The Sixth District court of Rhode Island processes by far the most cases in Rhode Island and thus deals with the majority of individuals that owe court debt to the state. It is protocol in the Sixth District to alert all those with fines and costs of the amount they owe and the date of their first hearing upon sentencing. Defendants sign a form agreeing to pay the set amount and appear at the set date. Individuals must then appear at that date and set up a payment plan and set the next hearing date. If the individual is sent to prison, they receive a video conference court hearing one month prior to release in which they will discuss the date of their first fine hearing and how much they owe. For all later hearing dates, individuals must either appear before a judge to discuss their ability to pay or pay the clerk the full amount owed. Individuals must appear in person, even if they can make their payment, to sign an agreement to come the following month. Payment in mail and payments made by others are not accepted by the Sixth District court.

Courtroom 3E, presided over by Magistrate Christine Jabour, is dedicated every morning between nine and around eleven solely to ability to pay hearings. These hearings are designed to assess the person's ability to pay, with the court claiming the authority to incarcerate those who fail to pay despite being able to pay. In practice, the hearing is cursory and it is extremely rare for people who appear at their scheduled hearing to be held for failure to pay.

The hearing often lasts no more than two minutes, and it is focused on getting the person who is appearing before the judge to agree to a future payment that he or she will be able to make. It frequently also involves some discussion of the person's employment situation. The magistrate sometimes tells the person to find a job, or a job with longer hours, or a second job that will allow them to make payments to the court. Occasionally, the hearing will involve more extensive demands from the judge, especially if the person has arrived late in court or has not paid the court for a long period of time. The magistrate might demand that a person who is not employed search for a job and bring a list of a certain length of places that he or she has applied for a job to the next hearing if he or she is not able to make a payment by then. In most cases, the hearing serves as a way for the court to keep in touch with the person who owes them money and to remind that person of the importance of paying.

If a person fails to make a scheduled payment and then fails to appear at the scheduled review hearing, then the judge issues a bench warrant. Any police officer who has contact with a person with an outstanding warrant will apprehend him or her. The person will be brought into the court where he or she owes costs or fines for its next session, which may involve being held in the intake service center overnight or over the weekend. When the person is taken into court on the bench warrant, the person's treatment is at the judge's discretion. The judge may decide to issue a hold on the person and set the bail at a level they deem appropriate (Section 12-6-7.1). In practice, they set it at a number related to the total amount owed in court fines, including all previous costs plus the $125 warrant fee[2]. Individuals who miss hearings can 'surrender' themselves to the court, and the judge will generally waive the warrant and warrant fee. This practice is

[2] RI General Law 12-6-7.1 recommends setting bail at the total amount of fines, however it allows for any bail that will ensure the defendant's appearance at the ability to pay hearing. "Any person apprehended on a warrant for failure to appear for a cost review hearing in the superior court may be released upon posting with a justice of the peace the full amount due and owing in court costs as described in the warrant or bail in an other amount or form that will ensure the defendant's appearance in the superior court at an ability to pay hearing, in addition to the one hundred twenty-five dollars ($125) warrant assessment fee described above."

relatively rare, possibly because it is not fully understood by defendants. Sometimes judges will offer a smaller bail at court, as low as one half of the total in fines, although afterwards if the person is incarcerated the bail is generally set at the full amount. The bail is always set as cash bail, as opposed to surety bail, which means that the individual must pay the full amount to be released.

In contrast to 6th District Court, in Providence Superior Court there are attorneys on hand to represent individuals brought in on warrants, and Ability to Pay Hearings are often conducted at someone's court appearance. While judges in Superior Court still may choose to hold someone in prison on bail, with those not paying forced to wait for a bail hearing, this not standard practice.

If an individual cannot pay the necessary bail and the judge chooses to incarcerate the individual, they are sent to the intake service center. If the bail is paid, then he or she is free to go, and the bail is treated as a payment of the costs and fines that were owed. Often judges will schedule hearings for dates several days after incarceration, at which point the court will release the individual on personal recognizance. If the individual owes fines to several courts, they will have to wait for hearings at all courts before being released. While many people are released after several days, many also spend close to a week in jail waiting for an ability to pay hearing. In much less common cases, they will spend several weeks in the Intake Center without any communication from the courts, waiting release or a court appearance. Individuals are almost always released after their ability to pay hearings, which consist mainly of the judge setting the next payment date for the individual and reviewing the amount they must pay. The hearings take place over video conference and there is no attorney present.

2006 Legislative Change

The 2006 Legislative Session of the Rhode Island Congress passed a bill (House Bill 2006-7006, Senate Bill 2006-2326) that amends Rhode Island General Law 11-25-15 and substantially changes how individuals are incarcerated for court fines and costs. According to the previously existing law, individuals were to be credited five dollars per day that they spend in prison as a result of failure to pay court fines and costs or make the proper appearances associated with court fines and costs.[3] The amendment altered this fee from $5 to $125. The intent of the amendment was that if people are incarcerated for failure to pay or failure to appear and do not have the ability to make bail they will receive some compensation for the time spent in prison, which will go to decreasing the number of indigent individuals spending time in prison for court fines. The new policy came into practice in the end of 2006. Perceivable effects of this new legislation will be discussed in the Results section.

Other Relevant Rhode Island Statutes

Rhode Island General Law is generally interpreted as giving the court the power to remit costs in criminal cases. Section 12-20-10 states:

[3] 11-25-15. **Imprisonment for failure to pay fines or costs or give recognizance.** – Every person who has been or shall be committed or detained in the adult correctional institutions for the nonpayment of his or her fine or costs, or both, or for failure to give the recognizance in the amount required of him or her to keep the peace, shall be detained in the adult correctional institutions after that person has served his or her sentence of imprisonment, if any shall have been imposed, one day for each ~~five~~ one hundred fifty dollars ~~($5.00)~~ ($150) or any fraction of it, of the amount of his or her fine or costs, or both, or of the recognizance so required of and not furnished by that person. However, the director of corrections may order the release of nay person held in the adult correctional institutions solely for the nonpayment of his or her costs on any terms that he or she shall fix for the payment of the costs by that person and any person so released may be caused to be reimprisoned by the director of his or her failure to observe she terms of the release, and his or her warrant for imprisonment shall be sufficient authority to all sheriffs, police officer, jailers, and the agents for the director to retake and detain the person who shall upon his or her return to the correctional institutions serve one day for each dollar or any fraction of it of his or her costs then unpaid.

> "The payment of costs in criminal cases may, upon application, be remitted by a justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken."

In addition, Section 12-20-10 states:

> "If, upon complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law."

Both of these statutes give the court power to waive court costs. Section 12-18.1-3 qualifies the court's ability by limiting the ability to waive specifically costs to cases where the court finds an inability to pay. The section lays out the specific costs for types of offenses (as discussed in the previous section) and then states:

> (b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be remitted by the court.
>
> (c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above three (3).
>
> (d) If the court determines that the defendant does not have the ability to pay the costs as set forth in this section, the judge may by specific order mitigate the costs in accordance with the court's determination of the ability of the offender to pay the costs.

Rhode Island General Law also makes reference to inability to pay as a necessary condition for waiving costs in Section 21-28-4.01(c)(3)(ii), in regard to drug treatment and education costs. In contrast, statute 12-25-28 currently forbids judges from waiving costs that contribute to the victims' fund, which is roughly one third of all court costs. The interpretation of these statutes seems to vary across judges, but most statutes are in agreement that costs can be waived if the defendant is found to be unable to pay the costs.

Rhode Island General Law 12-6-7.1 also specifically states that if a warrant is issued for someone's arrest for their "failure to appear or comply with a court order" $125 in fines is assessed. It also states that their bail shall be set at their total court costs or an amount "that will ensure the defendant's appearance in the superior court at an ability to pay hearing."[4] This statute uses the word 'costs' but is interpreted to refer to both costs and fines, since the debt is pooled.

This statute as well as the recently amended statute 11-25-15 are the two statutes which specify the ability of the court to incarcerate individuals for failure to appear at court fine hearings or failure to pay court fines or costs.

Court Costs in New England States

Massachusetts: In Massachusetts, the standard fees are the victim witness fee ($50-$90) and council fee ($150) per case. Fees can be worked off through community service and they can be waived for indigent defendants. Individuals arrested on warrants are brought immediately to ability to pay hearings, and there

[4] RIGL Section 12-6-7.1: "Any person apprehended on a warrant for failure to appear for a cost review hearing in the superior court may be released upon posting with a justice of the peace the full amount due and owing in court costs as described in the warrant or bail in an other amount or form that will ensure the defendant's appearance in the superior court at an ability to pay hearing, in addition to the one hundred twenty-five dollars ($125) warrant assessment fee described above. Any person detained as a result of the actions of the justice of the peace in acting upon the superior court cost warrant shall be brought before the superior court at its next session. Such monies shall be delivered by the justice of the peace to the court issuing the warrant on the next court business day."

is a warrant fee of $50. Court debt is generally collected through probation officers, and payment is usually a condition of probation. No interest is charged for outstanding court debts.

Connecticut: $20 fee for anyone who commits a felony, $15 for anyone who commits a misdemeanor (per case not per charge). There are also a considerable number of other costs assessed for specific cases, the most significant being a $200 fee for all people whose sentences include probation. Fees must be paid by the time of sentencing or before release from prison and no payment plans are allowed, however fees are often waived when the sentence includes prison time and can be waived for indigency. There are no warrant fees and no interest is charged for outstanding debts. An individual with one felony drug conviction will have a $220 state debt at most.

Maine: Maine has a mandatory victims' compensation fund assessment of $10 for each misdemeanor and $25 for each felony. There is also a surcharge of around 15% on fines. There are no warrant fees and no interest is charged for outstanding court debts, although there is a bail fee of $40 for being bailed out.

New Hampshire: New Hampshire charges a range of cost recovery fees for individuals representing by public defenders. Fees are $275 for a misdemeanor and around $750 for felony drug possession, but range even higher for more serious felonies. There is also a penalty assessment fee added on to any fines assessed. Fees are collected by the Office of Cost Containment and people are generally given fairly lenient payment plans. No interest is levied on outstanding debts. Payment is mailed in every month, and individuals are given "Show Cause Hearings" if they are very delinquent in their payments. At the hearings, the state must prove beyond a reasonable doubt that the individual is willfully in nonpayment in order to prove contempt of court. Most hearings end in agreements to keep paying, and jailing for court fees is extremely rare.[5]

[5]**Massachusetts**: Chapter 280, sec. 6 of Massachusetts General Laws; phone conversation with Andy Silverman, Deputy Chief Counsel for the Public Defender Division of the Committee for Public Counsel Services. **Connecticut**: Sec. 54-143 of the General Laws; correspondence with Catherine Meyer of the Division of Public Defender Services. **Maine**: Article 1901 of the General Laws; correspondence with Walter McKee, the president of the Maine Association of Criminal Defense Lawyers. **New Hampshire:** Correspondence with Christopher Keating of the NH Office of the Public Defender.

Relevant Supreme Court Cases

The Supreme Court has stated that individuals cannot be summarily incarcerated for owing money if they are unable to pay their debt. Alternative measures must be considered before incarceration is employed.

Bearden v. Georgia 461 U.S. 660 (1983) The Supreme Court found that a court cannot summarily jail an indigent probationer for failure to pay fine unless inquiry reveals willful failure to pay. The ruling stated that

> "…in revocation proceeding for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to the imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interest in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."

Tate v. Short 401 U.S. 395 (1971) The Supreme Court found that a court cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant cannot immediately pay the fine in full.

Payne v. Mississippi 462 So.2d 902, 905 (Miss. 1984) The Supreme Court found that a court may not first fine a defendant and then, because of his

indigency, convert the fine into a jail sentence for failure of the defendant to make immediate payment of the fine.

Court Debt Collection

The Rhode Island District and Superior Courts Assessed a total of $20,273,847 in court fines and costs in fiscal year 2007. Their four-year collection rate is 77% with another 13% of these fines still on payment plans or appealing the charges. 10% of their fines still went uncollected after four years.

District Court reported a significantly higher four-year rate of collection, 50% in Superior Court versus 90% in Sixth District. Superior Court maintains a significantly higher portion of people on payment plans, with 32% still on payment plans in Superior Court after four years, versus 3% in District Court. These differences in collection rates could be the result of generally higher fines and costs for people in Superior Court, since they more often face felonies.

The RI Judicial Technology Center calculated the total owed, collected, uncollected, and on payment plans/appealed from fiscal year 2001 to fiscal year 2005 for the Superior Courts, District Courts, and Traffic Courts. This information is provided in Appendix 1[6]. The table shows the collection data by court and also for District and Superior combined. This report does not specifically address the collection policies of traffic courts, since all holds that were included in the study were either District or Superior court holds.

Year by year collection data reflects the continual collection activity for fines and costs assessed in that year. The percentage collected for each year increases in both District and Superior Court because as years go by the debt is gradually collected. For example, in 2001 District and Superior Courts assessed $14,766,466.00 in fines. Since then, they have collected $11,376,077.00, or 77%, of this debt and another 13% is still on payment plan. Only 10% is categorized as "uncollected."

Methodology:

The information in this report is from either analyzing a large number of electronic files or interviews conducted in the Intake Service Center in the fall of 2006. The goal of the electronic data analysis was to determine which commitments in Rhode Island were the result of 'failure to pay' or 'failure to appear at an ability to pay hearing.' This was not a trivial task, because no agency in the state expressly records whether a commitment is for failure to appear at an ability to pay hearing. The full methodology is included in the April 2007 version of this report, but is omitted in this version because of length. All commitments between January 2005 and January 2008 were reviewed for the purpose of this study using data provided by the Department of Corrections and publicly available court data. The methodology has been reviewed and approved by the Department of Corrections Department of Research and Planning.

Cost Estimates

This study estimates the direct cost of incarceration to the state for court debt in two ways. The first uses the DOC's estimate of $95/day per person costs at the Intake Service Center. This represents the total daily operating costs of the building divided by the average inmate population. Court and police costs are estimated by using the $125 warrant fee. The second estimate is more conservative, and attempts to take into account marginal costs to estimate costs for this specific sub-population. Both methods have advantages and disadvantages.[7] Cost estimates do not include

[6] Information in appendix was released in 2007 and includes collection rates as well as rates of debt on payment plans from 2001 to 2005. More recent 2006,2007, and 2008 data was released in 2008, but this data does not include rates of debt on payment plans.

[7] The second estimate uses the per diem costs at the DOC, which is roughly nine dollars a day, along with the cost of one full-time prison guard salary. This estimate takes into account the number of men and women incarcerated, and estimates that one full-time guard at the ISC is necessary because of this population. The per diem cost, guard cost,

the cost of lost wages on the part of the defendant or other non-monetary costs to the defendant.

Interviews

25 people were interviewed while they were being held in the Intake Service Center during the months of September and October. They represent a random selection of the people that could be contacted to interview. As will be discussed in the results section, about half the people committed for court fines either bail out or are released after a few days. Those people were not in long enough to be contacted. The interviewee pool represents the set of people who were unable to make bail and ended up spending closer to a week in jail. This still represents a significant portion of people committed for court fines. No individuals were refused an interview after contact and no interviewees refused to be interviewed.

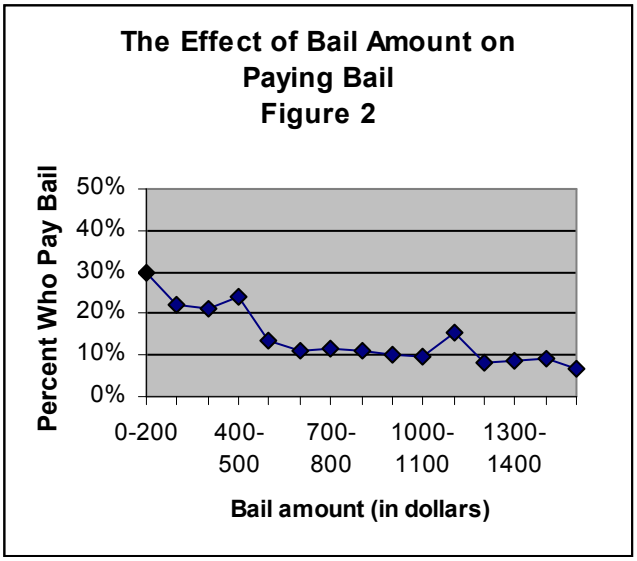
Results

Overall Results

18% (± .5%) of all commitments in the state of Rhode Island in 2007 were solely the result of the defendant missing an Ability to Pay hearing. This is greater than the frequency of any other single new charge.[8] There were 2446 (± 68) incidents of incarceration for court debt in 2007 for an average of three days (two nights) and with bails of $826 on average.

Bail and Time Spent in Jail for Court Debt

A considerable number of people are held on bails that are equal to or lower than the amount of money spent to incarcerate them. 13% of the commitments for court debt were net losses for the state—the money spent



incarcerating the individual was worth more than their debt.[9]

17% of those incarcerated for court debt make bail. They still remain in prison for an average of one day, and they pay an average of $437 in bail (the actual amount paid is probably half of that, since judges often offer lower amounts of bail while in court). The vast majority cannot pay and demonstrate this by spending an average of three nights in prison. 94% of individuals who are bailed pay bail within the first two days of incarceration. Among the population that is not bailed, although the average stay is three days, there is a wide variety of time spent in prison. A large portion of people spend three days or fewer in jail and another large portion average seven days inside--of the individuals who cannot make bail, 37% spend more than three days in prison and 12% spend a week or more in prison[10].

Figure 2 demonstrates that in 2007, people with smaller bails were more likely to pay bail. People paid bails below $500 twenty-five percent of the time, while people were able to pay higher bails only 11% of the time.

Differences in Rhode Island courts

The court handling the case makes a difference in the level of court debt related incarceration. Partially because of its high

and police and court cost estimate are combined. This estimate does not take into account the high costs of such a transient population, which will cost more to transport and house than a small number of people held for longer sentences.

[8] The second most frequent reason for a commitment is for driving with a suspended license (Family Life Center, unpublished results).

[9] This uses the highly conservative estimate, discussed later, that each night costs the state $23, plus $125 in police and court costs per incident.

[10] This is 9% of all commitments for court debt, bailed and unbailed.

number of cases, Sixth District Court accounts for the majority of the incarcerations for court debt. One half of all pre-trial commitments in Rhode Island originated in Sixth District Court but 67% of all incidents originated in Sixth District Court. In contrast, Superior Court generates 16% of pre-trial commitments but only 8% of court debt commitments. The full data by court is show in Appendix 2.

Background factors of incidents

People incarcerated for court fines have generally shown up for several of their previous court fine appearances or missed their very first one. As will be discussed in the interview section, a considerable number of individuals interviewed had made significant efforts to pay or appear before missing a hearing. There is also a significant number of people who never show up the first time to start their payment plan. This is reflected in the data as well. People had on average appeared at three hearings before missing the hearing that generated the warrant. Around 8% of the commitments were for first-time offenders—people who had never missed a date before. Overall, 66% of the people jailed for court debt either were first time offenders or showed up at least three times consecutively. This contradicts the notion that judges only use incarceration on people that are serially delinquent.

In Rhode Island court costs and court fines are pooled together when determining an individual's overall debt to the state. However, 53% of the individuals incarcerated for court debt did not receive a fine as part of their sentence for the case they were being held on. Their debt is comprised only of court costs and warrant fees.

Costs

One day in the Intake Service Center (ISC) costs the state $95 according to the DOC's estimated cost per offender.[11] There are an estimated 7,827 days spent in intake for court debt every year. Additionally, the state assesses a $125 warrant fee for every incident. Using the warrant fee to estimate the court and police costs, the total estimated cost to the state would be about one million dollars.

A more conservative estimate of the cost to the state, taking into account the marginal cost of each prisoner at the ACI, is $486, 575. This estimate relies on the estimate that decreasing the ISC population by eighteen people could result in the reduction of one Correctional Officer. The breakdown of this estimate is shown in table 1. Using this estimate, the average cost per incident is $210 and the average prison cost per night is $23[12].

	Cost
Eighteen prison-years (men)	$58,291
Four prison years (women)	$12,153
One guard position in ISC	$110,405
Court and police costs	$305,725
Total	$486,575

Conservative Estimate of Yearly Costs
Table 1

Results of new $150/ day credit

According to statute 11-25-15 individuals must now be credited with $150 for every day they spend in jail because of court debt. Conversations with judges and a review of court records demonstrated that judges are applying the credit in most cases. However, interviews demonstrated that some people were being held in jail for longer than their debt justified. For example, one individual owing less than $300 was held for eight days, but their debt was erased upon release. A reading of 1-25-15 along with 12-6-7.1 indicates that an individual should not continue to be incarcerated if they have paid off their debt.

There are several trends which may have been caused by this new $150/day credit policy: There are fewer incidents of incarceration for court debt. As shown in Figure 3, the number of people held at the ACI for court debt changed markedly after the new law went into effect in October 2006, and it has continued to come

[11] 2005, Rhode Island Department of Corrections Costs Per Offender –FY 2005

[12] $210/incident includes the $125 court/police cost

down since then[13]. In 2005 and 2006 there were on average 24 people held at the ACI for court debt each day[14]. Over the last six months the average has been 18, and the number may still be going down as the effects of the new credit continue to build. In parallel, since the law went into affect, the overall awaiting trial population has also decreased. In October 2006 the awaiting trial population was 910 people per day. In June 2007, the population was down to 700.[15] This is the first year since 2003 in which the June population size did not increase each year. While it is unlikely that a change in the court debt population could have caused a decrease of 200 people, it has contributed to the decline.

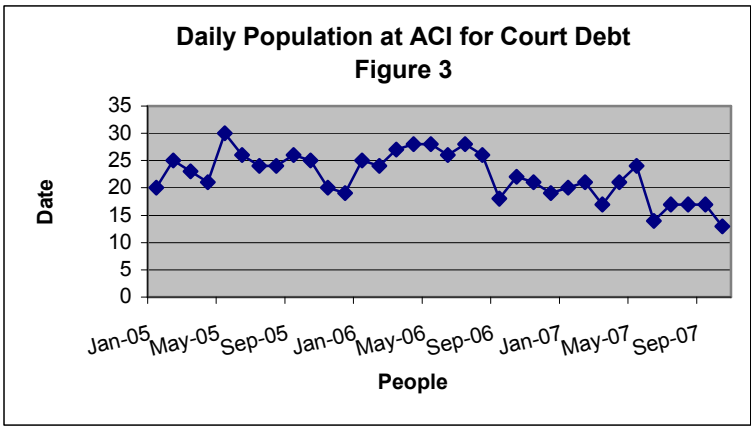
Secondly, it appears that fewer individuals are posting bail. In 2005, 22% of those picked up on court fine warrants posted bail. In 2007, only 16% have posted bail. It is possible that the $150 credit creates an incentive to not post bail.

Restitution

Individuals that owe restitution have special restitution review hearings scheduled. If they miss these hearings they are incarcerated similarly to people owing court fines or court costs. However, only about 1% of all commitments are for missing a restitution review hearing. This is possibly because restitution is far less likely to be assessed than court costs. An analysis of the types of sentences in court records indicates that only 17% of commitments were for cases that include restitution as part of the sentence.

Interviews

John Lester (name changed) was sleeping on a bench in Providence, Rhode Island. John is originally from Newport but took the bus down to Providence to see friends. A couple days ago he had shipped back from a several week long fishing voyage. Since he landed the job a couple months ago he was only off ship five days a month or so.



Unfortunately for John, a Providence police officer decided to ID John, and within hours he was in a holding cell. John owed almost $2,000 in court debt from prior convictions, his most recent being a disorderly conduct charge a year ago, and he was held on a $220 bail (his debt to Sixth District Court) which he could not pay. He had missed a court fine hearing the previous month, his first since getting out of alcohol abuse treatment. He stated "I went through hell for the last year, I lost my mother, I spent eight of the last twelve months in prison, then home confinement, then the court made me go through rehab. I just got out [of rehab] in April. Things were getting going, now they just jammed me up. It's my fault but that doesn't make it right." While John was being held his ship set sail without him, potentially causing him to lose his new job, and he was unable to call his federal parole officer about the parole date he had to miss. John was told he would be held for a week while waiting to appear before a judge to discuss his fines. Unfortunately, due to bureaucratic confusion, he was held for 32 days and was only released when a public defender was alerted to the problem.

John's story, aside from the very long time he spent in jail, was similar to the stories from the other 24 people interviewed. Ten

[13] The high number in May 2007 that seems to contradict the trend is a result of typical increases in the summer of most ACI populations. This increase occurred in the summer of 2005 and 2006 as well.

[14] These averages are monthly averages, calculated by averaging the number of inmates each day over the whole month.

[15] RI DOC Population Report-2007

interview summaries are included in the appendix.

Reasons for missing court date

Almost every person being detained for court fines is being detained for a combination of inability to pay and inability to meet the court schedule. Many could pay some bail but cannot pay the high bail that is set. Only one of the people interviewed could potentially pay their fines and expressed a significant resistance to paying, and even that person was currently unemployed. Table 2 shows the reasons that people missed Ability to Pay hearings. Overall, the conditions which resulted in the incarceration of the people interviewed demonstrated a haste to incarcerate people who missed appointments.

The most common reason people miss hearings is they forget about the hearing. One man interviewed had been paying and showing up regularly. He forgot one hearing and had planned on going to visit the court on the same day he went in to family court. The sheriff who came to his door to issue him a summons to his family court date picked him up on his warrant and he spent 8 days in jail on a bail of $1,182 which he could not pay. In the three months prior to his last incarceration he had gone to court and made his monthly payments each month.

Several people, such as John, were relatively recently released and had not yet gone to court to set up a payment plan. They had either never received the first court date or had received it prior to being released from prison or entering a rehabilitation program and then were never reminded of the date.

One woman had been released on probation several months ago. She had been seeing her probation officer regularly. She had never been aware of her ability to pay hearing and her probation officer never informed her of the warrant put out for her arrest. At five in the morning police broke into her bedroom looking for her neighbor. They ran her name and brought her to prison where she spent eight days in prison on a bail of $243.50.

Many people, especially those not living in Providence, stated that transportation necessary to meet court dates was both overly time consuming and expensive. One man from Woonsocket said that to make it to court in Providence by nine in the morning he has to get up at six in the morning, walk two miles, and take a bus to Providence. He is a veteran and is on SSDI for Post Traumatic Stress Syndrome. He has been incarcerated two other times for court debt. He stated, “If there was a court in Woonsocket I could go to and it was only thirty per month, I would pay it.”

While the courts rarely incarcerate people who show up to Ability to Pay Hearings, people who do not have the money to pay their fines sometimes do not go to their hearings because either they are not aware they should go anyway or they have been threatened by the court that if they continue to show up and not pay they will go to jail. The court does not explicitly inform defendants that they can continue to show up and not pay without being imprisoned, so confusion is not surprising.

One man who had been paying and showing up fairly regularly stated “I have a job, it’s a moving company, I only make $8.75. Money only stretches so far, I got bills, I got rent. I might miss a month or two. They want

Reasons for Missing Ability to Pay Hearings

knew about date but forgot	6
was never informed of date or did not remember being informed of date	6
refused to go	1
could not pay for transportation	2
did not have money and did not know they should go anyway	5
did not have money and had been threatened to not come back without money	1
could not miss work	2
tried to go, prevented by court	2

Table 2

to lock you up. Right now I'm losing my job. What can I do? I missed my last hearing because I had rent. No one ever told me that if I went they wouldn't lock me up even if I couldn't pay."

David has been homeless on or off for the last several years. He has not been able to work since 2002, and has SSI pending because of a chronic nerve disease, hepatitis, and diabetes. He has been in prison for court fines many times previously and reports often going to court dates despite the fact that he almost never can pay.

> "I can't work because I got a physical condition that keeps me from working. I got SSI and SSDI pending. I got peripheral neurapathy, chronic nerve disease. All the jobs I ever did were outdoors, I can't do that no more, or restaurant work, and I can't do that no more because I got hepatitis. A lot of times they go 'you got to come back to court on such-and-such a date or else' and when they say that 'or else' that means you are going to jail, no matter what, whether you come, whether you show up, or what. So I don't show up. Most of the money I owe is warrants, because I don't show up."

David is an example of a person stuck in a cycle of debt, missed hearings, incarceration, and increased debt. The continued assessments of warrant fines and the continued incarcerations do not result in increased payment.

Some people are incarcerated despite efforts to show up at court and pay their fines. One man reported going to court with shorts on to set up his payment plan and being turned away because of the shorts. He stated:

"The 16th of last month, I had got out. I got out on a Saturday, and I had a court date on a Monday, and I had just done six months. I had got out, and I went to court in shorts, not knowing that I wasn't supposed to be going to court in shorts. The sheriff wouldn't let me in, so I just went home and tried to reschedule that appointment. They told me to come back before two, and I live all the way in Pawtucket, so its not an easy thing for me to go and come back like that. I tried, but I didn't make it. I made it back at like 2:30, but they told me court was over that day for court fines. So I ended up just leaving, trying to call my lawyer, telling him that I think I have a warrant. He told me the best thing for me to do was try to take care of it, knowing that I would probably do seven days. He said there's no chance of me even taking care of it. So I knew I had a warrant, you know, and I ended up just procrastinating on that warrant."

He was incarcerated for 7 days for owing 300 dollars to Sixth District court.

Characteristics of Individuals Interviewed

- 50% (12/25) unemployed
- 18% (4/25) homeless
- 75% (18/25) had been incarcerated for court fines before
- 37 years old on average
- 50% (8/17) that had recently had an extended period in which they owed fines had been paying regularly
- 20% (5/25) had significant mental health problems, including schizophrenia, bipolar disorder, and depression
- 16% (4/25) were on SSI and almost half had significant health problems, including hepatitis, chronic nerve disease of the arms and legs, and seizures.
- Half (12/25) are responsible for children
- Half (12/25) of those with jobs will probably lose their job because of their incarceration

Collateral Effects of Incarceration

Aside from the cost to the state of jailing individuals, there are other collateral costs to the individual, including time lost from work. This report did not collect enough data to estimate the number of individuals who lost time from work because of incarceration, however, twelve of the twenty-five of those interviewed were currently employed. Individuals reported many other problems caused by the incarceration, from

losing apartments to not being able to take medicine for mental health problems.

Mike was on the point of giving up when he was interviewed in the Intake Service Center. Mike had a job and was living with his girlfriend when he was picked up by a cop who recognized him while he was leaving the hospital. He has hepatitis and seizures. He is on food stamps and has applied for SSI. Mike has been incarcerated two other times in the past year for court debt, and each time he almost lost his job. While in jail, he stated:

"I lost my job, I lost my girl, my apartment. I will probably get violated because I didn't show up for a probation appointment. They'll put another warrant out on me. I lost my job twice, they gave it back to me before, I don't think they will this time. I try so hard but I'm losing everything over and over again. After awhile you just feel like giving up and putting a bullet in your head."

Mike was in a drug rehabilitation program when he was incarcerated, and will probably not be able to reenter it immediately when released. He owed $300 to the state.

Mike's situation is not unique. Several individuals testified to having lost jobs more than once because of court debt incarceration. One man said that his family would not be able to pay rent that month because of his incarceration and he was worried what would happen to his wife and kids while he was in jail. Another man on SSI stated that he would probably get his SSI check stolen while in jail.

Incarceration for court debt is a major obstacle for individuals attempting to reenter society after time in prison or any individual who has a prior history of criminal conviction and is trying to maintain a legal and prosocial life. Incarceration for court debt interrupts medical and rehabilitation treatment, causes individuals to be fired from employment, disrupts families, and disrupts housing situations.

Verification and Error

Considerable efforts were made to verify all data provided in the results section, including: comparison to court warrants, in person corroboration of statistical results during interviews, and internal comparison within database results. For more discussion, see the April 2007 version of the report, available at riflc.org/index.php?name=reports. Verification efforts indicated that there while some unique commitments may have been mis-categorized, this represents a very small proportion of the total commitments, less than 1% of those identified. Because approximately 6% of all records could not be fully found in databases, a small amount of estimation was required. This is discussed more fully in the previous version of the report.

Recommendations

Introduction

This report recommends passage of S2234 sponsored by Senator Harold Metts and H8093 sponsored by Representative O'Neil. The current policy should be altered to avoid assessing fines that the defendant cannot pay, decrease the amount of money spent by the courts, police, and prison system to incarcerate, and avoid unnecessary incarceration of defendants. It is necessary that the courts still maintain and use the power to incarcerate for delinquency around court fines. This is a necessary measure to ensure that people with court debt that have the ability to pay the debt make efforts to pay it. However, incarceration related to court debt should be a last measure used for people avoiding payment. Incarceration related to court debt contributes to 17% of all pre-trial commitments, a significant part of the ACI's activity and a significant contribution to overcrowding.

This report makes the following general recommendations, which are elaborated below. Recommendations are based on research discussed in the results section, and many came at least in part from suggestions made by the individuals interviewed.

1. Reduce the amount of time people are held in jail awaiting ability to pay hearings to 48 hours.
2. Take ability to pay into account when assessing court fines and costs initially and throughout the payment plans.
3. Employ a variety of collection methods before resorting to incarceration.
4. Accept smaller bails from individuals brought in on warrants.
5. Reduce the warrant fee.

The recent policy change of providing a $150/day credit seems to have decreased the number of incarcerations for court debt and contributed to the reduction of the awaiting trial population in the ACI. Court fine reform is an important step towards decreasing unnecessary prison costs. However, the $150/day credit is not an ideal solution to the problem. It costs the state twice, since the state reduces fines and pays to imprison people, and it still leaves people in prison who should not be there. The above recommendations will decrease the number of unnecessary and costly incarcerations, reduce the burden of fines on the indigent, and lower the prison population.

Recommendations for Legislation

In the 2007-2008 legislative session, the RI legislature is considering Senate Bill 2234 and House Bill H8093. This bill alters several portions of section 12 of the Rhode Island general statutes to accomplish the following things:

1. Define the conditions for a defendant to be deemed indigent and clearly provide judges discretion to waive court costs for indigent individuals. The conditions include being on TANF, food stamps, disability insurance, or a government sponsored state supplemental income program.
2. Ability to pay hearings would occur within 48 hours of incarceration.
3. Prioritize the payment of restitution over court costs and fines.
4. Decrease the warrant fee to $25.

Reasons to Consider Ability to Pay when Assessing Court Fines and Court Costs

Judges should take an individual's ability to pay into account when assessing court debt and as they collect court debt. By adjusting court cost and court fine amounts to the ability of the defendant to pay the court is more likely to collect and can maximize revenue. For example, some individuals interviewed have medical conditions which prevent them from working, have been consistently unable to pay court debt, and have qualified for disability insurance from the state. It would be more affective for the court to assess lower court costs and court fines in these cases instead of establishing a court debt that is unlikely to be paid.

Structured or means based fines that relate to ability to pay are a tested and recommended judicial practice. They were demonstrated to be effective methods of punishment and fine collection in pilot studies and are recommended by the US Department of Justice Office of Justice Programs.[16] These documents lay out specific structures for creating levels of fines based on the offender's ability to pay and the severity of the crime. The New York Bar association, for example, recommends two tiers of payment—one for those who qualify for public defense and another for those who do not.[17] This should be seen as a measure to make

[16] Hillsman, Sally T., 1990. "Fines and Day Fines," *Crimes and Justice*, vol 12; Turner, Susan and Greene, Judith, 1999. "The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County," *The Justice System Journal*, Volume 21/1; Greene, Judith, 1990. "The Staten Island Day-Fine Experiment," in D.C. McDonald (ed.), *Day Fines in American Courts: The Staten Island and Milwaukee Experiments.* Washington DC: National Institute of Justice; "How to Use Structured Fines (Day Fines) as an Intermediate Sanction/ Bureau of Justice Assistance". U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, 1996. http://www.ncjrs.org/txtfiles/156242.txt; http://www.ncjrs.org/pdffiles/156242.pdf

[17] *Reentry and Reintegration: The Road to Public Safety* Special Committee on Collateral Consequences of

fines more likely to be collected while still maintaining revenue.

Require that individuals receive an ability to pay hearing forthwith, not to exceed 48 hours after arrest

Quick hearings are possible, since Superior Court in Providence has an attorney on hand who handles ability to pay hearings of people brought in on warrants immediately. Setting a limit to the amount of time an individual can sit in jail for court debt will do away with unnecessary and costly prison time. A significant portion of the people incarcerated are released after several days without paying bail. However, one third spend more than three nights incarcerated. Additionally, 94% of the people who make bail pay in the first three days. The time spent incarcerated beyond two nights increases jail costs and increases the disruption to the individual's life, such as the likelihood they will loose their employment. Discharge after two nights should be a rule not a possibility. If all individuals committed to jail-time for court debt had been released after 48 hours in 2007 the state would have saved approximately $200,000 and lowered the awaiting trial population by around 13 people a day[18]. Judges hold Ability to Pay Hearings within 48 hours of incarcerating someone. This could de done by seeing them immediately upon their arrest or holding the hearing soon after incarceration.

Allow judges to waive costs after the first charge

The intent of much of the legislation is to increase a judge's discretion to waive costs in cases of inability to pay. One of the reasons Rhode Island costs are so high is because they are assessed per charge. A second charge does not cost the court twice as much time and effort and it quickly increases costs beyond the point where many can pay them. Judges should have discretion to waive costs beyond a single charge.

Reduce the warrant fee from $125 to $25

Many people incur large warrant fees over time and are stuck in a cycle of increasing debt and continuous incarceration. One homeless individual interviewed has been jailed ten times for court debt since 2005, meaning this alone resulted in $1,250 of debt. Another has been to prison a total of seven times for the costs from his 1996 misdemeanor charge, meaning he has been assessed $875 in warrant fees. He has appeared in court 36 times for these costs. He said "Í didn't have the money and I got scared that I was going to get locked up, so I didn't go. I pay when I can, I've been out of work for a long time. I've been homeless for the last twelve years of my life, I get a job here and there. Whatever I do make, I got to use it to getting something to eat or find a place to stay. I've probably been paying the same fine over and over again for years because of warrants."(this is one of the summaries in the Summary of Interviews section at the end)

A $25 fee paid to the arresting agency would continue to pay the police for the cost of the arrest and the court for their time. An individual who comes to their ability to pay hearing freely is not charged anything, yet they cost the court the same amount of time and effort as someone brought in on a warrant. Someone forcefully brought in is an opportunity for the court to motivate payment for those who can pay, but should not also be an opportunity for courts to assess additional fees. Rhode Island's disproportionately high costs and fines result in the state spending a large amount of money incarcerating people who have trouble paying these fines. The warrant fine in particular is born most heavily by indigent individuals, since they are the ones repeatedly being incarcerated. Reducing this fine will decrease the number of indigent repeat-offenders, and a $25 fee is still high enough to provide additional incentive to come to hearings.

Criminal Proceedings of the New York Bar Association. Available at http://www.nysba.org/MSTemplate.cfm?Section=Table_of_Contents1&Site=Special_Committee_on_Collateral_Consequences_of_Criminal_Proceedings&Template=/ContentManagement/HTMLDisplay.cfm&ContentID=80374

[18] The total number of prison days spent beyond 48 hours was 4610, which was multiplied by the 9$ per diem cost. In addition, the cost of one guard was included, since there was the potential to decrease the awaiting trial population by 13 people on average

Further Recommendations

1. **Employ a variety of collection practices before incarceration**

The State of Rhode Island currently issues warrants for arrest for a single missed appointment. Although judges exercise restraint when dealing with indigent individuals who appear at ability to pay hearings, they require incarceration for individuals that are brought in on warrants. Many other states employ a variety of intermediate measures for court debt that is delinquent.

Mesa Court in Maricopa County, Arizona published an extensive report "The Facts About Collection Practices at the Mesa Municipal Court" in 2001. This report details an extensive number of collection practices that are effective. They include: late notices mailed to the individual, suspension of license, warning notices that a warrant will be issued, mass mailing to all individuals with delinquent debts, notifying credit agencies, phone calls to the individual, the place of work, and references such as family and friends. Each of the practices or a combination of these practices is more effective than summary incarceration of individuals who do not appear to hearings.

Interviews demonstrated that some sort of intermediate warning would be useful in many cases. Many individuals stated that they had forgotten about their fines or had forgotten one appointment. As discussed in the results section, most individuals either never show up to a single ability to pay hearing after their sentence or they show up to an average of three before missing one. Mailed notices or phone calls would help induce many individuals to pay.

2. **Accept smaller bails from individuals brought in on warrants**

People in many cases can pay something, but in most cases cannot pay the higher amounts being demanded by the court. Many individuals interviewed stated that they offered the court several payments worth of money as bail and were refused. Instead, they spent a week in prison and then left without paying anything. As demonstrated in Figure 2, people are around three times more likely to pay smaller bails. By accepting smaller bails the courts would be more likely to receive some payment immediately and avoid spending money to incarcerate people.

3. **Modify Court Cost Assessment**

Court costs in Rhode Island are a fee for services rendered by the state. They are not a form of restitution or punitive fine, which are legislatively and conceptually distinct from court fines. Some costs are set at levels that parallel costs associated with a specific service, for example laboratory fees are set at a level that attempts to estimate the necessary costs of investigative laboratory work. In contrast, Victims' Fund fees, which are one third of general court fines, are meant to compensate victims of violent crimes but are assessed against non-violent offenders. Roughly one half of felonies are non-violent. Victim fund fees should only be assessed for violent felonies. They could be increased to compensate for lost revenue.

4. **Involve Probation and Parole Officers in debt collection**

Currently Probation and Parole officers are not involved in the process of court debt collection. Paying debt to the court is rarely a condition of probation or parole in Rhode Island. This should not be changed, because if individuals could be violated for failure to pay debt or appear at hearings this would increase the number of technical violations and time spent incarcerated. However, probation and parole officers should be aware of an individual's warrants and ability to pay hearings and keep their clients informed.

5. **Make it clear to all individuals that they should show up to court even if they cannot pay their fines.**

Several individuals had no idea that they should come to court even if they could not

pay, and most that did know had heard it through rumor and not through the court.

6. **Allow individuals who arrive to court in clothing not acceptable to the court, such as shorts, to reschedule their ability to pay hearing immediately.**

7. **Provide incentives for people who miss appointments to voluntarily come in**.

Individuals expressed fear and uncertainty about going to court voluntarily after missing a hearing. After missing one appointment many grew frustrated because of the added $125 fine and the chance that they would be incarcerated if they went back to court. Courts could clearly guarantee removing the $125 fine for people who voluntarily come to court after missing a hearing and guarantee that they will not be incarcerated if they have the money to make one payment.

8. **Cities in Northern Rhode Island should have a place for people to pay fines**

People from Northern Rhode Island have to travel considerable distances, often by bus, just to pay fines. A number of people interviewed miss hearings because of the difficulty of coming in and paying fines. Although there is no court in Northern Rhode Island to accept fines, a similar state agency, such as the police station, could accept fines. This would make it easier and more likely for people from Northern Rhode Island cities, particularly Woonsocket, to pay.

Warrant	125	100 general revenue 25 arresting agency

Charge*	Amount	Recipient
Misdemeanor	93.50	60 general revenue 30 victim's fund 3.50 arresting agency
Felony punishable by more than one year or a fine more than $1,000**	273.50	180 general revenue 90 victim's fund 3.50 arresting agency
Felony punishable by more than five years**	453.50	300 general revenue 150 victim's fund 3.50 arresting agency

* each charge is assessed a distinct court fine, although judges can restrict assessments to three charges

** this refers to the potential punishable time period made possible under the statute, not the actual prison time given

Breakdown of Court Costs
Appendix 1

Characteristics of Court Debt Related Incarceration

	Rate of Incarceration for Court Debt	Length of Incarceration(days)	Average Bail/Fine Owed
Statewide	18%	3	$826
6th	24%	4	$725
Providence Superior	9%	3	$1,910
Second	14%		
Fourth	11%		
Third	20%		
Washington	3%		
Kent	5%		

Court Fine Commitment by Court
Appendix 2

		assessed	receipts		uncollected		plans	
Superior Court	2005	$5,072,145.00	$2,342,387.00	46.18%	$696,002.42	13.72%	$2,033,755.58	40.10%
	2004	$5,186,443.00	$2,373,929.00	45.77%	$864,814.19	16.67%	$1,947,699.81	37.55%
	2003	$5,464,772.00	$2,583,205.00	47.27%	$815,631.42	14.93%	$2,065,935.58	37.80%
	2002	$5,439,522.00	$2,544,722.00	46.78%	$797,899.34	14.67%	$2,096,900.66	38.55%
	2001	$4,929,996.00	$2,488,968.00	50.49%	$819,407.00	16.62%	$1,621,621.00	32.89%
	total	$26,092,878.00	$12,333,211.00	47.27%	$3,993,754.37	15.31%	$9,765,912.63	37.43%
District	2005	$10,073,300.00	$8,233,667.00	81.74%	$1,054,162.65	10.46%	$785,470.35	7.80%
	2004	$9,969,098.00	$8,434,882.00	84.61%	$762,299.56	7.65%	$771,916.44	7.74%
	2003	$9,819,597.00	$8,455,574.00	86.11%	$759,131.71	7.73%	$604,891.29	6.16%
	2002	$9,517,491.00	$8,451,363.00	88.80%	$655,478.72	6.89%	$410,649.28	4.31%
	2001	$9,836,470.00	$8,887,109.00	90.35%	$638,530.46	6.49%	$310,830.54	3.16%
	Total	$49,215,956.00	$42,462,595.00	86.28%	$3,869,603.10	7.86%	$2,883,757.90	5.86%
District+Superior	2005	$15,145,445.00	$10,576,054.00	69.83%	$1,750,165.07	11.56%	$2,819,225.93	18.61%
	2004	$15,155,541.00	$10,808,811.00	71.32%	$1,627,113.75	10.74%	$2,719,616.25	17.94%
	2003	$15,284,369.00	$11,038,779.00	72.22%	$1,574,763.13	10.30%	$2,670,826.87	17.47%
	2002	$14,957,013.00	$10,996,085.00	73.52%	$1,453,378.06	9.72%	$2,507,549.94	16.77%
	2001	$14,766,466.00	$11,376,077.00	77.04%	$1,457,937.46	9.87%	$1,932,451.54	13.09%
	Total	$75,308,834.00	$54,795,806.00	72.76%	$7,863,357.47	10.44%	$12,649,670.53	16.80%
District+Superior+Traffic	2005	$27,993,301.00	$20,950,413.00	74.84%	$4,000,115.07	14.29%	$3,042,772.93	10.87%
	2004	$28,995,115.00	$22,270,493.00	76.81%	$3,910,160.50	13.49%	$2,814,461.50	9.71%
	2003	$28,166,305.00	$21,953,111.00	77.94%	$3,486,915.56	12.38%	$2,726,278.44	9.68%
	2002	$26,394,982.00	$20,560,730.00	77.90%	$3,315,199.92	12.56%	$2,519,052.08	9.54%
	2001	$27,354,491.00	$21,636,340.00	79.10%	$3,723,663.93	13.61%	$1,994,487.07	7.29%
	Total	$138,904,194.00	$107,371,087.00	77.30%	$18,446,054.98	13.28%	$13,087,052.02	9.42%

Court Collection Data
provided by the Judicial Technology Center
Appendix 4

***** NOT AN OFFICIAL DOCUMENT *****

Case ID:
Court : (DC) District Court **Location :** (6D) 6th District Court
Type: M - MISDEMEANOR

Charge#	Charge	Disposition / Date	Sentence / Judge
1	SIMPLE ASSAULT	PLEA OF NOLO CONTENDERE	SUSPENDED 1 Year HIGGINS,JUDGE PROBATION 1 Year HIGGINS,JUDGE COURT COSTS HIGGINS,JUDGE

Case Event Schedule

Event	Date	Location	Judge
ABILITY TO PAY COSTS	05-JAN-2000	6th District Court	*unassigned*
ABILITY TO PAY COSTS	31-MAR-2000	6th District Court	*unassigned*

Docket Entries

Description	
10-NOV-1999	COMPLAINT FILED
10-NOV-1999	DFT APPEARS, ARRN, PLEADS NOLO
10-NOV-1999	DISPOSED/SENTENCED
06-JAN-2000	DEFT TO MAKE FURTHER PAYMENTS
06-JAN-2000	PET WRIT OF HABEAS CORPUS
31-MAR-2000	DEFT DOES NOT APPEAR
31-MAR-2000	BENCH WARRANT ISSUED
09-MAY-2000	BENCH WARRANT WITHDRAWN

Example of Court Case Record. Identifying information has been removed. The commitment that occurred on May 6,2000 is estimated to be caused by failure to appear for the March 31, 2000 Ability to Pay Hearing. This person showed up for one ability to pay hearing, on January 6, 2000, before missing an appointment. Their sentence did not include any court fines, only court costs.

Appendix 5

Interview Summaries:

These are summaries of ten of the 25 interviews completed. The names have been changed to retain anonymity. They were chosen randomly from the completed interviews and reflect the overall types of situations encountered. All details relating to criminal history, bail, and payment schedule have been verified with court records.

Luke Brite
"The 16th of last month, I had got out. I got out on a Saturday, and I had a court date on a Monday, and I had just done six months. I had got out, and I went to court in shorts, not knowing that I wasn't supposed to be going to court in shorts. The sheriff wouldn't let me in, so I just went home and tried to reschedule that appointment. They told me to come back before two, and I live all the way in Pawtucket, so its not an easy thing for me to go and come back like that . I tried, but I didn't make it. I made it back at like 2:30, but they told me court was over that day for court fines. So I ended up just leaving, trying to call my lawyer, telling him that I think I have a warrant. He told me the best thing for me to do was try to take care of it, knowing that I would probably do seven days. He said there's no chance of me even taking care of it. So I knew I had a warrant, you know, and I ended up just procrastinating on that warrant. One day I was with my friend, going to another friend of mines, and the police just came right into the apartment we were at."

Luke was held for eight days on a $300 bail. He said he might have been able to pay it, but he was hoping to get the $150/day rebate. The fines were for a misdemeanor assault charge.

John Gomes
Jose has been homeless on or off for the last several years. He has not been able to work since 2002, and has SSI pending because of a chronic nerve disease, hepatitis, and diabetes. When John was arrested he owed a total of $717 to two courts and also had a warrant for failure to appear for a restitution hearing. The restitution stood at $450 for a 2004 forgery and counterfeiting charge. Jose's bail was $500, and he was held for seven days before being released. Prior to failing to appear for his court fee hearings he had shown up three times.

"I can't work because I got a physical condition that keeps me from working. I got SSI and SSDI pending. I got peripheral neurapathy, chronic nerve disease. All the jobs I ever did were outdoors, I can't do that no more, or restaurant work, and I can't do that no more because I got hepatitis. A lot of times they go 'you got to come back to court on such-and-such a date or else' and when they say that 'or else' that means you are going to jail, no matter what, whether you come, whether you show up, or what. So I don't show up. Most of the money I owe is warrants, because I don't show up."

David Fernandes
David has never been charged with a felony in adult court, despite a long criminal record as a juvenile. He has been without charge for four years, but has been unemployed up until recently. He regularly would not go to court fine hearings because he did not have money to pay the fines. He has been incarcerated for court fines four times in the last four years. He demonstrated significant paranoia about appearing in court. He had appeared at his hearings two consecutive times prior to the most recent missed hearing, which he missed because of a family emergency. His fines are for a simple assault misdemeanor charge from 2002. He was held on a bail of $517.

"My son had fell from a chair, he'll be two next month. He cracked his lip, got a few stitches. I had court, but I was like oh well, my son's here, he's happy I'm here with him. I held him while he got stitches. That's priceless to me, I mean this court can wait, I'm a man, I don't care a few days in."

Jesse McCormick
Jesse owes $1231.50 in fines and court costs from a driving with a suspended license conviction from early 2005. He states he was never aware that he still owed fines and had never gone to set up a payment plan. He says he would have gone and made payments had he known. He offered the court $150 when he was picked up. Jesse was held for nine days before being released.

"I have fines for driving on a suspended license, I recently moved, totally forgot about the fines, never received anything in the mail. I had a warrant out on me for 18 months I didn't know about. They wanted half of what I owe, and I can't come up with that kind of money. Me being in here isn't doing them any good, they're not getting any money that way. I keep up with my court dates and my fines, and I haven't been in any trouble."

Bob Davis
Robert regularly appears at his court fine hearings and pays when he can, despite the fact that he is currently homeless and unemployed. He just finished drug rehab, and at his last Ability to Pay Hearing the judge had told him he had been doing a good job with appearing and making payments. He has SSI pending due to his Post Traumatic Stress Disorder, hepatitis, and depression, and receives treatment from the Veteran's Hospital. Bob was held for four days. In 1996 Robert plead no contest to a misdemeanor charge of "Tampering with a Motor Vehicle" and was given one year probation. He was held for four days for $418 in fees from that charge. Robert has appeared for Ability to Pay Hearings 36 times for this fine and been incarcerated seven times for failure to appear on this case alone.

"Í didn't have the money and I got scared that I was going to get locked up, so I didn't go. I pay when I can, I've been out of work for a long time. I've been homeless for the last twelve years of my life, I get a job here and there. Whatever I do make, I got to use it to getting something to eat or find a place to stay. I've probably been paying the same fine over and over again for years because of warrants."

Charles Rice
Charles was picked up while driving when a police officer ran his plates. His car was towed and he will owe $300 to the towing company. He offered the judge $200 bail, but couldn't pay the $600 necessary. Charles is on SSI for back problems. Prior to missing his hearing he had appeared and paid at the three previous hearings. He stopped going because he couldn't make the payments anymore. This was the first time he had been incarcerated for court fines.

"I didn't know I would spend seven days, it really surprised me. I expected they'd hold me a little and then let me give them the money. There should be some kind of warning, a letter or something. Credit cards send you a letter."

Steven Deasy
Steven was incarcerated for eight days. He owes $3500 to sixth district court for a combination of court fees from charges over the last several years—mostly driving with a suspended license charges. He had appeared and paid twice prior to the incarceration. He has been incarcerated several times for failure to appear at court fine hearings in the past several years. He would have paid several hundred dollars to stay out of prison.

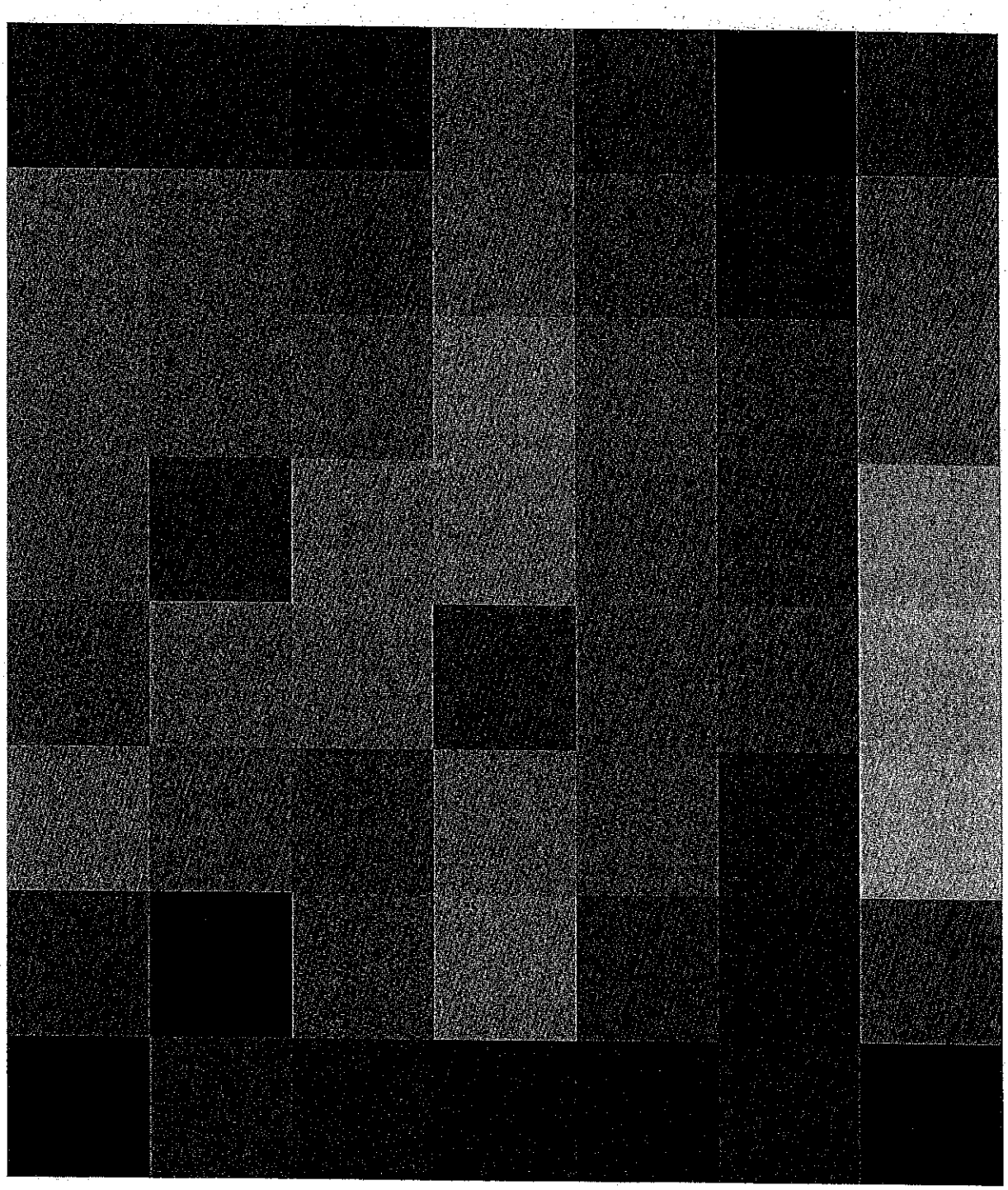
Terrence Peterson
Terrence owed sixth district court $1300 from a 2004 misdemeanor conviction of marijuana possession; he spent eight days in jail. He had appeared at his last five Ability to Pay Hearings and estimated that he had paid the courts over $2,500 over the last four years. Terrence had just been placed in a new job by a temporary employment agency and he expected to lose the job because of his incarceration. He stated he had been paying regularly and then forgot about his payments after being briefly incarcerated—he recently served three weeks for felony assault from a Superior Court case, and his Ability to Pay hearing was several weeks after he was released.

Lawrence Imbriglio
Several weeks before being incarcerated for court fines Lawrence was picked up for having an open container in the parking lot of a county fair. He was released and given a summons. Lawrence appeared in court for the summons and was given a $500 bail and sent to Providence because of outstanding failure to appear warrant. His fines are from a 2006 Driving with a Suspended License charge. He stated he had never gone to make a payment plan because he had no money, so he felt it was pointless. Lawrence had never been incarcerated before this incident. When I arrived, Lawrence had very little understanding of what was going on. He stated, "Why are they holding me here? I don't have any money. If I had money, I wouldn't be here."
Lawrence is homeless, unemployed, and has been diagnosed as a schizophrenic by the Northern Rhode Island Mental Health Center. He was incarcerated for fifteen days.

Rhonda Harris
Rhonda was put on probation recently for a misdemeanor assault charge. She had been seeing her probation officer regularly. She had never been aware of her ability to pay hearing and her probation officer never informed her of the warrant put out for her arrest. At five in the morning police broke into her bedroom looking for her neighbor. They ran her name and brought her to prison where she spent eight days in prison on a bail of $243.50. Rhonda had never been incarcerated for court fines before and had been without charges since 2003 when she was convicted of possession of marijuana. She works full time and expected she would lose her job. Rhonda has been diagnosed with bipolar disorder.

Stanley Brown
Stanley was pulled over for having old license plates on his car. He spent eight days in prison on a bail of $1100. He owed fines from a DUI charge from 2003. His only other charge in the last nine years was a misdemeanor assault charge in 2001. Stanley is 59 years old and on SSI for depression and post-traumatic stress syndrome. He receives treatment from the Veteran's Hospital. Prior to missing his hearing, Stanley has appeared to pay seven times for these fees and been incarcerated four times for failure to appear for these fines. He has only ever been incarcerated for court fines and almost half of his remaining fee is for warrants. Stanley lives in Woonsocket and has to wake up at six in the morning and walk two miles in order to catch the bus to arrive in Providence by nine for hearings. He stated, "If there was a court in Woonsocket I could go to and it was only 30/month, I would pay it."

Welcome to Coffeyville, Kansas, where the judge has no law degree, debt collectors get a cut of the bail, and Americans are watching their lives — and liberty — disappear in the pursuit of medical debt collection.



When Medical Debt Collectors Decide Who Gets Arrested

By Lizzie Presser
Photography by Edmund D. Fountain
October 16, 2019

ProPublica is a nonprofit newsroom that investigates abuses of power. Sign up for ProPublica's Big Story newsletter to receive stories like this one in your inbox as soon as they are published.

ON THE LAST TUESDAY of July, Tres Biggs stepped into the courthouse in Coffeyville, Kansas, for medical debt collection day, a monthly ritual in this quiet city of 9,000, just over the Oklahoma border. He was one of 90 people who had been summoned, sued by the local hospital, or doctors, or an ambulance service over unpaid bills. Some wore eye patches and bandages; others limped to their seats by the wood-paneled walls. Biggs, who is 41, had to take a day off from work to be there. He knew from experience that if he didn't show up, he could be put in jail.

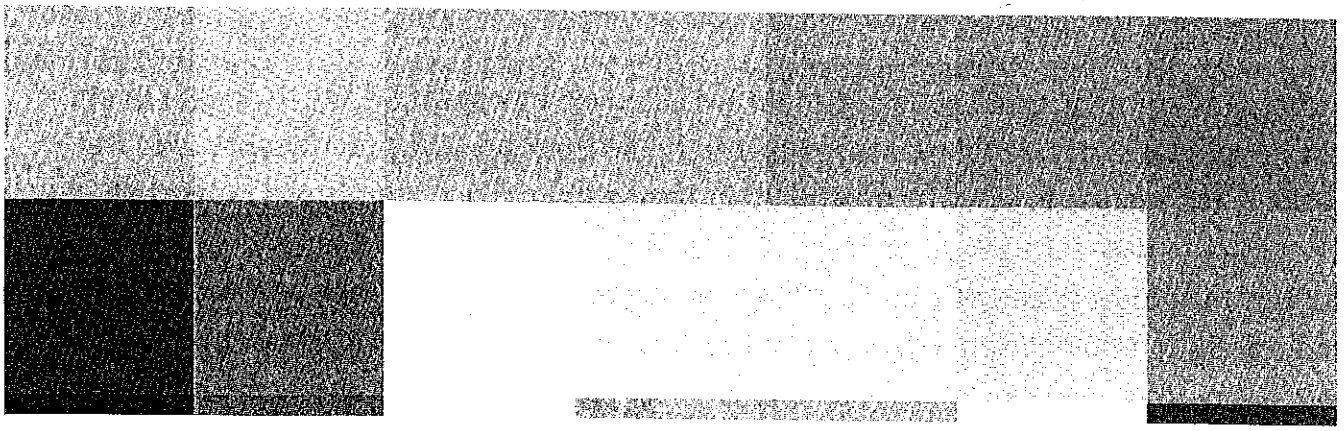
Before the morning's hearing, he listened as defendants traded stories. One woman recalled how, at four months pregnant, she had reported a money order scam to her local sheriff's office only to discover that she had a warrant; she was arrested on the spot. A radiologist had sued her over a $230 bill, and she'd missed one hearing too many. Another woman said she watched, a decade ago, as a deputy came to the door for her diabetic aunt and took her to jail in her final years of life. Now here she was, dealing with her own debt, trying to head off the same fate.

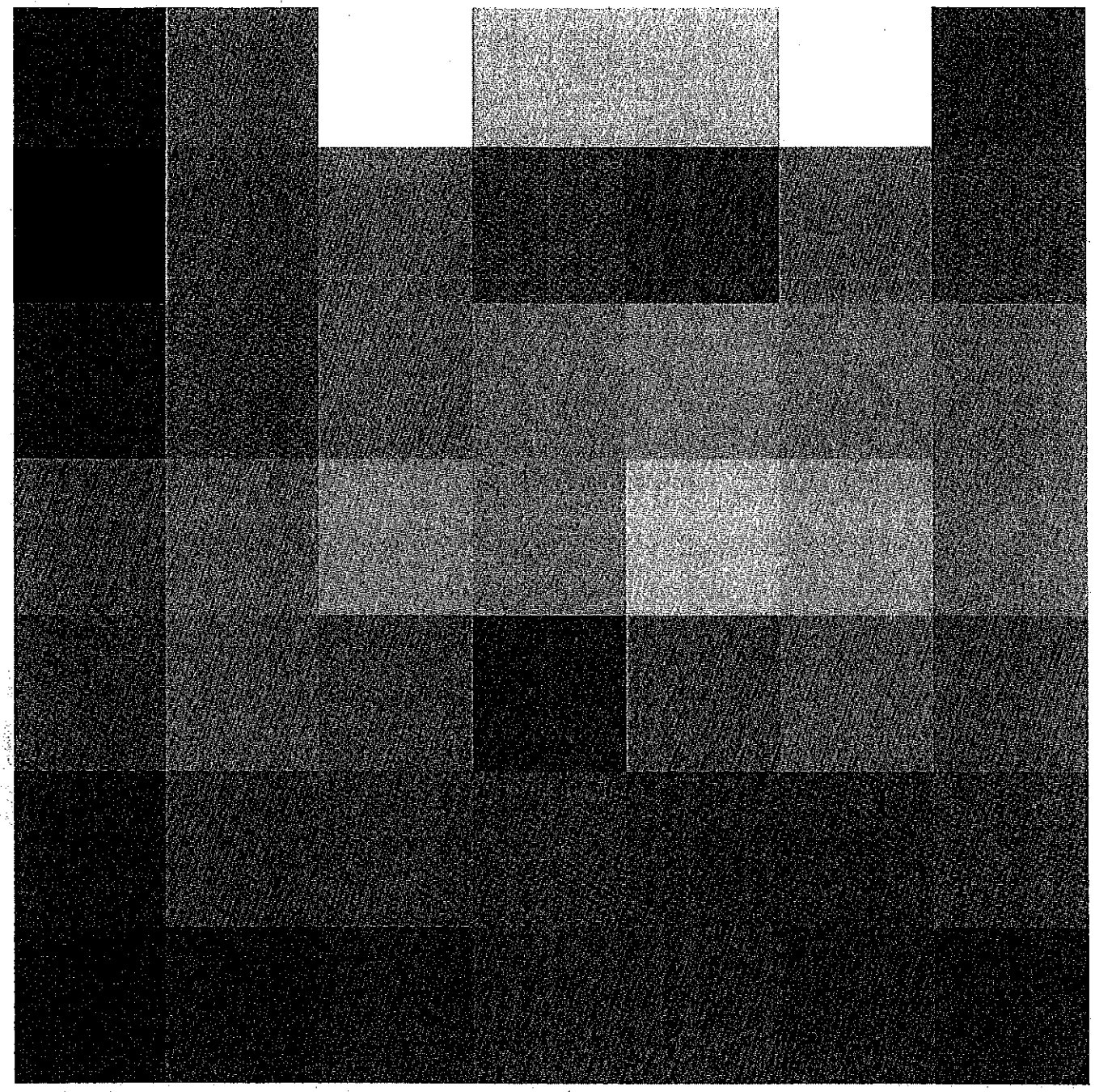
Biggs, who is tall and broad-shouldered, with sun-scorched skin and bright hazel eyes, looked up as defendants talked, but he was embarrassed to say much. His court dates had begun after his son developed leukemia, and they'd picked up when his wife started having seizures. He, too, had been arrested because of medical debt. It had happened more than once.

Judge David Casement entered the courtroom, a black robe swaying over his cowboy boots and silversmithed belt buckle. He is a cattle rancher who was appointed a magistrate judge, though he'd never taken a course in law. Judges don't need a law degree in Kansas, or many other states, to preside over cases like these. Casement asked the defendants to take an oath and confirmed that the newcomers confessed to their debt. A key purpose of the hearing, though, was for patients to face debt collectors. "They want to talk to you about trying to set up a payment plan, and after you talk with them, you are free to go," he told the debtors. Then, he left the room.

The first collector of the day was also the most notorious: Michael Hassenplug, a private attorney representing doctors and ambulance services. Every three months, Hassenplug called the same nonpaying defendants to court to list what they earned and what they owned — to testify, quite often, to their poverty. It gave him a sense of his options: to set up a payment plan, to garnish wages or bank accounts, to put a lien on a property. It was called a "debtor's exam."

If a debtor missed an exam, the judge typically issued a citation of contempt, a charge for disobeying an order of the court, which in this case was to appear. If the debtor missed a hearing on contempt, Hassenplug would ask the judge for a bench warrant. As long as the defendant had been properly served, the judge's answer was always yes. In practice, this system has made Hassenplug and other collectors the real arbiters of who gets arrested and who is shown mercy. If debtors can post bail, the judge almost always applies the money to the debt. Hassenplug, like any collector working on commission, gets a cut of the cash he brings in.





Crystal Dyke with her husband and two kids outside their home in Leroy, Kansas. She was arrested when she was pregnant because she missed hearings involving a $230 radiologist bill.

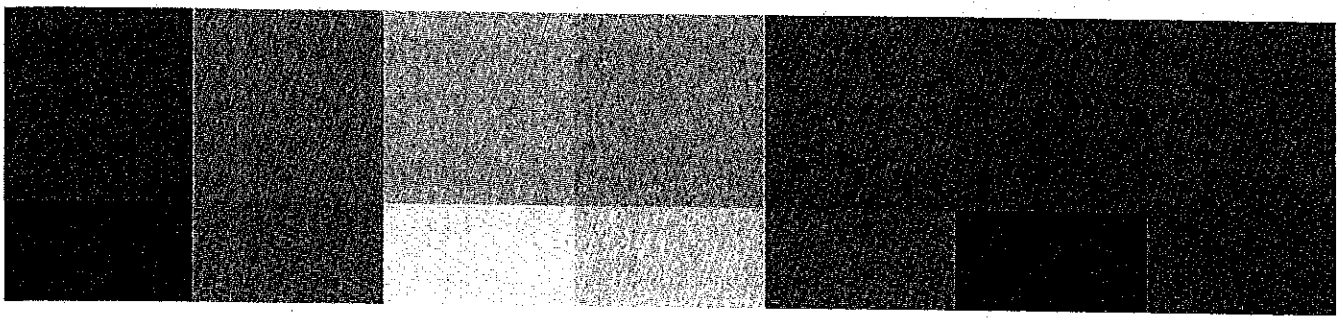
Across the country, thousands of people are jailed each year for failing to appear in court for unpaid bills, in arrangements set up much like this one. The practice spread in the wake of the recession as collectors found judges willing to use their broad powers of contempt to wield the threat of arrest. Judges have issued warrants for people who owe money to landlords and payday lenders, who never paid off furniture, or day care fees, or federal student loans. Some debtors who have been arrested owed as little as $28.

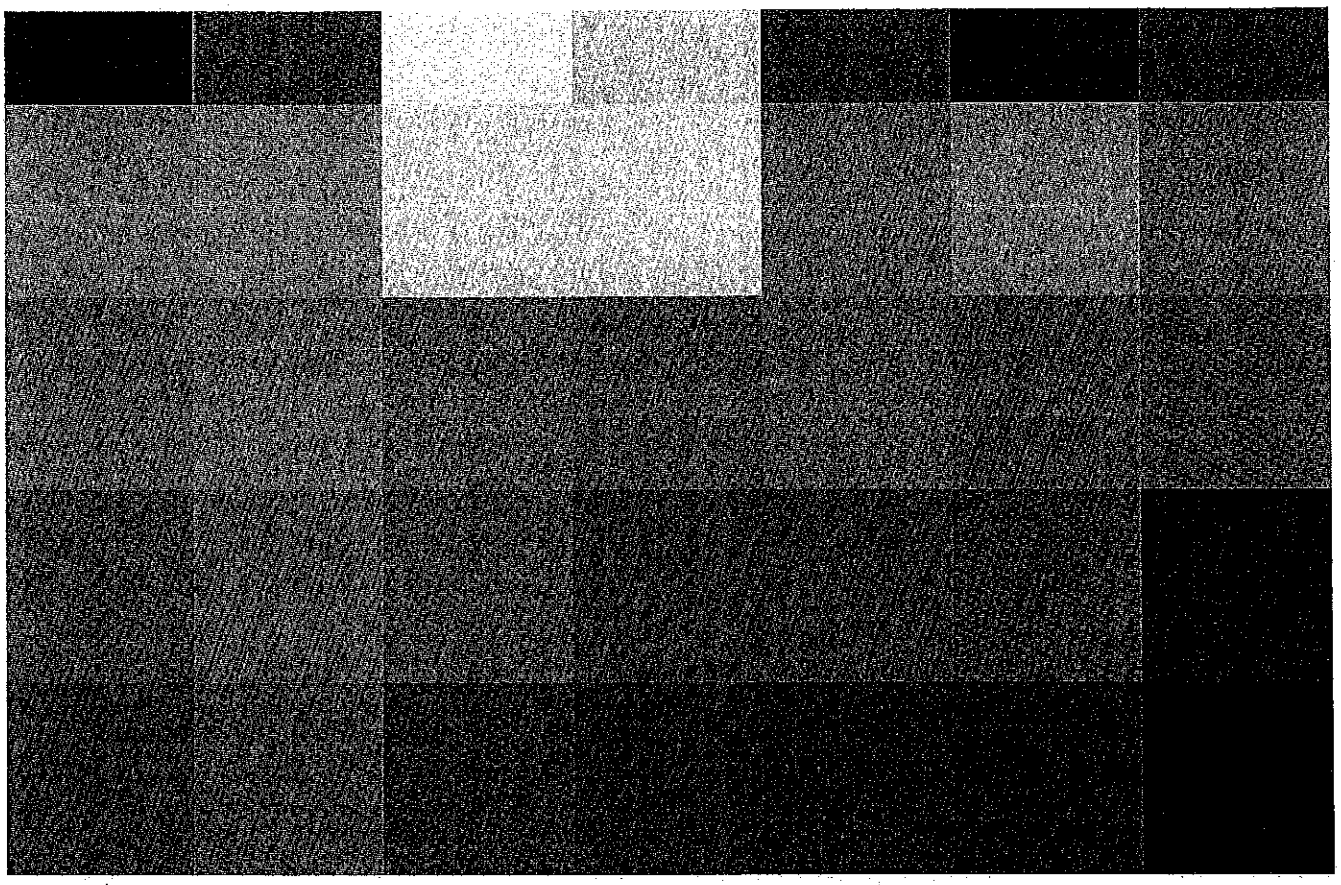
More than half of the debt in collections stems from medical care, which, unlike most other debt, is often taken on without a choice or an understanding of the costs. Since the Affordable Care Act of 2010, prices for medical services have ballooned; insurers have nearly tripled deductibles — the amount a person pays before their coverage kicks in — and raised premiums and copays, as well. As a result, tens of millions of people without adequate coverage are expected to pay larger portions of their rising bills.

The sickest patients are often the most indebted, and they're not exempt from arrest. In Indiana, a cancer patient was hauled away from home in her pajamas in front of her three children; too weak to climb the stairs to the women's area of the jail, she spent the night in a men's mental health unit where an inmate smeared feces on the wall. In Utah, a man who had ignored orders to appear over an unpaid ambulance bill told friends he would rather die than go to jail; the day he was arrested, he snuck poison into the cell and ended his life.

In jurisdictions with lax laws and willing judges, jail is the logical endpoint of a system that has automated the steps from high bills to debt to court, and that has given collectors power that is often unchecked. I spent several weeks this summer in Coffeyville, reviewing court files, talking to dozens of patients and interviewing those who had sued them. Though the district does not track how many of these cases end in arrest, I found more than 30 warrants issued against medical debt defendants. At least 11 people were jailed in the past year alone.

With hardly any oversight, even by the presiding judge, collection attorneys have turned this courtroom into a government-sanctioned shakedown of the uninsured and underinsured, where the leverage is the debtors' liberty.





The courtroom where Michael Hassenplug and other collectors administer "debtor's exams."

SEATED AT THE FRONT of the courtroom, Hassenplug zipped open his leather binder and uncapped his fountain pen. He is stout, with a pinkish nose and a helmet of salt and pepper hair. His opening case this Tuesday involved 28-year-old Kenneth Maggard, who owed more than $2,000, including interest and court fees, for a 40-mile ambulance ride last year. Maggard had downed most of a bottle of Purple Power Industrial Strength Cleaner, along with some 3M Super Duty Rubbing Compound, "to end it all." His sister had called 911.

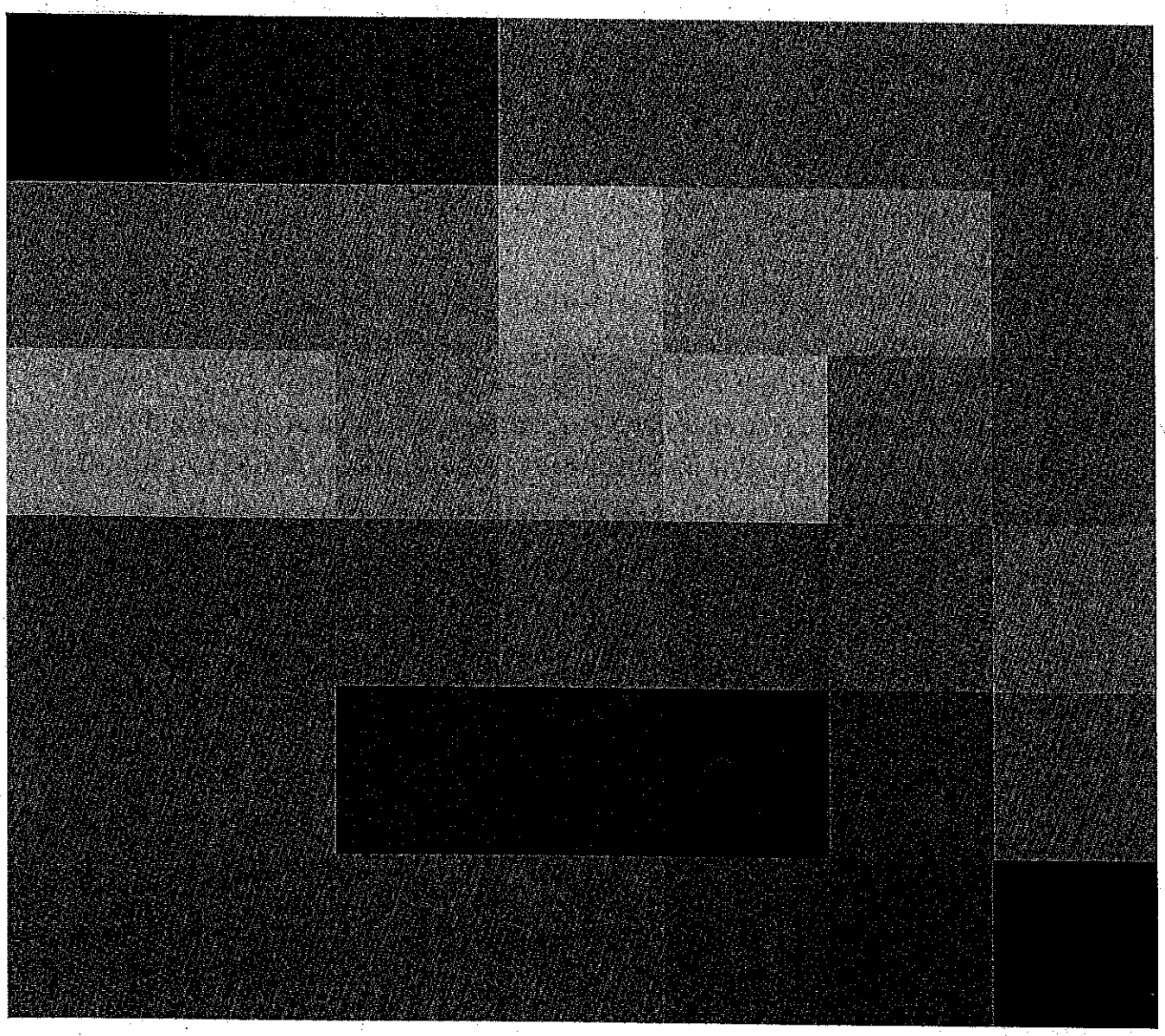
Maggard took his seat. He had cropped red hair, pouchy cheeks and mud-caked sneakers. "The welfare patients are the most demanding, difficult patients on God's earth," Hassenplug told me, with Maggard listening, before launching into his interrogation: *Are you working?* No. *Are you on disability?* He was diagnosed with schizoaffective disorder, bipolar type, and anxiety. *Do you have a car?* No. *Anyone owe you money you can collect?* I wish.

They had been here before, and they both knew Maggard's disability checks were protected from collections. Hassenplug set down his pen. "Between you and me," he asked, "you're never going to pay this bill, are you?"

"No, never," Maggard said. "If I had the money, I'd pay it."

Hassenplug replied, "Well, this will end when one of us dies."

Though debt collection filings are soaring in parts of America, Hassenplug speaks with pride about how he discovered their full potential in Coffeyville long before. A transplant from Kansas City, he was a self-dubbed "four-star fuck-up" who worked his way through law school. He moved to Coffeyville to practice in 1980 and soon earned a reputation as a hard-ass. He saw that his firm, Becker, Hildreth, Eastman & Gossard, hadn't capitalized on its collections cases. The lawyers didn't demand sufficient payments, and they rarely followed up on litigation, he said. Where other attorneys saw petty work, Hassenplug saw opportunity.



Kenneth Maggard at his home. "Blaze," painted below, is his son's name.

Hassenplug started collecting for doctors, dentists and veterinarians, but also banks and lumber yards and cities. He recognized that medical providers weren't being compensated for their services, and he was maddened by a "welfare mentality," as he called it, that allowed patients to dodge bills. "Their attitude a lot of times is, 'I'm a single mom and ... I'm disabled and,' and the 'and' means 'the rules don't apply to me.' I think the rules apply to everybody," he told me.

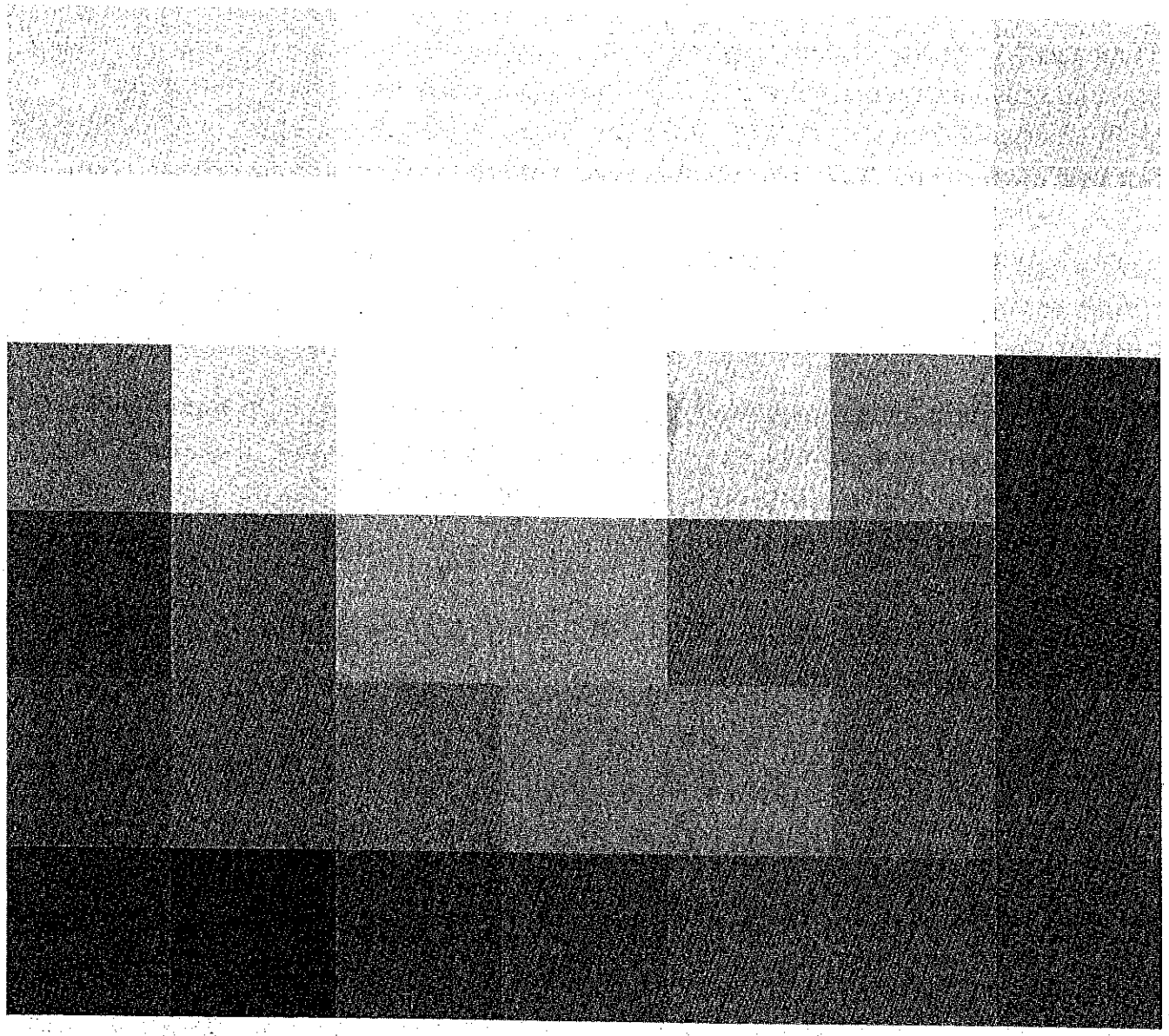
He logged his cases in a computer to track them. First with the firm and later in his own practice, he took debtors to court, and he won nearly every time; in about 90% of cases nationally, collectors automatically win when defendants don't appear or contest the case. Hassenplug didn't need to accept $10 monthly payments; he could ask for more, or, in some cases, even garnish a quarter of a debtor's wages. His fee was, and often still is, one-third of what he collects. He asked the court to summon defendants, over and over again. It was the judge's contempt authority that backed him, he said. "It's the only way you can get them into court."

The power of contempt was originally the power of kings. Under early English rule, monarchs were considered vicars of God, and disobeying them was equivalent to committing a sin. Over time, that contempt authority spread to English courts, and ultimately to American courts, which use it to encourage compliance with the judicial system. There is no law requiring that a court use civil contempt when an order isn't followed, but judges in the U.S. can choose to, whether it's to force a defendant to pay child support, for example, or show up at a hearing. A person jailed for defying a court order is generally released when they comply.

When Casement took the bench in 1987, after passing a self-study exam, he didn't know much legalese — he had never been in a courtroom. But attorneys taught him early on that the power of contempt was available to him to punish people who ignored his orders. At first, Casement could see himself in the defendants. "I was a much more pro-debtor aligned judge, much more sympathetic, much less inclined to do anything that I thought would burden them," he told me. "And over the years, I've gradually moved to the other side of the fulcrum. I still consider myself very much in the middle, and I don't know if I am or not."

Once a bustling industrial hub, Coffeyville has a poverty rate that is double the national average, and its county ranks among the least healthy in Kansas. Its red-bricked downtown is lined with empty storefronts — former department stores, restaurants and

shops. Its signature hotel is now used for low-income housing. "The two growth industries in Coffeyville," Hassenplug likes to say, "are health care and funerals."



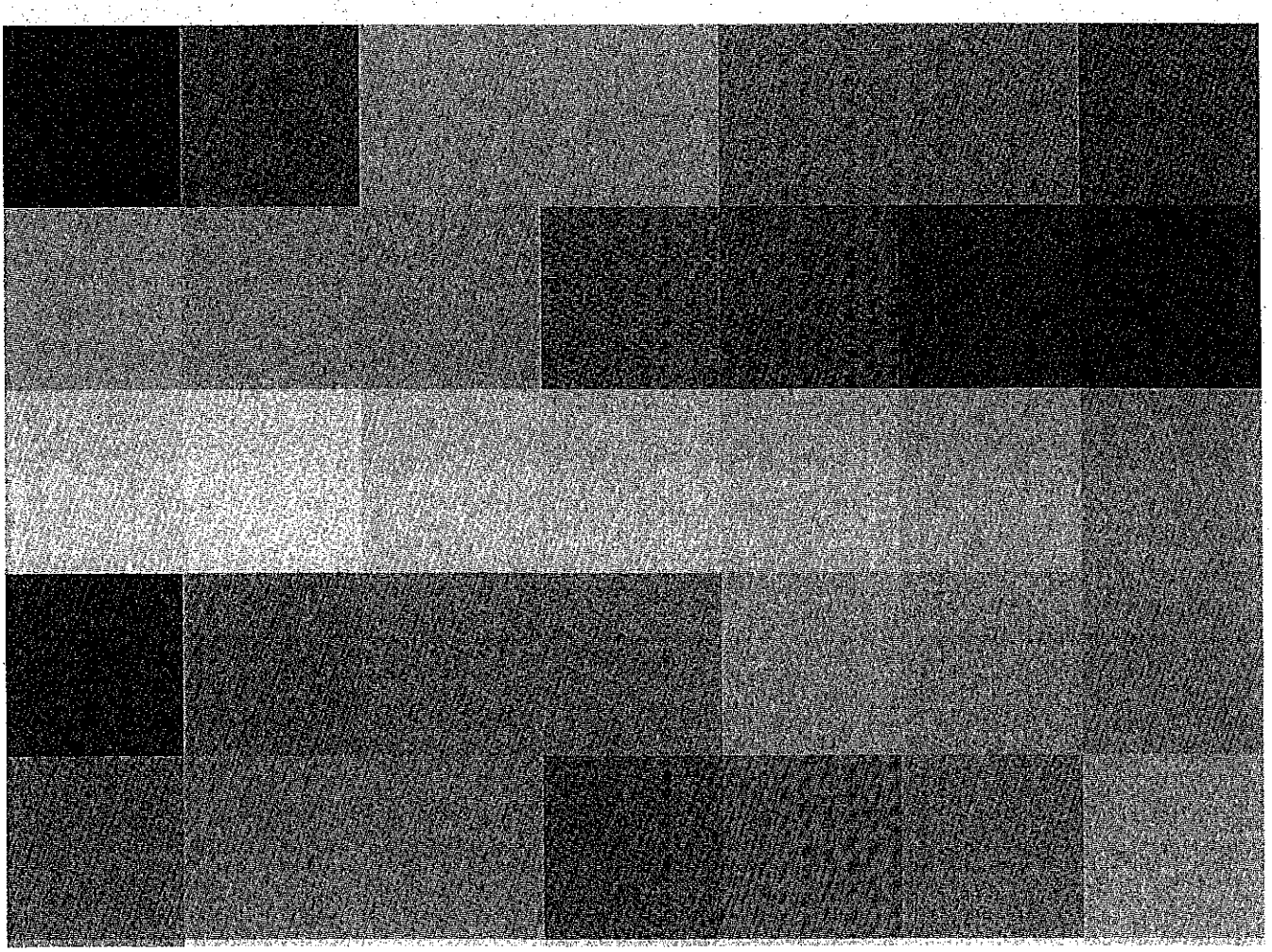
A shuttered motel in Coffeyville. The town, once a bustling industrial hub, now has a poverty rate more than double the national average.

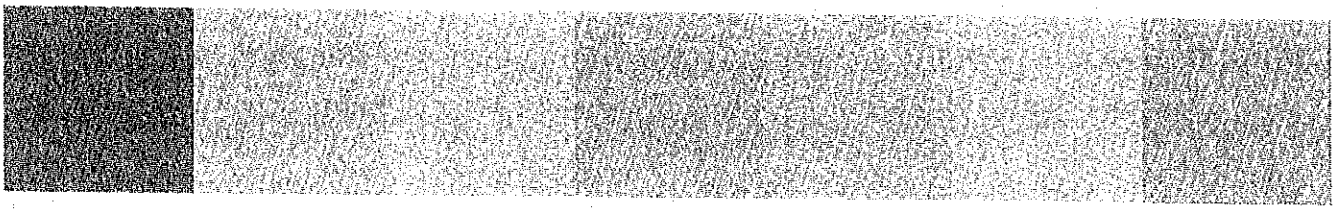
Coffeyville Regional Medical Center is the only hospital within a 40-mile radius, and it reported $1.5 million in uncollectible patient debt in 2017. A nonprofit run in a city-owned building, the hospital accounts for the vast majority of medical debt lawsuits in the county — about 2,000 in the past five years. It also accounts for the majority of related warrants. Account Recovery Specialists Inc. handles its collections, and it does so for hospitals in most Kansas counties. Though the hospitals can direct ARSI and its contracted attorneys to tell judges not to issue warrants, hardly any have. The Coffeyville

hospital's attorney, Doug Bell, said that its only motivation is to continue to serve the area, and that Kansas' decision to not expand Medicaid under the Affordable Care Act has had a "dramatic effect on the economic liability of small rural hospitals."

Three nearby hospitals in this rural region have closed in the past several years, meaning ambulances make more trips. A half-hour from Coffeyville, Independence runs its ambulance service at about a $300,000 annual loss. Its bills were at the root of four arrests this year alone. Derek Dustman, who is 36 and works odd jobs, had been driving a four-wheeler when he was hit by a car and rushed to the hospital. Though he was sued for not paying his $818 ambulance bill, he didn't have a license to drive to the courthouse. This spring, he spent two nights in jail. "I never in a million years thought that this would end with jail time," he told me.

For years, Hassenplug has requested that the judge issue warrants on the ambulance service's behalf. When I asked Lacey Lies, the city's director of finance, if she ever considered telling him not to resort to bench warrants, she was puzzled. "You're saying an attorney with no teeth?"



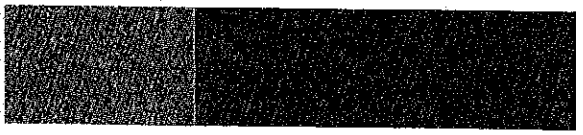


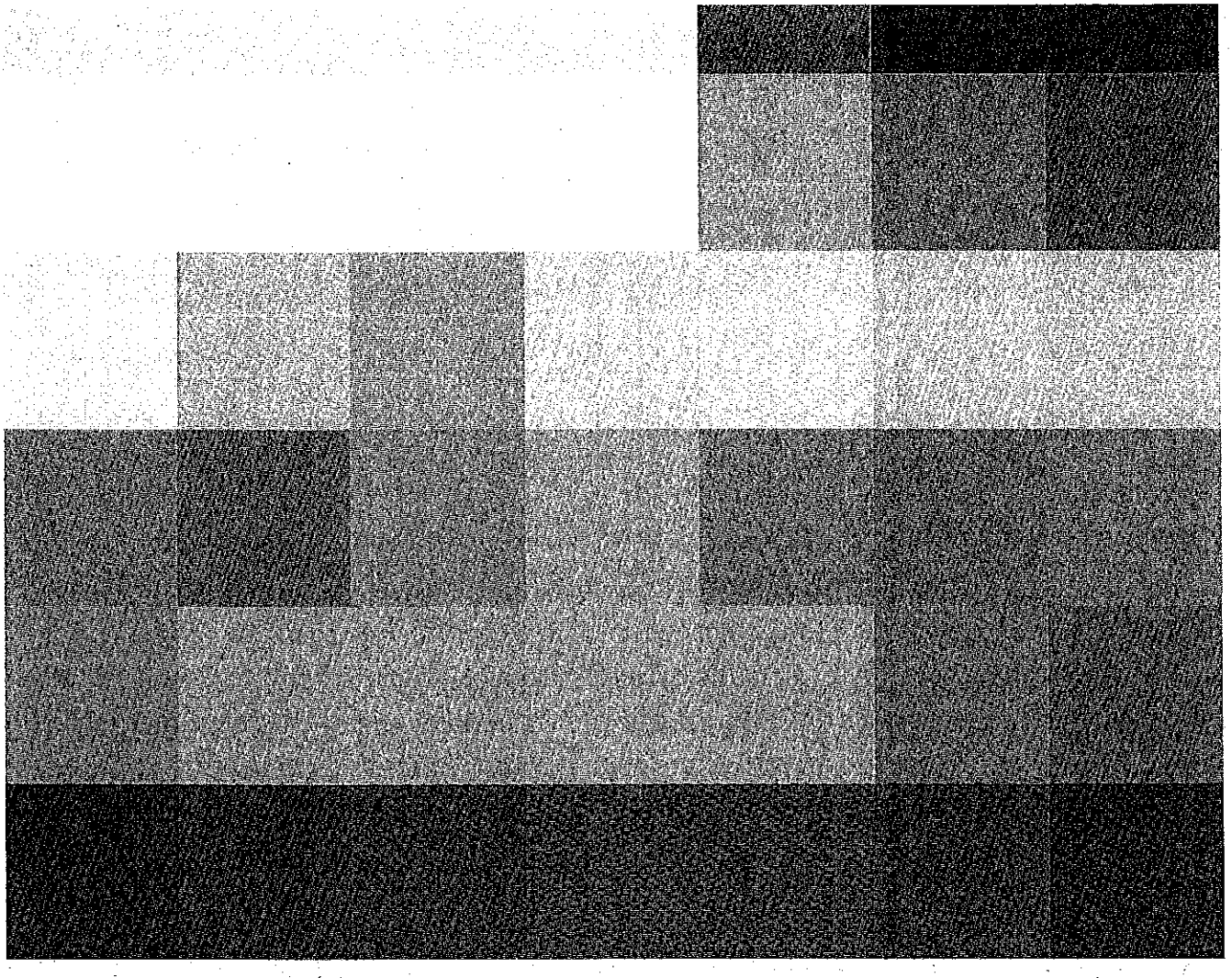
A city ambulance in Independence, Kansas. Hassenplug represents the service against its debtors.

THE FIRST TIME Tres Biggs was arrested, in 2008, he was dove hunting in a grove outside Coffeyville. It had been just a year since his 6-year-old son Lane was diagnosed with leukemia, and Biggs watched him breathe in the fresh air, seated on a haybale under an orange sky. When a game warden came through to check hunting permits, Biggs' friends scattered and hid. He wasn't the running type, and he took Lane by the hand. The warden ran Biggs' license. There was a warrant out for his arrest. Biggs asked a friend to take Lane home and crouched into the warden's truck, scouring his memory for some misstep.

The last few years had been a blur. His wife, Heather, had quit her job as a babysitter to care for their son. Then, she got sick. Some days, she passed out or felt so dizzy she couldn't leave her bed. Her doctors didn't know if the attacks were linked to her heart condition, in which blood flowed backward through a valve. To provide for his wife, son and two other kids, Biggs worked two jobs, at a lumber yard and on construction sites. He didn't know when he would have had time to commit a crime. He'd never been to jail. As he stared out the window at the rolling hills, his face began to sweat. He felt his skin tighten around him and wondered if he would be sick.

The warrant, he learned at the jailhouse, was for failure to appear in court for an unpaid hospital bill. Coffeyville Regional Medical Center had sued him in 2006 for $2,146, after one of Heather's emergency visits; neither of his jobs offered health insurance. In the shuffle of 70-hour workweeks and Lane's chemotherapy, he had missed two consecutive court dates. He was fingerprinted, photographed, made to strip and told to brace himself for a tub of delousing liquid. His bail was set at $500 cash; he had about $50 to his name.





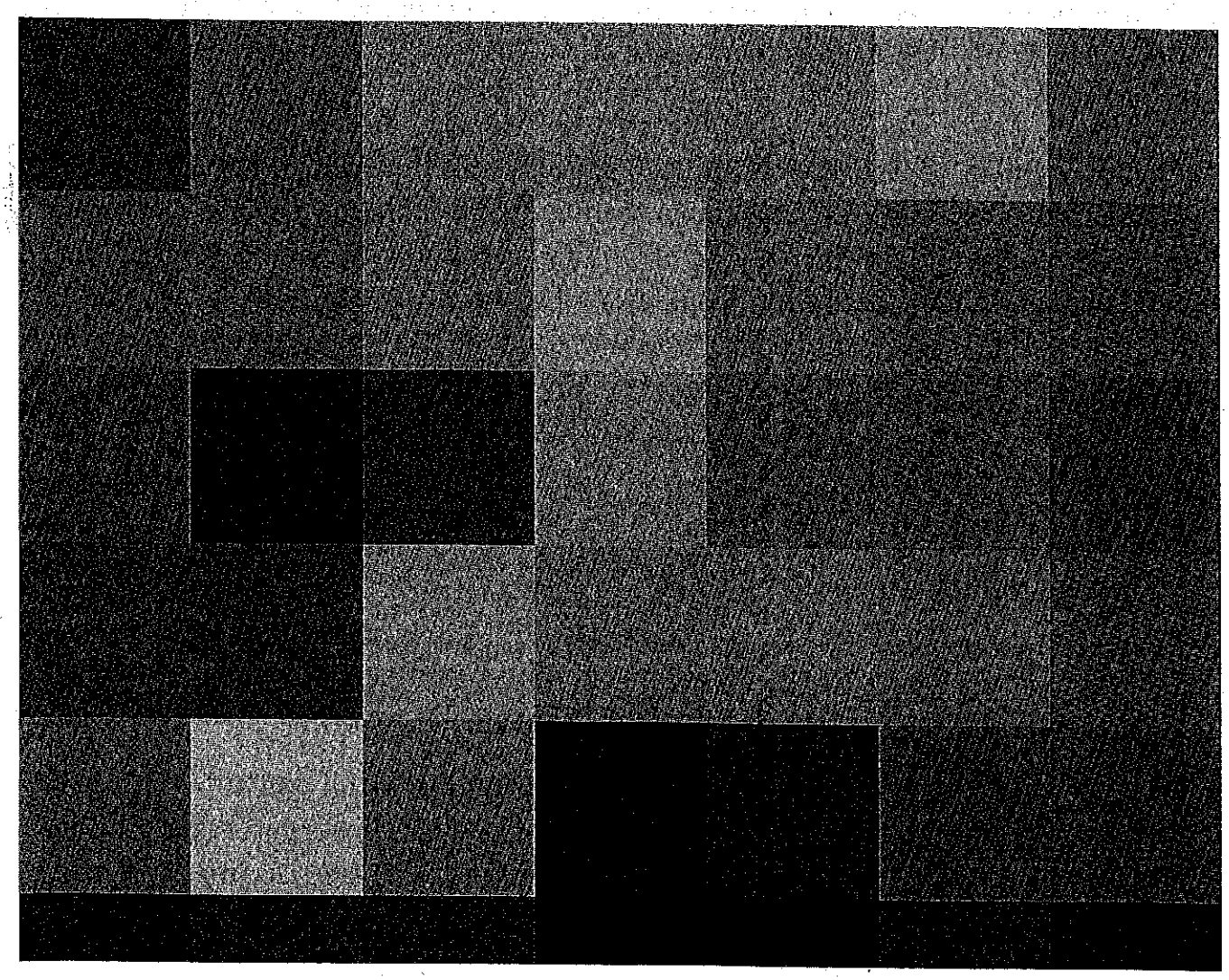
Coffeyville Regional Medical Center is the only hospital within a 40-mile radius.

His friend bailed him out the next morning, but at the bond hearing, the judge granted the $500, minus court fees, to the hospital. Biggs compensated his friend with a motorboat that a client had given him in exchange for a hunting dog. But it wasn't long before the family received a new summons. In 2009, a radiologist represented by Hassenplug sued them for $380.

Some court hearings fell on days when Lane had treatment, at a hospital in Tulsa, an hour south. Heather refused to postpone his care. Lane's condition was improving — in a year, he would be cancer-free — and his dirty blond hair was sprouting again. Her health, though, had taken a turn. She began having weekly seizures, waking up on the floor, confused about where their Christmas tree had gone or why a red Catahoula puppy was skidding around their ranch house. Her doctors concluded she had Lyme disease, which was affecting her nervous system and wiping her short-term memory. Each time she woke up, she repeated: "Don't take me to the hospital."

Biggs was still on the hook for the bill that had landed him in jail; bail had covered only part of it, and the rest was growing with 12% annual interest. The hospital had garnished his wages, and the radiologist had garnished his bank account, seizing contributions that his family had raised for Lane's care. Living on $25,000 a year, Biggs couldn't afford to buy insurance. His family was on food stamps but didn't qualify for Medicaid, a federal insurance program for people in poverty. Other states were about to expand it to cover the working poor, but not Kansas, which limited it, for families of his size, to those who earned under $12,000. Like millions of others across America, he and Heather fell into a coverage gap.

By 2012, the Biggs family had accrued more than $70,000 in medical debt, which it owed to Coffeyville Regional Medical Center and other hospitals, pediatricians and neurologists. Some forgave it; others set up lenient payment plans. Coffeyville's was the only hospital that sued. The doctors who took them to court were represented by Hassenplug.



Tres Biggs with his wife, Heather, and son, Lane, at their home.

Biggs began to panic around police, haunted by the fear that at any moment, he might be locked up. That spring, outside the Woodshed gas station, he spotted a sheriff's deputy who was also an old friend. To shake off his dread, he asked the friend to run his license. The deputy found another warrant, signed by Casement, involving the $380 radiologist's bill. "You're not really going to take me in, right?" Biggs remembers asking. The deputy said he had no choice. Bail, as usual, was set at $500.

The family filed for bankruptcy, a short-term fix that erased their debt but burdened them with legal fees. They lost their home and started renting. Biggs ultimately got a job that offered insurance, as a rancher, covered by Blue Cross Blue Shield. But it required Biggs to pay the first $5,000 before it covered medical expenses. When chest pain hit him as he worked cattle in the heat, and he began vomiting, the only nearby hospital was Coffeyville's. In 2017, the hospital sued again. It was the family's sixth lawsuit for medical debt.

Sitting in Casement's courtroom this July, Biggs calculated that he was losing about $120 by taking time off from work to attend this hearing. "I haven't received a bill," he told me, slouched over his turquoise shorts. "The only thing I received was this summons." Around noon, he finally sat down with an ARSI representative, who explained that the underlying bill had been garnished from his wages, but he still owed $328 in interest and court fees. He had another couple thousand dollars in collections for separate bills he hadn't paid, for which he hadn't yet been sued. He said the most he could afford to pay, every two weeks, was $12.50.

BEFORE THE END of the Tuesday docket, Casement returned to the courtroom to read off the names of the hospital's defendants. Five had failed to show up for contempt citations, to give their reasons for missing their debtor's exams. Casement saw that two of the no-shows hadn't been properly notified of the hearing, so attorneys would need to try to

reach them again. The judge read the names of the other three defendants and told the hospital's collections lawyer, "That would be a bench warrant if you want it."

The following morning, I was reading court files in the clerks' office when Christa Strickland arrived at 10:20 in flip-flops and black leggings, her caramel hair wrapped in a bun atop her head. She ran her finger down a docket on the bulletin board and asked why her case wasn't listed. When the clerk pulled up her file, she told Strickland that her contempt hearing had been on Tuesday and she was one day late. "You need to call the law office of Amber Brehm," the clerk insisted, referring to ARSI's contracted lawyer, who represents the hospital. She handed over the phone number.

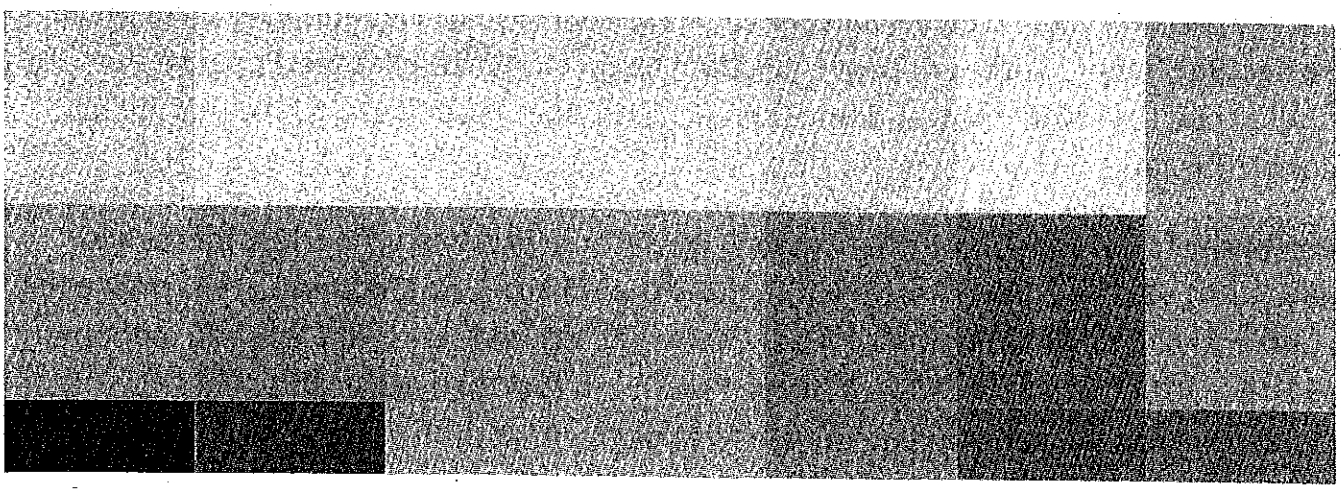
Strickland sat on a hard bench and took out her cellphone. She had saved the hearing in the wrong day on her calendar, but she had taken the day off from work and wanted to clear up the misunderstanding. "I had a court date," she said when a man answered at the law office. "I thought it was today but apparently it was yesterday. I'm just needing to see if I can set something up?"

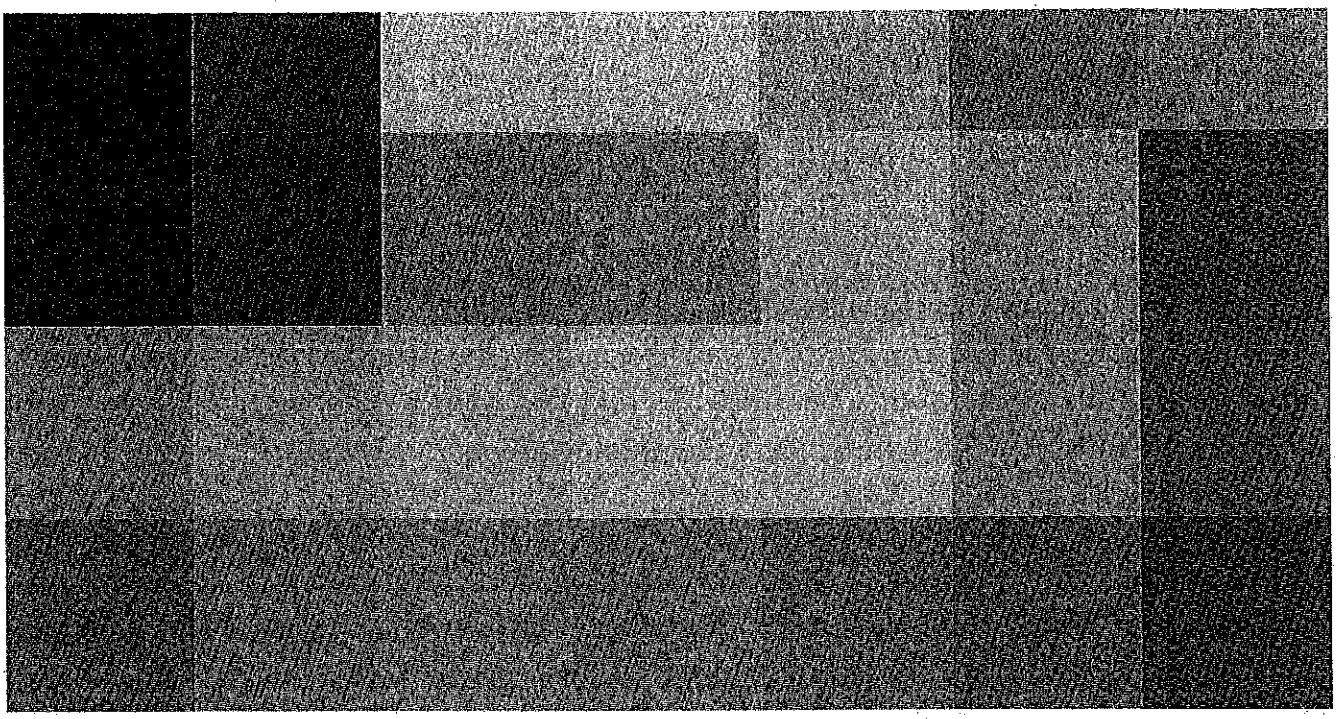
"By not appearing at that, the court would be in the process of issuing a bench warrant," he said.

"What does that mean?" Strickland asked, shaking her head.

"You don't know what a bench warrant means?" he asked. "That means you will be arrested and taken to jail and ordered to post bond."

"Oh my God." Strickland squeezed her eyes shut, wetness smudging her mascara. She poked at her cheek with her index finger. Her father was a preacher. She'd never been in trouble with the law. She had made a mistake, she tried to explain. She wanted to make an arrangement to pay.





The Coffeyville courthouse.

The man on the phone told her that it might take a couple weeks before the court processed her warrant paperwork, which the law office had not yet submitted. Once the judge issued the warrant, she could turn herself in. Strickland wanted to scream, *I'll pay the bill, don't make me go to jail!* but she didn't have the money. Instead, she looked at the ceiling and asked: "Turn myself into the court? The police station?"

"The Sheriff's Department," he responded.

"They're here in the same building," she said. "I won't leave here until I get this figured out. Thank you!"

She hung up. *Prick,* she muttered to herself. *You're going to talk to me like I'm a freaking idiot? That's not okay. Educate me. The court has to process it?* Her mind kept moving in circles. She herself worked in debt collection, for an auto title lending company. She understood that everyone was doing their job. Still, she couldn't grasp how this bill had gotten this far.

Before she had taken this position, during her second pregnancy, her right breast had developed a chronic infection. In 2008, she was uninsured, needed surgery to remove the swollen abscess and ran up a $2,514 bill. More than a decade later, she was still chipping away at a balance that, because of interest and court fees, had more than doubled to $5,736. She had fallen behind on her monthly payment plan and now worried that her

booking photo would be on Mugshot Monday, a Facebook album run by the Police Department. She imagined what she would tell her boss: *I went to jail ... because I missed a court date ... for medical bills*. It sounded absurd.

She spotted a sheriff's deputy in a bulletproof vest with a name tag that said Bishop and a pistol on his hip. "Hey!" she called out, explaining her phone call and how the man said something about a warrant and turning herself in. Bishop radioed into dispatch and smiled with an update: "There's no warrant in the system yet," he told her.

"*Yet!*" Strickland replied, deflating his look of reassurance. "That's what I'm worrying about."

"You better give Amber a call back," Bishop said.

When I asked ARSI about how attorneys decide to request warrants, Joshua Shea, who is general counsel, told me that they don't. The judge can choose to issue one if court orders are not followed, he said. But Casement said the opposite, telling me that he gave the choice to the attorneys. "I'm not ordering a bench warrant. My decision is to give them that option," Casement told me. "Whether they exercise it is up to them, but they have my blessing if that's what they want to do."

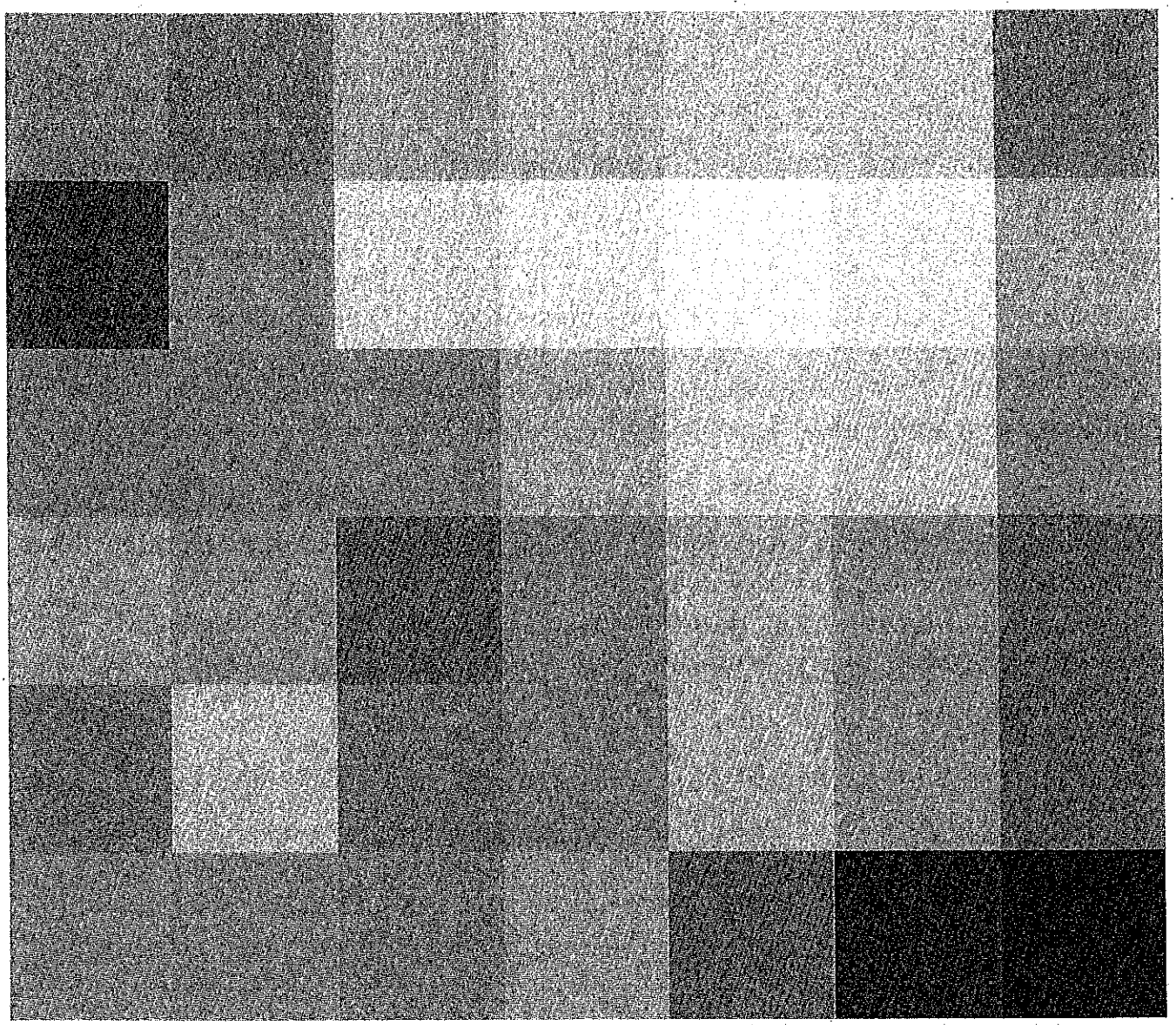
Shea sent me an eight-page email to make clear, in large part, that ARSI, as a collection agency, has no involvement in the courts, and that Brehm is a lawyer whom the agency contractually employs and who represents the hospital directly. Her email address, though, has an ARSI domain, and her resume lists her as ARSI's director of legal. Brehm said that court hearings aren't the only option for debtors, who can call her instead and answer questions under oath. Shea said nobody — not the hospital, ARSI, Brehm or the court — uses the threat of jail to "extract payment."

Strickland reached Brehm after several days, and the attorney agreed to a new hearing. On Aug. 13, when they met in court, Brehm sat at the front of the room.

"We're giving you a second chance on that citation; just to try to take care of this without there having to be any sort of bench warrant," the lawyer said. "I want to make sure that we're all on the same page about the consequences of not coming into court when the order has been issued."

Strickland nodded.

"Again, if you set a payment plan and keep it," Brehm said, "we won't have to worry about that."

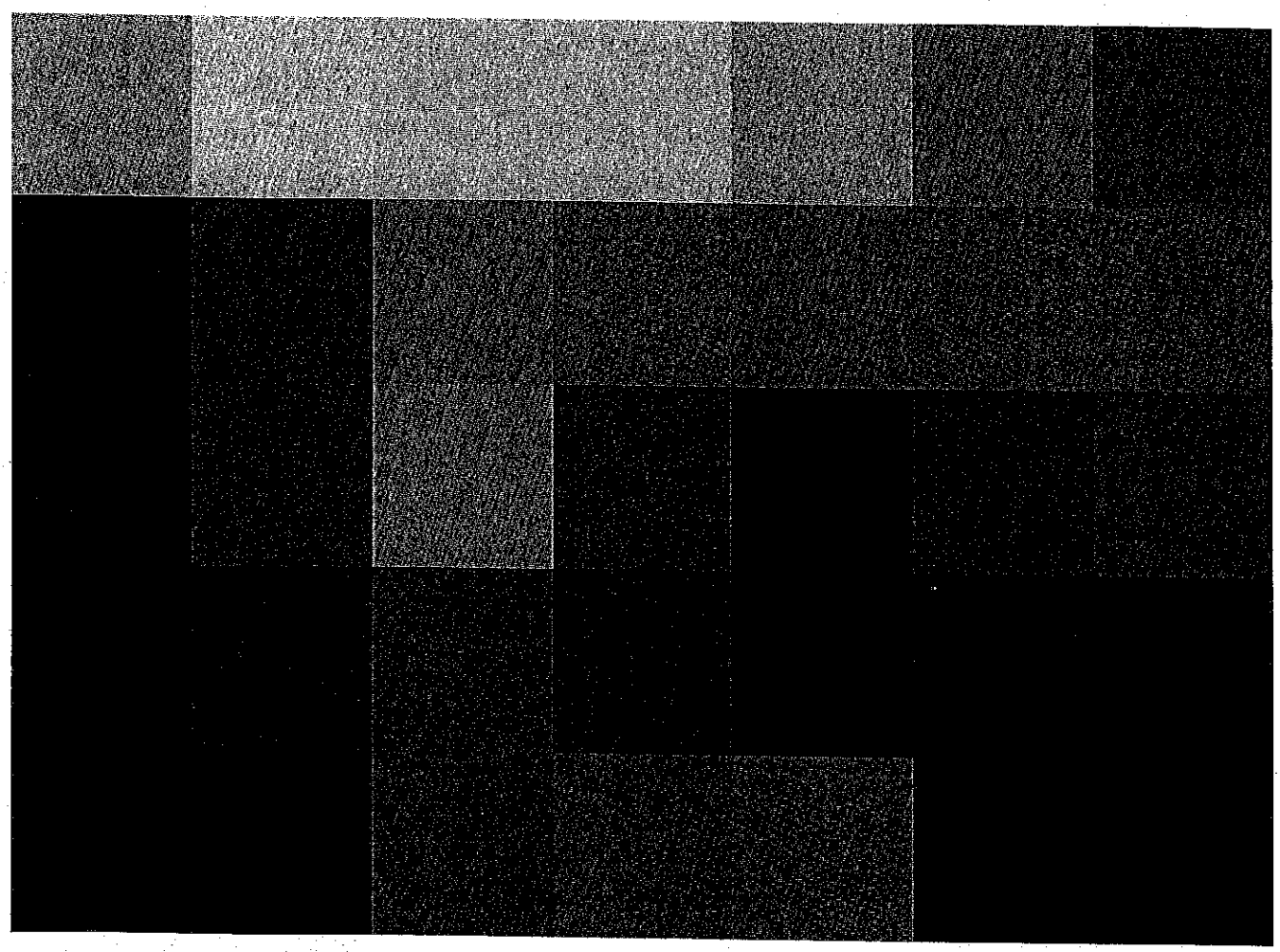


The jail in Independence, where many debtors in the county are booked.

IN SOME COURTHOUSES, like Coffeyville's, collection attorneys are not only invited to decide when warrants are issued, but they can also shape how law is applied. Recently, Hassenplug came to believe that debtors were only attending every other hearing in a scheme to avoid jail, and he raised his concern with the judge. He suggested that the

judge could fix this by charging extra legal fees; Casement wrote a new policy explaining that anyone who missed two debtor's exam hearings without a good reason would be ordered to pay an extra $50 to cover the plaintiff's attorney fees. If they didn't pay, they would be given a two-day jail sentence; for each additional hearing that they missed, they would be charged a higher attorney fee and get a longer sentence.

Most states don't allow contempt charges to be used for nonpayment, and some, like Indiana and Florida, have concluded that it is unconstitutional. Michael Crowell, a retired law professor at the University of North Carolina and an expert in judicial authority, reviewed Casement's policy. "You can't lock people up for contempt for failing to pay unless you have gone to the trouble to determine that they really have the ability to pay," he said. Casement told me he hadn't made findings on ability to pay before ordering defendants to foot attorney's fees, "but I know that's something the court should consider," he said. He also made plain why he wrote the policy: "Mr. Hassenplug and Brehm's outfit have asked me to." (Brehm denied she requested this.)



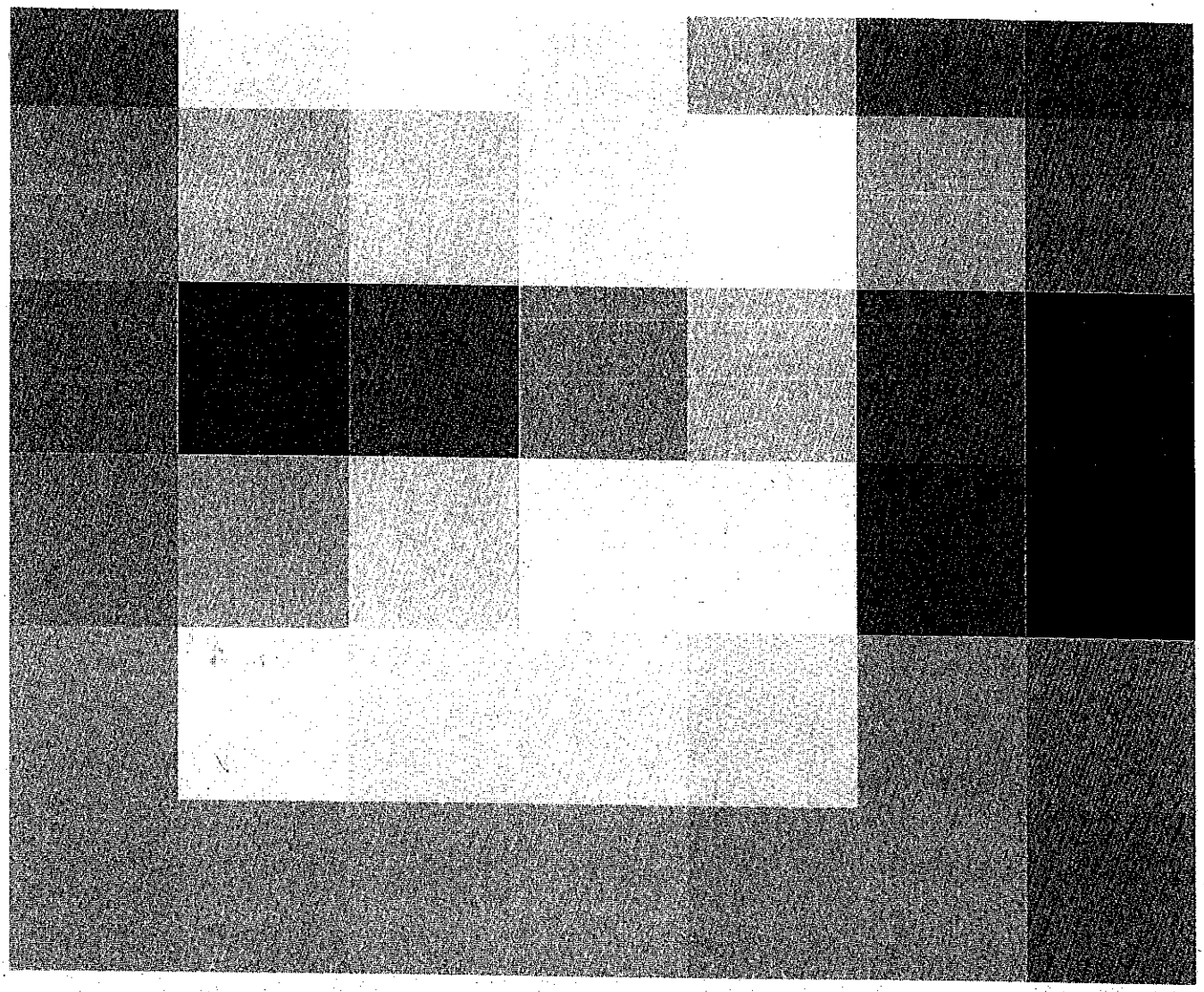
Judge David Casement in the courtroom. Casement, a cattle rancher, was appointed magistrate judge, though he'd never taken a course in law.

Casement has not done everything the debt collection lawyers have suggested. At first, he agreed to their requests to set bail at the amount of the debt, but he eventually settled on $500. "Most people can come up with $500," he said. "It may not be their money, but they know someone who will pay." He made sure no one was arrested unless they'd been reached by personal service or certified mail.

Kansas law allows courts to order debtors in "from time to time," leaving discretion to judges. Casement limited the frequency of Hassenplug's debtor's exams to once every three months. He came to the decision by his own logic around what seemed like a reasonable burden for defendants, and it remains his personal policy today. The law also states that anyone found to be disabled and unable to pay can only be ordered to appear once a year. Without an attorney, debtors like Kenneth Maggard don't know to assert this right.

Allowing bail money to count toward collections raises some of the most critical legal questions. Hassenplug told me that he thinks it's great that cash bail is applied to the debt. "A lot of times, that's the only time we get paid, is if they go to jail," he said. Peter Holland, the former director of the Consumer Protection Clinic at the University of Maryland Law School, explained that this practice reveals that the jailing is not about contempt, but about collection. "Most judges will tell you, 'I'm working for the rule of law, and if you don't show up and you were summoned, there have to be consequences,'" he explained. "But the proof is in the pudding: If the judge is upholding the rule of law, he would give the bail money back to you when you appear in court. Instead, he is using his power to take money from you and hand it to the debt collector. It raises constitutional questions."

Congress has not acted on advocates' calls to amend the Fair Debt Collection Practices Act to prohibit collectors from requesting warrants. There are also no current efforts to bar nonprofit hospitals or medical providers that receive funds through Medicare or Medicaid from seeking warrants. Some states have reformed their laws, to make sure defendants are properly served or to prohibit wage garnishments for debt. But legal experts on collections say that more remains to be done, like taking jail out of the equation and instead requiring debtors to sign a financial affidavit or a promise to appear.



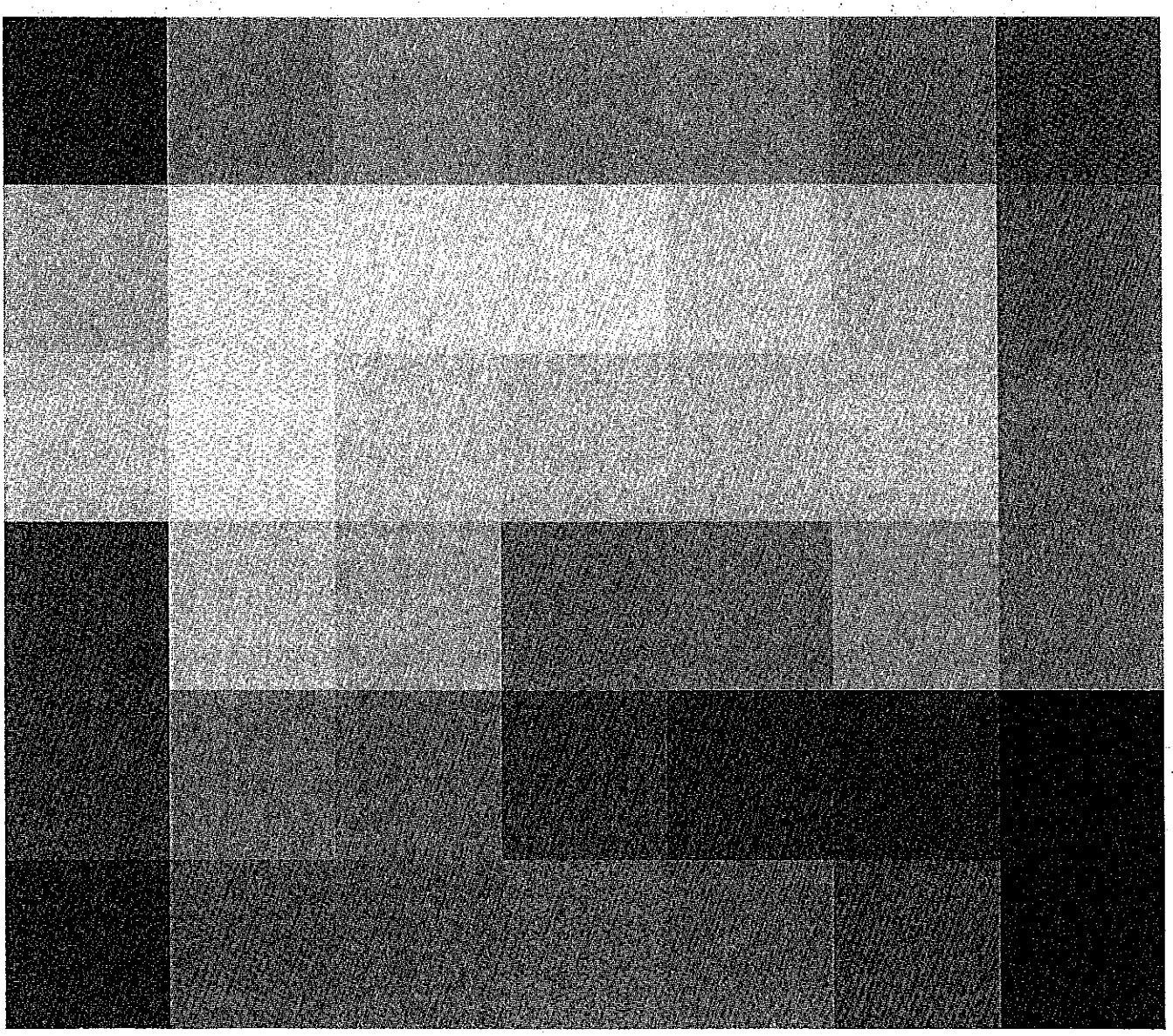
Hassenplug's office in Coffeyville.

Shea, from ARSI, said that using the legal process is time-consuming and costly — a last resort; arrests are "the least desirable stage for any case to reach for all involved." Even after lawsuits are filed, they try to connect eligible debtors with the Coffeyville hospital to apply for financial assistance, he said. Last year, the hospital wrote off $1.7 million in charity care, said Bell, the hospital lawyer. "That is evidence of a hospital that cares."

Casement said he did not consider the legality of his policies a problem. He placed some blame on the health care system. "What we have isn't working," he said. "As a lifelong Republican, I would probably be hung, but I think we need health care for everybody with some limits on what it's going to cost us."

The way he saw it, he had wide latitude to enforce compliance with a court order, though he acknowledged that creditors used bail money to their advantage. "I don't know

whether the Legislature intended it to be used that way or not," he told me. "I have not had enough pushback from the defendants' side to give me the impression that I'm really abusing this badly."



Car lights streak by on a quiet Coffeyville street.

BEFORE I LEFT Coffeyville, I sat down with Hassenplug in the low-ceilinged courtroom. I asked him whether he thought that the system in Coffeyville was effectively imprisonment for debt, in a country that has outlawed debtors' prisons. "The only thing they're in jail for is not appearing," he replied. "I do my job, I follow the law. You just have to show up in court."

Debt collection is an $11 billion industry, involving nearly 8,000 firms across the country. Medical debt makes up almost half of what's collected each year. Today, millions of debt collection suits are overwhelming state courts. The practice is considered a "race of the diligent," where every creditor is rushing to the courthouse, hustling to get the first judgment, in order to be the first to collect on a debtor's assets. In Hassenplug's view, though, this work is not the rich taking from the poor. He laughed at how locals spread rumors, saying that he seized wheelchairs or Christmas trees. Once, he confessed, he took a man's Rolex, only to find out it was a fake. Some months, he said, even his law office could not make ends meet.

After a couple of hours, a clerk poked her head into the courtroom and told us it was time to leave. Hassenplug and I began to walk out, and on the terrazzo steps, he asked if I wanted to see his buildings. He owned five of them on a shuttered stretch of town. He wondered out loud if he was making a mistake by inviting me, but he was pleased when I accepted. "There ain't any place on earth quieter than downtown Coffeyville," he said, leading me into the silent streets.

He walked me through the alleys under a cloudless sky, and when he arrived at one of his buildings, he tapped a code to his garage. The door lifted, and inside, five perfectly maintained motorcycles, Yamahas and Suzukis, were propped in a line. To their left, nine pristine, candy-colored cars were arranged – a Camaro SS with orange stripes, a Pontiac Trans Am, a vintage Silverado pickup with velvet seats. He toured me around the show cars, peering into their windows, and mused about what his hard work had gotten him.

Correction, Oct. 16, 2019: This story originally misstated the type of cancer Tres Biggs' son, Lane, had. It was leukemia, not lymphoma.

Lizzie Presser covers health and healthcare policy at ProPublica. She previously worked as a contributing writer for The California Sunday Magazine, where she wrote about labor, immigration, and how social policy is experienced.

Doris Burke contributed research.

Design and production by Jillian Kumagai and Agnes Chang.

BROWN

Testimony in Support of H5196
February 5, 2019

Introduction:
Thank you for the opportunity to speak before the committee in support of this bill. Rhode Island is a nationwide pioneer in passing legislation to protect low-income defendants from being saddled with administrative fees that they are unable to pay. However, the promise of the original legislation has not been met, because courts are not systematically determining defendants' ability to pay court debts, and anyone who fails to pay is automatically issued a warrant for their arrest.

Methods:
I worked with Open Doors in 2015 to follow up on their original study of the incarcerated debtor population in Rhode Island. I reviewed data on all 8,000 people incarcerated at the ACI in 2015; I interviewed 21 men at the ACI while they were incarcerated for failure to pay court debts and observed 25 "ability to pay" hearings at district and superior court.

Portrait of the Arrested Debtor Population:
Debtors in Rhode Island made up 16% of all commitments to the ACI in 2015. That year, over 1,500 Rhode Islanders were jailed for at least a day because of their court debts. I estimate that at least 50% of them should never have been assessed this debt in the first place. Half of them were unemployed and a larger percentage would have likely qualified for debts to be waived under the 2008 statute. Among the 21 men I interviewed over just a three-week timespan, ten of them received food stamps and five of them were homeless. One man shared with me, "I had to blow my payment off, because it's a choice of eat now or pay." Yet they owed an average of $1,000 in court debts, ranging from 10 dollars to over $10,000. Though most spend 1-2 nights in jail, two people were jailed for over 20 days for their court debts.

Current Implementation of the Law:
The reason these low-income defendants are continuing to be levied court debts is because the courts are not systematically assessing ability to pay. In 25 so-called "ability-to-pay" hearings I attended in 2016, I did not witness a single district or superior court magistrate ask a single defendant about any of the criteria for determining ability to pay that the legislature articulated in the 2008 law, even though a clerk told me that the courts' primary method for assessing ability to pay is for judges to "query the defendant in open court." Magistrates did ask defendants how much they could afford to pay, but the goal was prolonging the financial obligation through a monthly payment plan – not waiving the costs altogether. When I asked a Providence superior court clerk how the court determines ability to pay, they responded "we usually just do payment plans of $30 per month." In 2015, only 3% of defendants in my study had their court debts waived—far short from at least 50% who likely qualify for this benefit.

Limitations of Debt Collection Efforts:
I found that the majority of defendants with court debts were charged with non-violent, misdemeanor offenses like vandalism or driving with a suspended license who were trying to fulfill their financial commitments to the courts but simply failing to pay off the balance. I found that the average incarcerated debtor had made three prior payments toward their fees—but with no consistent income and $1,000 owed in fees on average, they missed a monthly payment date, automatically received a new arrest warrant, and became reentangled with the justice system. Moreover, incarceration for failure to pay doesn't appear to work as a debt collection mechanism – in my study, just 20% of jailed debtors paid off their total fees within six months of arrest. That means that 80% of people were unable to pay off their court debts, even after being imprisoned for it. Meanwhile, the state is paying to process and house them at the ACI. The cost of arrest and incarceration exceeds any revenue that would come in from this group.

Conclusion:
In light of my research, I support H5196 because it would fulfill the promise of the original law by ensuring that the courts systematically assess defendants' ability to pay and ensuring that defendants will not be arrested or incarcerated if this ability to pay assessment has not taken place. Passage of this bill will ensure Rhode Island continues to be a nationwide leader in preventing modern-day debtor's prison and helping citizens transition back out of the justice system and into productive-crime free lives.

This research was made possible with the cooperation and support of:

OpenDoors Rhode Island

Rhode Island Department of Corrections Office of Planning and Research

Rhode Island Judiciary

Brown University

For further information, contact Rachel Black at:

Email: rachellambblack@gmail.com
Phone: 617-721-3063

Fact	Data	Methods
# people incarcerated for failure to appear	1556 people / 1685 commitments – (or 15.5% down from 18% in 2008)	ACI records (all inmates)
Nature of original crimes	72% misdemeanors 73% non-violent offenders 81% were not incarcerated for initial offense	ACI records (all inmates)
Unemployment Rate	44% in ACI data 52% in interview sample	ACI records / interviews
Amount owed	$1082 mean total across an average of 5 prior cases	Random sample – 300 inmates
Prior Payments	Incarcerated debtors had made 3 prior payments on average 57% had made at least one payment in past	Random sample – 300 inmates
Prior Arrests	Incarcerated debtors had been arrested for failure to pay 1 prior time on average 58% had been arrested at least once for failure to pay	Random sample – 300 inmates
Payment after arrest	65% make one payment 20% pay in full within 6 months	Random sample – 300 inmates
Cost Abatement	3% of inmates have costs abated at their next hearing after being incarcerated	Random sample – 300 inmates Does not include people whose costs are abated without any arrest/incarceration period

BROWN

LOW-INCOME DEFENDANTS & THE COURT DEBT COLLECTION PROCESS: A CASE STUDY OF RHODE ISLAND

Rachel Black **April 2016**

Introduction

Court costs have increased in both size and scope over the last 30 years across the nation. Courts primarily collect outstanding court debts from defendants by creating periodic payment plans and issuing arrest warrants for those who fail to appear at a payment date. Such warrants often lead to incarceration. The U.S. Justice Department reasserted in March 2016 that it is unlawful for state court systems to arrest and incarcerate debtors for failure to pay court debts without first assessing ability to pay (Gupta & Foster, 2016). Rhode Island is a nationwide pioneer in developing standards for assessing ability to pay and offering debt protections for indigent debtors who qualify for them. In 2008, the state legislature passed a set of measures designed to protect indigent defendants from the financial burden of court costs and the harm caused by jail time for failure to appear at a payment date. This brief summarizes the methods and findings from a study of the implementation of these policies and their effect on low-income debtors.

The study used a mixed-methods approach to identify the debtor population in Rhode Island and examine the implementation of the new reforms. Quantitative data from the Department of Corrections and the Rhode Island Judiciary's CourtConnect database were analyzed to understand the demographic makeup and debt payment history of the incarcerated debtor population. Interviews with 21 incarcerated debtors and observation of 25 ability-to-pay hearings were used to compare the implementation of policies with the legislation. The findings reveal that almost half of all arrested debtors are low-income. The implementation assessment indicates that the legislation has reduced jail time for arrested debtors, but challenges in implementation remain to ensure uniform and widespread adoption of debt reform practices.

Legislative Background

In 2008, the Rhode Island legislature passed reforms designed to protect low-income court debtors. First, policymakers reduced the length of debt-related jail time by requiring the courts to hold an ability-to-pay hearing promptly after a debtor's arrest. Those debtors arrested during judicial business hours are required to be taken directly to court for a hearing, and all others must be seen within 48 hours (with exceptions for weekends and state holidays) (§12-6-7.1(c)). Second, the legislature attempted to reduce the size of the debtor inmate population through the introduction of a systematic assessment tool for ability-to-pay determinations and a subsequent cost abatement allowance for defendants who qualify as indigent. The legislation mandates that judges and magistrates systematically assess defendants' ability to pay using a "standardized…financial assessment instrument" (§12-21-20(d)) that inquires into defendants' receipt of welfare benefits and their other outstanding debt obligations, including child support and restitution. Determinations of ability to pay must take place first "immediately after sentencing or nearly thereafter as practicable" (§12-21-20(c)) and again after a defendant is arrested for debt delinquency (§12-6-7.1(b)). Judges and magistrates are then authorized to abate the costs of any defendant who legally qualifies as "unable to pay" under legislative guidelines (§12-20-10(b)).

Portrait of the Arrested Debtor Population

In 2015, approximately 1,556 adults were arrested and committed to the Intake Center solely for failure to appear at a court payment date. Debtors thus comprised 15.5% of the total inmate population in 2015. Arrested debtors owed an average of $1,082 upon commitment, and they were predominantly low-income and non-violent misdemeanor offenders with a mixed history of debt payment compliance. At least half of arrested debtors had no consistent source of income available to make debt payments—45% were unemployed, 52% received food stamps, and 5% received Social Security benefits. Three fourths of arrested debtors were misdemeanor offenders—one third were originally sentenced for "driving with a suspended license." Perhaps because of the low-income status of this population, most debtors arrested in 2015 had a history of trying and failing to comply with court debt obligations. A majority of arrested debtors had made one or more prior payments on the case they ultimately received a bench warrant on—but 86% had received at least one bench warrant for failure to appear in the past, and 58% had previously experienced debt-related incarceration.

The Implementation of Court Debt Reforms

Prompt Hearings for Arrested Debtors

The Department of Corrections and the judiciary have effectively worked together to limit jail time to 48 hours for the vast majority of arrested debtors. Arrested debtors in 2015 were held for an average of 1.21 nights in jail, and 87.5% of the debtor inmate population saw a judge or magistrate within two days. This successful implementation of the measures in §12-6-7.1 represents a significant improvement from 2007, when the average arrested debtor was held in jail for three nights before seeing a judge. Despite these impressive efficiency gains in the hearing process, approximately 30% of arrested debtors in 2015 were subsequently incarcerated *after* seeing a judge in court. This pattern of post-hearing incarceration prevents further reductions in Rhode Island's inmate population, and it may also be unlawful—courts are not allowed to incarcerate delinquent debtors unless they formally establish that their failure to pay debts was "willful" (*Bearden v. Georgia*, 1983).

Assessment of Ability to Pay & Cost Abatement

The debtor inmate population has fallen by 14% since 2007, but the judiciary's limited use of cost abatement for eligible debtors represents a missed opportunity to protect indigent debtors and further reduce the inmate population. The judiciary has not adopted a financial assessment instrument for use during ability-to-pay determinations that includes the criteria in §12-20-10. While clerks and magistrates consistently inquire into arrested debtors' employment status and occasionally probe for other details about their lives (for example, their housing situation), they rarely ask for information pertaining to public benefits receipt or the presence of other debt obligations. Perhaps due to limited use of the legislature's ability-to-pay criteria, magistrates abated the costs of just 3% of arrested debtors in 2015. The fact that roughly half of arrested debtors in 2015 received food stamps indicates that magistrates do not exercise their authority to abate court costs for a majority of those who are eligible.

Policy Recommendations

Rhode Island was one of the first states in the nation to require the courts to systematically assess debtor ability to pay and to create protections for debtors found to be legally indigent. While the state has made some impressive strides to limit the harm of court

debts on vulnerable defendants, the judiciary and the legislature must work together to fully implement the 2008 reforms and further protect indigent debtors.

1) *Formalize the Standardized Financial Assessment Instrument*: This research suggests that the judiciary must follow through on §12-20-10 requiring the creating of a standardized tool for assessing ability to pay that includes criteria already identified by the legislature. These assessments are a crucial first step toward removing indigent debtors from the debt collection process.

2) *Consistently Abate Costs for Eligible Debtors*: Magistrates are encouraged to take greater advantage of their ability to abate court costs for all legally indigent debtors. The legislature could ensure more frequent abatement by building ability-to-pay determinations into the sentencing process so that magistrates do not even need to assess costs unless they find a defendant capable of paying them.

3) *Limit Debt-Related Incarceration to the Pre-Hearing Period*: To maintain compliance with federal law, the state should only incarcerate debtors who are arrested at night or on weekends. Debtors who are arrested during a weekday should be fully processed in court and released back into the community.

4) *Phase Out Select Court Cost Categories:* Dramatic reductions in the debtor inmate population may only result from broader reductions in court cost assessment for all criminal defendants. As the premise of revenue generation through the courts is increasingly being challenged on both constitutional and ethical grounds, the legislature is strongly encouraged to reexamine the policy purpose of existing court cost categories and remove categories that are no longer essential to state policy goals.

Works Cited

Bearden v. Georgia, 461 U. S. 660 (1983)

Gupta, V., & Foster, L. (2016, March 14). Dear Colleague Letter Regarding Law Enforcement Fines and Fees. Retrieved from https://www.justice.gov/crt/file/832461/download

This research was made possible with the cooperation and support of:

OpenDoors Rhode Island

Rhode Island Department of Corrections Office of Planning and Research

Rhode Island Judiciary

For further information, contact Rachel Black at:

Email: rachel_black@brown.edu
Phone: 617-721-3063

Protecting vs. Policing:

Indigent Defendants in Rhode Island's Court Debt Collection Regime

Rachel Black

A thesis submitted in partial fulfillment of the requirements for the degree of Bachelor of Arts with Honors in Public Policy and American Institutions

Brown University

Providence, Rhode Island

April 2016

ACKNOWLEDGEMENTS

I am very grateful to my diligent thesis readers, Ross Cheit and Valerie Cooley. Professor Cheit's "everything is data" maxim encouraged me to travel to courthouses across the state and pursue conversations with countless clerks, police officers, judges, and defendants. Professor Cooley repeatedly affirmed the policy relevance of my work and continues to provide invaluable guidance on how to communicate my findings to a broader audience. I am also indebted to Nick Horton at OpenDoors Rhode Island for making me aware of this urgent research topic, providing a framework for my methodology, and introducing me to key collaborators at the Department of Corrections. I thank Jeffrey Renzi at the Rhode Island Department of Corrections Office of Planning and Research for looking past my status as an undergraduate to support my research goals and grant me access to the Intake Service Center for interviews. Finally, I thank the twenty-one incarcerated men that I interviewed, who generously shared often frustrating and painful experiences with me, and whose narratives form the backbone of this thesis.

TABLE OF CONTENTS

ABSTRACT

I. Introduction

Many have voiced alarm that the United States' rate of incarceration has more than quadrupled in the past four decades. Fewer are aware that the financial arm of the sentencing system has similarly expanded over the same period. In fact, so-called "court debts"—lump sums of fines, restitution and administrative fees—are a major element in the "widening net" of the carceral state (Leone, 2002; Natapoff, 2015) that extends beyond prison walls and into communities alongside parole and probation programs, reentry and diversion initiatives, court-mandated drug treatment centers, and other forms of community-based social control. Even as public opinion moves towards the dismantling of mass incarceration, the impact of community-based elements of the criminal justice system remain under-examined.

Each year, thousands of people in Rhode Island are assessed court debts ranging from $93.50 for a single misdemeanor to over $1000 for violent, drug-related felonies (Rhode Island Judiciary, n.d.). Those who fail to appear at subsequent payment dates in court can be jailed for up to 48 hours and brought before a judge to discuss their delinquency, create a payment plan, and begin the debt cycle anew. In 2008, Rhode Island's legislature attempted to protect indigent defendants from both court debts, themselves, and jail time for failure to appear at payment dates. For this honors thesis in Public Policy, I investigated the implementation of this protective legislation in order to understand:

1. Who is incarcerated for court debt delinquency in Rhode Island?

2. How is Rhode Island's debt collection policy regime being implemented in light of recent reforms?

3. How does this policy regime (including any implementation challenges) affect arrested debtors' lives?

II. Policy Context & Literature Review

The term "court debts" describes a bundle of fines, fees and/or restitution payments that virtually all offenders in Rhode Island are assessed upon conviction in a District or Superior Court. In response to anti-crime fervor and victims' rights advocacy in the 1980s and '90s, Rhode Island legislators passed large increases in fines and restitution amounts across most crime categories, while simultaneously creating new "administrative fee" and "court cost" categories intended to raise revenue and cover rapidly growing criminal justice costs. This expansion mirrors trends in court debt assessment across the country, and researchers are beginning to find that court debts may significantly impact debtor employment (Bannon, Nagrecha, & Diller, 2010; Beckett, Harris, & Evans, 2008; Pleggenkuhle, 2012; Vallas & Patel, 2012), wellbeing (Alexander, Konanova, & Ross, 2010; Diller, 2010; Martire, 2010; Richards & Jones, 2004), and ultimate recidivism risk (Blattenberger, Fowles, & Krantz, 2010; George, 2012; Martire, Sunjic, Topp, & Indig, 2011). But even though many are studying the impact of court debt *assessment* on offenders' lives, far fewer have researched the impact of the *collection* practices that courts use to enforce debt payment (Alexander et al., 2010; Horton, 2008). This is a significant oversight, because court debts largely gain meaning in debtors' lives via the practices that courts use to collect them.

In Rhode Island, the Judiciary essentially employs one method of enforcing debt payment: issuing arrest warrants for everyone who fails to appear at monthly payment dates in court. In 2007, Horton (2008) reported that the state was arresting and jailing 24 adults per day on debt-related warrants—these adults constituted 18% of all statewide commitments annually

(Horton, 2008). He further found that this time in jail caused job and housing loss, strained family relationships, and pushed debtors into even more financial hardship. In 2008, state legislators attempted to respond to the negative impacts of jailing delinquent debtors by expediting the debtor arrest and commitment process and allowing judges to waive the costs of any defendant they found to be legally indigent.

III. Methods

I analyzed both quantitative and qualitative data to investigate the implementation and impact of the debt collection policy regime in Rhode Island. First, I analyzed Department of Corrections data on all commitments to Rhode Island's central jail, the Intake Service Center, in 2015 to generate cross-tabulations on the demographics and criminal history for all 1,556 debt-related commitments. I used these statistics to compare jailed debtors to other inmates at the Intake Center. For a random sample of 270 of these 1,556 debt-related commitments, I manually inputted and analyzed data on defendants' debt payment history from the Rhode Island Judiciary's CourtConnect database. Second, in January 2016, I interviewed 21 jailed debtors who were held at the Intake Center and observed 25 "ability to pay" hearings that court magistrates conduct with every jailed debtor. All inmate interviews were audio recorded, transcribed, and coded in two ways: I created a list of categorical variables corresponding to every potential interaction in a debtor's arrest and commitment process (*i.e.*, did the debtor see a Justice of the Peace before being committed?) in order to track variation in debtors' pathways through the system, and I coded responses for key themes (*i.e.*, confusion, regret, criminalization). Courtroom observations were recorded using written notes and used to contextualize interviewee narratives of their experience with debt-related hearings.

My efforts to incorporate implementation analysis into research on the personal impact of debt collection practices were inspired by Jodi Sandfort & Stephanie Moulton's (2015) novel framework for evaluating implementation at the "front-lines" of bureaucratic agencies, the Frontline Interactions Audit. This methodological framework focuses on mapping out different debtor trajectories (via my quantitative and qualitative data) and expectations (via my qualitative data) and exploring how this variation influences overall policy results.

IV. Key Findings

Recent policy reforms have produced marginally improved but largely insufficient protection of indigent debtors. Moreover, erratic implementation of the debt collection process is widespread and exacerbates the negative effects of court debts on debtors' lives, including job loss, financial strain, and feelings of anxiety, helplessness, and criminalization. While the total number of debtors committed annually has fallen by 30% since 2007, debt-related commitments still made up 15.5% of all Intake Center commitments in 2015. Further, although the corrections system successfully limited debt-related jail time to just one night per debtor on average, judicial magistrates failed to regularly assess debtor ability to pay and ultimately only waived the costs of about 3% of jailed debtors—a percentage far smaller than the population of indigent debtors who were eligible for cost abatement under the law.

The jailed debtor population also experienced significant variations in the nature of their arrest, incarceration and judicial processing—and displayed similarly varied (mis)understanding of the debt collection system and their responsibilities within it. In the interview sample, multiple debtors did not even know the reason they were in jail or when they could expect to be released. Others had been denied the opportunity to make even one phone call and believed their partners and family members did not know their whereabouts. These procedural injustices significantly

exacerbated the negative impacts of court debts observed in this and other studies—namely job loss and feelings of criminalization and anxiety. In fact, implementation failures in the debt collection process made some jailed debtors *less* likely to pay their debts than they were before, due to frustration with the system and a perception that it was illegitimate or mismanaged. In contrast to other research on the impact of court debts, I did not find that jail time significantly impacted most debtors' housing or social relationships. Responding to a lack of consensus in the emerging literature on court debts, my findings support the hypothesis that the impacts of court debts are significantly mediated by the policies that states enact to collect them. Broader and more punitive collection efforts, especially poorly implemented ones, may drive much of the highly concerning effects of court debts that have been observed in many studies in recent years.

V. Policy Recommendations

Rhode Island criminal justice stakeholders seeking to respond to these findings should consider pursuing both process-based and structural changes in the debt collection system. First, the Judiciary and Department of Corrections must implement agency-level policies that ensure arrested debtors are informed of the reason for their arrest and offered the opportunity to contact a family member, friend, or employer. In order for this to occur, the Judiciary needs to start systematically distinguishing delinquent debtors from other types of offenders on all bench warrants issued so that police and corrections officers can respond appropriately to questions and requests during a debtor's arrest. But beyond these necessary improvements to the existing debt collection apparatus, state lawmakers should pass legislation that better protects indigent debtors by making debt abatement mandatory instead of discretionary for all debtors who qualify as unable to pay under the criteria already laid out in the law. Given the high poverty and history of repeat offending in the jailed debtor population, the legislature is strongly encouraged to pilot

alternatives to jail time for debt nonpayment and phase out court costs in the Judiciary altogether. Revenue generation through the courts is increasingly viewed as fundamentally unethical and unconstitutional, and Rhode Island legislators should, at a minimum, take steps to minimize the negative effects of this practice on defendants who are simply unable to pay.

CHAPTER 1: INTRODUCTION

It is often said that a criminal offender owes a debt to society. Lately, though, it seems that a growing number of bill collectors are trying to cash in on that debt (Logan & Wright, 2014)

I. Introduction

The United States' rate of incarceration has more than quadrupled in the last four decades, and there are currently over 2.2 million Americans behind bars (American Civil Liberties Union, 2016). But even as the federal and state governments begin to attempt widespread reductions in their prison populations, few are paying equal attention to the large and growing criminal justice apparatus *outside* of prison walls that includes everything from probation supervision to restitution obligations to drug courts and court-mandated community service. Sociologists have called this growth in non-prison sanctions a "widening of the net of social control" (see Leone, 2002) because, although sanctions may be less intrusive, they ultimately impact a larger swath of the population in subtler but significant ways. While mass incarceration has understandably received substantial policy attention in recent years, attention to the "net-widening problem" is increasingly necessary as hundreds of thousands of reentering prisoners and newly sentenced individuals interact with the criminal justice system from within their own communities. Do community-based sanctions and programs ameliorate the damage caused by incarceration, or do they instead create new and unique obstacles for those subject to them?

In this thesis, I shine a light on court debts, the financial side of the net-widening phenomenon. Court debts—also known as criminal justice debts or legal financial obligations—are bundled combinations of fines, restitution and/or administrative fees that a majority of convicted offenders in the United States are assessed as part of the criminal sentencing process

(Council of Economic Advisers, 2015). These debts have grown in both size and scope at all levels of government alongside increases in mass incarceration. Although some argue that court debts are both a viable alternative to incarceration and a justifiable cost-shifting to the offender, critics counter that revenue generation in the courts is a fundamental violation of due process and constitutes an undue burden on an already vulnerable defendant population.

II. History of the Growth of Court Debts

More than one in 100 American adults are behind bars today (Vallas & Patel, 2012) and the United States is the most punitive society in the world in terms of its use of incarceration (Reitz, 2015). The current period of mass incarceration is the result of a complex period of "punitive expansionism" that began in the 1970s and has continued into the most recent decade, though incarceration rates have flattened out since 2010 (Reitz, 2015). The three basic categories of court debts—fines, restitution, and fees—all grew in size and scope during the same time period. In 1986, 12% of those incarcerated were also charged a fine and/or fee, compared to 66% in 2004 (Council of Economic Advisers, 2015). The Office of the United States Inspector General writes that the number of criminal debts pending at the end of each fiscal year grew by 150% between 1994 and 2014—and in all but three years between 1994 and 2014, "more criminal debts have been opened than closed" at the federal level (United States Department of Justice, 2015, p. 12). While fines and restitution increased in response to the nationwide War on Crime and Victims' Rights Movements, administrative fees were instead developed as revenue generators for budget-crunched states attempting to fund growing prison populations.

A) History of Fines

Fines have always been a part of the American criminal justice system (see Logan & Wright, 2014 for a comprehensive overview) but during this prison expansionist period, their use

has increased in both scope and amount (Bannon et al., 2010; Harris, Evans, & Beckett, 2010). While the increased usage of monetary sanctions is largely part of a broader "thrust toward greater severity in sentencing" (Reitz, 2015, p. 1738), it was actually driven, in part, by a group moving *against* that thrust. Criminal justice reform advocates in the 1980s and '90s who were alarmed by skyrocketing incarceration rates actually began advocating for greater use of fines as an *alternative* to incarceration. Pro-reform policy researchers sponsored by organizations like the Vera Institute for Justice studied European sentencing systems, where fines are used far more extensively than in the United States. Some even set up model "day fine" pilot systems in the United States and attempted to modernize American legal debt collection systems in preparation for this change in sentencing (Winterfield & Hillsman, 1993). But even as fines did increasingly show up in sentences, a move toward community-based sentences never really occurred. As Reitz (2015) writes,

> Economic sanctions are not worth very much on the retributive scale…over the past several decades, the metric of "serious" punishment in American law and culture has been prison time…Because of the low retributive valuation of economic sanctions, American legal systems have not found it possible to use them as substitutes for jail or prison terms. (p.1740)

The result is that fines in the modern era are simply more likely to be added *on top* of prison or probation sentences, not in place of them.

B) History of Restitution

Restitution orders have increased in size and frequency in recent decades in response to a victims' rights movement in the 1990s. The idea that the state should compensate victims of crime for their losses was initially popularized by penal reformer Margery Fry in the 1950s (see

Young & Stein, 2004). California enacted the first formal victims' compensation program in 1965, and advocacy groups have pushed for increasingly more stringent compensation legislation since then, from the Victims of Crime Act of 1984 to the Mandatory Victims Restitution Act of 1996 to the Crime Victims' Rights Act of 2004. While victims of crime gained well-deserved protection and recourse, they also produced an unprecedented expansion in restitution orders. Today, judges can order defendants to compensate victims for an increasingly broad number of losses, including "emotional and psychological losses and losses for which the defendant was found not guilty" (Lollar, 2014, p. 93). As a result, the non-federal debt balance for restitution has grown seven times faster than the overall U.S. criminal debt balance in the last 20 years (United States Department of Justice, 2015).

C) History of Administrative Fees

Unlike growth in fines and restitution, historic growth in administrative fees was *not* tied to philosophical questions about punishment and retribution in the criminal justice system. Instead, fees (also known as court costs or surcharges) have skyrocketed across virtually all states in recent years due to criminal justice budget shortfalls. While administrative fees have always played at least a small role in criminal justice systems, most states developed a host of new fee categories in recent years specifically to address budget shortfalls. Florida, for example, has introduced 20 new types of fees since 1996, including public defender application fees, crime prevention fund surcharges, and domestic violence program payments (Diller, 2010). Fees tend to be politically popular for legislators who claim to shift the costs of the criminal justice system away from law-abiding taxpayers or create funding streams for new crime prevention programs or other correctional initiatives. By 2010, all 15 states with the largest prison populations had

imposed some kind of administrative fee upon conviction, during prison or jail, and during the supervision period (Bannon et al., 2010).

D) Historical Summary

Today a majority of all criminal defendants owe debt to the government upon completion of other parts of their sentence (Visher, La Vigne, & Travis, 2004a). In California in 2006, there were 269 separate court fines, fees, forfeitures, surcharges, and penalty assessments that were available to be assessed to defendants (Nieto, 2006). While the size of these debts varies by sentence type, they can easily add up to the thousands of dollars. In Pennsylvania, for example, a person convicted of a Class E Felony for driving while intoxicated will owe around $7500 dollars in total. A person convicted of manufacture of a controlled substance will be charged with three months in prison, a $500 fine, $325 in restitution, and $2,674 from 26 other administrative fees and surcharges (Rosenthal & Weissman, 2007).

III. The Ethics of Revenue Generation in the Courts

While restitution ultimately accrues to the victims of an offender's crime, fines and fees instead bring in revenue for the state. As described above, revenue generation has been a primary reason why states have raised fines and added new fee categories in recent decades. But as revenue streams become larger and more normalized within state judicial systems, a host of critics have argued that the practice of using the Judiciary as a tax collector is unethical and perhaps even unconstitutional. Indeed, the United States Justice Department publicly announced in March 2016 that, "In addition to being unlawful, to the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents" (Gupta & Foster, 2016).

The most common argument in favor of using the courts to generate revenue is that the practice is "justifiable cost shifting from the taxpayer to the offender" (New York State Bar Association, 2006, p. 197). This argument treats those who pass through the courts like those who cross over a toll bridge—positing that people who derive a "private benefit" from the courts should provide money to cover their operating costs. But this argument raises deeper questions about whether offenders really "choose" to use the criminal courts—some counter that because criminal defendants are "involuntary consumers," the comparison to a toll arrangement for a public utility does not stand up to scrutiny (New York State Bar Association, 2006; Parent, 1990). Additionally, offenders forced to pay a user fee are in some cases paying twice for a service already supported by their general income taxes (Baird, Holien, & Bakke, 1986, p. viii). Others have called debt assessment a "regressive tax" for turning the poorest populations into funding fodder for the Judiciary and other government budgets (Council of Economic Advisers, 2015; Natapoff, 2015).

The allocation of court debt revenue is also controversial. In states that send court debt revenue straight to the general fund, some lawmakers portray this revenue flow as illegal because the judicial branch is not constitutionally allowed to levy taxes. The Louisiana Supreme Court recently struck down the assessment of any fees that are not directly connected to the administration of the courts on the grounds of separation of powers. The majority opinion stated, "our clerks of court should not be made tax collectors…nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature" (State v. Lanclos, 2008). This "toll booth" can be dangerously appealing to budget-crunched legislators—Logan and Wright (2014) point out that, when there is a major disconnect between the nature of the offender's crime and the entity ultimately receiving the court debt funds, a risk

arises that defendants will "pay amounts driven more by the needs of government in a given moment than by the nature and consequences of their crimes" (p. 1178).

But judicial systems that keep all of the revenue they generate grapple with their own major conflicts of interest—at least in theory, these systems face an incentive to convict more offenders in order to generate more money. Indeed, judges in some municipalities have reported being pressured by colleagues to collect more penalties or risk receiving fewer operating funds (ACLU, p.6 in Shookhoff, Constantino, & Elkin, 2011). The National Center for State Courts in 1996 released a statement that it is "beyond dispute that [the concept of self-supporting courts] is not consistent with judicial ethics or the demands of due process" (Tobin, 1996). A due process concern emerges if court systems' ability to meet clients' needs depends solely on transient or erratic court debt revenue. In early 2016, the chief public defender in New Orleans announced that his office was unable to meet growing client demand because they were largely funded by insufficient traffic fine revenue (Bunton, 2016). For these reasons, the Conference of State Court Administrators and the Conference of Chief Justices have both released statements urging state governments to provide the Judiciary with a sustainable and predictable funding stream that is not tied to fees, fines, and/or costs (Montgomery, 2015; Reynolds & Hall, 2012). More recently, the authors of the second Model Penal Code have stated, "On principle, the MPC regards revenue generation as an illegitimate purpose of the sentencing process" (Reitz, 2015, p.1749).

Looking beyond revenue, court debts can be similarly criticized as part of an overall widening of the net of social control. Natapoff (2015) places them in the category of "microcontrols"—"small-scale penal intrusions, formal and informal, that shape offenders' lives" (p.3). These microcontrols range from the constant intrusions and anxieties of supervision to the financial pressures exerted by fines and fees to the informal but influential ways that a citation,

arrest, or conviction alters an offender's relationship to police, employers, schools, hospitals, social services, and other institutions (Rappleye & Seville, 2014). The United States not only has the largest prison population but also one of the largest probation and parole populations (Reitz, 2015). Court debts extend the criminal justice system's social control to an even broader swath of the population, raising troubling questions about imbalances of power and control in our society at large.

IV. Modern-Day Debtors' Prison

Regardless of the ethics or legality of court debts, judges are increasingly assessing them at sentencing—and court systems are struggling to collect even a majority of these outstanding obligations. Debt collection statistics are not always tracked, but those who have researched the problem produce shocking results. In Florida, just 9% of fees assessed in felony cases are expected to be collected (Bannon et al., 2010)—in New York in 2001, the collection rate for one fee category—monthly supervision payments—was only 1% (Rosenthal & Weissman, 2007). At the end of 2014, the U.S. Inspector General's Office actually classified 92% of the federal court debt balance as uncollectible. These low collection rates translate to enormous outstanding debt balances—a survey of eleven states found an average of $178 million per state in uncollected court debts, while outstanding federal criminal debts totaled $103 billion (United States Department of Justice, 2015).

In an effort to solve the collection problem, most states authorize incarceration as a punishment for anyone who "willfully" refuses to pay their court debts, but is financially able to do so. In 1971, the Supreme Court ruled that the state could not incarcerate people who were financially unable to pay public debts (Tate v. Short, 1971), and twelve years later it specified that judges must inquire into a person's ability to pay *and* consider alternatives to incarceration

before imposing a jail sentence for nonpayment (Bearden v. Georgia, 1983). While this may seem to leave jail as a collection tactic of last resort, a growing body of research has found that judges and court administrators routinely pave paths around the "willful nonpayment" requirement. The Brennan Center for Justice reported in 2010 that there are four common paths to jail for those who fail to pay court debts:

1. Parole or probation revocation: For debtors with sentences involving supervision in the community, judges may make debt repayment a part of the supervision requirements (along with things like weekly reports to an officer and maintaining an address in the court's jurisdiction). While the Supreme Court rulings technically cover indigent parolees and probationers, judges can jail offenders for a technical violation of their supervision agreement without leaving an incriminating paper trail.

2. Pre-hearing jail time: Judges routinely issue arrest warrants for debtors in the community who miss a monthly payment date. Police officers then arrest the debtors in question and jail them for one or more days until a judge can see them for an "ability to pay" hearing. Because this jail time is technically for "failure to appear" instead of "failure to pay," it skirts the Supreme Court ruling.

3. Allowing debtors to "choose" jail: Some states and counties have clauses that grant debtors a financial "credit" for each night they stay in jail for failure to pay. They allow indigent debtors to "choose" jail as the only way to pay off large debt balances—but the choice itself is coerced by the justice and enforcement system.

4. Wrongfully determining "willful" nonpayment: Even judges who technically consider ability to pay before jailing someone may use crude, careless, or outright discriminatory processes to do so. Bannon et al. (2010) reported that one judge in Michigan would jail anyone who was a

cigarette smoker or subscribed to cable television because that money could have been spent repaying their court debts (pp.21-22). Beckett et al. (2008) interviewed one judge who ordered jail if the debtor simply had an "I don't care attitude" (p.44).

Jail for failure to pay is clearly used far more often than it is constitutionally allowed to be—and the practice is made worse by the fact that the court debts themselves may violate the constitution as well. Court debts have recently received a wave of attention in the popular press, as citizens speak out against the criminalization of poverty and the return of debtors' prisons, which are widely viewed to be unlawful (Champagne, 2010; Dolan, 2015; Esman, 2014; Rappleye & Seville, 2014; Robertson, 2015a, 2015b; Rosenberg, 2011). This media coverage is driven largely by investigative work by advocacy groups like the American Civil Liberties Union and New York University's Brennan Center for Justice.

V. Conclusion

All three elements of court debts—fines, fees, and restitution—have increased in scope and size in recent decades. While the financial arm of the sentencing system has historically gone unstudied, advocacy groups and media platforms are beginning to raise an objection to legislatures' use of the courts as revenue "toll booths." In 2008, Rhode Island became one of the first states in the nation to attempt to systematically identify low-income debtors and protect them from the punitive court debt collection regime. Because Rhode Island is a pioneer in this policy arena, the state provides an excellent opportunity to evaluate the implementation of this legislation and provide a model for states considering similar reform.

CHAPTER 2: POLICY CONTEXT

I. Introduction

The historical rise of court debts in Rhode Island mirrors the national trajectory—and like most states, Rhode Island's primary payment enforcement tactic is the use of arrest warrants and brief jail commitments for delinquent debtors. But from 2006 to 2008, state legislators passed a group of reforms intended to protect impoverished debtors from debt obligations. The implementation of these reforms is the focus of this thesis research.

II. Court Debt Assessment

Many nationwide forces that drove fine, restitution, and fee increases across the country also influenced Rhode Island in the 1980s and 1990s. While fines were always part of the array of sanction options, the state legislature increased fine amounts across most categories in the 1980s as tough-on-crime rhetoric gained political popularity (J. Ippolito, personal communication, February 9, 2016). Similarly, restitution obligations increased in size and frequency in the 1980s in response to the National Victims' Rights movement described above—Rhode Island passed its own Victims' Bill of Rights in 1986, and have since bolstered it with extra measures for restitution collection (§12-28). These included limiting the use of parole or work release until restitution payment plans are written and prioritizing the collection of restitution before other categories of court debts (§13-8-14, §42-56-21.2, & §12-19-34). Finally, administrative fees—called "court costs" in Rhode Island—have also been systematically increased since the 1980s. The legislature added several new cost categories for drug-related crimes under the Uniform Controlled Substances Act (like the Victims' Rights movement, anti-drug fervor was sweeping the nation at this time), and added others as a result of similar advocacy efforts. For example, the RI Coalition Against Domestic Violence successfully lobbied

in 2009 for domestic violence offenders to be charged an additional $125 that would support domestic violence prevention in the state (80% of which actually goes directly to the Coalition) (§12-29-5).

Many cost categories that were already on the books were raised to higher levels during the mid 1990s, with an apparent central motive of revenue generation. State legislators in this era exhibited an interesting pattern of redirecting revenue intended for specific criminal justice initiatives into the state's general fund. Though many cost categories that existed prior to the 1990s started out as "restricted receipts" for specific programs—fees on prostitution crimes would go to a special prostitution prevention fund, "probation & parole support" fees would feed directly into the Department of Corrections—virtually all of these were gradually redirected to general revenue during the 1990s and 2000s. Despite this fact, all of the state's court cost categories still maintain their original names—an offender convicted of Schedule I drug possession still has to pay a $100 "Laboratory Maintenance" fee, even though that money goes right to the general fund (§23-1-3).

Virtually all court costs in Rhode Island are mandatory at sentencing. While judges have some discretion in the punitive aspect of a sentence (the combination of fines, prison and/or probation), they cannot waive or reduce costs on a defendant's first two charges in any circumstance, regardless of the defendant's ability to pay (see §12-25-28(2)(c) & §12-18-1.3(3)(c)). The result is that every single person charged with a misdemeanor will automatically be charged a minimum of $93.50 (§12-18-1.3, §12-25-28, & §12-20-6). Likewise, a person with a felony will automatically be charged a minimum of $270, and will pay much more if convicted of a drug-related felony, a felony for assault or other interpersonal violence, or prostitution. Figure 1 displays all fees available to be assessed at sentencing.

Figure 1: Court Costs in Rhode Island

ALL OFFENDERS	
Violent Crimes Indemnity Fund	$30-$150
Probation & Parole Support Fund	$60-$300
Court Appeals Cost	$3.50

DRUG POSSESSION / SALE	
Drug Education Fund	$400
Laboratory Fee	$118
Forfeited Property Account	<$1000

DUI	
Driver Retraining Course Fund	$100

DOMESTIC VIOLENCE	
Domestic Violence Training and Monitoring Fee	$125

PROSTITUTION	
Additional Assessment for Prostitution-Related Offenses	$350-$500

Beyond the court debts assessed at sentencing, offenders in Rhode Island will continue to be charged expenses during their time in prison and in any form of community supervision. This thesis does not focus on these subsequent debts because they are all civil penalties, which means debtors are not jailed for failure to pay them. However, it is important to realize that offenders with monthly court debt payments may simultaneously face other public debt obligations. Offenders will also accrue additional expenses during the process of repaying their original court debts. Rhode Island recently started allowing District Court debtors to make debt payments online, but they are charged a $5.25 processing fee each time they do so (E. Bucci, personal communication, January 22, 2016). Additionally, debtors who are arrested for missing a payment date are charged a $125 warrant fee that gets added to their total debt balance.

Figure 2: Fees Accrued During the Sentence

PRISON
Wage Garnishment
Medical Co-Pays

WORK RELEASE
Wage Garnishment

PAROLE / PROBATION
Rehabilitation Fee
Drug Testing Fee
Batterers' Intervention Program Fee

III. Court Debt Collection

The Rhode Island Judiciary has one primary method for collecting outstanding court debts: clerks set periodic incremental payment dates with any debtors who are unable to pay in full, and then issue arrest warrants for anyone who fails to appear on the designated date. This practice parallels the second of the Brennan Center for Justice's four paths to debtor's prison, as jailed debtors are classified as "awaiting trial" for "failure to appear" until they see a judge to discuss their debt delinquency.

In both the District and Superior Courts, clerks and magistrates* are authorized to set up monthly payment plans with debtors who cannot pay their debts all at once. After receiving this payment schedule, debtors in Rhode Island are required to make payments periodically (usually monthly) until their court debts are fully paid off. The traditional mode of payment requires debtors to appear in person in the courthouse where they were sentenced and pay a court clerk at a designated "payment window." The legislature enabled online payments in 2014 (§8-15-11), but only the District Court is currently equipped with this capability. Superior Court debtors still must pay at the court monthly in person, and District debtors who do pay online face a $5.25 charge for every transaction ("Online Payments," 2014). If a debtor fails to appear in court on any one of his monthly payment dates, a bench warrant (essentially a judge's order for arrest) is issued. As described previously, judges are never allowed to jail debtors who are simply financially unable to pay their monthly payment—but they are allowed to issue "bench warrants" for debtors who do not pay online or show up in court in a given month. These warrants are for "failure to appear," and magistrates are authorized to issue them for anyone who does not show up at any type of court date, from an arraignment to a sentencing to a payment date (§8-8-8.1).

* Magistrates are lay judges or civil officers who have jurisdiction over minor criminal cases and preliminary hearings, including all payment-related hearings in Rhode Island. Clerks are administrative workers who maintain accounts and accept debt payments.

Once a magistrate has issued a bench warrant for failure to appear, state or local police who encounter the debtor (usually via a routine traffic stop) will arrest him and commit him to the Intake Service Center. Every debtor who is arrested for "failure to appear" is charged a $125 warrant fee that is added to his outstanding debt balance (§12-6-7.1). If a debtor wishes to see a Justice of the Peace (who could accept bail if the debtor has money on his person) he is charged $50 for a daytime visit or $200 if the Justice of the Peace visits between 11PM-8AM (§12-10-2). If a debtor cannot pay his full court debt balance and cannot persuade a Justice of the Peace to release him on a lower bail (or cannot afford to see a Justice of the Peace at all) then the debtor will be taken to the Intake Service Center, Rhode Island's central jail, and held until a magistrate from the district that issued the bench warrant is available to see him in court. In the District Court, this court date is called an "Ability to Pay Costs" date. In Superior Court, it may be called either a "Cost Review," "Restitution Review," or "Payment Schedule" date. At this hearing, the magistrate may probe the debtor's reasons for failing to appear in court. She is authorized to either abate or reduce the debtor's outstanding obligations, or send the debtor back to jail for a few more days, or do nothing at all. The practice of re-committing an intransigent debtor for "willful nonpayment" is called "commitment for failure to obey judgment or sentence (§12-21-9). If the magistrate does not send the debtor back to jail, the debtor is released from court with a new scheduled payment date, and his payment cycle begins anew. Since 1992, magistrates have been authorized to suspend the driver's licenses and/or garnish the wages of employed offenders with unpaid court debts (§10-5-8)—but use of these alternative practices is currently limited, and jail time remains the central punishment for delinquent debtors in the state.

Prior to 2008, Rhode Island incarcerated an average of 24 adults per day for failure to appear at a court payment date and spent about $489,000 per year to do so (Horton, 2008). This

meant that more people were jailed for failure to appear at payment dates in a given year than were jailed for any other single charge. The average inmate owed $826 at the time he was arrested, and he was held for three days. Twelve percent of jailed debtors spent a week or more in jail before seeing a judge (Horton, 2008).

IV. Recent Legislative Reforms

In 2008, state legislators acknowledged the historical accumulation of court debts in the state and the real burden that these debts and their punitive enforcement policies placed on indigent debtors. They adopted a number of policy changes to the debt assessment and collection process (The full scope of the changes is documented in Appendix A). Most notably, the legislature required that magistrates actively assess a debtor's ability to pay court debts as part of the debt collection process. The legislation specifically orders magistrates to "make a preliminary assessment of the debtor's ability to pay immediately after sentencing" (in the Superior Court) "or nearly thereafter as practicable" (in the District Courts) using a standardized "financial assessment instrument" (§12-21-20). As a first step towards the creation of this "instrument," the legislature named a list of conditions that legally qualify as "prima facie evidence of the debtor's indigency," including:

- Qualification for and/or receipt of TANF, Social Security, Public Assistance, Disability Insurance and/or food stamps.
- Outstanding court orders in excess of $100 for other civil debts, including restitution, child support, and/or court-ordered counseling (i.e. mental health, domestic violence, or substance use) (§12-20-10).

The legislature also authorized magistrates to fully abate or reduce the court costs of anyone they find to be legally indigent. It is important to note that this law does not *require* magistrates to

remit debts—it just empowers them to do so and provides a standardized list of criteria to guide their decision. Magistrates who do not fully abate a debtor's court costs are required by law to develop a "payment schedule" based on the debtor's determined ability to pay (§12-21-20).

Further, the legislature attempted to reduce the use and length of jail time for those who are arrested for failure to appear at a payment date. In 2006, the legislature voted to compensate jailed debtors with $150 for every night spent in jail, in order to allow indigent debtors to "pay" their outstanding debts using this jail time. This credit was later reduced down to $50 per night in 2012 (§11-25-15). The legislature also attempted to shorten the time that debtors wait at the Intake Center before seeing a magistrate. They required police officers to bring debtors directly to court if they are arrested while court is still in session, and ordered the Judiciary to see all other debtors within 48 hours, or, if debtors are arrested on a weekend or holiday, on the next available date court date (§12-6-7.1).

V. Conclusion

Trends in Rhode Island's court debt growth mirrored those in the rest of the country and were driven by similar factors—anti-crime sentiment, victims' rights advocacy, and pressure to generate public revenue. But while Rhode Island's history in this area is not unique, the state is a pioneer in attempting to ameliorate potential harms caused by the court debt regime by accounting for debtors' ability to pay (Gupta & Foster, 2016; Harvard Law Review, 2015). With this in mind, the state presents an excellent opportunity to study the implementation of court debt reforms and understand how court debt collection policies influence debtors' lives. The following chapter articulates the specific research questions guiding this project and shows how this work fits into existing literature on the impacts of court debts and best practices in implementation of policy reforms in the criminal justice arena.

CHAPTER 3: LITERATURE REVIEW

I. Introduction

As described in Chapter 1, citizens across the country are growing increasingly alarmed by the large and growing financial arm of the sentencing system. Some of this concern arises from ethical questions of whether the Judiciary should ever be used to generate revenue, and whether financial sanctions are inappropriate for low-income "involuntary consumers" of the criminal justice system. But others are concerned that court debts may negatively impact the lives of vulnerable ex-offenders subject to them. Many advocacy groups have argued that court debts are a structural barrier to successful reentry. Though scholars have not yet reached consensus, an emerging body of research confirms that court debts negatively impact multiple areas of debtors' lives, including employment, housing, social ties, mental health, and recidivism risk.

The first section of this literature review summarizes early findings from scholarship on how court debt impact ex-offenders attitudes, circumstances and future criminal activity. The second section surveys the smaller body of work that has investigated the effect of specific debt collection practices on both offenders' debt payment behavior and the rest of their lives. The final section shows why implementation research is a crucial addition to court debt scholarship by documenting implementation challenges in parallel criminal justice reform arenas. Implementation research on court debt reforms is currently nonexistent—and as legislators across the country attempt to respond to damage caused by court debts, it is crucial to develop a body of work on common policy successes and challenges in this field.

II. The Impact of the Court Debt Burden

Researchers seeking to understand how court debts impact debtors' lives have primarily investigated whether court debts exacerbate common challenges that people with criminal histories face: securing employment and housing, maintaining supportive social relationships, and managing material and psychological stress. Early findings are concerning but contradictory—while some scholars have documented negative impacts of court debts across all of these categories, others have found neutral or even positive impacts. These inconsistencies highlight the need to identify key mediating variables that may be driving variation in outcomes.

A) Employment Impacts

Some researchers have found that court debts encourage employment by prompting debtors to find a steady source of income, but others report that court debts instead provide substantial barriers to finding and keeping a job. Although people with criminal records have a comparatively more difficult time finding formal employment (Levingston & Turetsky, 2007; New York State Bar Association, 2006), Pleggenkuhle (2012) and Visher, Debus-Sherrill & Yahner (2011) found that offenders with court debts may work harder to overcome these barriers because of the pressure to repay their debts. In Pleggenkuhle's (2012) unpublished dissertation on the debt experiences of 105 former felons in Missouri, she reported, "The majority of debtors expressed that legal financial obligations positively impacted their employment attitudes" (p.97). Similarly, Visher et. al. (2011) compared the post-release employment outcomes of state prisoner releasees across Illinois, Ohio, and Texas and found that offenders with court debts worked a higher percentage of time in the months after release than those with no court debts. Thus, there is some evidence to suggest that court debts actually incentivize debtors to find and maintain employment.

In contrast, a few scholars have found that large debt burdens actually reduce debtors' incentive to work by decreasing their take-home income (Beckett & Harris, 2011; Pleggenkuhle, 2012). Court debts may also provide a structural barrier to obtaining employment by damaging delinquent debtors' credit scores. In interviews with 50 former prisoners in Washington State, Beckett, Harris, & Evans (2008) found that multiple debtors identified their credit score as a barrier to finding employment, but no other researchers have echoed this finding. In Martire et al.'s (2011) interviews with 156 reentering prisoners in New South Wales, 81% of respondents said that government debts reduced their ability to obtain jobs, but the authors did not probe the reasoning behind these responses.

In summary, scholars at the intersection of court debts and employment have not yet reached a consensus on how court debts impact an offender's motivation or ability to find and retain a job. The fact that most existing research draws from small, nonrandom samples of people with criminal histories and relies on unverified self-reported data (Beckett et al., 2008; Gowdy, 2011; Martire et al., 2011; Nagrecha & Katzenstein, 2015; Pleggenkuhle, 2012) further prevents scholars from reaching firm conclusions.

B) Housing Impacts

Court debts may block debtors from obtaining housing by damaging credit scores and weakening their ability to retain housing by forcing difficult tradeoffs between rent and debt payment. Many researchers have documented landlord biases towards people with criminal histories (see New York State Bar Association, 2006)—but even in states where discrimination based on criminal records is illegal, landlords can and do still check credit history before deciding to rent (Alexander et al., 2010; Bannon et al., 2010). The ACLU interviewed former prisoners across five states about their experiences with court debts, and one participant

expressed, “Well, for the most part, anybody who’s renting doesn’t want anything to do with anyone who has a criminal history. However, there are a few places that would accept me if I could get my credit in line, so having the poor credit [is] a bigger barrier than the criminal history” (Alexander et al., 2010, p. 71). Beckett et al. (2008) and Pleggenkuhle (2012) echoed this finding. Even some public housing agencies who do systematically rent to ex-offenders have separate rules banning people with poor credit histories (Bannon et al., 2010). Further, multiple qualitative researchers have confirmed that, in systematically reducing the income of ex-offenders, court debts force difficult tradeoffs between rent payments and other necessities that can lead to eviction (Alexander et al., 2010; Beckett et al., 2008; Pleggenkuhle, 2012).

C) Social Impacts

Although some have found that court debts encourage debtors to build a stronger social and financial support system, others report that debts do just the opposite by isolating debtors who do not want to be a financial burden on family, or by tainting relationships with those who help with repayment. A large body of research has documented the protective value of strong social ties for offenders who are reentering into the community from jail or prison (see James, 2015; Sampson & Laub, 2001). Morris & Tonry (1991) theorized that the “imposition of fines on at least some impecunious offenders may serve preventive ends by catalyzing family and social support” (p. 114), a hypothesis backed up by the framework of life course criminology (Sampson & Laub, 1993; Laub & Sampson, 2003 in Roman & Link, 2015). Nagrecha & Katzenstein (2015), Pleggenkuhle (2012), and Gowdy (2011) all confirmed that a majority of debtors that they interviewed relied on family, friends, and intimate partners for financial and emotional support post-release from prison.

Even though court debts may initially catalyze a social safety net, long-term financial dependence could damage a debtor's most important relationships (Harris et al., 2010; Martire et al., 2011; Nagrecha & Katzenstein, 2015; Pleggenkuhle, 2012). Martire et al. (2011) specifically reported that 64% of reentering prisoners in their sample categorized the effect of government debts on relationships with children and family as "large" and "negative" (p.265). Court debts may weaken relationships by causing family members to resent the debt-burdened offender, or they may instead challenge key aspects of a debtor's identity. Pleggenkuhle (2012) found, "[T]he inability to financially provide for the family caused negative feelings and essentially challenged [offenders'] masculinity" (p.152). She further reported that, in addition to straining existing relationships, legal debts also deterred some interviewees from pursuing new intimate relationships. Many in Gowdy's (2011) and Nagrecha & Katzenstein's (2015) interview pools expressed similar feelings of guilt for not being able to sufficiently provide for dependent children and partners.

Finally, court debts may also damage debtors' relationship with their community supervision officers. Parole and probation officers have a dual responsibility of deterring criminal behavior but also encouraging rehabilitation. One national study of probation officers reported that 58% of officers felt that fee collection interfered with their attempts to help the offender (Morgan, 1995). Two more contemporary researchers noted that select debtors acknowledge this interference (Nagrecha & Katzenstein, 2015; Pleggenkuhle, 2012). Pleggenkuhle (2012) quotes an interviewee, Mario, saying "But when you know I'm not working, and I'm showing you this here [describing his job seeking efforts] that I'm doing, trying- why would you put this pressure on me [to pay my debts]?" (p.116). Nagrecha & Katzenstein (2015) echo this frustration in a quote from Afi, a parolee in New York: "One of the

first things you hear when you first meet your parole officer is, 'You know you have to pay a supervision fee.' Instantly, I got nervous. I don't have money. I just got home. I don't have money*"* (p.17). Harris et al. (2010) found that debtors in their interview sample frequently skipped supervision meetings out of fear they would be punished for debt nonpayment. Thus, to the extent that a supervision officer can act as a rehabilitative influence on the offender, court debts may interfere with this positive relationship.

D) Emotional Impacts

Regardless of whether court debts negatively impact housing, employment or social relationships, researchers have unequivocally found that these debts are a chronic source of stress with a large and negative impact on debtors' quality of life. Pleggenkuhle (2012) reports that a majority of debtors in her interview sample characterized their court debts as stressful, while debtors in other studies describe debts as "crushing" or "a perennial source of stress" (Martire et al., 2011; Richards & Jones, 2004). In addition to the financial strain that court debts directly produce, they may also make debtors feel helpless and less in control of their lives. Alexander et al. (2010) quote one interviewee who lamented, "It's like, 'Oh God.' It's just like a nightmare. You know? Like is this ever going to go away? And the only thing, I keep hearing the judge say, 'if you have to pay $20 for the rest of your life, that's what you are going to be doing'" (p.79). Finally, unpaid court debts may cause further stress by labeling debtors as criminals long after they have completed their original sentence. Feelings of criminalization are perpetuated by the marks that court debts leave on offenders' lives—in addition to showing up on a credit score, unpaid court debts also prevent debtors from voting or obtaining a drivers' license in some states (Bannon et al., 2010).

E) Recidivism Impacts

While it is becoming clear that court debts negatively impact at least some areas of debtors' lives, it is far less clear whether they ultimately increase recidivism risk. Some scholars have found that court debts are linked to a higher risk of reoffending, while others have found that court debts either have no effect or even reduce the risk of reoffending. While these conflicts are likely driven (at least somewhat) by differences in the specific types of offenders and court debts studied, it is clear that the connection between court debts and recidivism requires further research attention.

Reitz (2015) theorizes that pushing vulnerable reentering offenders into poverty is a criminogenic act. In this vein, multiple researchers have found that court debts increase the temptation to commit income-generating crimes (Alexander et al., 2010; Beckett et al., 2008; Pleggenkuhle, 2012). One of 50 former felons from Washington State interviewed by Beckett et al. (2008) reflected,

> And my last P.O., I asked her for a bus ticket to get to my appointments, she's like, 'oh, we don't do that anymore.' It's like, oh, ok, I'm not supposed to do any crime, I'm not supposed to... and frankly, I mean, I'm not trying or wanting to do any crime, and I still can't quite commit myself to do prostitution, but I think about it sometimes... at least that way I could pay some of these damn fines. (p.40)

Martire et al.'s (2011) study of reentering prisoners in New Zealand provides the only instance of respondents actually admitting to new crimes (as opposed to simply reporting the temptation to reoffend). Roughly 13% of those who admitted to reoffending post-release from prison reported that, "the repayment of one or more forms of debt was among the motives for their crime" (p.264). However, it is plausible that this criminal activity is missing in other scholarship

because self-reported delinquency tends to be at least somewhat underreported (see Thornberry & Krohn, 2000). In a public records analysis of one quarter of all Utah parolees in 2006, Blattenberger et al. (2010) found that those who owed child support and restitution had a greater likelihood of parole revocation than offenders without these financial obligations.

While some have documented that court debts raise recidivism rates, others have found no correlation at all. In Pleggenkuhle's (2012) unpublished dissertation on the debt experiences of former felons in Missouri, she found that the size of an offender's debt burden had no statistical relationship with returns to prison or technical violations. Iratzoqui & Metcalfe (2015) surveyed the recidivism outcomes of 358 low-income probationers in Florida and found no statistically significant relationship between court debt size and debtor probation violations.

Finally, a third group of researchers have found that offenders with court debts actually experience reduced recidivism compared to their debt-free peers. When Bucklen & Zajac (2009) studied determinants of parole revocation in Philadelphia, they found that "parole successes"—those who did not return to prison within three years—had larger median court debts than their recidivating counterparts ($5,000 vs. $2,000), even after controlling for parolee income, criminal history, and other demographic characteristics. Roman & Link (2015) documented the presence or absence of child support orders (a financial obligation analogous to court debts) in a sample of participants in the Serious and Violent Offender Reentry Initiative and found that offenders with child support orders had a marginally significant reduction in the odds of re-arrest three months post-release. In a review of recidivism among drunk drivers, Yu (1994) found that drivers who received larger financial penalties were less likely to drive drunk in the future. Finally, Cherry (2001) compared the median financial sanctions in 90 counties in North Carolina and concluded

that higher "fines and forfeitures" produced a "significant deterrent effect on county-level criminal activity" (p.7).

These varied findings on the link between court debts and recidivism are likely driven by mediating variables that have not yet been studied, including variation in the type of financial obligation (*i.e.*, restitution vs. administrative fees) or the type of offender (*i.e.*, violent vs. non-violent) or the nature of the original sentence (*i.e.*, prison-based vs. community-based). While most researchers discussed above focused on individuals reentering from prison (Beckett et al., 2008; Blattenberger, Fowles, & Krantz, 2010; Bucklen & Zajac, 2009; Martire et al., 2011; Pleggenkuhle, 2012; Roman & Link, 2015), a few limited their sample to those who served their sentence in the community (Iratzoqui & Metcalfe, 2015; Yu, 1994). Some researchers isolated one type of financial obligation—like restitution—while others analyzed court debts as a whole. These mediating variables are largely unacknowledged in the existing literature, resulting in scholarship that treats court debts as a "black box." This in turn prevents policymakers and other interested stakeholders from understanding where to intervene in the court debt system in order to mitigate harm.

III. The Impact of Jail as a Debt Collection Tactic

One mediating variable that has only been given slight attention in the literature above is variation in the debt collection practices that states employ to enforce payment. Most researchers have chosen to define their independent variable as either the size of an offender's court debt balance or the overall presence or absence of court debts in an offender's sentence. This research design is logically weak because court debts of any size largely gain meaning in debtors' lives via the specific debt collection practices that debtors are subject to. A non-punitive missed payment letter will likely affect both a debtor's payment behavior and his wellbeing differently

than a three-night stay in jail for the same infraction. The small body of literature that does attend to variation in debt-collection practices indicates that more punitive policies may better encourage debt payment adherence but also exacerbate the negative impacts of court debts overall.

Since the 1980s, a small group of scholars has reported that jail time (or at least the threat of jail time) is a superior tactic for yielding payment from delinquent debtors in the Judiciary. Hillsman & Mahoney (1988) write,

> Practitioners across America and Europe report how effective the *threat* of immediate jailing is in getting debtors to pay the full amount due. One American court clerk called this "the miracle of the cells," a visible phenomenon in many courtrooms when a judge threatens imprisonment, only to have a family member or friend of the offender dash forward, cash in hand. (p.30)

In a study of a broader sample of criminal justice stakeholders, Parent (1990) reported that, "Corrections officials interviewed believed that, ultimately, debtors must face a credible threat of imprisonment if they willfully refuse to pay fees" (p.16).

Isolated studies have provided support for this common perception. Williams (1987) concluded that jurisdictions that utilized both short repayment periods and strict enforcement penalties (including jail) had higher fee and fine collection rates than more lenient jurisdictions (in Olson & Ramker, 2001). Hillsman, Sichel, & Mahoney (1984) found that, in a nationwide study of American courts, three-quarters of courts they categorized as "successful" in collections reported "often" jailing debtors who were brought to court for debt nonpayment (p.103). Only one randomized experimental study has assessed jail as a debt collection tactic, but it found that probationers in New Jersey who were jailed for failure to pay were significantly more likely to

pay court debts than those subject to "regular probation supervision" (Weisburd, Einat, & Kowalski, 2008). While the experiment's sample size was fairly small (N=228), the design was strong and the findings were highly statistically significant (p=.01). Thus, there appears to be consensus—at least in this older body of work—that the threat of jail effectively induces debt payment.

On the other hand, jail time likely exacerbates much the negative impacts on debtors' lives that policymakers and advocates are most concerned about. The only two studies that have specifically investigated the impact of debt-related incarceration report that the practice may disrupt debtor housing, employment and social ties, and worsen emotional stress and financial strain. Horton (2008) interviewed 25 Rhode Island men while they were jailed for failure to appear at a court payment date. Seventy-five percent of respondents had been jailed for failure to pay at least once in the past and said that the jail time seriously disrupted their lives and efforts to thrive in the community. One respondent who had been jailed two times already that year, revealed,

> I lost my job, I lost my girl, my apartment. I will probably get violated because I didn't show up for a probation appointment. They'll put another warrant out on me. I lost my job twice, they gave it back to me before; I don't think they will this time. I try so hard but I'm losing everything over and over again. (p.16)

Other isolated impacts from the jail time in Horton's sample included loss of public benefits, disruption of medication for chronic illness, and the accrual of additional court debts directly linked to the arrest and commitment.

American Civil Liberties Union researchers (2010) spoke with current and former offenders who had been jailed for failure to pay across five states—Louisiana, Michigan, Ohio,

Georgia, and Washington—and their findings largely overlapped with Horton's (2008). An immediate and direct impact of debt-related incarceration is the additional cost that debtors accrue from the jail time—including a warrant fee and sometimes even a bill for room and board. The ACLU also found evidence of debtors losing jobs and housing as a result of jail time for failure to pay, but did not aggregate these findings across their interview sample (Alexander et al., 2010). In summary, although this body of research is quite preliminary, it is clear that the use of jail as a debt collection tactic may be a significant mediating factor in how court debts affect offenders' lives.

IV. Implementation Challenges in Criminal Justice Reform

Policymakers seeking to respond to the potential link between court debts and recidivism would be hard-pressed to identify evidence-based guidelines for whom to protect from potentially harmful effects of court debts, and how to go about protecting them. Implementation research in this arena is essentially nonexistent despite the fact that court debt reforms share some of the most historically challenging policy elements to implement—including personalized intervention, inter-agency coordination, and broad judicial discretion.

Literature on recidivism reduction policies in American criminal justice systems shows that promising programs are often implemented erratically or incompletely (see Rhine, Mawhorr, & Parks, 2006). Rhode Island's court debt reforms share characteristics with other criminal justice initiatives that have historically failed in the implementation phase. First, a cornerstone of the reforms is personalized indigency determinations for every debtor—but corrections workers have historically implemented personalized programs much more erratically than more uniform interventions (Wilson & Davis, 2006). Second, the court debt reforms require several independent entities to work together (the courts, police departments, and the Department of

Corrections). Inter-agency collaboration has historically provided administrative and communicative stumbling blocks in policy implementation (Zajac et. al., 2015). Third, police officers and judges interacting with indigent debtors may fail to implement the reforms if they hold beliefs that conflict with the more protective or rehabilitative norms of the new debt collection guidelines (Cooley, 2011; Goodstein & Sontheimer, 1997; Heale & Lang, 2001; Lin, 2002; Price, 2004). Finally, in programs involving judicial discretion, judges' philosophies about when and how to apply the new policy may not align with policymakers goals (Bazemore, 1993; Law & Sullivan, 2006). For these reasons and others, criminal justice scholars conclude that implementation fidelity significantly mediates the success of recidivism reduction policies (Hubbard & Latessa, 2004; Landenberger & Lipsey, 2005; Lowenkamp, Latessa, & Smith, 2006). Indeed, the sole preexisting study on the implementation of fee waivers for indigent debtors in Canada reported that judges routinely diverted from stated policy goals by basing waiver decisions on factors other than a debtor's indigence and generally waiving fees more often than legislators had intended (Law & Sullivan, 2006).

Implementation research in the court debt arena is also important from a procedural justice perspective. A small but compelling body of work demonstrates that offenders who perceive the criminal justice system to operate with fairness, uniformity and consistency are less likely to be frustrated by any sanctions against them and are ultimately less likely to reoffend (Mazerolle, Bennett, Antrobus, & Eggins, 2012; Paternoster, Brame, Bachman, & Sherman, 1997; Tyler & Huo, 2002). With this in mind, this research not only examines whether the 2008 reforms are being applied with fidelity but also evaluates whether this application is consistent across different offenders and circumstances.

V. Conclusion

Preliminary findings in the court debt literature reveal that court debts likely negatively impact multiple aspects of ex-offenders' lives, from employment and housing to emotional wellbeing and financial stability. But court debts' ultimate impact on recidivism is unknown—and all court debt impacts are likely mediated by multiple under-studied variables, including the nature of the debt collection practices that different judicial systems adopt to enforce payment. The only two studies that have examined the specific impact of incarceration as a debt collection tactic found that jail time disrupts debtors' employment and social lives and exacerbates the documented negative impacts of court debts overall.

But because Rhode Island legislators were among the earliest respondents to this challenge in 2008, this state provides an excellent opportunity to start building an evidence base by mapping out the implementation of debt collection reforms and evaluating whether policy goals were achieved. As Rhode Island attempts to respond to the harms caused by court debts, it is important to analyze policy results with potential implementation challenges in mind. The next chapter introduces my mixed-methods approach to respond to three overlapping questions that fill gaps in the existing literature:

1. Who is being incarcerated for court debt delinquency in Rhode Island?
2. How is the state's debt collection policy being implemented in light of recent reforms?
3. How does this policy regime (including any implementation challenges) impact arrested debtors' lives?

CHAPTER 4: METHODS

I. Introduction

Sandfort & Moulton (2015) write, "One of the most troubling aspects of how policy and program implementation is often studied is how little attention is paid to understanding target groups' perspectives and behaviors" (p.23). This target group perspective is important because "seeking to understand the way such behavior is indeed logical by attending to the actual motivations and realities of these target groups is essential for orienting what implementation improvements should address" (Sandfort & Moulton, 2015, p. 10). In keeping with Sandfort & Moulton's (2015) argument, my research design pairs a quantitative overview of the debt collection policy regime in Rhode Island with a qualitative deep-dive into jailed debtors' reactions to and understanding of the debt collection process. As described at the close of the previous chapter, I seek to answer three questions in this thesis:

1) Who is being incarcerated for court debt delinquency in Rhode Island?

2) How is debt collection policy implemented in light of recent reforms?

3) How does this policy regime (including any implementation challenges) affect debtors' lives?

I employ a mixed-methods research design to respond to these questions. The quantitative data analysis responds to Questions One and Two by compiling and summarizing demographic, occupational, and criminal activity data on everyone jailed for failure to appear at a court payment date in 2015. My qualitative data contextualizes the quantitative findings in Questions One and Two and responds to Question Three via analysis of interviews with debtors currently jailed for failure to appear at a court payment date. The first section in this chapter introduces the quantitative and qualitative data sources and summarizes the collection and data

preparation processes for each source. The following section identifies the data sources and forms of analysis that contributed to each of the three overarching research questions.

II. Data Collection

Quantitative data on all 1,556 debtors jailed in 2015 was sourced from two government databases—INFACTS and CourtConnect and manually validated for a random sample of 270 debtors. Qualitative data sources included interviews with debtor inmates, observation of payment-related court hearings, and informal conversations with court clerks, magistrates, and corrections officers.

A) Quantitative Sources

1. Department of Corrections INFACTS Data

The primary quantitative data source for this research is a data file with demographic, occupational and criminal history information for every adult committed to Rhode Island's central jail, the Intake Service Center, in 2015. This file was provided by Michael Eldridge, computer systems manager at the Rhode Island Department of Corrections, via the Department's INFACTS Database. A list of relevant variables is provided in Table 1.

Table 1: Key variables in the 2015 Intake Service Center Commitments File

Demographic Variables	Criminal History Variables	Commitment Variables
Date of Birth	Offender Type	Commitment Type
Sex	Criminal Case ID	Admission Date
Race	Charge Code	Discharge Date
Citizenship Status	Charge Description	Supervision Violation Status
Country of Origin		Bail Amount
Occupation		
Marital Status		
Number of Children		

The data set included 20,940 observations, and the level of observation was the criminal charge. This means that a person arrested and jailed on two different charges simultaneously (say, both a DWI and Reckless Endangerment) would have two unique entries for the date of his commitment. If he were arrested again later in 2015, he would receive one or more additional unique entries for that arrest, with each entry corresponding to a new charge. Those who were arrested and jailed for violating some term of their sentence (including the delinquent debtor subjects of this research) were treated very similarly, with the *arrest warrant* replacing the *charge* as the level of observation. If an inmate had multiple outstanding arrest warrants (say, he failed to appear at a payment date at multiple courts in one month) he would also receive multiple entries for the date he was jailed. With this data structure taken into account, the 20,940 observations in the data file translate to 10,836 unique *commitments* and 8,238 unique *people* jailed in 2015 in Rhode Island.

People who were committed to the Intake Center for failure to appear at a court payment date were not systematically identified in this data set. While the "Admission Type" variable did include a "failure to pay costs/fines" category, jailed debtors were frequently mislabeled with other admission types as well, including the broader category "failure to appear" or simply "new commitment." Because of this inconsistency, the primary method for identifying jailed debtors is the Bail Amount variable—jailed debtors were given bails that equaled their exact unpaid court debt balance, so these bails almost never ended in two zeros (unlike the bails for newly charged inmates). Using bail as an identifier, I flagged all commitments in 2015 that were solely for failure to appear at a court payment date. Anyone who was jailed on both a new charge and a debt-related warrant was left out of the sample. This identification process yielded a debtor inmate data set of 1,871 observations, 1,685 commitments, and 1,556 unique individuals.

Demographic and criminal history variables for both debtors and non-debtors are displayed in Table 2. As shown in the table, women were over-represented among debtor inmates compared to the general inmate population. In contrast, foreign-born inmates were under-represented among debtors. This finding is itself noteworthy, but its causes were not explored in this research.

Table 2: Demographic Characteristics of Rhode Island's Inmate Population

Characteristic	Non-Debtors (N=6,682)		Debtors (N=1,556)	
Race	Frequency	Percent	Frequency	Percent
White	3,464	51.84%	829	53.28%
Black	1,576	23.59%	364	23.39%
Hispanic	1,405	21.03%	307	19.73%
Asian	66	0.99%	15	0.96%
American Indian	49	0.73%	15	0.96%
Mixed Race/Other	106	1.59%	21	1.35%
Missing	16	0.24%	5	0.32%
			$X^2 = 3.204$	P = 0.783
Gender	Frequency	Percent	Frequency	Percent
Male	5,674	84.91%	1,258	80.85%
Female	1,008	15.09%	298	19.15%
			$X^2 = 15.644$	P = 0.000*
Marital Status	Frequency	Percent	Frequency	Percent
Single	5,169	77.36%	1,226	78.79%
Married	677	10.13%	127	8.16%
Divorced	524	7.84%	128	8.23%
Separated	245	3.67%	58	3.73%
Widowed	53	0.79%	15	0.96%
Missing	14	0.21%	2	0.13%
			$X^2 = 6.473$	P = 0.263
Immigration Status	Frequency	Percent	Frequency	Percent
Born in United States	5,773	86.40%	1,380	88.69%
Foreign-Born	909	13.60%	176	11.31%
			$X^2 = 5.801$	P = 0.016*

2. Rhode Island Judiciary CourtConnect Data

The second quantitative data source was the Rhode Island Judiciary's CourtConnect database, which allows for public searches of the criminal court dockets by offender name or criminal case ID. For a random sample of 300 jailed debtors in the INFACTS data file, I manually accessed each debtor's original criminal case page and added values for the following variables to my data set:

Table 3: Variables in the CourtConnect Database

Pre-Commitment Variables	Post-Commitment Variables
Number of prior payment-related court appearances	Did inmate pay within one month?
Number of prior payments	Did inmate pay in full by end of 2015?
History of debt-related bench warrants	Did inmate attend next payment date?
Number of prior debt-related commitments	Did inmate attend next two payment dates?
Most recent missed payment date	Were inmate's costs abated by a judge?
Most recent warrant issue date	Did inmate post bail?
	Was inmate re-committed within six months?

These variables were created with policy implementation in mind—I wanted to understand jailed debtors' payment compliance history and track any payment-related behavior after the jail period as well. While manually entering information for the following variables into the data set, I identified and removed 30 inmates who had been erroneously included in the debtor inmate population, resulting in a final sample size of 270 debtors with 333 observations.

B) Qualitative Sources

1. Inmate Interviews

The largest qualitative data source was transcripts from interviews with 21 adult male inmates who were, at the time of the interview, currently jailed at the Intake Center for failure to appear at a court payment date. All interviews were conducted at the Intake Center's visiting

room in January 2016 during the facility's visiting hours between 4-6PM. I identified eligible interviewees from a list of daily Intake Center admissions using the bail-based identification method described above. 19 out of 21 interviews took place on Sunday afternoons, when there was a critical mass of debtor inmates at the Intake Center over the weekend prior to their Monday morning payment hearings before a magistrate. The weekend interview method meant that debtors in my interview sample spent more nights in jail than the average jailed debtor in 2015. Demographic characteristics for the interview sample are displayed in Table 4.

Table 4: Demographic Characteristics of the Debtor Inmate Interview Sample

Characteristic	Interviewees (N=21)	
Race	Frequency	Percent
White	8	38.10%
Black	9	42.86%
Hispanic	2	9.52%
Asian	1	4.76%
American Indian	0	0%
Mixed Race/Other	1	4.76%
Missing	0	0%
Gender	Frequency	Percent
Male	21	100%
Female	0	0%
Marital Status	Frequency	Percent
Single	14	66.67%
Married	2	9.52%
Divorced	3	14.29%
Separated	2	9.52%
Widowed	0	0%
Missing	0	0%
Immigration Status	Frequency	Percent
Born in United States	20	95.24%
Foreign-Born	1	4.76%

People of color and those born in the United States were over-represented in the interview sample compared to the rest of the jailed debtor population in 2015—and because I only gained access to the men's commitment facility, women were not represented in the sample at all. In contrast, single inmates were under-represented in the interview sample compared to the overall debtor inmate population, but still comprised a majority of interviewees.

When I arrived at the visiting room with a list of potential interviewees, all eligible interviewees were phoned down to the room one by one and told that a "student researcher" was here to see them. Immediately upon meeting each inmate, I briefly introduced myself, summarized my research, and invited him to speak with me. In my initial sample, one inmate declined to be interviewed upon meeting me and another did not speak English—both men were free to return to their cells. All other inmates sat down with me at a visiting room table and provided informed consent via a protocol approved by the Brown University Institutional Review Board for Research with Human Subjects (see Appendix B for a copy of the consent form). Each interviewee received a paper copy of the consent form for him to take back to his cell.

For the first five interviews, I used an exact replica of the interview form that Horton (2008) used in debtor inmate interviews for his original research on the same topic. This interview form briefly asked inmates to explain the events leading up to this time in jail and then focused primarily on the inmates' perceptions of how the time in jail would affect their lives upon release—asking specifically about employment, housing and relationships with children and family members. After the first five interviews, I realized that inmates reported a significant range of experiences and implementation failures within the debt collection system that the interview tool did not significantly capture. With a new eye towards mapping out this range of

inmate experiences with (and understanding of) the debt collection process, I revised the interview form and used an updated version for the following sixteen interviews. The original and updated interview templates can be found in Appendix B.

All inmate interviews were recorded with an Olympus digital recorder and then transcribed into a word document for processing. At the close of each interview, I identified my contact information on the informed consent sheet and invited each interviewee to reach out to me with any future updates on his case or the debt collection process in general. Just one out of twenty-one interviewees reached out via email with some follow-up information. Beyond the value in this extra information, the email was a welcome confirmation that interviewees were indeed permitted by corrections officers to keep the consent forms in their possession.

2. Courtroom Observation

The inmate interviews were supplemented by observation of 25 "ability to pay" hearings and informal interviews with three magistrates who preside over these hearings. I visited the three courthouses that issue the most warrants for failure to appear at debt payment dates—Providence Superior, 6th District and 3rd District—and sat in on payment hearings conducted by magistrates from each courthouse. For each hearing, I recorded the questions asked by the magistrate and key elements of debtors' responses. All observations were recorded using written notes, as audio recorders are prohibited from judicial complex premises. I was also able to speak informally with magistrates at each of the three courthouses I visited. In these unstructured interviews, I asked questions to elicit information on how the magistrates determine debtors' ability to pay and make decisions around cost abatement and reduction and debtor incarceration. These informal interviews lasted between thirty minutes to one hour and were recorded using written notes.

III. Data Analysis

During the data analysis process, I drew upon both quantitative and qualitative data sources to respond to each research question. Generally, the quantitative analysis provided an overarching portrait of pathways the court debt collection system, while the qualitative analysis supplemented and contextualized these broad findings by drawing on individual debtors' narratives and experiences.

A) Who is being incarcerated for debt delinquency in Rhode Island?

First, I used the random sample of debtor inmates to produce summary statistics on the criminal history, debt payment history, and employment status of jailed debtors prior to their arrest. The qualitative data contextualized all three of these areas of analysis—first, interviewees provided richer information on their employment, income, and social services receipt that built a narrative around the basic employment rate in the larger data sample. Debtor interviewees also provided information about why they missed the hearing that ultimately resulted in a bench warrant. These responses were coded for common themes and compared to the quantitative debt payment history findings.

B) How is debt collection policy being implemented in Rhode Island in light of recent reforms?

I analyzed policy implementation from two perspectives: implementation fidelity and process variation. First, I developed a set of quantitative and qualitative indicators to determine the extent to which the following four key legislative reforms were being applied to arrested debtors. I isolated the main elements of each reform and investigated each element in turn.

1. Determination of Ability to Pay (§12-21-20 and §12-20-10):

a) Did the Judiciary promptly and systematically determine ability to pay for all debtors in 2015?

b) Did magistrates draw on a standardized financial assessment instrument to do so?

c) Did this assessment process include the criteria for determining ability to pay laid out in §12-20-10?

2. Cost Abatement (§12-20-10):

a) Did magistrates waive eligible costs of those who they determined to be legally unable to pay?

3. Minimization of Jail Periods for Arrested Debtors (§12-6-7.1):

a) Were all arrested debtors brought before a judge within 48 hours, with the exception of those whose commitments included weekends and judicial holidays?

b) Were daytime arrestees brought immediately before a judge instead of being taken to the Intake Center?

4. Credit for Nights in Jail (§11-25-15):

a) Were all arrested debtors credited $50 towards their outstanding court debt balance for each night spent in jail?

I investigated the implementation of ability to pay determinations using courtroom observation and conversations with clerks and magistrates, as these determinations were not systematically recorded in the quantitative INFACTS or CourtConnect data sources. Incidences of cost abatement, however, were systematically noted in CourtConnect, and I produced a total abatement rate for the random debtor sample. I evaluated the implementation of the jail minimization reforms by calculating every debtor inmate's length of stay in the INFACTS data

file and checking for the presence of daytime arrestees among my inmate interview sample. Finally, I investigated the use of the $50 credit through courtroom observation, inmate interviews, and informal interviews with magistrates and other criminal justice stakeholders.

Beyond examining high-level fidelity with recent legislative reforms, I also tracked variation in debtor experience within the debt collection process, starting from a debtor's original missed payment date to his ultimate release from jail. This analysis largely relied on qualitative data and was informed by Sandfort & Moulton's (2015) "Frontline Interactions Audit." In keeping with the authors' novel implementation research protocol, I analyzed interview transcripts with a goal of evaluating whether interactions with arrested debtors were uniform and consistent with both policy intent and debtor expectations. First, I coded interviewee narratives about the nature of their treatment by law enforcement during arrest and commitment to identify common debtor pathways to the Intake Center and key points of variation in debtor inmate experience while in jail. In each debtor's narrative, I also flagged every misconception about the debt collection process and every miscommunication with a judicial or law enforcement representative. Within these two categories I identified common themes and linked them to key breakdowns in the implementation of the debt collection process. Finally, I drew upon courtroom observation and informal interview notes to identify variation in in magistrates' behavior and decision-making during the payment hearings that follow a debt-related commitment.

C) How does the debt collection regime (including any implementation challenges) affect arrested debtors' lives?

I drew on both quantitative and qualitative data to analyze the impact of jail time on three dimensions of debtors' lives: their behavior, their circumstances and their wellbeing. First, in order to understand how jail time influenced debtors' future debt payment behavior, I drew upon

the random debtor sample to track jailed debtors subsequent payments and court appearances. I calculated the percent of jailed debtors who attended one or more payment hearings and made a payment on their debt within the month out of release, as well as the percent of jailed debtors who paid their debts in full by the end of 2015. I contextualized these findings with interviewee narratives about how their time in jail affected their willingness to comply with future court debt obligations. Second, I coded interviewees' responses about how their time in jail would affect three key factors of stability in their lives: employment, housing, and social relationships. I also created a list of other effects of the jail time that interviewees voluntarily identified and aggregated this list for common themes. Finally, I coded the tone of interviewee responses to all questions for emotional themes and indicators of debtors' overall wellbeing.

IV. Conclusion

In this mixed-methods study, I sought to respond to the debt collection reforms passed in 2008 with a focus on implementation challenges and their effects on debtors' lives. I attempted to understand who was jailed for failure to appear at debt payment court dates and what their experiences were within the system. I also sought to understand how variations in debtor experiences with the debt collection regime might affect debtors' lives and their future interaction with the criminal justice system. While this research suffers from limitations in both the data sources used and the experimental design employed, it sheds light on a population that is undocumented and unnoticed in Rhode Island's current criminal justice bureaucracy. It also provides a comparative follow-up to Horton's (2008) study that helps state policymakers observe changes in debt collection policy in the state over time.

CHAPTER 5: RESULTS

I. Introduction

The jailed debtor population in Rhode Island in 2015 was predominantly low-income and composed of non-violent, misdemeanor offenders who had a history of debt payment attempts and noncompliance. The presence of indigent debtors in the Intake Center population signals that the Judiciary did not systematically assess debtor ability to pay or abate the costs of those found to be legally indigent—courtroom observations and conversations with magistrates confirm this implementation failure. The state criminal justice system did successfully reduce the length of commitments for debt delinquency and credited every arrested debtor $50 per night at the Intake Center—but a significant portion of low-income debtors should never have arrested in the first place. Multiple procedural injustices within the debtor arrest and commitment process—especially failure to provide debtors with information or phone access—jeopardized debtors' employment status and exacerbated debtor financial and emotional vulnerability.

II. Portrait of the Debtor Inmate Population

In 2015, roughly 1,556 adults in Rhode Island were jailed for failure to appear at a payment date in one of Rhode Island's District or Superior courts. This translates to 1,685 debt-related commitments, because some debtors were jailed multiple times in the 12-month period. Commitments in 2015 represent a 31% decrease from 2007, when there were 2,446 debt-related commitments annually (Horton, 2008, p.11). But while the total number of debt-related commitments has gone down, the proportion of debtors relative to the total inmate population has fallen by less than half as much, from 18% in 2007 to 15.5% in 2015.

A) Criminal History

The vast majority of jailed debtors in Rhode Island in 2015 were nonviolent, misdemeanor offenders who were not incarcerated as part of their original sentence, as shown in Tables 1A and 1B.

Table 1A: Criminal History Comparison of Debtor and Non-Debtor Inmates

Characteristic	Non-Debtors (N=19,068)		Debtors (N=1,871)	
Crime	Frequency	Percent	Frequency	Percent
Non-Violent	5,617	29.46%	1,384	73.97%
Violent	7,791	40.86%	163	8.71%
Drug	2,913	15.28%	201	10.74%
Breaking & Entering	1,496	7.85%	59	3.15%
Weapons	309	1.62%	8	0.43%
Rape / Child Molestation	325	1.70%	0	0.00%
Murder	104	0.55%	0	0.00%
Sex	261	1.37%	13	0.69%
Other	252	1.32%	43	2.30%
			X^2 = 1.6e+03	P = 0.000*
Crime Type	Frequency	Percent	Frequency	Percent
Misdemeanor	11,166	58.56%	1,354	72.37%
Felony	7,512	39.40%	517	27.63%
			X^2= 154.093	P = 0.000*
License-Related Charge	Frequency	Percent	Frequency	Percent
License Charge	1,475	7.74%	675	36.08%
Non-License Charge	17,593	92.26%	1,196	63.92%
			X^2 = 1.5e+03	P = 0.000*

Table 1B: Incarceration History of Debtor Inmates

Characteristic	Debtors (N=333)	
Incarceration Status	Frequency	Percent
Was Not Incarcerated	269	80.78%
Was Incarcerated	60	18.02%
Missing	4	1.20%

The final variable in Table 1A describes the percentage of debtors who were arrested for debt delinquency on an original charge of driving with a suspended license. This was isolated for review because it was the most common single charge for both debtor and non-debtor inmates.

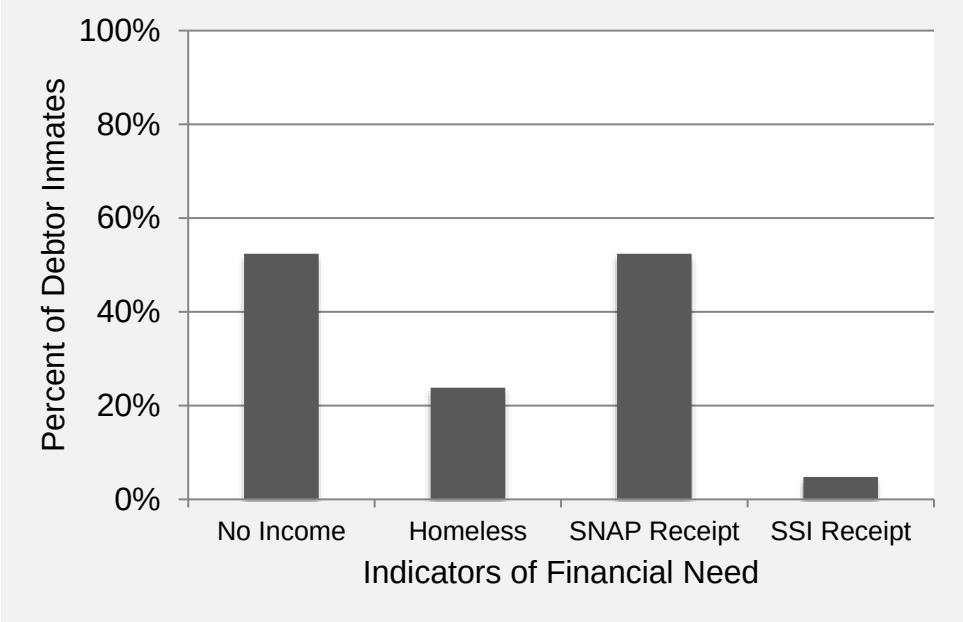
B) Employment & Income

In 2015, just under half of arrested debtors were unemployed, and many likely met one or more of the criteria for determining "inability to pay" put forth in §12-20-10 (see Appendix A). As shown in Table 2, the overall debtor inmate unemployment rate was 44% in 2015. The interview sample presented an opportunity to collect richer data on debtors' financial need—Figure 1 displays key indicators of poverty among the 21 interviewees.

Table 2: Unemployment among Debtor Inmates

	All Debtor Inmates (n=1,556)		Interview Sample (n=21)	
Employment Status	Frequency	Percent	Frequency	Percent
Employed	866	55.66%	10	47.62%
Unemployed	690	44.34%	11	52.38%

Figure 1: Indicators of Inability to Pay among Debtor Inmates (n=21)

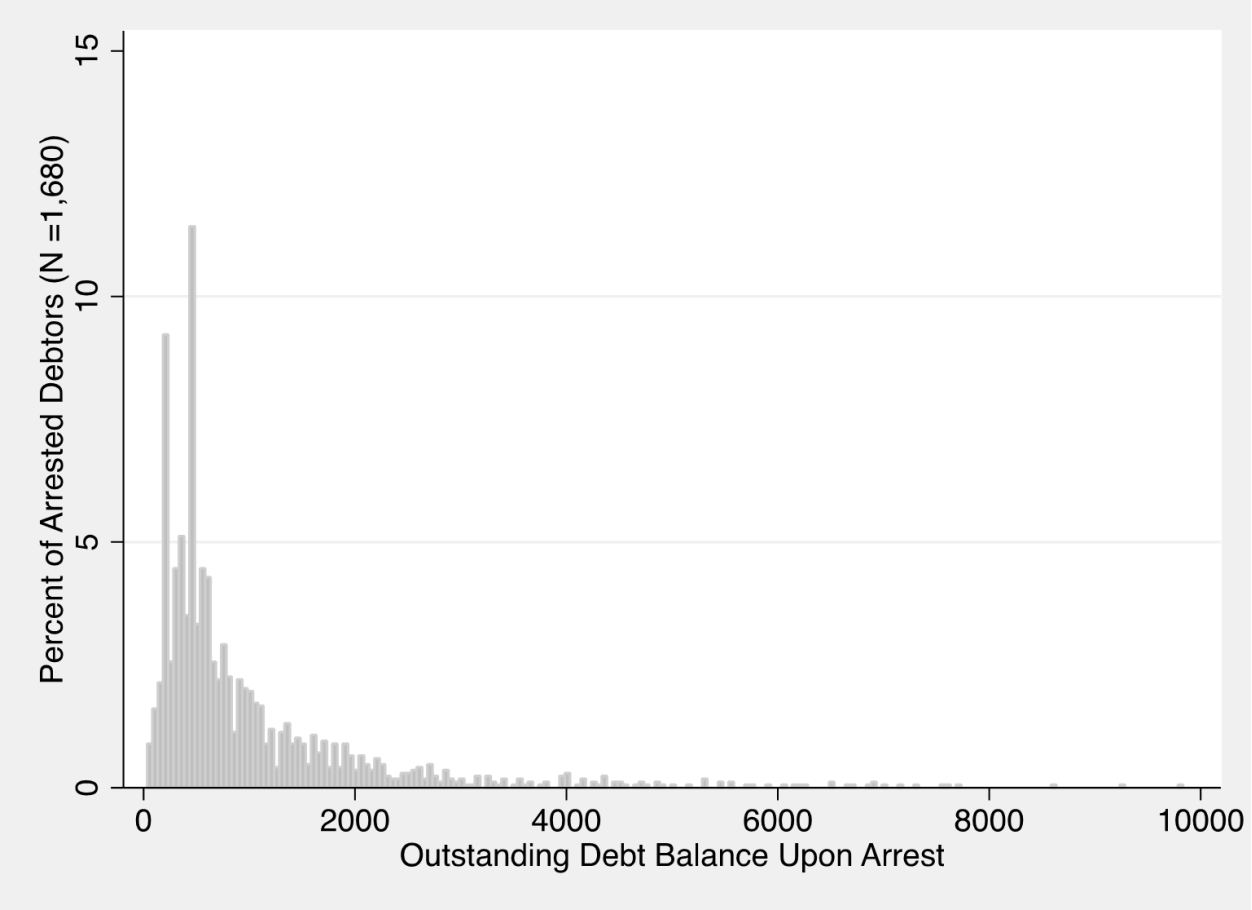


The mean monthly income among employed interviewees was $2,050, but a majority of debtors interviewed had no employment or other source of income. In parallel with this finding, a majority of debtors interviewed received food stamps, and one out of 21 received social security benefits. Moreover, five out of 21 of debtors interviewed were homeless—three were "couch surfing" with no stable address, and two were staying in a shelter. As Table 2 shows, unemployed debtors were overrepresented in my sample compared to the overall debtor inmate population in 2015, so it is possible that the other indicators of financial need were also more severe in this small non-random interview sample.

C) Debt Payment History

Delinquent debtors who were committed to the Intake Center in 2015 had a history of both positive and negative involvement with the system—they had generally tried to pay their debt obligations but sometimes failed to do so. This resulted in a history of one or more bench warrants and subsequent Intake Center commitments for debt delinquency. Arrested debtors' mean and median debt balances were $1,082 and $592 respectively. Thus, mean debt balance in 2015 was 31% higher than in 2007—and because this represented only the debt owed on the cases that each debtor had fallen *behind* on, it is an understatement of the total amount owed per debtor across all criminal convictions. In my interview sample, jailed debtors owed court debts on an average of five criminal cases in total, including the case they were currently arrested on. Figure 2 displays a histogram of the size and distribution of debt balances in the arrested debtor population in 2015.

Figure 2: Outstanding Debt Balances for Arrested Debtors



Tables 3A and 3B represent patterns of historical debt compliance across the sample. Table 3A shows the mean number of prior interactions each debtor had on the case(s) that they were ultimately arrested on, with a 95% confidence interval. Table 3B shows the percent of debtors who had previously appeared and paid at least once on the case that they ultimately fell behind on. It also displays the number of jailed debtors who had received at least one prior bench warrant for failure to appear at a court payment date.

Historical Debt Compliance among Debtor Inmates

Table 3A

Variable	Mean (N = 333)	Median	Maximum
# of Prior Scheduled Payment Dates	4.41 ± 0.37	2	40
# of Prior Voluntary Court Appearances	3.59 ± 0.36	1	43
# of Prior Payments	3.23 ± 0.35	1	42
# of Prior Debt-Related Commitments	1.34 ± 0.10	1	13

Table 3B

Variable	Debtor Sample (N=333)	
Made one or more prior voluntary court appearances	Frequency	Percent
Yes	191	58.59%
No	135	41.41%
Missing	7	2.10%
Made one or more prior debt payments	Frequency	Percent
Yes	185	56.75%
No	141	43.25%
Missing	7	2.10%
Received one or more prior bench warrants – this case	Frequency	Percent
Yes	164	50.75%
No	169	49.25%
Missing	0	0.00%
Received one or more prior bench warrants - all cases	Frequency	Percent
Yes	289	86.79%
No	43	12.91%
Missing	1	0.30%
Been arrested for debt delinquency one or more times		
Yes	192	57.66%
No	141	42.34%
Missing	0	0.00%

A slim majority of jailed debtors had shown up voluntarily to at least one prior payment-related court date and made at least one payment on their case prior to missing a payment date and getting arrested (58% and 56%, respectively). The median numbers of prior voluntary

appearances and prior payments across the sample were both 1. Although most jailed debtors had made some effort to comply with payment obligations, many had also been arrested before for debt delinquency. While the average arrested debtor had two prior hearings on his court calendar, he had only voluntarily appeared to one of them. A full 55% of the debtors arrested in 2015 had been jailed at least once before for failure to appear at a court payment date. 24% of debtors had experienced just one prior debt-related commitment, but one debtor had been jailed 13 times in the past. 84% of the sample had received at least one prior bench warrant for failure to appear at a payment date. The latter population is larger because bench warrants do not always result in jail time—if delinquent debtors appear in court voluntarily after receiving a bench warrant, their warrant is often cleared.

Even though most arrested debtors had a history of involvement with the debt collection process, 6% of arrested debtors had no history of warrants or arrests for debt delinquency and were arrested after missing their very first debt payment hearing in court.

Responses from the inmate interviews illustrate common reasons that debtors miss court payment dates. Half of debtor inmates in the interview sample reported that they simply forgot to attend their last payment date (N=9). Seven of these interviewees reported that they became caught up in the excitement of completing a prison or probation sentence and forgot that they were still responsible for debt payments. Other interviewees were aware of their payment dates but chose to skip them—either because they chose to spend scarce funds on other needs (N=5) or because they perceived their debt obligations to be unjust (N=2). One interviewee, Charlie,[†] was an unemployed 48-year-old Black man who owed $592 on a driving with suspended license charge. Reflecting on his payment history, he revealed,

[†] All interviewee names have been changed

> So you know the main reason I blow it off, it's a choice of eat now or pay…and it's easier for me to pay later cause now I'm locked up, and they're subtracting money off of my fines for being locked up, and believe it or not, that's easier for me.

Jordan, a 47-year-old Black man, had been chronically homeless for the last five years but owed $1,445 across two old charges. At his most recent conviction, he felt he was forced into an unfair plea bargain on his original charge and decided, "That's it, I'm done with court." From then on, he refused to attend his payment dates because "I don't want to see no judge when I have no money."

Some also faced transportation challenges on the day of their court appearance. Because a large portion of jailed debtors have suspended or revoked licenses, they rely on rides and public transit to reach courthouses that sometimes are far from where they live. Red, a 37-year-old who was "couch surfing" and had no stable address, explained,

> I don't have transportation and right now—I'm staying with my sister, she's in Central Falls. Before that I was staying in Woonsocket, and it's hard to get from Woonsocket to over here if you don't got a ride…It's usually during the week that you gotta go [to court] and most people I talk to they got jobs. It's hard for them to come take me to court.

Finally, two debtors in my sample reported that they missed their court dates because they were unable to receive permission from their boss to take a day off of work and attend the payment date.

In conclusion, jailed debtors were largely nonviolent and misdemeanor offenders who owe debts on multiple prior convictions. A majority of these debtors had attempted to comply with their debt obligations, but most had been arrested at least once before for debt delinquency.

III. Implementation of the Debt Collection Regime

While the state criminal justice system has successfully implemented most reforms governing a debtor's time in jail, the Judiciary only minimally assesses debtor ability to pay and thus abates costs for a minority of eligible debtors under the current legislative guidelines. Moreover, arrested debtors face a host of procedural injustices from the date of their missed payment to their release from jail, including a lack of correct information provision by state agents and a denial of access to a phone.

A) Assessment of Ability to Pay

As described in Chapter 2, legislative reforms passed in 2008 required judges to systematically assess all defendants' ability to pay court debts, and set forth guidelines for how and when this assessment should take place. In observation of 25 debt-related hearings and interviews with multiple magistrates and court clerks, I found that Superior and District court judges in Rhode Island do not systematically or sufficiently determine the ability to pay of debtors arrested for debt-delinquency.

During observation of 25 debt-related hearings across the 3rd & 6th District and Providence Superior courts, I did not witness any magistrate ask *any* defendant about *any* of the criteria for determining ability to pay that the legislature laid out in §12-20-10 (which can be found in Appendix B). Although the hearing sample size was small and non-random, the Judiciary's failure to adopt a uniform financial assessment instrument was confirmed by a statement from a Rhode Island judicial librarian. In response to my question "Does the Judiciary use a standardized financial assessment instrument?" the librarian reported:

> There are a couple of ways in which a defendant's indigency is determined. One is to refer a defendant to the Office of the Public Defender, which has an interview process for

> making that determination. Another is for a judge to query a defendant in open court under the criteria enumerated in §12-21-10. (C. Hanna, personal communication, November 18, 2015)

This statement implies that, while Rhode Island judges are certainly aware of the legislature's criteria, the Judiciary has not yet adopted a tool for magistrates to use that ensures uniformity across hearings or includes any documentation or recording procedures.

Instead of using the legislature's criteria for determining ability to pay, magistrates most commonly probed for debtor financial need by asking about employment status (N=15) and weekly or monthly income (N=8). They also consistently asked debtors "How much can you afford to pay each month?" (N=15) and "When can you make your next payment?" (N=10). Three representative exchanges are displayed in Figure 2 on the following page.

Because I only observed hearings that took place after a delinquent debtor's arrest, it is possible that magistrates gathered more information in debtors' first ability to pay hearings after sentencing. However, informal interviews with three magistrates did not imply that this was the case. Indeed, most magistrates and clerks told me that they did not hold initial hearings at all, and simply relegated a newly sentenced debtor's first "ability to pay" diagnosis to their clerk's office. A conversation with one District Court clerk confirmed this trend:

> At sentencing, they get a payment date. [It is] usually about two months post-sentence. We tell them they have to pay minimum $20 on that date, but if they pay less, we work with them. On their first payment date they sign a monthly contract for a payment plan. We ask them what their income is and how much they can pay each month (D. Bellamy, personal communication, January 25, 2016).

In response to a similar question about how her office determines ability to pay, a Superior Court clerk simply said, “We usually do [payment plans of] $30 per month” (personal communication, January 13, 2016).

In summary, it appears that the Rhode Island Judiciary may be failing to fully implement almost all elements of §12-21-20 that govern determination of ability to pay. First, magistrates did not always “make a preliminary assessment of a defendant’s ability to pay immediately after sentencing or nearly thereafter as practicable…” (§12-21-10 (b) & (c)). When they did inquire about ability to pay, they did not use “standardized procedures including a financial assessment instrument…” (§12-21-20 (d)). Finally, these inquiries were not “completed based on a personal interview of the defendant [that] includes any and all relevant information relating to the defendant’s present ability to pay, including, but not limited to, the information contained in §12-20-10” (§12-21-20 (d) (2)).

Figure 3: Debt-Related Hearings in the Rhode Island Judiciary

3rd District Court – 1/19/16

Judge: *Why did you miss your payment date?*

Debtor: *I tried to send my girlfriend with a payment with but they wouldn't accept it. Every [month] I make a 20 dollar payment!*

Judge: *Not on this case you haven't!*

Debtor: *I can pay on Friday*

Judge: *How much do you earn?*

Debtor: *$22 an hour…I can do better than $20 per month.*

Judge: *I want $100 by Friday*

Debtor: *I have to pay rent; can you do $75?*

Judge: *Thereafter beginning in February it's $125 a month. You're making good money so it's time to step up to the plate.*

6th District Court – 1/20/16

Judge: *What's going on? We've never gotten one dime!*

Debtor: *I have to find a job. I have two kids.*

Judge: *Who has been supporting the kids?*

Debtor: *My kids' mother. She is right there. [points]*

Judge: *You also owe restitution [in addition to costs]. You haven't paid that either. That was three months ago. I don't know why I shouldn't have you locked up right this second!*

Debtor: *I'm sorry.*

Judge: *You'll be back on February 10th for a payment review.*

Providence Superior Court – 1/13/16

Judge: *What is your plan for paying these?*

Debtor: *After February 22 I can start paying*

Judge: *What will you be able to afford to pay?*

Debtor: *Maybe $30 per month?*

Judge: *I'll put you on that schedule.*

B) Abatement of Costs

Perhaps resulting from a limited determination of ability to pay, magistrates only abated the court costs of 3% (±.09%) of debtors arrested in 2015. Thus, they did not take widespread advantage of the power granted to them by the legislature to abate most cost categories for those who are found to be unable to pay (see Table 4). Courtroom observation and interviews with magistrates and clerks suggest that the abatement rate is low for two reasons: first, as documented above, magistrates do not systematically determine ability to pay in a way that would allow for cost abatement. Second, magistrates who do encounter an indigent defendant prioritize intermediate solutions rather than full abatement, especially incremental and/or intermittent payment plans.

Table 4: Cost Abatement for Arrested Debtors

	Abatement (N = 333)		
Court	# of Debt-Related Cases	# Abated	Abatement Rate
2nd District	10	1	10.00%
3rd District	104	3	2.88%
4th District	19	4	21.21%
6th District:	99	2	2.02%
Providence Superior	75	0	0.00%
Kent Superior	11	0	0.00%
Newport Superior	9	0	0.00%
Washington Superior	6	0	0.00%

Like the results described in the previous section, the 3% abatement rate only pertains to hearings that took place after each debtor's arrest. Any abatement that occurred during a different hearing (for example, immediately after sentencing) would not appear in this result. For this reason, the abatement rate documented here is likely an under-estimate of the total

abatement rate for all debtors (both arrested and not arrested) in 2015. Similarly, the abatement rate does not reflect any partial reductions in court debts, as these are not systematically recorded in clerks' notes on CourtConnect.

When asked how they respond to indigent debtors, most magistrates reported that they preferred to encourage small payments rather than waive costs altogether. One magistrate mentioned, "If someone comes to me for multiple months and says he can't pay, I ask for proof of employment search and set weekly court dates. Often they'll just get frustrated by the frequent dates and start paying something." Another magistrate reported that she only regularly abated the costs of inmates who have been sentenced to long prison terms and will be unable to begin paying for quite a while. For all other debtors, she explained, "I prefer to lower [the debt balance] rather than get rid of it altogether because I think it's useful for them to pay at least some amount of the costs." In stark contrast to this trend, however, one magistrate from the 6th District Court reported that he automatically abated costs for anyone who was "on SSI permanently" and offered a community service alternative to people with "marginal ability to pay." This exception to the norm shows that judicial discretion may produce troublesome disparities in debtor outcomes in the absence of a standardized protocol for determining and responding to ability to pay.

C) Reduction of the Commitment Period

In 2015, the Judiciary successfully limited most debtors' time in jail to less than 48 hours and granted virtually all debtors the $50 nightly credit required by law—but they needlessly incarcerated a significant population of delinquent debtors who were arrested during the day and brought directly to court for a hearing.

The mean number of nights spent in jail by debtors was 1.21, and 87.5% of debtors spent fewer than two nights in jail. As shown in Figure 4, virtually all arrested debtors are processed more efficiently than they were prior to the 2008 reforms. While clerks do not systematically record the application of the $50 nightly credit on CourtConnect, interviews with inmates, magistrates, and clerks all confirmed that the credit is automatically granted and universally applied. Despite widespread application of the 48-hour commitment limit, there were two types of circumstances where arrested debtors were treated outside the bounds of the 2008 reforms. First, one arrested debtor in my interview sample was accidentally held in jail for 27 days because a clerk in the 6th District Court forgot to release a "hold" on his record after the conclusion of his "ability to pay" hearing. Such a catastrophic oversight is likely rare within this system, but its severity merits individual recognition in these findings. In addition to the debtor described above, one additional debtor in 2015 was held for more than 20 days solely on a debt-related charge (the specific reason for his extended stay remains unknown).

Second, a larger group of arrested debtors were needlessly committed to jail even though they had been arrested during the day and brought immediately before a judge for an ability to pay hearing. In the interview sample, seven out of 21 arrested debtors actually saw a judge and went through an ability to pay hearing *before* being admitted to the Intake Center (see Figure 5). Under the assumption that the legislature passed the "immediate hearing" provision in order to help some arrested debtors bypass jail altogether, the judicial practice of jailing daytime arrestees seems to counteract this goal.

Figure 4: Arrested Debtors' Nights in Jail

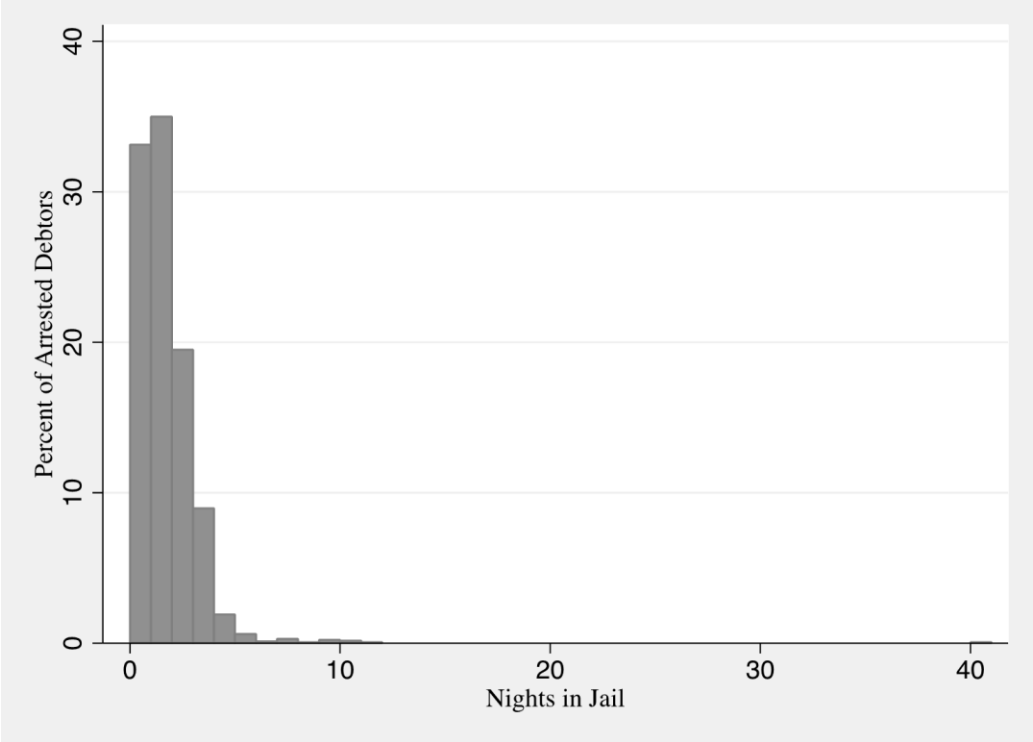
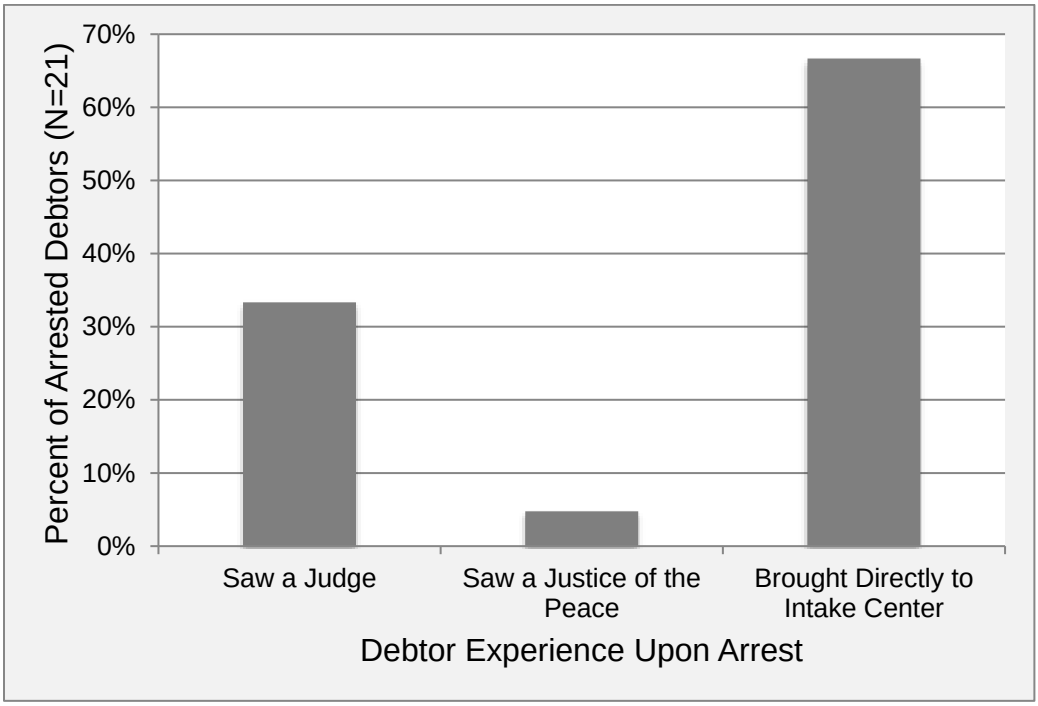


Figure 5: Debtor Arrest and Commitment Patterns



Just like the cost abatement arena, judges' decisions about whether to jail daytime arrestees are left to their discretion. One daytime arrestee who was subsequently sent to jail expressed frustration with this use of discretion:

> I feel like it should be more written rules than just how the judge feels… because when I got picked up I was with somebody—he had the same thing, he got picked up on a suspended license [charge that] he didn't pay or anything. But he had a son so the judge let him go, and then [she] put my bail for what I owe. And I'm like, how does that even work?… I just felt like he had a nice cut clean cut and I didn't shave, so she probably thought I don't have any money…I don't know she just looked at my face and [thought] 'you know what you're just another one of those,' and…he had [nice] shoes on, he was dressed up.

D) Process Failures

Beyond evaluating adherence to the laws governing court debt delinquency, I also sought to map out the debtor arrest and incarceration process and identify any elements of the process that might be undermining policy goals. Using both quantitative and qualitative data sources, I identified three key process failures experienced by many debtors in the debt collection regime. Before debtors were arrested, a variety of state agents sent them conflicting cues about how the court would respond to their missed payment date. Upon arrest, delinquent debtors were sometimes misinformed or under-informed as to the reason for their arrest and the terms of their commitment. Finally, almost all arrested debtors were denied the opportunity to place a phone call for the entire time they were in the custody of the state. All three of these phenomena may significantly impact the achievement of the legislature's goal of minimizing the use of jail for debt delinquency and the harm it causes.

1. Inconsistent Response to Failure to Appear

Debtors who failed to attend a court payment date received an inconsistent and sometimes halting state response to their actions that caused confusion and prevented voluntary debt compliance. First, while courts universally issued warrants for failure to appear, they varied drastically in the length of time they allowed to elapse between the missed payment date and the warrant issue date. Second, probation and parole officers did not inform supervised debtors of debt-related warrants, even if they met in person with their supervisee while a warrant was out for their arrest.

In 2015, the median "warrant lag"—the time elapsed between a missed payment date and a warrant issue date—was 15 days, and ranged from 0 days to 1432 days (see Figure 6). It is possible that the observed variation was exaggerated by incomplete information on the Judiciary's CourtConnect database, but multiple judicial workers confirmed that long lag times were the norm, especially in courts with larger case loads. A District Court clerk reported that these lags often occur because magistrates have to personally sign every bench warrant, and some courts with larger dockets simply are not able to make time for this process. A 6th District Magistrate reported that his courthouse processes bench warrants in large chunks a few times per year, while a Providence Superior court magistrate instead signs most bench warrants on the same business day as a debtor's missed payment. Disaggregation of lag times by courthouse confirmed this anecdotal evidence. The 6th District Court (the court with the largest criminal case load) had the longest median warrant lag time, at 52 days. The superior courts (with comparatively smaller case loads) exhibited the shortest lag times (See Table 5).

Figure 6: Warrant Lag Times for Delinquent Debtors

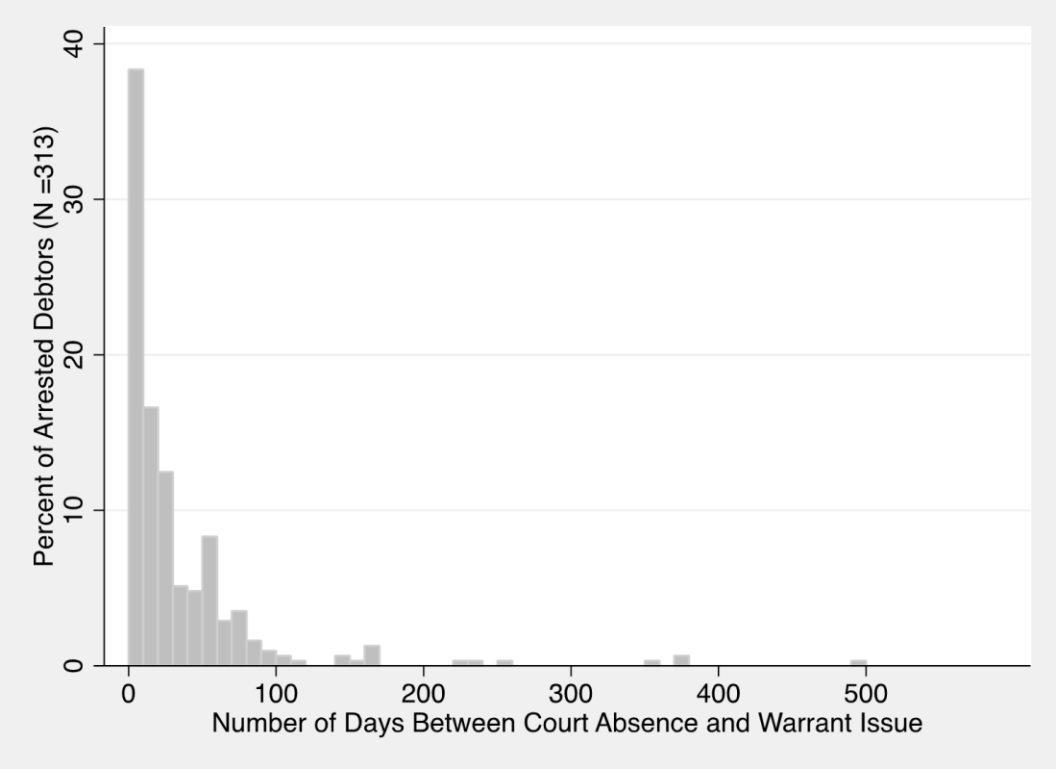


Table 5: Warrant Lag Times by Courthouse

Jurisdiction	Median Warrant Lag	Maximum Warrant Lag
6th District	52 days	1432 days
4th District	23 days	358 days
3rd District	17.5 days	239 days
2nd District	7.5 days	56 days
Providence Superior	5 days	370 days
Newport Superior	4 days	6 days
Washington Superior	3 days	7 days
Kent Superior	1 day	75 days

Even after a warrant was issued, debtors were not systematically notified of the open warrant by the Judiciary or their probation or parole officers. Seven out of 21 debtors in the interview sample believed that their probation officers were responsible in some way for monitoring and reminding them of their court debt payment dates, and they were surprised to

learn of their warrants upon arrest. Scott was a White 29-year-old who owed $218.50 on a domestic disorderly conduct charge. He reported,

> I had disorderly conduct and it was twelve months ago. So I did probation, six months probation, and the whole time I did six months probation they didn't say nothing about me having a warrant. They should tell you if I even had a court date—at least tell me if I have a court date—but I did the whole 6 months probation like I don't get in trouble!

John, an unemployed 26-year-old who owed $1,350 on a DUI charge, reflected,

> They wanted my ID and I was like, 'yeah no problem.' I didn't know I had a warrant, I would have handled the warrant. The warrant's almost been out for a year almost! My probation never told me…I'm surprised she didn't tell me about the warrant because she's my probation officer.

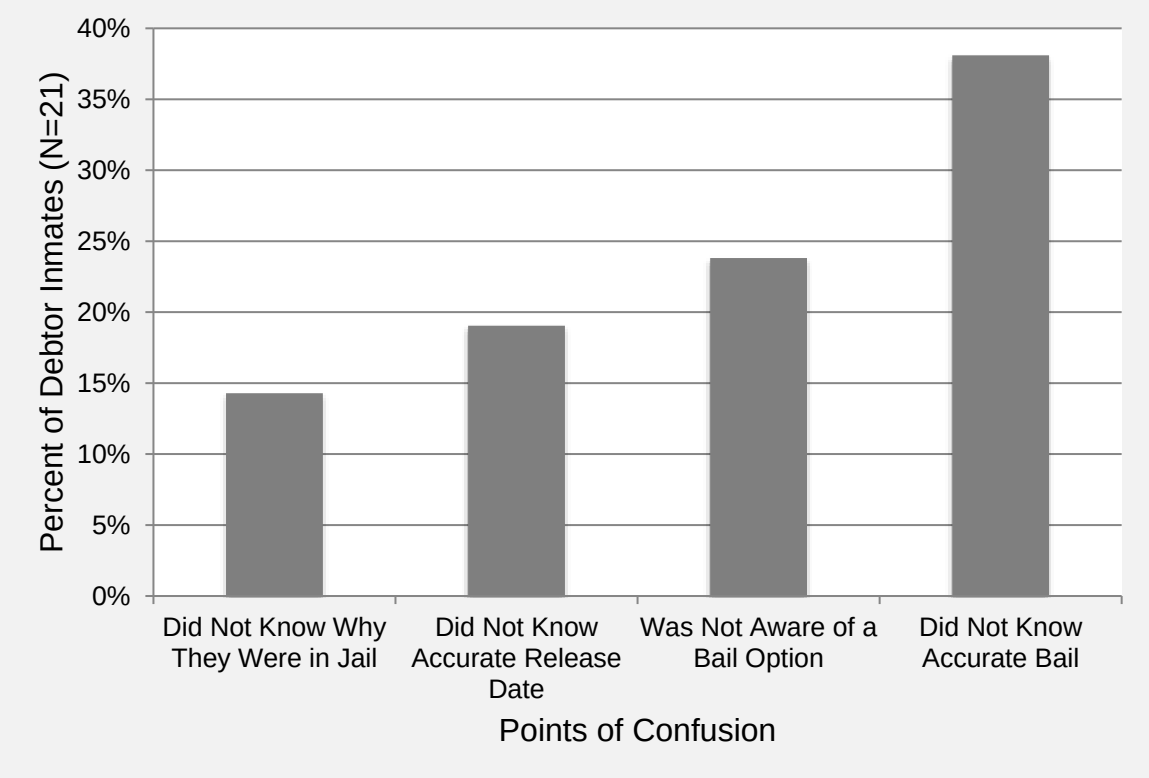
A spokesperson for the Department of Probation and Parole confirmed that officers do not take any responsibility for helping debtors keep up with court dates. She expressed the sentiment that this element of the system is debtors' own responsibility (C. Imbroglio, personal communication, January 26, 2016). Nevertheless, it is logical that some supervised debtors would expect such guidance from their probation officers.

2. Lack of Communication During the Arrest Process

Upon arrest, debtors were not systematically informed of the reason for their arrest or the terms of their commitment at the Intake Center. While most debtors interviewed were aware of their outstanding warrant and familiar with the consequences of debt delinquency, debtors who did not understand the process received very little explanation from police or corrections officers.

As Figure 7 shows, debtors in the interview sample lacked a range of crucial information about their commitment at the Intake Center. Three out of 21 men interviewed actually *did not know why they were in jail* until I explained their status during our interview. One of these interviewees was told he had been arrested for a probation violation. The other two interviewees were both arrested on warrants more than 10 years old, and the only information the police provided (according to the interviewees) was the nature of the original charge that their warrant was linked to. In fact, two interviewees asked me to return the next day with additional information about their incarceration so that they could better grasp the details of their situation.

Figure 7: Points of Confusion among Debtor Inmates



Even among interviewees who knew why they were in jail, eight interviewees could not report their accurate bail amount within $200, and five interviewees did not know they even had a bail option. Primo, a 26-year-old Black man who had never been to jail before, lamented, "You

have to over-communicate here because they fail to tell you and they assume you've been here a million times so you should know!" Finally, some debtors did not understand the finite nature of their commitment—and at least one had been actively misinformed about his commitment length by a magistrate. He lamented:

> [I'll be here] until someone bails me out…[the magistrate] is telling me that, no, this is my third time trying to pay these court fines, so she's not going to let me out until somebody pays it for me—or I just sit out my days until the court fines is paid up!

In fact, as legally required, he would be released within 48 hours regardless of whether he paid his debts or not. He was not aware that this was the case.

3. Lack of Phone Access

While at the Intake Center, almost none of the debtors in the interview sample were given permission to use the phone even though official Department of Corrections policy allows every new inmate one bail call. In informal conversations with two corrections officers at the Intake Center, both affirmed that every new inmate is given multiple opportunities in the morning and evening to place one permitted phone call to request bail. But in stark contrast to this official narrative, a majority of interviewees reported that they were not allowed to use the phone while in jail. Five out of 21 interviewees had actively requested a bail call and reported that they were denied the opportunity to make one. One complained,

> I mean it shouldn't take as long for people to be able to use the phone. Because, like, I've been sitting in here for the last three days and it's like, I could have called my mom and gotten out. I could have been bailed out already. And I can't even get on the phone to send a message out to say 'Hey, I'm locked up, can you come bail me out?'…The first time I ever came here they did a bail call for me, but other than that [they never have]…

> and even then, it took me like 45 minutes, I like cussed a guy out because I wanted to get a phone call, and then they put me in a room where the phone didn't even work. So it was like…the judge sent paperwork saying I had to make a phone call and [even then] they didn't even let me go.

While the Department of Corrections insists they make the bail call opportunity available, two out of three magistrates interviewed for this study reported hearing similar inmate reports about a lack of access to phone calls.

In addition to inmates who were denied a bail call, other interviewees were simply not aware of the bail call opportunity. This second group of inmates believed that they had no access to the outside world until their Intake Center prepaid calling accounts were activated. Right now, the activation process takes up to *two weeks* after an inmate's admission date. According to one corrections officer, this lag time occurs because the Intake Center has just one employee tasked with manually inputting each new inmate's PIN and list of approved phone numbers into the Department's phone vendor's online system (C. Barney, personal communication, January 26, 2016). DOC representatives acknowledge that this arduous and understaffed process results in long delays. New inmates have no connection to the outside world for up to two weeks, aside from one bail call opportunity that many did not know existed.

IV. Impacts of the Debt Collection Regime

As currently implemented, the debt collection process negatively impacted debtors' future payment compliance, their employment status, and their emotional wellbeing. By default, arrests for debt delinquency also pushed debtors further into debt through the application of a $125 warrant fee for every debt-related arrest.

A) Effects on Debt Payment Compliance

As described in the literature review, a major assumption underlying the use of jail as a debt collection tactic is that harsher enforcement methods are more likely to yield payment from delinquent debtors. In my random sample of jailed debtors from 2015, full payment after most debtors' arrests did not occur. 6% of debtors arrested in 2015 were bailed out of jail (and thus paid in full), and 22% of debtors paid their court debts in full within six months. The low abatement and paid-in-full rates indicate that the majority of arrested debtors arranged or continued a payment installment plan for their outstanding debts. This incremental method had somewhat high but non-universal compliance. 65% of debtors made one payment of any size within a month after going to jail. 68% of arrested debtors showed up to their next payment date in court. This means that around 20-30% of jailed debtors promptly received another warrant for failure to appear and began the arrest and commitment cycle again without having made a single payment in between. The effects of jail on debt compliance seemed to wear off over time as well—only 62% of those who attended their first post-jail payment date attended their second payment date as well. First-time jailed debtors in 2015 were slightly more likely to make payments compared to repeat offenders: 21% paid in full within six months (vs. 17% overall) and 67% made some payment of any kind within a month of being in jail (vs. 65% overall).

In the interview sample, select debtors indicated that jail time made them more likely to comply with future payments, but others indicated that the time in jail actually made them *less* likely to pay. A few interviewees acknowledged that the commitment offered a useful opportunity to reflect on their actions. Primo admitted, "I mean it's reasonable, it's an eye opener, it really does help…it makes you think in here. Like 'what the hell was I doing, I should have just paid that, I wouldn't be in here.'" Another agreed, "I guess the time I'm in here sorts

stuff out like in your head, you know…[you] think about things, your life, where you want it to go."

However, other interviewees reported that their experience in jail made them less likely to pay in the future. Some inmates viewed the arrest as a sign that the state was trying to prevent them from building a crime-free life. Ted was a 41-year-old Social Security recipient with a long criminal record, but he had not been convicted of a new crime in about eight years. He explained,

> A lot of it's my own fault, but it's just…I don't know. Even when you try to get out of it—even when you try to get past it all—it's like they just won't let you. It's like they do whatever they do just to hold you down and that's not right to me. If somebody's trying to better [themselves] they should let them better themselves. But the court isn't gonna see it that way.

Ted and one other interviewee both reported that they actually planned to move out of state after their release to escape a system they viewed as oppressive. Other interviewees were reticent to pay their debts because their arrest strengthened a view of the state as inefficient and mismanaged. Scott, who owed just $93 dollars to the courts, joked,

> It's costing you guys more just to bring me here! 93 dollars just to drive me here, 93 dollars to drive me back, two dollars for every meal, two dollars for this jumpsuit…it's a really big inconvenience. Everybody could be saving money.

Another described the court debts as, "Just a way for this stupid state to make money, and God knows they don't even know how to spend it because we're still broke." Finally, most interviewees simply reported that they would not be paying because they were financially unable to. Jordan lamented, "They're trying to find ways to make me give them money I don't have."

B) Employment Effects

As described in the Literature Review, employment is largely believed to be a key factor in preventing offender recidivism by helping offenders establish pro-social ties and meet basic needs. When the eleven employed men in the interview sample were asked whether this jail time would jeopardize their employment, four said yes, four said maybe, and three said no.

Those inmates who were sure that the commitment would result in job loss were aware of specific workplace policies that they were violating during their time in jail. Primo reported that he would lose his job because he was committing his second "no call, no show." Two others had both just started their jobs less than a week ago and were violating a behavioral trial period. Finally, one respondent had a history of losing jobs after being jailed for debt delinquency and expressed certainty that this would happen again based on his experience.

Those who were not sure about the effect of jail on their job status expressed frustration with not being able to contact their work or even a family member who could reach out to an employer on their behalf. Tito, a 26-year-old Puerto Rican, owed $93.50 on a receiving stolen goods misdemeanor charge from 2008. He explained,

> I've got to go over and talk to them, show the paperwork, and see if they still going to take me back or if I lost my job…so that's still in the air. I missed my shift today—a nine-hour shift, so I mean…kinda weighs in on the restaurant when they are depending on you to be there to open and close and you're not even there…it's kinda like, 'Damn, do we need him or no?'

Another was concerned because he had told his employer he did not have any outstanding warrants when he got hired and thought that the employer would see this time in jail as a betrayal

of trust. Primo also felt like this jail time would confirm his employer's existing prejudice against him as a black male in a predominantly white suburban community:

> Hell yeah. I'm already a stereotype…in Lincoln a lot of people are not exposed to minorities, more of the exposure is from TV, so I'm like their first black person they see and what I represent is what they see from black people….so I don't know. It's my manager, you know, he's a good guy and everything but it's just…I'm a minority… sometimes they don't want to deal with problems that we bring.

Of the ten interviewees who were out of work, three reported that this time in jail would negatively impact their job search, while the remaining seven believed that this jail time would have no effect on their employment prospects. All three of the unemployed respondents who believed this time in jail would affect their job search also erroneously believed that this arrest would show up as a new charge on a background check. This misunderstanding fits into the landscape of confusion among this population that was described in the previous section.

C) Social Relationships Effects

Researchers have found that ex-offenders with stable and strong social relationships are less likely to commit future crimes. When interviewees were asked whether this time in jail would impact their social relationships, three said "yes," four said "maybe," and thirteen said "no."

Those who were sure that the jail time would negatively impact their relationships told stories of families and partners who were "fed up" with their history of offending and had told them that any more criminal activity would be the "last straw." Frankie, a 20-year-old White male who owed $405 to a District Court, explained,

> I just proved them all right that I was gonna end up back in jail…like it's my fault…[but] they're gonna look at it like I got arrested [for] a new crime! And now a lot of my family is probably just going to be like, 'well you f***ed up again, now you have to build it back'—and it's like, dude, I didn't even really go to jail for a crime, I went to jail for not paying a court fine.

Those who believed the jail time might negatively affect their relationships worried that partners or parents would be angry about a new arrest or anxious because they didn't know their whereabouts. Jay, a 29-year-old White male who had been denied permission call his girlfriend upon arrest, expressed,

> I mean think about it: I had my girlfriend's car; she lives all the way in Plymouth with me; we are stuck here in Rhode Island and there's no way to get her kids, no way to know where or how to get back, no nothing—and nobody knows where I am! For all she knows, I took the car to Mexico.

Those who were unconcerned about the impact of this jail time on social relationships either reported that family members were "used to this" behavior from them and wouldn't be hurt or surprised, or that family members "know them to be a good person" and would not be affected by this time in jail. Charlie explained,

> I've done a lot of time, I just finished doing 20 years, [and] I've been out for going on five years, so [this arrest] is not really a big scare for them, it's just…you know this is minor things compared to what I could be into. But I'm a pretty good guy, I'm staying out of trouble. That's why I take all this with a grain of salt.

D) Housing Effects

Criminal justice scholars have reached consensus that stable housing acts as a foundational protective factor in preventing recidivism by physically stabilizing ex-offenders and allowing them to meet basic needs and plug into a community. When interviewees were asked whether this time in jail would impact their housing situation, two responded "yes," five responded "maybe," and fourteen responded "no."

Both of the men who were sure this time in jail would affect their housing situation were homeless and expected to lose their shelter beds because they would not be showing up to claim them. It is common practice in most shelters across the state to cede unclaimed beds to people on a shelter's "waitlist" if a bed owner does not claim the bed by a certain time each night. Wilson was a 59-year-old homeless man who still owed $368.50 on a domestic assault charge from 2002. He reported, "I was at the Mission. I don't know how that's going to pan out [now]… I've got to go talk to these folks."

Those who were unsure about disruptions to their housing reported that they might lose housing via changes in the other factors described above, employment and social ties. Three interviewees who lived with partners or family members reported that they feared these people would kick them out of the house out of anger from their arrest. James, a 22-year-old unemployed male who owed $1,190 across four previous charges, admitted,

> "My parents said [if I got arrested for] driving without a license I would be kicked out and I would have my car impounded…but…it's for court costs—not for that—so I really don't know until I talk to them, and the phone takes two weeks to go on, so you really can't talk to anyone in here."

Two who rented their own apartments were nervous that they would be unable to pay rent if this time in jail caused them to lose their job. John simply said, "If I lose this job—if I lose this job it's going to screw everything up."

E) Emotional Effects

When debtors were asked to volunteer other effects of this time on jail on their lives, many identified emotional impacts including anxiety, frustration, and feelings of helplessness and unjust criminalization. Tito said, "It's just a headache. It's just annoying man… I might lose my job or anything like that for something so simple and stupid." Red, who had been held at the Intake Center for 11 days before I spoke to him, admitted, "I got real bad anxiety right now. If I knew when I was going to court it would be one thing—but to sit here…and above all for court fines. It's that that's really bothering me." Others expressed that they were "confused," "upset," and "more than stressed." Ryder, a 49-year-old roofer who owed $557 on a driving with suspended license charge, called jail "a waste of time…it's four days of my life I'll never get back."

A second reported effect was a feeling of unjust criminalization. Some interviewees had never been in jail before and were alarmed by both the other inmates and the treatment by corrections officers. Primo explained,

> This does open your eyes…but it's just like, I'm in here with…like my cellmate is a first degree arsonist, like I don't belong here. I know people who attempted murder, I'm here with people who shot people's moms and like the craziest things, and I'm just here for court fees.

He went on to complain about a correctional officer's assumption that he was a habitual criminal even though this was his first time in jail: "I told the C.O., 'you look familiar, wasn't you here

last night?' and he said 'no, you probably remember me from the last time.'" Paul, a 52-year-old dog breeder who owed $4,505 on six unpaid cases, complained that it wasn't enjoyable to have "a bunch of weirdos running around you."

Other debtors with longer criminal histories felt like this time in jail triggered painful memories. E.J., who paying debts on a felony assault charge from 2013, explained, "I was a heroin addict, and I got my life together, and everything just started falling into place and then… I left the state for a couple years and came back and had these warrants." Ted reflected,

> I went to prison, I did my time, and I got out—you can ask Florida, I ain't been in trouble since I got out. It's been maybe eight years since I got out of prison and I ain't looked back, I ain't got in trouble, I don't even hang around anybody no more or nothing. And it's like, I don't know, just when I thought I was doing good and not getting in trouble and everything else, this pops up.

Wilson, who had just moved back to Rhode Island to be closer to his kids, admitted,

> Well it brought up old wounds, you know, scars. Because I wasn't expecting it. You know, I thought there might be a warrant, I don't know, but after thirteen years…It triggers those old scars. So I'm a little perturbed about that.

Several debtors worried that they had "proved family and friends right" by being re-arrested, and felt compelled to highlight the distinction between this debt-related arrest and a "real crime"—especially those who were employed and, as one interviewee put it, "productive members of society." Gordon, a 51-year-old White male who owed $2,591 on multiple license-related misdemeanors, complained, "I'm at work, you know what I'm saying, I'm doing something positive, I'm not really doing drugs, I'm not stealing, I'm pretty old. I'm old enough to know what my priorities are. And right now my priority is my job." Others echoed this sentiment, with

statements like “I was out there doing good!” or “No, [I hadn’t started paying,] but I stayed out of trouble.”

F) Financial Effects

Finally, interviewees also reported frustration that their arrest had pushed them deeper into debt via the $125 warrant fee assessed for all arrested debtors. James described that the jail time “just puts people in a bigger hole.” Those interviewees with suspended or revoked licenses were especially likely to feel trapped in a cycle of punishment and debt. Paul lamented,

> Yeah I got like two [suspended license charges] back to back, and I can’t drive anymore. I’ve just gotta get my license…and believe it or not, I got an $80 ticket and that’s why my license was suspended. See how it all snowballs? You miss one little thing and forget it. Now I’m in, here I am. It all snowballed.

Primo echoed his sentiment: “I feel like now that I have [a suspended license charge] it’s just so much easier to get sucked in here”

V. Conclusion

In summary, jailed debtors in Rhode Island in 2015 were largely non-violent misdemeanor offenders who were not incarcerated during their original sentence. Those arrested for court debt delinquency had a complex history with debt compliance—most had been arrested on a debt-related warrant at least once before, despite multiple attempts to pay off their outstanding balance. The Judiciary did not systematically identify indigent debtors or abate their costs, even though at least half of arrested debtors were low income and likely qualified for abatement under current legislative guidelines. Thus, while the criminal justice system minimized the amount of time each debtor spent in jail, the proportion of debtors within the

inmate population only fell by 13% over the last eight years. More worrisome, arrested debtors' mean outstanding debt balances rose by $256 over the same period.

Once arrested, delinquent debtors were at risk of falling victim to an array of procedural injustices in the debt collection system, from a lack of police communication about the nature of their arrest to the denial of a phone call while in jail. These implementation failures exacerbated a host of negative effects of debt-related incarceration—most notably job loss, frustration and anxiety, and financial strain. Beyond its harmful effects, it is unclear whether this jail time actually achieved policy goals of inducing delinquent debtors to comply with future payments and court dates.

CHAPTER 6: DISCUSSION

I. Introduction

In this thesis, I sought to understand who was being incarcerated for debt delinquency in Rhode Island, how that process was being implemented, and what effects it might have on jailed debtors' lives. I employed a mixed-methods research design that included quantitative data collection and analysis and qualitative interviews and observation. I found that approximately 1,556 adults were jailed for failure to appear at a court payment date in 2015 and were held at the Intake Center for an average of one night with a mean outstanding debt balance of $1,082. As it currently operates, Rhode Island's court debt collection regime suffers from two major implementation challenges. First, the state needlessly incarcerates a significant population of debtors who either legally qualify as indigent or have already been brought before a judge for an ability to pay hearing. Second, criminal justice employees subject arrested debtors to an array of small procedural injustices, including denial of information and phone access, that significantly negatively impact debtors' debt compliance attitudes, their wellbeing, and their material circumstances.

II. A Portrait of the Debtor Inmate Population

Debtors arrested in Rhode Island in 2015 were predominantly non-violent misdemeanor offenders who did not go to prison for the crime they owe court debts on. This finding conflicts with the predominant focus on reentering prisoners in the academic literature on court debts and suggests that a research focus on lower-level offenders who serve their sentence in the community may be more relevant to policymaking. Because data on the total proportion of misdemeanor versus felony debtors in the state is unavailable, this research cannot draw conclusions about the criminal history of *all* debtors in Rhode Island, including those who were

not arrested in 2015. However, it is likely that misdemeanor offenders do make up a majority of total debtors, given that the District Courts (which process misdemeanor charges) assess more total court debts annually than do the Superior Courts (which process felonies) (K. Davis, personal communication, February 22, 2016).

Approximately half of the arrested debtor population was unemployed with limited sources of income, and a majority may have been eligible for court cost abatement under the existing criteria set forth by the legislature in §12-20-10. The legislature has declared receipt and/or qualification for public benefits as "prima facie evidence" of a defendant's indigency, and in my interview sample, 52% of arrested debtors received Supplemental Nutrition Assistance for Needy Families (SNAP) and 5% received Social Security benefits. An additional 19% of interviewees were in the process of applying for either SNAP or Social Security. These findings present a conservative estimate of total abatement eligibility in the debtor population because they only tally receipt of benefits and do not account for those who are simply "qualified" for these benefits. Although the sample size in this research was small and nonrandom, the degree of indigency among interviewees suggests, at the least, that a significant proportion of the larger debtor population is legally indigent.

Debtors also faced other public debts that were not reflected in the single outstanding debt balance they were arrested on. Most arrested debtors had built up a history of convictions and, on average, owed court debts on four other cases in addition to the one they were currently behind on. Debtors who were still serving their original sentence also owed probation and educational program fees, and others may have had outstanding child support balances. Roughly one third of arrested debtors likely also owed 400-500 dollars in driver's license reinstatement fees. Oscar, a 29-year-old Black man who owed $1,755.50 in court debts, explained,

> I owe about 700 dollars on my license. And I'm in the process of doing that—that's also another cost. I have these two court costs plus I have to pay off my license so that's everything…if I total, add it up, it's probably like 2,000 dollars that I have to pay slowly. It's not like I can just dish it all out.

Thus, arrested debtors were not only a low-income population but also a group burdened with an array of financial obligations in addition to any criminal fines, fees and restitution.

III. Implementation Fidelity in the Debt Collection Regime

Although the 2008 legislative reforms largely ensured that arrested debtors attended a payment hearing within 48 hours, the magistrates presiding over these hearings did not make use of a "standardized financial assessment instrument" to assess ability to pay, and they ultimately abated the costs of a small minority of debtors. The result was that many defendants who qualified as unable to pay under the legislature's current list of criteria were not removed from the debt collection system and were instead needlessly punished with jail time for failure to appear at a court payment date.

In 2015, the Department of Corrections and the Judiciary ensured that almost all arrested debtors saw a judge within 48 hours or on the next available court date. 98.5% of jailed debtors were held for five nights or fewer—and anecdotal evidence from my interview sample suggested most debtors who spent three to five nights in jail were either arrested over the weekend or had to clear warrants at multiple courthouses. That said, it appears that a few arrested debtors per year fall through the cracks and are held at the Intake Center for far longer than they should be—for 41 nights and 27 nights, in the case of two men in my research sample. While these administrative failures are hopefully rare, the risk of a mistake like this occurring may be

exacerbated by the fact that arrested debtors are not allowed widespread access to phones once committed to the Intake Center.

Even though the length of jail stays for debt delinquency was successfully reduced down to one night on average, magistrates across state courthouses did not use the payment hearings that came after these commitments to identify indigent debtors or remove them from the court debt system. In 2015, only 3% of jailed debtors had their costs abated by a magistrate. Even though abatement was extremely limited, it is important to note that incremental debt reductions may have been much more common, and were not observable in the data. Indeed, all debtors who were arrested for failure to appear at a payment date were credited $50 for each night they spent in jail. That said, two homeless men in my interview sample—one of whom was a four-year resident of Harrington Hall shelter—did not have their costs abated by the court. As a result, the shelter resident still owes $327 dollars to the state even though he has no job and no means to repay it.

The low abatement rate may be a product of the fact that magistrates did not use a "standardized financial assessment instrument" when conducting post-jail payment hearings. Most payment hearings in both district and superior court lasted less than three minutes and were limited to inquiries into a defendant's employment status. Magistrates typically allowed defendants to choose their own monthly payment rate, but they almost never inquired into any item on the legislature's list of "evidence of inability to pay," including social security, food stamps, or welfare receipt. The absence of this line of questioning from the post-jail payment hearings contradicted state law, which declares that every arrested debtor must "be afforded a review hearing on his or her ability to pay within 48 hours" (§12-6-7.1) While the legislature only specified for a "financial assessment instrument" to be used during a newly sentenced

debtor's first payment hearing (§12-21-20), it is clear that they still intended for some kind of indigency determination take place at the post-jail hearing. Because the jailed debtor population exhibits such widespread poverty, post-jail hearings are an excellent opportunity to identify and protect vulnerable debtors who fully qualify for cost abatement under existing legislative criteria.

Magistrates further delayed reduction in the population of debtors at the Intake Center by choosing to jail some debtors who were brought to them immediately after arrest. When state legislators indicated in a 2008 amendment that any debtors arrested during the day should be brought immediately before the court, it is reasonable to assume that they intended for these debtors to circumvent Intake Center commitment and be released directly from court. However, this expedited arrest process did not always happen in practice. Seven of the 21 inmates in my debtor interviewee sample had seen a magistrate before being committed to the Intake Center—in their cases, the magistrate simply set their bail and scheduled a second payment hearing for them to take place a few days later. This practice complies with the letter of the law but not its underlying goals—it needlessly inflates the Intake Center's population with a group of debtors who have already attended a hearing in court and thus fulfilled the purpose of their original arrest warrant.

IV. Procedural Injustices in the Arrest and Commitment Process

Beyond evaluating fidelity to the overarching policies governing court debt collection in Rhode Island, this research also identified gaps in judicial and corrections administrative processes that significantly impacted policy outcomes and debtor experience. Debtors ultimately arrested for failure to appear at a court payment date reported receiving mixed messages from multiple state agencies and representatives about the nature of their debt payment responsibilities and the consequences for noncompliance. More troubling, jailed debtors were consistently

denied access to crucial information about their arrest and commitment status and were barred from using phones to request bail or notify family and friends of their whereabouts.

Even though one magistrate quipped in court that bench warrants follow a failure to appear "like the sun follows the moon," many arrested debtors did not realize that this was the case. Debtors in my interview sample reported a range of signals that they interpreted to mean they would not be punished for failure to appear in court. Multiple interviewees assumed that their probation officers would notify them of upcoming court dates—or, at the very least, tell them if they had an outstanding warrant. Some of interviewees assumed that silence from their POs meant that they did not need to appear in court—but others directly asked for this information from probation officers and reported that they were actually told that no payment action was required of them. The long lag times between a debtor's missed payment date and a warrant issue date may exacerbate this pattern of miscommunication and misunderstanding by preventing debtors or other state agents from linking the missed payment date to any punitive state action.

Multiple magistrates, clerks and corrections officers were hesitant to believe inmates' claims that they were not aware of their debt responsibilities. One magistrate asserted, "These people are not stupid! Don't assume that they are innocent and simpleminded…many are very street-wise." Indeed, state employees' skepticism aligns with the fact that most arrested debtors in 2015 had been to jail at least once before for debt delinquency. But debtors operate within an ecosystem of different criminal justice requirements that justifiably cause confusion when they conflict with court debt payment. For example, though debtors will always receive an arrest warrant for fine and fee nonpayment, it appears that they currently face no penalty whatsoever for failing to pay monthly probation fees. When debtors on probation are never punished for

failing to pay a single dollar toward their probation fees, they might reasonably view their fine and fee obligations as part of the same non-punitive system.

Other debtors in my interview sample received cues from state agencies that made them logically assume their debt obligations were terminated. When one interviewee received permission from the state to transfer his child support wage garnishment to a new employer in North Carolina, he assumed that meant he was "allowed" to move out of state and stop paying court debts. Another made a similar assumption after receiving approval to transfer his probation sentence from Rhode Island to Florida. Although state agents might argue that it is not their job to help debtors keep track of their various sentence requirements, they must also concede that it may be difficult for even repeat offenders to keep track of the different terms of their sentence.

Once arrested, a troubling number of debtors were not provided crucial information about the reason for their arrest or the circumstances of their commitment. Some interviewees in my sample did not know why they were at the Intake Center or when they could expect to be released—others did not know that they had a bail payment option or had not been told what their bail was set at. While a few debtors in my sample had been offered a phone call upon arrest, debtors who attempted to use a phone once they were committed to the Intake Center were routinely denied the opportunity to do so. This finding runs counter to official Department of Corrections policy, which allows every new inmate to receive one bail call before his prepaid phone account is activated. My interviews show that inmates were not in fact given bail calls—and the seven- to fourteen-day lag time in the activation of their prepaid phone accounts left debtors with no contact with the outside world until their release. Even though the average debtor commitment period was just one night on average, debtors' lack of access to phones prevented

those who want to pay bail from doing so. Lack of phone access also significantly exacerbated the other negative impacts of this jail time, as described further below.

V. The Impact of Poor Implementation

Debt-related incarceration often negatively impacted debtors' employment status and mental health and occasionally jeopardized debtors' housing and social relationships as well. The observed negative impacts are consistent with most existing scholarship (Alexander et al., 2010; Beckett et al., 2008; Horton, 2008; Martire, 2010; Pleggenkuhle, 2012) but contradict a smaller body of scholarship that finds court debts to have a positive effect on debtors' lives by incentivizing stable employment and social ties (Gowdy, 2011; Nagrecha & Katzenstein, 2015; Visher, Debus-Sherrill, & Yahner, 2011). Although the observed effects themselves echo prior findings, the mechanism by which they arose is novel: virtually all observed negative impacts of debt-related incarceration in this study were either exacerbated or fully produced by the process failures described above—most notably, the lack of access to phones.

Although most interviewees reported that jail time would not impact their housing status or relationships, the negative effects that were reported in these categories were largely produced by either a lack of access to phones or a failure of the system to identify and protect indigent debtors. Those who reported that jail time would impact their housing were both homeless men who feared losing their bed in their respective shelters—and if their ability to pay had been appropriately diagnosed prior to this arrest, they likely would have had their costs abated and would not have received a warrant at all. Those who reported that jail would negatively affect their relationships all cited the inability to contact family members as the primary reason for this social damage. Others who reported that the time in jail might damage their relationships were primarily interested in calling family members to reassure them that they had no in fact

committed a new crime and would be released soon. Similarly, almost all interviewees who reported that the jail time would jeopardize their employment were most concerned about their inability to contact their employers and explain their absence.

Most of the observed negative impacts on debtors' mental health were also caused by both the lack of access to phones and the denial of key information about their arrest. Multiple debtors who reported feelings of anxiety or frustration explicitly identified these process failures as the cause of their distress. Jay exclaimed,

> I've gotta work today, and I can't get in touch with anybody to let them know… I'm not even allowed to call my mom, so it's like, no one even knows where I am! I've got my girlfriend with her kids who doesn't know what's going on. I don't even care when I get out as long as I knew these things were taken care of.

Implementation failures during the arrest and commitment process may have also dissuaded debtors from future payment compliance because they perceived the debt collection system to be inconsistent or unjust. Though a slim majority of debtors arrested in 2015 made at least one debt payment in the month after their arrest, only 20% paid in full within six months, and attendance at payment dates appeared to wear off over time. In interviews, debtors expressed a view of Rhode Island's criminal justice system as arbitrary and mismanaged—and this directly influenced debtor decisions about future payment compliance. Two out of 21 interviewees told me, unprompted, that their treatment in jail had made them decide to leave Rhode Island permanently and move to another state. Jay reported he would not make future payments because, "it's just a way for this stupid state to make money and got knows they don't even know how to spend it because we're still broke." Others were aware that their commitment cost the

state more than they actually owed, and saw this as symbolic of the system's mismanagement and lack of credibility. Charlie, who was unemployed and earned no income, reflected,

> It's just a really ridiculous waste of money. It's not going to make us pay any faster…It just costs the taxpayers more money to have us here for the weekend, who knows how much it costs them. It's crazy it's not helping it's not [prompting] us to pay the fines…there's no motivation there. If anything it's motivation not to pay because you know when you stay that it subtracts from what you owe.

Thus, although jail time provided a useful opportunity for reflection for some delinquent debtors, the observed implementation failures seemed to largely counteract this positive effect. Overall, jail time likely hurt rather than helped debtors' attitudes toward future debt compliance.

Finally, the current debt collection regime automatically pushed arrested debtors further into debt by assessing them with a $125 warrant fee that was added to their outstanding debt balance. Even though virtually all debtors received a $50 debt credit for one night spent in jail, the average debtor still emerged from jail with $75 added to an existing debt balance of $1,082. Because at least half of arrested debtors in 2015 earned little to no income, the warrant assessment made their financial circumstances even more dire and produced profound feelings of helplessness and anxiety. Multiple debtors in my interview sample expressed frustration that the state was continuing to label them as criminals long after they had completed their original sentence. They expressed a profound desire to prove to their family, employers, and even to me that they were not in jail for a "real crime." Though some debtors had been convicted quite recently, others had not participated in any criminal activity for over five years. This latter group of arrested debtors saw court debts as a barrier to their finding and maintaining stable employment and becoming "productive members of society."

VI. Research Limitations

While noteworthy, these research findings should be interpreted as early warnings rather than comprehensive diagnoses of implementation failures in the court debt collection process in Rhode Island. While a limited range of demographic and criminal history data was available for all debtors committed to the Intake Center in 2015, much of the research findings drew upon data from small and nonrandom samples of debtor inmates and courtroom observation hearings, and anecdotal evidence from conversations with state criminal justice workers. Moreover, the population identified for this analysis may not have entirely overlapped with the true debtor population, as debtors were not systematically identified in Department of Corrections databases.

First, interviewees and court hearings used in this study were identified non-randomly and did not overlap temporally with the quantitative data source. All quantitative data was drawn from the Department of Corrections' 2015 commitment file, while interviews and courtroom observation took place in January and February of 2016. Further, all interviewees were men—and although men made up the majority of jailed debtors, women were actually overrepresented in the jailed debtor population compared to the general inmate population. Thus, female interviewees would likely have provided a unique and valuable perspective on the effect of debt collection practices on debtors' lives. Debtors in the interview sample also spent more nights in jail than the average debtor in 2015 because most were arrested over the weekend. Thus, it is likely that they experienced more severe negative impacts from debt-related incarceration than did the overall debtor inmate population.

In the quantitative data source, the debtor population was only roughly identified using inmate bail amounts as a proxy. Because the Department of Corrections does not systematically identify inmates who are arrested for failure to appear at a court payment date, "odd" bail

amounts (that did not end in two zeros) provided the only sign of a debt-related commitment. Manual data validation in a random sample of 300 debtor inmates revealed approximately 10% of observations to be erroneously included in the data set. If this pattern held true in the entire data file, then the number of debtors jailed in 2015 may have been closer to 1400. In contrast, however, the bail-based identification method also left out any debtors who happened to have an outstanding debt balance ending in two zeros. Thus, there is ultimately no way of determining whether the debtor population size identified in this research is conservative or overstated.

Finally, both the quantitative and qualitative data analysis did not include long-term or uniform follow-up periods. In the quantitative debtor sample, attempts at identifying patterns in debt compliance behavior after jail were limited by the fact that each debtor had a different follow-up time length depending on what time of the year they were jailed in. An inmate jailed in January 2015 had 11 months of follow-up before data collection occurred in January 2016, while another jailed in November 2015 only had two months of follow-up. This lack of a uniform follow-up period limited the value of post-jail behavior indicators like debtors' payment rates. In the qualitative interview sample, there was no opportunity to follow up with interviewees. Thus, analysis of the impact of debt-related incarceration relied fully on debtors' prospective predictions of how jail would affect them instead of reports on their lived experience. A factor that mitigates this limitation is that a majority of interviewees in my sample had been experienced debt-related incarceration before and were using past experience to predict effects of the present jail period. That said, a uniform follow up period would have corroborated the effects they reported while incarcerated.

VII. Suggestions for Future Research

Future researchers should both replicate these research questions with larger samples and more rigorous methodology and pursue the follow-up questions that arise from these findings. First, this research prompts a larger scale investigation of the implementation failures described above—most notably the Judiciary's failure to diagnose and respond to defendant indigency and the Department of Corrections' denial of inmate phone access. The current findings strongly suggest that both of these practices are widespread in the current system, but more expansive data collection is required to document the exact scope of each problem. Researchers interested in further exploring the impact of debt-related incarceration would benefit from the use of larger and more diverse interview samples and multiple longer-term follow-up periods. The specific impact of debt-related incarceration could be better approximated using a comparison group of debtors who were not arrested for delinquency in the same period—although this population would likely exhibit other external and internal differences from the arrested debtor population that would limit meaningful comparison.

This research also prompts evaluation of the impact and extent of other public debts on the lives of low-income people involved in the criminal justice system. Specifically, the high rate of suspended license charges among the jailed debtor population raises questions about how driver's license suspensions (and their accompanying reinstatement fees) impact ex-offender employment, financial status, and criminal activity. This thesis suggests that driver's license suspension may initiate long-term involvement in the criminal justice system for low-income individuals who accrue a sequence of "driving with suspended license" charges and the large debt burden that accompanies them. The cost to the criminal justice system of arresting and prosecuting these offenders for the charge itself and for subsequent debt nonpayment may

outweigh the state's revenue gains from license reinstatement fees. If a suspended license limits an individual's ability to find stable employment, then payment of the license reinstatement fee becomes even less likely and criminal involvement becomes more likely. Future research could identify alterations to license reinstatement policies as a powerful lever to prevent low-income individuals from entering the criminal justice system.

VIII. Policy Recommendations

As shown above, implementation failures are undermining state legislative efforts to reform the debt collection process. Criminal justice stakeholders interested in following through on the goals of the 2008 reforms should consider immediate improvements to the arrest and commitment process for delinquent debtors as well as broader policy reforms to more consistently remove indigent debtors from the collection system as a whole.

A) Process Reforms

Conversations with employees of the Judiciary, Department of Probation and Parole, and Department of Corrections suggest that many state workers believe delinquent debtors are simply repeatedly choosing not to show up at payment dates and do not need to be "babysat" or "coddled" through better debt education, payment reminders, or other forms of communication. But these agencies' current failure to consistently provide essential information and communication opportunities to delinquent debtors may actually be hindering voluntary debt compliance. Urgent process changes are necessary to fully respect arrested debtors' rights *and* encourage future payment. Three key reforms are identified below.

1. Better Debtor Identification & Tracking: Judiciary and Department of Corrections staff should create a unique identifier for delinquent debtors within both the CourtConnect and INFACTS databases so that staff at every level of each agency are aware of debtors' status as

such and are able to tailor the information and treatment they provide to that status. Right now, debtors are categorized with all other offenders who have "failed to appear" at any type of court date, and this may prevent police and corrections officers from appropriately tailoring any information they provide about the nature of the arrest and commitment process.

2. Better Information Provision: All defendants in Rhode Island who are assessed court debts should be given the Public Defender's office's existing Court Debts Informational Brochure so that they better understand their responsibilities moving forward. Moreover, arresting agents must ensure that delinquent debtors review their bench warrants and understand the reason for their arrest. The arrest also provides a second opportunity to offer debtors the Court Debt brochure and thus ensure that debtors have the knowledge required to alter their payment behavior (if possible) after release. Finally, probation officers should, at the very least, monitor open warrants for their supervisees and give delinquent debtors an opportunity to clear the warrant in court voluntarily.

3. Guaranteed Phone Calls: All arrested debtors must be offered an opportunity to contact a family member or friend *prior* to their commitment at the Intake Center, in order to ensure clear communication about the nature of the arrest and duration of their commitment. Intake Center leadership must also investigate the inconsistent implementation of its bail call policy and consider devoting more staff time to expediting the current prepaid phone account setup process that results in such long account activation lag times.

B) Systemic Reforms

While the administrative changes summarized above are urgently needed if the current debt collection regime is to continue unchanged, these research findings suggest that further policy changes are necessary to follow through on the legislature's existing goal of removing

indigent defendants from the court debt collection process. The Judiciary's failure to exempt indigent debtors from payment responsibilities could stem in part from magistrates' punitive ideology—but it likely also arises from a contradictory legislative mandate that attempts to maximize revenue generation and minimize harm to debtors at the same time. Legislators must need to take a clearer position on the protection of indigent debtors in order for the Judiciary to fully implement reforms.

1. Resolve Mixed Messages on Cost Assessment and Abatement: The legislature should reverse the current status quo wherein all debtors are assessed debts "unless proven indigent." This reversal would require two changes: first, ability to pay assessments must be integrated directly into the sentencing process instead of taking place after sentencing, so that debtors are never assessed costs until *after* an indigency assessment takes place. Second, cost abatement should be mandatory instead of discretionary for all debtors who meet existing financial criteria for inability to pay. This pair of changes would ensure the Judiciary's use of the standardized financial assessment that it has failed to adopt and guarantee abatement instead of leaving it up to judicial discretion.

2. Pilot Incremental Responses to Missed Payment Dates: In addition to systematically relieving indigent debtors of payment responsibilities, the legislature should reframe jail time as a sanction of last resort rather than a default option for delinquent debtors. First, legislators should allocate funding for mail and text-message missed payment date warnings that give delinquent debtors an opportunity to come to court voluntarily before a warrant is issued. The state should also consider a three-strike system for payment-related court absences so that only repeat offenders are ultimately incarcerated.

3. Gradually Phase Out Court Costs: Beyond improving court debt collection practices, the legislature should pursue significant reductions in existing cost categories and/or the removal of select cost categories altogether. As shown in Chapter Three of this thesis, multiple prominent criminal justice organizations across the country—including the United States Justice Department—have denounced the very premise of court costs as a revenue generation tool and have raised arguments about their unconstitutionality. In 2008 the Louisiana Supreme Court actually outlawed all court fees that do not directly support the Judiciary. Because virtually all of Rhode Island's court cost revenues flow directly to the general fund, they are already illegal within that state's framework. Thus, it is not out of the question that cost assessment will be ruled unconstitutional in a state or federal court in the coming years. With that in mind, the Rhode Island legislature must make a proactive transition away from this problematic revenue source.

IX. Conclusion

The debt collection regime in Rhode Island is poorly implemented, and it disrupts the lives of vulnerable low-income ex-offenders. Debtors are not adequately informed of their payment responsibilities and view responses to their failure to appear in court as unjust, inconsistent, and mismanaged. The use of jail as a primary debt collection tactic jeopardizes employment, strains emotional wellbeing, and pushes those subject to it further into debt. Overall, the policy goals of the Rhode Island legislature's 2008 reforms have not been fully achieved—in some cases are being counteracted by procedural injustices. Beyond the implementation failures within the existing system, this research raises questions about the overall premise of court debt assessment and collection. In Rhode Island host of debtors who

truly cannot pay their fines and fees are needlessly incarcerated—and those who do earn an income are often hurt the most by the negative effects of jail time on their employment stability.

Magistrates, corrections officers and other criminal justice stakeholders frequently characterize delinquent debtors as intransigent offenders who are simply choosing not to comply with debt requirements. Within this mental framework, many conclude that the existing jail-based punishment regime is the only way to squeeze payment out of such a population. Indeed, it is may be true that court debt payment compliance would be even lower without the threat of jail—but the harm *and* expense that this practice accrues could outweigh gains in compliance. Although magistrates rightly point out that a system that failed to punish debt nonpayment would lose credibility, it may be necessary to remove court debts from the judicial process altogether. Revenue generation in the Judiciary is increasingly being viewed in the highest levels of government as unethical and contrary to due process. This research yields insight into necessary incremental reforms to improve the existing debt collection regime—but it also raises larger questions about the future of debt collection in Rhode Island.

WORKS CITED

Alexander, S., Konanova, Y., & Ross, D. (2010). *In For a Penny: The Rise of America's New Debtors' Prisons*. New York, NY: American Civil Liberties Union. Retrieved from https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons

American Civil Liberties Union. (2016). Mass Incarceration: What's At Stake. Retrieved March 22, 2016, from https://www.aclu.org/issues/mass-incarceration

Baird, C., Holien, D., & Bakke, A. (1986). *Fees for Probation Services*. Washington, DC: National Institute of Corrections. Retrieved from https://s3.amazonaws.com/static.nicic.gov/Library/004274.pdf

Bannon, A., Nagrecha, M., & Diller, R. (2010). *Criminal Justice Debt: A Barrier to Reentry*. New York, NY: Brennan Center for Justice at New York University School of Law. Retrieved from https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry

Bazemore, G. (1993). Formal Policy and Informal Process in the Implementation of Juvenile Justice Reform. *Criminal Justice Review*, *18*(1).

Beckett, K., & Harris, A. (2011). On cash and conviction. *Criminology & Public Policy*, *10*(3), 509–537. http://doi.org/10.1111/j.1745-9133.2011.00726.x

Beckett, K., Harris, A., & Evans, H. (2008). *The Assessment and Consequences of Legal Financial Obligations in Washington State*. American Civil Liberties Union. Retrieved from https://aclu-wa.org/sites/default/files/attachments/LFO%20Report%20(WA%20Minority%20and%20Justice%20Comm.%20Report).pdf

Blattenberger, G., Fowles, R., & Krantz, J. (2010). *Bayesian Models to Predict the Return to Prison* (JSM 2010 Proceedings: Section on Bayesian Statistical Science) (pp. 5216–5299). Alexandria, VA: American Statistical Association.

Bucklen, K. B., & Zajac, G. (2009). But Some of Them Don't Come Back (to Prison!) Resource Deprivation and Thinking Errors as Determinants of Parole Success and Failure. *The Prison Journal, 89*(3), 239–264. http://doi.org/10.1177/0032885509339504

Bunton, D. (2016, February 19). When the Public Defender Says, "I Can"t Help'. *The New York Times*. Retrieved from http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html

Champagne, D. M. (2010, October 26). Getting blood from a stone: High fees, fines imposed on criminals often perpetuate the cycle of poverty and crime. *Daily Record*. Rochester, NY, United States. Retrieved from http://search.proquest.com/docview/761380773/abstract/101E3C0318C74348PQ/60

Cherry, T. L. (2001). Financial penalties as an alternative criminal sanction: Evidence from panel data. *Atlantic Economic Journal*. http://doi.org/10.1007/BF02299333

Council of Economic Advisers. (2015). *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* (Issue Brief). Washington, D.C.: The White House. Retrieved from https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf

Diller, R. (2010). *The Hidden Cost of Florida's Criminal Justice Fees*. New York, NY: The Brennan Center for Justice. Retrieved from http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf

Dolan, S. (2015, May 31). Taxpayers lose as Maine counties jail indigents over unpaid fines. *McClatchy - Tribune Business News*. Washington, United States. Retrieved from http://search.proquest.com/docview/1684259488/abstract/C9A59ED935314C4BPQ/16

Esman, M. R. (2014, June 16). And justice for all... Too Poor to Pay? *The Louisiana Weekly*, p. 6. New Orleans, La., United States.

George, T. P. (2012). *Domestic Violence Sentencing Conditions and Recidivism*. Olympia, WA: Washington State Center for Court Research, Administrative Office of the Courts. Retrieved from http://www.ofm.wa.gov/sac/pdf/nchip/DV_sentencing_conditions_recidivism.pdf

Gowdy, E. A. (2011). *Impact of Monetary Sanctions on Impoverished Criminal Defendants, Their Family, and the Community*. University of Georgia, Athens, GA. Retrieved from https://getd.libs.uga.edu/pdfs/gowdy_elizabeth_a_201112_phd.pdf

Gupta, V., & Foster, L. (2016, March 14). Dear Colleague Letter Regarding Law Enforcement Fines and Fees. Retrieved from https://www.justice.gov/crt/file/832461/download

Harris, A., Evans, H., & Beckett, K. (2010). Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States. *American Journal of Sociology*, *115*(6), 1753–1799. http://doi.org/10.1086/651940

Harvard Law Review. (2015). Criminal Procedure - Indigency Tests - Colorado Requires On-the-Record Indigency Proceedings Prior to Incarceration for Failure to Pay Fines. *Harvard Law Review*, *128*(4), 1312.

Hillsman, S. T., & Mahoney, B. (1988). Collecting and Enforcing Criminal Fines: A Review of Court Processes, Practices, and Problems. *The Justice System Journal*, *13*(1), 17–92.

Hillsman, S. T., Sichel, J. L., & Mahoney, B. (1984). *Fines in sentencing: A study of the use of the fine as a criminal sanction*. [Washington] : Retrieved from http://hdl.handle.net/2027/pur1.32754078862277

Horton, N. (2008). *Court Debt and Related Incarceration in Rhode Island from 2005 through 2007*. Providence, RI: Rhode Island Family Life Center. Retrieved from http://opendoorsri.org/sites/default/files/CourtDebt.pdf

Hubbard, D. J., & Latessa, E. J. (2004). *Evaluation of Cognitive-Behavioral Programs for Offenders: A Look at Outcome and Responsivity in Five Treatment Programs*. Cincinnati, OH: Ohio Office of Criminal Justice Services. Retrieved from http://www.truthought.com/pdf/uceval5programsresearchfinalreport.pdf

Iratzoqui, A., & Metcalfe, C. (2015). Set Up for Failure? Examining the Influence of Monetary Sanctions on Probation Success. *Criminal Justice Policy Review*, 0887403415586595. http://doi.org/10.1177/0887403415586595

Landenberger, N. A., & Lipsey, M. W. (2005). The positive effects of cognitive–behavioral programs for offenders: A meta-analysis of factors associated with effective treatment. *Journal of Experimental Criminology*, *1*(4), 451–476. http://doi.org/10.1007/s11292-005-3541-7

Law, M. A., & Sullivan, S. M. (2006). *Federal Victim Surcharge in New Brunswick: An Operational Review* (Operational Review No. rr07-vic2e). New Brunswick, Canada: Department of Justice Canada.

Leone, M. C. (2002). Net Widening. In D. Levinson (Ed.), *Encyclopedia of Crime and Punishment*. 2455 Teller Road, Thousand Oaks California 91320 United States: SAGE

Publications, Inc. Retrieved from http://sk.sagepub.com/reference/crimepunishment/n286.xml

Levingston, K., & Turetsky, V. (2007). Debtor's Prison: Prisoners' Accumulation of Debt as a Barrier to Reentry. *Clearinghouse REVIEW Journal of Poverty Law and Policy*, *41*(3-4). Retrieved from http://www.clasp.org/resources-and-publications/files/0394.pdf

Logan, W. A., & Wright, R. F. (2014). Mercenary Criminal Justice. *University of Illinois Law Review*.

Lollar, C. E. (2014). What Is Criminal Restitution? *Iowa Law Review*, *100*(1), 93–154.

Lowenkamp, C. T., Latessa, E. J., & Smith, P. (2006). Does Correctional Program Quality Really Matter? The Impact of Adhering to the Principles of Effective Intervention*. *Criminology & Public Policy*, *5*(3), 575–594. http://doi.org/10.1111/j.1745-9133.2006.00388.x

Martire, K. (2010). An Examination of the Implications of Financial Strain for Forensic Psychology. *Journal of Forensic Psychology Practice*, *10*, 159–176.

Martire, K., Sunjic, S., Topp, L., & Indig, D. (2011). Financial sanctions and the justice system: Fine debts among New South Wales prisoners with a history of problematic substance use. *Australian & New Zealand Journal of Criminology*, *44*(2), 258–271. http://doi.org/10.1177/0004865811405258

Mazerolle, L., Bennett, S., Antrobus, E., & Eggins, E. (2012). Procedural Justice, Routine Encounter, and Citizen Perceptions of Police: Main Findings from the Queensland Community Engagement Trial. *Journal of Experimental Criminology*, *8*(4), 343–367.

Montgomery, L. (2015, March 5). National Court Leadership: Fines and Fees No Way to Pay for Justice. Retrieved from http://www.ncsc.org/newsroom/backgrounder/2015/fines-and-fees-no-way-to-pay-for-justice.aspx

Morris, N., & Tonry, M. (1991). *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: Oxford University Press. Retrieved from http://www.amazon.com/Between-Prison-Probation-Intermediate-Punishments/dp/0195071387

Nagrecha, M., & Katzenstein, M. F. (2015). *When All Else Fails, Fining the Family: First Person Accounts of Criminal Justice Debt*. New York, NY: Center for Community Alternatives. Retrieved from http://www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf

Natapoff, A. (2015). Misdemeanor Decriminalization. *Vanderbilt Law Review*, *68*(4), 1055–1116.

New York State Bar Association. (2006). *Re-entry and Reintegration: The Road to Public Safety: Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings*. Albany, NY: New York State Bar Association. Retrieved from https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857

Nieto, M. (2006). *Who Pays for Penalty Assessment Programs in California?: A Report for the Assembly Public Safety Committee*. California Research Bureau.

Olson, D., & Ramker, G. R. (2001). Crime Does Not Pay, But Criminals May: Factors Influencing the Imposition and Collection of Probation Fees. *The Justice System Journal*, *22*(1). Retrieved from https://csgjusticecenter.org/wp-

content/uploads/2008/12/Crime_Does_Not_Pay_But_Criminals_May_Factors_Influencing_the_Imposition_and_Collection_of_Probation_Fees.pdf

Online Payments. (2014). Retrieved April 13, 2016, from https://www.courts.ri.gov/OnlinePayments/Pages/District%20Disclaimer.aspx

Parent, D. (1990). *Recovering Correction Costs Through Offender Fees* (Issues and Practices in Criminal Justice). Washington, DC: U.S. Department of Justice, National Institute of Justice.

Paternoster, R., Brame, R., Bachman, R., & Sherman, L. W. (1997). Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault. *Law & Society Review*, *31*(1), 163–204. http://doi.org/10.2307/3054098

Pleggenkuhle, B. (2012). *The Effect of Legal Financial Obligations on Reentry Experiences* (Ph.D.). University of Missouri - Saint Louis, United States -- Missouri. Retrieved from http://search.proquest.com/docview/1036691037/abstract/858D0964AB344700PQ/16

Rappleye, H., & Seville, L. R. (2014). The Return of the Debtors' Prison. *The Nation*, *298*(15), 12ff–12ff.

Reitz, K. (2015). The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second). *Minnesota Law Review*, *99*(5). Retrieved from http://docplayer.net/3072055-The-economic-rehabilitation-of-offenders-recommendations-of-the-model-penal-code-second.html

Reynolds, C., & Hall, J. (2012). *Courts Are Not Revenue Centers* (2011-2012 Policy Paper). Conference of State Court Administrators. Retrieved from http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx

Rhine, E. E., Mawhorr, T. L., & Parks, E. C. (2006). Implementation: The Bane of Effective Correctional Programs. *Criminology & Public Policy, 5*(2), 347–358. http://doi.org/10.1111/j.1745-9133.2006.00382.x

Rhode Island Judiciary. (n.d.). Court Filing Fees: Superior Court. Rhode Island Judiciary. Retrieved from https://www.courts.ri.gov/Courts/SuperiorCourt/PDF/Fees.pdf

Richards, S. C., & Jones, R. S. (2004). Beating the Perpetual Incarceration Machine. In S. Maruna & R. Immarigeon (Eds.), *After Crime and Punishment: Pathways to Offender Reintegration*. London: Willan Publishers. Retrieved from http://www.worldcat.org/oclc/53069175

Robertson, C. (2015a, September 17). Suit Alleges "Scheme" in Criminal Costs Borne by New Orleans's Poor. *The New York Times*. Retrieved from http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleanss-poor.html

Robertson, C. (2015b, October 19). For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time. *The New York Times*. Retrieved from http://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html

Roman, C., & Link, N. (2015). *Child Support, Debt, and Prisoner Reentry: Examining the Influences of Prisoners' Legal and Financial Obligations on Reentry* (Final Report to the National Institute of Justice). Philadelphia, PA: Temple University. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/248906.pdf

Rosenberg, T. (2011, June 6). Paying for Their Crimes, Again. *The New York Times*. Retrieved from http://opinionator.blogs.nytimes.com/2011/06/06/paying-for-their-crimes-again/

Rosenthal, A., & Weissman, M. (2007). *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction*. New York, NY: Center for Community Alternatives. Retrieved from http://sentencing.nj.gov/downloads/pdf/articles/2007/Mar2007/document01.pdf

Sandfort, J., & Moulton, S. (2015). *Effective Implementation in Practice: Integrating Public Policy and Management* (1st ed.). San Francisco, CA: John Wiley & Sons.

Shookhoff, A., Constantino, R., & Elkin, E. (2011). The Unintended Sentence of Criminal Justice Debt. *Federal Sentencing Reporter*, *24*(1), 62–65. http://doi.org/10.1525/fsr.2011.24.1.62

Thornberry, T., & Krohn, M. (2000). *The Self-Report Method for Measuring Delinquency and Crime* (No. NCJ 185538) (p. 51). Washington, DC: National Criminal Justice Reference Service. Retrieved from https://www.ncjrs.gov/app/publications/abstract.aspx?id=185538

Tobin, R. W. (1996). *Funding the State Courts: Issues and Approaches*. Williamsburg, VA: National Center for State Courts.

Tyler, T. R., & Huo, Y. (2002). *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (1st Edition). New York: Russell Sage Foundation.

United States Department of Justice. (2015). *Review of the Debt Collection Program of the United States Attorneys' Offices* (Evaluation and Inspections Division 15-06). Washington, DC: U.S. Department of Justice, Office of the Inspector General. Retrieved from https://oig.justice.gov/reports/2015/e1506.pdf

Vallas, R., & Patel, R. (2012). Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing out of Poverty. *Clearinghouse Review Journal of Poverty Law and Policy*, *46*(3-4). Retrieved from https://csgjusticecenter.org/wp-content/uploads/2013/04/Sentenced-to-a-Life-of-Criminal-Debt.pdf

Visher, C. A., Debus-Sherrill, S. A., & Yahner, J. (2011). Employment after Prison: A Longitudinal Study of Former Prisoners. *Justice Quarterly*, *28*(5), 698–718.

Visher, C. A., La Vigne, N. G., & Travis, J. (2004a). *Maryland Pilot Study - Findings from Baltimore* (Returning Home: Understanding the Challenges of Prisoner Reentry:). Washington, D.C.: The Urban Institute Justice Policy Center.

Visher, C. A., La Vigne, N. G., & Travis, J. (2004b). *Returning Home: Understanding the Challenges of Prisoner Reentry - Maryland Pilot Study: Findings from Baltimore*. Washington, DC: The Urban Institute Justice Policy Center. Retrieved from http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410974-Returning-Home-Understanding-the-Challenges-of-Prisoner-Reentry.PDF

Weisburd, D., Einat, T., & Kowalski, M. (2008). The Miracle of the Cells: An Experimental Study of Interventions to Increase Payment of Court-Ordered Financial Obligations*. *Criminology & Public Policy*, *7*(1), 9–36. http://doi.org/10.1111/j.1745-9133.2008.00487.x

Wilson, J. A., & Davis, R. C. (2006). Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program*. *Criminology & Public Policy*, *5*(2), 303–338. http://doi.org/10.1111/j.1745-9133.2006.00380.x

Winterfield, L., & Hillsman, S. T. (1993). *The Staten Island Day-Fine Project* (Research in Brief). Washington, D.C.: National Institute of Justice. Retrieved from http://www.vera.org/sites/default/files/resources/downloads/1566.pdf

Young, M., & Stein, J. (2004). *The History of the Crime Victims' Movement in the United States* (Victims of Crime Oral History Project). Washington, DC: Office for Victims of Crime,

U.S. Department of Justice. Retrieved from https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4c.html

Yu, J. (1994). Punishment celerity and severity: Testing a specific deterrence model on drunk driving recidivism. *Journal of Criminal Justice*, *22*(4), 355–366. http://doi.org/10.1016/0047-2352(94)90082-5

APPENDIX A: LEGISLATIVE TEXT

This appendix reproduces in full the exact reforms passed by the state legislature in 2008. All newly added language is underlined.

Chapter 326
2008 -- S 2234 SUBSTITUTE A AS AMENDED

Enacted 07/08/08

AN ACT

RELATING TO CRIMINAL PROCEDURE -- WARRANTS FOR ARREST

Introduced By: Senators Metts, Pichardo, C Levesque, Issa, and Goodwin

Date Introduced: February 06, 2008

It is enacted by the General Assembly as follows:

SECTION 1. Section 12-6-7.1 of the General Laws in Chapter 12-6 entitled "Warrants for Arrest" is hereby amended to read as follows:

12-6-7.1. Service of arrest warrants. -- (a) Whenever any judge of any court shall issue his or her warrant against any person for failure to appear or comply with a court order, or for failure to make payment of a court ordered fine, civil assessment, or order of restitution, the judge may direct the warrant to each and all sheriffs and deputy sheriffs, the warrant squad, or any peace officer as defined in section 12-7-21, requiring them to apprehend the person and bring him or her before the court to be dealt with according to law; and the officers shall obey and execute the warrant, and be protected from obstruction and assault in executing the warrant as in service of other process. The person apprehended shall, in addition to any other costs incurred by him or her, be ordered to pay a fee for service of this warrant in the sum of one hundred twenty-five dollars ($125). Twenty-five dollars ($25.00) of the above fee collected as a result of a warrant squad arrest shall be divided among the local law enforcement agencies assigned to the warrant squad. Any person apprehended on a warrant for failure to appear for a cost review hearing in the superior court may be released upon posting with a justice of the peace the full amount due and owing in court costs as described in the warrant or bail in an other amount or form that will ensure the defendant's appearance in the superior court at an ability to pay hearing, in addition to the one hundred twenty-five dollars ($125) warrant assessment fee described above. Any person detained as a result of the actions of the justice of the peace in acting upon the superior court cost warrant shall be brought before the superior court at its next session. Such monies shall be delivered by the justice of the peace to the court issuing the warrant on the next court business day.

(b) Any person arrested pursuant to a warrant issued by a municipal court may be presented to a judge of the district court, or a justice of the peace authorized to issue warrants pursuant to section 12-10-2, for release on personal recognizance or bail when the municipal court is not in session. The provisions of this section shall apply only to criminal and not civil cases pending before the courts.

(c) Any person arrested pursuant to a warrant issued hereunder shall: (1) be immediately brought before the court; (2) if the court is not in session then the person shall be brought before the court at its

next session; (3) be afforded a review hearing on his/her ability to pay within forty-eight (48) hours;

and (4) if the court is not in session at the time of the arrest, a review hearing on his/her

ability to pay will be provided at the time for the first court appearance, as set forth in subsection (c)(3) of this section.

SECTION 2. Section 12-18.1-3 of the General Laws in Chapter 12-18.1 entitled "Probation and Parole Support Act" is hereby amended to read as follows:

12-18.1-3. Court costs. -- (a) The court shall assess as court costs, in addition to those otherwise provided by law, against all defendants charged with a felony, misdemeanor, or petty misdemeanor, and who plead nolo contendere or guilty or who are found guilty of the commission of those crimes, as follows:

(1) Where the offense charged is a felony and carries a maximum penalty of five (5) or more years imprisonment, three hundred dollars ($300) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater;

(2) Where the offense charged is a felony and carries a maximum penalty of less than five (5) years imprisonment, one hundred eighty dollars ($180) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater; and

(3) Where the offense charged is a misdemeanor, sixty dollars ($60.00) or ten percent (10%) of any fine imposed on the defendant by the court, whichever is greater.

(b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be remitted by the court.

(c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above ~~three (3)~~ two (2).

(d) If the court determines that the defendant does not have the ability to pay the costs as set forth in this section, the judge may by specific order mitigate the costs in accordance with the court's determination of the ability of the offender to pay the costs.

SECTION 3. Section 12-19-34 of the General Laws in Chapter 12-19 entitled "Sentence and Execution" is hereby amended to read as follows:

12-19-34. ~~Restitution payments~~ Priority of restitution payments to victims of crime. ~~--~~ (a) (1) If a person, pursuant to sections 12-19-32, 12-19-32.1, or 12-19-33, is ordered to make restitution in the form of monetary payment the court may order that it shall be made through the administrative office of state courts which shall record all payments and pay the money to the person injured in accordance with the order or with any modification of the order; provided, in cases where court ordered restitution totals less than two hundred dollars ($200) payment shall be made at the time of sentencing if the court determines that the defendant has the present ability to make restitution.

(2) Payments made on account when both restitution to a third-party is ordered, and court costs, fines, and fees, and assessments related to prosecution are owed, shall be disbursed by the administrative office of the state courts in the following priorities:

(i) court ordered restitution payments to person injured until such time as the court's restitution is fully satisfied; and

(ii) court costs, fines, fees, and assessments related to prosecution after the full payment of restitution.

~~(3)~~(2) Notwithstanding any other provision of law, any interest which has been accrued by the restitution account in the central registry shall be deposited on a regular basis into the violent crime indemnity fund, established by chapter 25 of this title. In the event that the office of the administrator of the state courts cannot locate the person or persons to whom restitution is to be made, the principal of the restitution payment shall be deposited into the general fund.

(b) The state is authorized to develop rules and/or regulations relating to assessment, collection, and disbursement of restitution payments when any of the following events occur:

(1) The defendant is incarcerated or on home confinement but is able to pay some portion of the restitution; or

(2) The victim dies before restitution payments are completed.

(c) The state may maintain a civil action to place a lien on the personal or real property of a defendant who is assessed restitution, as well as to seek wage garnishment, consistent with state and federal law.

12-20-10. ~~Remission of costs~~ Remission of costs-Prohibition against remitting restitution to victims of crime-ability to pay-indigency. – (a) The payment of costs in criminal cases may, upon application, be remitted by any justice of the superior court; provided, that any justice of a district court may, in his or her discretion, remit the costs in any criminal case pending in his or her court, or in the case of any prisoner sentenced by the court, and from which sentence no appeal has been taken. Notwithstanding any other provision of law, this section shall not limit the court's inherent power to remit any fine, fee, assessment or other costs of prosecution, provided no order of restitution shall be suspended by the court.

(b) For purposes of sections 12-18.1-3(d), 12-21-20, 12-25-28(b), 21-28-4.01(c)(3)(iv) and 21-28-4.17.1, the following conditions shall be prima facie evidence of the defendant's indigency and limited ability to pay:

(1) Qualification for and/or receipt of any of the following benefits or services by the defendant:

(i) temporary assistance to needy families

(ii) social security including supplemental security income and state supplemental payments program;

(iii) public assistance(iv) disability insurance; or(v) food stamps(2) Despite the defendant's good faith efforts to pay, outstanding court orders for

payment in the amount of one-hundred dollars ($100) or more for any of the following: (i) restitution payments to the victims of crime;(ii) child support payments; or(iii) payments for any counseling required as a condition of the sentence imposed

including, but not limited to, substance abuse, mental health, and domestic violence.

SECTION 5. Section 12-21-20 of the General Laws in Chapter 12-21 entitled "Recovery of Fines, Penalties, and Forfeitures" is hereby amended to read as follows:

12-21-20. ~~Order to pay costs~~ Order to pay costs and determination of ability to pay. – (a) If, upon any complaint or prosecution before any court, the defendant shall be ordered to pay a fine, enter into a recognizance or suffer any penalty or forfeiture, he or she shall also be ordered to pay all costs of prosecution, unless directed otherwise by law.

(b) In superior court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing by use of the procedures specified in this section.

(c) In district court, the judge shall make a preliminary assessment of the defendant's ability to pay immediately after sentencing or nearly thereafter as practicable by use of the procedures specified in this section.

(d) The defendant's ability to pay and payment schedule shall be determined by use of standardized procedures including a financial assessment instrument. The financial assessment instrument shall be:

(1) based upon sound and generally accepted accounting principles;

(2) completed based on a personal interview of the defendant and includes any and allrelevant information relating to the defendant's present ability to pay including, but not limited to, the information contained in section 12-20-10; and

(3) made by the defendant under oath.

(e) The financial instrument may, from time to time and after hearing, be modified by the court.

(f) When persons come before the court for failure to pay fines, fees, assessments and other costs of prosecution, or court ordered restitution, and their ability to pay and payment schedule has not been previously determined, the judge, the clerk of the court, or their designee shall make these determinations by use of the procedures specified in this section.

(g) Nothing in this section shall be construed to limit the court's ability, after hearing in open court, to revise findings about a person's ability to pay and payment schedule made by the clerk of the court or designee, based upon the receipt of newly available, relevant, or other information.

SECTION 6. Section 12-25-28 of the General Laws in Chapter 12-25 entitled "Criminal Injuries Compensation" is hereby amended to read as follows:

12-25-28. Special indemnity account for criminal injuries compensation. -- (a) It is provided that the general treasurer establish a violent crimes indemnity account within the general fund for the purpose of paying awards granted pursuant to this chapter. The court shall assess as court costs in addition to those provided by law, against all defendants charged with a felony, misdemeanor, or petty misdemeanor, whether or not the crime was a crime of violence, and who plead nolo contendere, guilty or who are found guilty of the commission of those crimes as follows:

(1) Where the offense charged is a felony and carries a maximum penalty of five (5) or more years imprisonment, one hundred and fifty dollars ($150) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(2) Where the offense charged is a felony and carries a maximum penalty of less than five (5) years imprisonment, ninety dollars ($90.00) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(3) Where the offense charged is a misdemeanor, thirty dollars ($30.00) or fifteen percent (15%) of any fine imposed on the defendant by the court, whichever is greater.

(b) These costs shall be assessed whether or not the defendant is sentenced to prison and in no case shall they be waived by the court unless the court finds an inability to pay.

(c) When there are multiple counts or multiple charges to be disposed of simultaneously, the judge shall have the authority to suspend the obligation of the defendant to pay on all counts or charges above ~~three (3)~~ two (2).

(d) Up to five percent (5%) of the state funds raised under this section, as well as federal matching funds, shall be available to pay administrative expenses necessary to operate this program. Federal funds for this purpose shall not supplant currently available state funds, as required by federal law.

SECTION 7. This act shall take effect upon passage.

APPENDIX B-1: INFORMED CONSENT FORM

You are being invited to participate in a Brown University study about being put in jail for court fines.

You will be asked about the causes and effects of this jail time, your court fines and court fines hearings, and your living situation before this time in jail. The interview will take roughly a half hour. **This interview is completely voluntary!** Whether or not you agree or refuse to answer questions will have no effect on your treatment by law enforcement officials. With your permission, the interviewer will record your responses using written notes.

Some of the questions may make you uncomfortable. You are free to refuse to answer the questions or to refuse to answer any particular question. You can ask that the interviewer stop recording notes at any time.

If you agree to participate, your responses will be kept confidential. That means that only the research staff will have access to them. Any reports that are generated as a result of this study will NOT include your name or other identifying information.

There are no direct benefits for you by participating in this study.

The research is being conducted by Brown University student Rachel Black and supervised by Brown University Professor of Political Science, Ross Cheit. If you have any questions later about this interview you can reach the student researcher at rachel_black@brown.edu or Dr. Cheit at ross_cheit@brown.edu or call both researchers at 401-863-3523

This study has been approved by Brown University's Institutional Review Board for the protection of human subjects. If you have questions regarding your rights as a research subject, please contact the Human Research Protections Program at 401-863-3050.

I agree to participate in this study of Rhode Island court fines. I have read the above statement and understand what will be required and that all information will be confidential. I also understand that I can withdraw from the study at any time without penalty.

□ I am 18 years of age or older

□ I agree that the interview may be recorded using written notes

□ I agree to be contacted for future research studies

Name _____ Date _____

Researcher_____ Date_____

APPENDIX B-2: INTERVIEW FORM

Revised or added questions are **bold and underlined**

Pseudonym: _____ Date: _____

Age: _____

Gender: M F Race: Black/African American White
Asian American Indian
Native Hawaiian/Pacific Islander

Hispanic or Latino: Y N

Verify that the current incarceration is for court debts, and ask the following questions about it.

A. Description of current incarceration

1. How long have you been at the Intake Center?
Since [date] _____ approximate / exact

2. Are you being held on any other charges? Yes / No
Would you be incarcerated if you did not owe court fines? Yes / No
Explain (if either is "yes"): _____

_____

3. How long do you expect to be held (for court fines)?
Until [date] _____ approximate / exact

4. Do you think you will be able to pay your bail?
___Yes
___No

5. Did you see a magistrate, judge, or justice of the peace before coming to the Intake Center?

6. How did you end up in front of the judge who incarcerated you for court fines?
___I was brought in on a warrant after missing an ability to pay hearing
___Other (specify)_____

7. **Describe your arrest. Where did you encounter the police? What was it like?**

8. When was your last ability to pay hearing **OR payment date** scheduled?
Date: _____ approximate / exact

7. How much was the payment that you were supposed to make before the ability to pay hearing **OR payment date**?
$_____ approximate / exact

8. **Were you on a monthly payment plan? If so what was it set at?**

9. What is the total amount that you owe **on this case**? **What is the total amount you owe across all cases?**
$_____ approximate / exact

10. **Do you know if this debt includes restitution? Fines? Costs?**

11. What was your bail set at?
$_____ approximate / exact

12. What is the total amount that you will owe in fines after you are released?
$_____ approximate / exact

11. Before you were incarcerated for court fines, …

…how much (of these debts) had you paid **on this case**? $_____ approximate / exact

…how much (of these debts) had you paid **on all cases? $_____ approximate / exact**

…how many times had you appeared at an ability to pay hearing:
For this case: _____ approximate / exact
For all cases: $_____ approximate / exact

…how many times **have you been arrested for** missing an ability to pay hearing (for these fines)? Number: _____ approximate / exact

12. Why did you miss the **most recent** hearing?

13. What did you do differently in your life because of the need to pay debts?

14. Were any problems caused by the need to pay court debts?

15. Were any problems caused by the need to appear at court debt hearings?

B. Questions about living situation

1. Where are you currently living?

- ☐ Homeless/on street
- ☐ Your own market rate house/apartment (name on lease)
- ☐ Your own apartment; public housing or section 8 (name on lease)
- ☐ Someone else's house
- ☐ At many different houses ("couch surfing")
- ☐ Residential treatment facility/supportive housing:
  Name:_____
- ☐ Transitional house or halfway house
  Name:_____
- ☐ Shelter or rooming house
  Name:_____
- ☐ No set place
- ☐ Other_____

2. Are you responsible or partially responsible for the care of children?

☐ Yes ☐ No

If yes, who is taking care of them currently_____?

3. On average, how many total hours per week do you usually work for pay at all jobs?
_____hour per week

4. How much money do you currently earn at your jobs before taxes, including tips, bonus, and commissions?

ONLY FILL IN ONE LINE

- $_____per hour
- $_____per day
- $_____per week
- $_____per two weeks
- $_____per month
- $_____per year

5. Do you receive income from Social Security Insurance or Social Security Disability?

- ☐ Yes
- ☐ No

6. Do you get food stamps?

- ☐ Yes
- ☐ No

7. Do you have a high school diploma or GED?

☐ Yes
☐ No

8. Do you currently receive any mental health treatment?

☐ Yes
☐ No

9. <u>Do you currently receive any substance use treatment?</u>

☐ Yes
☐ No

10. What is your living situation going to be after you are released (including housing and employment)?

11. Will being in jail have any other effects on your life when you get out?

<u>A) Employment</u>
<u>B) Housing</u>
<u>C) Relationships</u>
<u>D) Other Effects</u>

12. Other than court fines, did you have to pay any other expenses directly related to your sentence, incarceration or parole?

13. What would help you avoid spending time in jail as a result of having court fines and court fine hearings?

14. Is there anything else you'd like to tell me about this experience?

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TIMBS *v.* INDIANA

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 17–1091. Argued November 28, 2018—Decided February 20, 2019

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction, the trial court denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions.

Held: The Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Pp. 2–9.

(a) The Fourteenth Amendment's Due Process Clause incorporates and renders applicable to the States Bill of Rights protections "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *McDonald* v. *Chicago*, 561 U. S. 742, 767 (alterations omitted). If a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires. Pp. 2–3.

(b) The prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day. Protection against excessive fines has been a constant

Syllabus

shield throughout Anglo-American history for good reason: Such fines undermine other liberties. They can be used, *e.g.*, to retaliate against or chill the speech of political enemies. They can also be employed, not in service of penal purposes, but as a source of revenue. The historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is indeed overwhelming. Pp. 3–7.

(c) Indiana argues that the Clause does not apply to its use of civil *in rem* forfeitures, but this Court held in *Austin* v. *United States*, 509 U. S. 602, that such forfeitures fall within the Clause's protection when they are at least partially punitive. Indiana cannot prevail unless the Court overrules *Austin* or holds that, in light of *Austin*, the Excessive Fines Clause is not incorporated because its application to civil *in rem* forfeitures is neither fundamental nor deeply rooted.

The first argument, overturning *Austin*, is not properly before this Court. The Indiana Supreme Court held only that the Excessive Fines Clause did not apply to the States. The court did not address the Clause's application to civil *in rem* forfeitures, nor did the State ask it to do so. Timbs thus sought this Court's review only of the question whether the Excessive Fines Clause is incorporated by the Fourteenth Amendment. Indiana attempted to reformulate the question to ask whether the Clause restricted States' use of civil *in rem* forfeitures and argued on the merits that *Austin* was wrongly decided. Respondents' "right, . . . to restate the questions presented," however, "does not give them the power to expand [those] questions," *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 279, n. 10 (emphasis deleted), particularly where the proposed reformulation would lead the Court to address a question neither pressed nor passed upon below, cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7.

The second argument, that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures, misapprehends the nature of the incorporation inquiry. In considering whether the Fourteenth Amendment incorporates a Bill of Rights protection, this Court asks whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted. To suggest otherwise is inconsistent with the approach taken in cases concerning novel applications of rights already deemed incorporated. See, *e.g., Packingham* v. *North Carolina*, 582 U. S. ___, ___. The Excessive Fines Clause is thus incorporated regardless of whether application of the Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted. Pp. 7–9.

84 N. E. 3d 1179, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS,

Syllabus

C. J., and BREYER, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 17–1091

TYSON TIMBS, PETITIONER *v.* INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[February 20, 2019]

JUSTICE GINSBURG delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined,

would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N. E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari. 585 U. S. __ (2018).

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *McDonald* v. *Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

I

A

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833). "The constitutional Amendments adopted in the aftermath of the Civil War," however, "fundamentally altered our country's federal system." *McDonald*, 561 U. S., at 754. With only "a handful" of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them appli-

cable to the States. *Id.*, at 764–765, and nn. 12–13. A Bill of Rights protection is incorporated, we have explained, if it is "fundamental to our scheme of ordered liberty," or "deeply rooted in this Nation's history and tradition." *Id.,* at 767 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.,* at 765 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.[1]

B

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Taken together, these Clauses place "parallel limitations" on "the power of those entrusted with the criminal-law function of government." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*, 430 U. S. 651, 664 (1977)). Directly at issue here is the phrase "nor excessive fines imposed," which "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States* v. *Bajakajian*, 524 U. S. 321, 327–328 (1998) (quot-

---

[1]The sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca* v. *Oregon*, 406 U. S. 404 (1972). As we have explained, that "exception to th[e] general rule . . . was the result of an unusual division among the Justices," and it "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald*, 561 U. S., at 766, n. 14.

ing *Austin* v. *United States*, 509 U. S. 602, 609–610 (1993)). The Fourteenth Amendment, we hold, incorporates this protection.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement . . . ." §20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225).[2] As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris*, 492 U. S., at 271. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ."). But cf. *Bajakajian*, 524 U. S., at 340, n. 15 (taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. *E.g.*, The Grand Remonstrance ¶¶17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625–1660, pp. 210, 212 (S. Gardiner ed., 3d ed. rev. 1906); *Browning-Ferris*, 492 U. S., at 267. When James II was overthrown in the Glorious Revolution, the

---

[2] "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Browning-Ferris*, 492 U. S., at 269. "[T]hough fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably." Brief for Eighth Amendment Scholars as *Amici Curiae* 12.

attendant English Bill of Rights reaffirmed Magna Carta's guarantee by providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, §10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, *e.g.*, Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage."). In 1787, the constitutions of eight States—accounting for 70% of the U. S. population—forbade excessive fines. Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines. Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. See, *e.g.*, Mississippi Vagrant Law,

Laws of Miss. §2 (1865), in 1 W. Fleming, Documentary History of Reconstruction 283–285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. *E.g.*, *id.* §5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev 671, 681–685 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude"). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 443 (1866); *id.,* at 1123–1124.

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. *Id.*, at 9 (citing *Norris* v. *State*, 271 Ind. 568, 576, 394 N. E. 2d 144, 150 (1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. See *Browning-Ferris*, 492 U. S., at 267. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin* v. *Michigan*, 501 U. S. 957, 979, n. 9 (1991) (opinion of Scalia, J.) ("it

makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U. S., at 767 (internal quotation marks omitted; emphasis deleted).

II

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause's specific application to such forfeitures is neither fundamental nor deeply rooted.

In *Austin* v. *United States*, 509 U. S. 602 (1993), however, this Court held that civil *in rem* forfeitures fall within the Clause's protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies "identically to both the Federal Government and the States." *McDonald*, 561 U. S., at 766, n. 14. Accordingly, to prevail, Indiana must persuade us either to overrule our decision in *Austin* or to hold that, in light of *Austin*, the Excessive Fines Clause is not incorporated because the Clause's application to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The first argument is not

properly before us, and the second misapprehends the nature of our incorporation inquiry.

A

In the Indiana Supreme Court, the State argued that forfeiture of Timbs's SUV would not be excessive. See Brief in Opposition 5. It never argued, however, that civil *in rem* forfeitures were categorically beyond the reach of the Excessive Fines Clause. The Indiana Supreme Court, for its part, held that the Clause did not apply to the States at all, and it nowhere addressed the Clause's application to civil *in rem* forfeitures. See 84 N. E. 3d 1179. Accordingly, Timbs sought our review of the question "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment." Pet. for Cert. i. In opposing review, Indiana attempted to reformulate the question to ask "[w]hether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures." Brief in Opposition i. And on the merits, Indiana has argued not only that the Clause is not incorporated, but also that *Austin* was wrongly decided. Respondents' "right, in their brief in opposition, to restate the questions presented," however, "does not give them the power to expand [those] questions." *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 279, n. 10 (1993) (emphasis deleted). That is particularly the case where, as here, a respondent's reformulation would lead us to address a question neither pressed nor passed upon below. Cf. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view . . . ."). We thus decline the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.

B

As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.

Indiana's suggestion to the contrary is inconsistent with the approach we have taken in cases concerning novel applications of rights already deemed incorporated. For example, in *Packingham* v. *North Carolina*, 582 U. S. ___ (2017), we held that a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, we noted that the First Amendment's Free Speech Clause was "applicable to the States under the Due Process Clause of the Fourteenth Amendment." *Id.,* at ___ (slip op., at 1). We did not, however, inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. See also, *e.g.*, *Riley* v. *California*, 573 U. S. 373 (2014) (holding, without separately considering incorporation, that States' warrantless search of digital information stored on cell phones ordinarily violates the Fourth Amendment). Similarly here, regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

* * *

For the reasons stated, the judgment of the Indiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–1091

TYSON TIMBS, PETITIONER *v.* INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[February 20, 2019]

JUSTICE GORSUCH, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. See, *e.g.*, *post*, at 1–3 (THOMAS, J., concurring in judgment); *McDonald* v. *Chicago*, 561 U. S. 742, 805–858 (2010) (THOMAS, J., concurring in part and concurring in judgment) (documenting evidence that the "privileges or immunities of citizens of the United States" include, at minimum, the individual rights enumerated in the Bill of Rights); Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L. J. 1509 (2007); A. Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

SUPREME COURT OF THE UNITED STATES

No. 17–1091

TYSON TIMBS, PETITIONER *v.* INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

[February 20, 2019]

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment's prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment's Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment.

I

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant . . . United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status." *McDonald* v. *Chicago*, 561 U. S. 742, 808 (2010) (THOMAS, J., concurring in part and concurring in judgment). But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." *Id.*, at 808–809. Litigants seeking federal protection of substantive rights against the States thus needed

"an alternative fount of such rights," and this Court "found one in a most curious place," *id.*, at 809—the Fourteenth Amendment's Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

Because this Clause speaks only to "process," the Court has "long struggled to define" what substantive rights it protects. *McDonald*, *supra*, at 810 (opinion of THOMAS, J.). The Court ordinarily says, as it does today, that the Clause protects rights that are "fundamental." *Ante*, at 2, 3, 7, 9. Sometimes that means rights that are "'deeply rooted in this Nation's history and tradition.'" *Ante*, at 3, 7 (quoting *McDonald*, *supra*, at 767 (majority opinion)). Other times, when that formulation proves too restrictive, the Court defines the universe of "fundamental" rights so broadly as to border on meaningless. See, *e.g.*, *Obergefell* v. *Hodges*, 576 U. S. ___, ___–___ (2015) (slip op., at 1–2) ("rights that allow persons, within a lawful realm, to define and express their identity"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). Because the oxymoronic "substantive" "due process" doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *McDonald*, *supra*, at 811 (opinion of THOMAS, J.). And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions. *E.g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Dred Scott* v. *Sandford*, 19 How. 393, 450 (1857).

The present case illustrates the incongruity of the

Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to "'proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions,'" or that the State failed to provide "some baseline procedures." *Nelson* v. *Colorado*, 581 U. S. ___, ___, n. 1 (2017) (THOMAS, J., dissenting) (slip op., at 2, n. 1). His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process. *McDonald*, 561 U. S., at 811 (opinion of THOMAS, J.).

II

When the Fourteenth Amendment was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" *Id.*, at 813. Those "rights" were the "inalienable rights" of citizens that had been "long recognized," and "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against interference by the States. *Id.*, at 822, 837. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. "Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text." *Id.*, at 818.

The question here is whether the Eighth Amendment's prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

A

The Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689," *United States* v. *Bajakajian*, 524 U. S. 321, 335 (1998), which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that "[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but *according to the measure of the offence so shall he pay* . . . ." Sources of English Legal and Constitutional History ¶8, p. 50 (M. Evans & R. Jack eds. 1984) (emphasis added). Expanding this principle, Magna Carta required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood," *Bajakajian*, *supra*, at 335:

> "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy." Magna Carta, ch. 20 (1215), in A. Howard, Magna Carta: Text & Commentary 42 (rev. ed. 1998).

Similar clauses levying amercements "only in proportion to the measure of the offense" applied to earls, barons, and clergymen. Chs. 21–22, *ibid.* One historian posits that, due to the prevalence of amercements and their use in increasing the English treasury, "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." Pleas of the Crown for the County of Gloucester xxxiv (F. Maitland ed. 1884).

The principle was reiterated in the First Statute of Westminster, which provided that no man should "be amerced, without reasonable cause, and according to the

quantity of his Trespass." 3 Edw. I, ch. 6 (1275). The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff "to take a moderate amercement proper to the magnitude and manner of th[e] offense, according to the tenour of the Great Charter of the Liberties of England," and the bailiff was sued for extorting "a heavier ransom." *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (1316), reprinted in 52 Selden Society 3, 5 (1934); see also *Richard Godfrey's Case*, 11 Co. Rep. 42a, 44a, 77 Eng. Rep. 1199, 1202 (1615) (excessive fines are "against law").

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint "in the constitutional and political struggles between the king and his parliamentary critics." L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981) (Schwoerer). From 1629 to 1640, Charles I attempted to govern without convening Parliament, but "in the absence of parliamentary grants," he needed other ways of raising revenue. 4 H. Walter, A History of England 135 (1834); see 1 T. Macaulay, History of England 85 (1899). He thus turned "to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law." 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II 462 (1827) (Hallam); see 4 Walter, *supra*, at 135.

The Court of Star Chamber, for instance, "imposed heavy fines on the king's enemies," Schwoerer 91, in disregard "of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means. . . ." 2 Hallam 46–47. "[T]he strong interest of th[is] court in these fines . . . had a tendency to aggravate the punishment. . . ." 1 *id.*, at 490. "The statute abolishing" the Star Chamber in 1641 "specifically prohibited any court thereafter from . . . levying . . . excessive fines." Schwoerer 91.

"But towards the end of Charles II's reign" in the 1670s

and early 1680s, courts again "imposed ruinous fines on the critics of the crown." *Ibid.* In 1680, a committee of the House of Commons "examined the transcripts of all the fines imposed in King's Bench since 1677" and found that "the 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." *Ibid.*; 9 Journals of the House of Commons 692 (Dec. 23, 1680). The House of Commons determined that the actions of the judges of the King's Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had "most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors" without "any Regard to the Nature of the Offences, or the Ability of the Persons." *Id.*, at 698.

Yet "[o]ver the next few years fines became even more excessive and partisan." Schwoerer 91. The King's Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. *Id.*, at 93. For speaking against the Duke of York, the sheriff of London was fined £100,000 in 1682, which corresponds to well over $10 million in present-day dollars[1]—"an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law." The History of England Under the House of Stuart, pt. 2, p. 801 (1840). The King's Bench fined Sir Samuel Barnadiston £10,000 for allegedly seditious letters, a fine that was overturned by the House of

---

[1] See Currency Converter: 1270–2017 (estimating the 2017 equivalent of £100,000 in 1680), http://nationalarchives.gov.uk/currency-converter (as last visited Feb. 8, 2019)

Lords as "exorbitant and excessive." 14 Journals of the House of Lords 210 (May 14, 1689). Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves "suffered heavy fines." Schwoerer 91–92. And in 1684, judges in the case of John Hampden held that Magna Carta did not limit "fines for great offences" against the King, and imposed a £40,000 fine. *Trial of Hampden*, 9 State Trials 1054, 1125 (K. B. 1684); 1 J. Stephen, A History of the Criminal Law of England 490 (1883).

"Freedom from excessive fines" was considered "indisputably an ancient right of the subject," and the Declaration of Rights' indictment against James II "charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom." Schwoerer 90. Article 10 of the Declaration declared "[t]hat excessive Bayle ought not to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted." *Id.*, at 297.

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as "excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Case of Earl of Devonshire*, 11 State Trials 1354, 1372 (K. B. 1687). Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were "contrary to Law and ancient Practice" and violated the prohibition on "excessive Fines." *Harmelin* v. *Michigan*, 501 U. S. 957, 971 (1991); *Trial of Oates*, 10 State Trials 1080, 1325 (K. B. 1685). The House of Commons passed a bill to overturn Oates's conviction, and eventually, after a

request from Parliament, the King pardoned Oates. *Id.*, at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—"whose works constituted the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)—explained that the prohibition on excessive fines contained in the English Bill of Rights "had a retrospect to some unprecedented proceedings in the court of king's bench." 4 W. Blackstone, Commentaries 372 (1769). Blackstone confirmed that this prohibition was "only declaratory . . . of the old constitutional law of the land," which had long "regulated" the "discretion" of the courts in imposing fines. *Ibid.*

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

B

"As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen," *McDonald*, 561 U. S., at 816 (opinion of THOMAS, J.), including the prohibition on excessive fines. *E.g.*, J. Dummer, A Defence of the New-England Charters 16–17 (1721) ("The Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shall be fin'd above the Nature of his Offence, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge"). Thus, the text of the Eighth Amendment was "'based directly on . . . the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'" *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 266 (1989) (quoting *Solem* v. *Helm*, 463 U. S. 277, 285, n. 10 (1983)); see *Jones* v. *Commonwealth*, 5 Va. 555, 557 (1799) (opinion of Carrington, J.) (explaining that the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any "fine or amercement ought

to be according to the degree of the fault and the estate of the defendant").

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were "the drudge-horse of criminal justice," "probably the most common form of punishment." L. Friedman, Crime and Punishment in American History 38 (1993). To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition on excessive fines was essential to "the security of liberty" and was "as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other." Brutus II (Nov. 1, 1787), in The Complete Bill of Rights 621 (N. Cogan ed. 1997). Similarly, during Virginia's ratifying convention, Patrick Henry pointed to Virginia's own prohibition on excessive fines and said that it would "depart from the genius of your country" for the Federal Constitution to omit a similar prohibition. Debate on Virginia Convention (June 14, 1788), in 3 Debates on the Federal Constitution 447 (J. Elliot 2d ed. 1854). Henry continued: "[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives" to "define punishments without this control." *Ibid.*

Governor Edmund Randolph responded to Henry, arguing that Virginia's charter was "nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects." *Id.*, at 466. According to Randolph, "the exclusion of excessive bail and fines . . . would follow of itself without a bill of rights," for such fines would never be imposed absent "corruption in

the House of Representatives, Senate, and President," or judges acting "contrary to justice." *Id.*, at 467–468.

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before "it was agreed to by a considerable majority." 1 Annals of Cong. 754 (1789). And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.[2]

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the Fourteenth Amendment, explained that the Eighth Amendment was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts," when "[e]normous fines and amercements were . . . sometimes imposed." 3 J. Story, Commentaries on the Constitution of the United States §1896, pp. 750–751 (1833). Story included the prohibition

---

[2] Del. Const., Art. I, §11 (1792), in 1 Federal and State Constitutions 569 (F. Thorpe ed. 1909); Md. Const., Decl. of Rights, Art. XXII (1776), in 3 *id.*, at 1688; Mass. Const., pt. 1, Art. XXVI (1780), in *id.*, at 1892; N. H. Const., pt. 1, Art. 1, §XXXIII (1784), in 4 *id.*, at 2457; N. C. Const., Decl. of Rights, Art. X (1776), in 5 *id.*, at 2788; Pa. Const., Art. IX, §13 (1790), in *id.*, at 3101; S. C. Const., Art. IX, §4 (1790), in 6 *id.*, at 3264; Va. Const., Bill of Rights, §9 (1776), in 7 *id.*, at 3813. Vermont had a clause specifying that "all fines shall be proportionate to the offences." Vt. Const., ch. II, §XXIX (1786), in *id.*, at 3759. Georgia's 1777 Constitution had an excessive fines clause, Art. LIX, but its 1789 Constitution did not. And the Northwest Ordinance provided that "[a]ll fines shall be moderate; and no cruel or unusual punishments inflicted." §14, Art. 2 (1787)

on excessive fines as a right, along with the "right to bear arms" and others protected by the Bill of Rights, that "operates, as a qualification upon powers, actually granted by the people to the government"; without such a "restrict[ion]," the government's "exercise or abuse" of its power could be "dangerous to the people." *Id.*, §1858, at 718–719.

Chancellor Kent likewise described the Eighth Amendment as part of the "right of personal security . . . guarded by provisions which have been transcribed into the constitutions in this country from *magna carta*, and other fundamental acts of the English Parliament." 2 J. Kent, Commentaries on American Law 9 (1827). He understood the Eighth Amendment to "guard against abuse and oppression," and emphasized that "the constitutions of almost every state in the Unio[n] contain the same declarations in substance, and nearly in the same language." *Ibid.* Accordingly, "they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the . . . rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright." *Ibid.*; accord, W. Rawle, A View of the Constitution of the United States of America 125 (1825) (describing the prohibition on excessive fines as "founded on the plainest principles of justice").

C

The prohibition on excessive fines remained fundamental at the time of the Fourteenth Amendment. In 1868, 35 of 37 state constitutions "expressly prohibited excessive fines." *Ante*, at 5. Nonetheless, as the Court notes, abuses of fines continued, especially through the Black Codes adopted in several States. *Ante*, at 5–6. The "centerpiece" of the Codes was their "attempt to stabilize the black work force and limit its economic options apart from plantation

labor." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 199 (1988). Under the Codes, "the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." *Ibid.* The Codes also included "'antienticement' measures punishing anyone offering higher wages to an employee already under contract." *Id.*, at 200.

The 39th Congress focused on these abuses during its debates over the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the "severe penalties" inflicted by the Black Codes and similar measures, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (Sen. Trumbull), suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult "freedmen, free negroes and mulattoes" "without lawful employment" faced $50 in fines and 10 days' imprisonment for vagrancy. Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. Exec. Doc. No. 6, 39th Cong., 2d Sess., §2, p. 192 (1867). Those convicted had five days to pay or they would be arrested and leased to "any person who will, for the shortest period of service, pay said fine and forfeiture and all costs." §5, *ibid.* Members of Congress criticized such laws "for selling [black] men into slavery in punishment of crimes of the slightest magnitude." Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (Rep. Cook); see *id.*, at 1124 ("It is idle to say these men will be protected by the States").

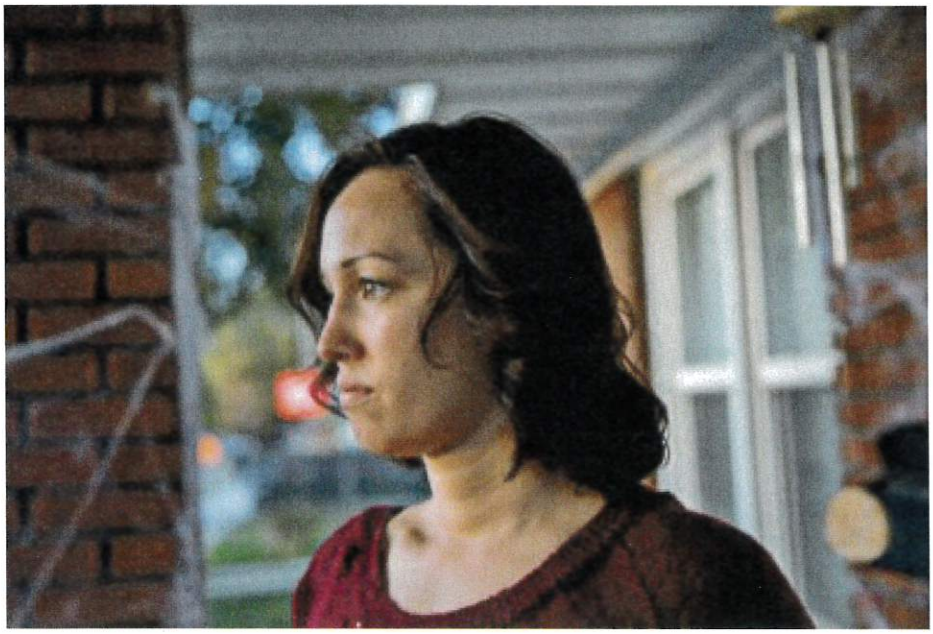
Similar examples abound. One congressman noted that Alabama's "aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose . . . a fine of fifty dollars and six months' imprisonment on

any servant or laborer (white or black) who loiters away his time or is stubborn or refractory." *Id.*, at 1621 (Rep. Myers). He also noted that Florida punished vagrants with "a fine not exceeding $500 and imprison[ment] for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court." *Ibid.* At the time, such fines would have been ruinous for laborers. Cf. *id.*, at 443 (Sen. Howe) ("A thousand dollars! That sells a negro for his life").

These and other examples of excessive fines from the historical record informed the Nation's consideration of the Fourteenth Amendment. Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those "fundamental principles" "fixed" by the Constitution, including "immunity from . . . excessive fines." 2 Cong. Rec. 384–385 (1874) (Rep. Mills); see also *id.*, at App. 241 (Sen. Norwood). And every post-1855 state constitution banned excessive fines. S. Calabresi & S. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008). The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

* * *

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the Eighth Amendment's prohibition on excessive fines applies in full to the States.



Jessica Albritton was arrested for missing a hearing on an overdue loan. (Kim Raff for ProPublica)

THE NEW DEBTORS PRISONS

They Loan You Money. Then They Get A Warrant For Your Arrest.

High-interest loan companies are using Utah's small claims courts to arrest borrowers and take their bail money. Technically, the warrants are issued for missing court hearings. For many, that's a distinction without a difference.

by Anjali Tsui, Dec. 3, 5 a.m. EST

Jessica Albritton was arrested for missing a hearing on an overdue loan. (Kim Raff for ProPublica)

ProPublica is a nonprofit newsroom that investigates abuses of power. Sign up to receive our biggest stories as soon as they're published.

Cecila Avila was finishing a work shift at a Walmart. David Gordon was at church. Darrell Reese was watching his granddaughter at home. Jessica Albritton had pulled into the parking lot at her job, where she packed and shipped bike parts.

All four were arrested by an armed constable, handcuffed and booked into jail. They spent anywhere from a few hours to a couple of days behind bars before being released after paying a few hundred dollars in bail or promising to appear in court.

None of the four, who live in northern Utah and were detained last year, had committed a crime. They had each borrowed money at high interest rates from a local lender called Loans for Less and were sued for owing sums that ranged from $800 to $3,600. When they missed a court date, the company obtained a warrant for their arrest.

Avila was handcuffed and marched down the main aisle in the Walmart in front of customers and co-workers. "It was the most embarrassing thing," said Avila, 30, who has worked at the store for eight years. At the time of the arrest, Loans for Less had applied to garnish her wages. "It just didn't make any sense to me," she said. "Why am I being arrested for it?"

It's against the law to jail someone because of an unpaid debt. Congress banned debtors prisons in 1833. Yet, across the country, debtors are routinely threatened with arrest and sometimes jailed, and the practices are particularly aggressive in Utah. (ProPublica recently chronicled how medical debt collectors are wielding similar powers in Kansas.)

Technically, debtors are arrested for not responding to a court summons requested by the creditor. But for many low-income people, who are not familiar with court proceedings, lack access to transportation, child care options or time off, or move frequently and thus may not receive notifications, it's a distinction without a difference.

Reese, a 70-year-old Vietnam veteran, said he missed a hearing because he couldn't afford to put gas in his car. Gordon, 46, said he was never personally notified of the court date. Avila and Albritton, 32, said they couldn't take time off work.

In Utah, payday lenders and similar companies that offer high-interest, small-dollar loans dominate small claims court. Loans for Less, for example, filed 95% of the small claims cases in South Ogden, a suburban city of 17,000 about a half-hour north of Salt Lake City on the interstate, in fiscal year 2018, according to state data.

Across Utah, high-interest lenders filed 66% of all small claims cases heard between September 2017 and September 2018, according to a new analysis of court records conducted by a team led by Christopher Peterson, a law professor at the University of Utah and the financial services director at

the Consumer Federation of America, and David McNeill, a legal data consultant and CEO of Docket Reminder.

Companies can sue for up to $11,000 in Utah's small claims courts, which are stripped of certain formalities: There are rarely lawyers, judges are not always legally trained and the rules of evidence don't apply.

Lenders file thousands of cases every year. When defendants don't show up — and they often don't — the lenders win by default. Once a judgment is entered, companies can garnish borrowers' paychecks and seize their property. If borrowers fail to attend a supplemental hearing to answer questions about their income and assets, companies can ask the court to issue a bench warrant for their arrest.

Darrell Reese, a Vietnam veteran, with his granddaughter on his porch. Reese was arrested after he missed a court hearing because, he said, he couldn't afford to put gas in his car. (Kim Raff for ProPublica)

Arrest warrants were issued in an estimated 3,100 small claims cases during the period studied by Peterson's team. Almost all of the warrants — 91% — were issued in cases filed by payday, auto title or other high-interest lenders. The number of people who are jailed appears to be small. The state does not track the information, but ProPublica examined a sampling of court records and identified at least 17 people who were jailed over the course of 12 months.

Most people scramble to meet bail to avoid being incarcerated. Others, like Avila, Gordon and Albritton, are booked into jail and held until they pay.

They often borrow from friends, family, bail bonds companies and even take on new payday loans.

"Bail" has a different meaning in Utah than it does in other states — one that tilts the power even more in the direction of lenders and other creditors. In 2014, state legislators passed a law that made it possible for creditors to get access to bail money posted in civil cases. Prior to that, bail money would return to the defendant. Now, it is routinely transferred to high-interest lenders. The law has transformed the state's power to incarcerate into a powerful tool to guarantee that loan companies get paid.

As Peterson put it, "They're handcuffing and incarcerating people in order to get money out of them and apply it towards insanely high interest rate loans."

Small claims cases are heard once a month at City Hall in South Ogden, a former frontier town nestled between Hill Air Force Base and the Wasatch Mountains. On a sunny Monday morning in July, I walked past black-and-white portraits of City Council members and paused in front of a metal detector outside the courtroom on the ground floor.

"Are you here for small claims court?" a bailiff asked.

"Yes," I said.

"You can check in with her," he said, pointing at a makeshift station in a hallway in front of the courtroom. "You probably won't need to go inside to see the judge."

The person standing at a high-top post office-style table a few feet from a wall decal that read "Welcome to the South Ogden City Kiosk" was not a court official.

She was Valerie Stauffer, 44, a senior collections officer with Loans for Less. Reddish-brown hair tied back, the bespectacled Stauffer clutched dozens of beige and blue file folders, one for each borrower whose case was on the docket that day. She then piled them into a foot-high stack on the table next to her car keys and phone.

Loans for Less offers auto title and installment loans, which are higher-stakes versions of payday loans. Traditional payday loans, often for sums in the low hundreds of dollars, are typically due on the borrower's next payday. The loans carry interest with annual percentage rates that run into

triple digits. Borrowers provide postdated checks or access to their bank account as collateral. Auto title loans involve similarly stratospheric interest rates — Loans for Less charges up to a 300% APR — and larger sums of money, since the money is secured by the title to a borrower's car. The loans are then paid back within a month, or in installments that might stretch over several months.

Loans for Less has six employees across two branches in Salt Lake City and Ogden. More than half of its borrowers, the company said, are repeat customers. The company's website promises to help borrowers "get the cash you need" for the "lowest possible rates." Loans for Less, the website says, is "up-front, fair, and honest with everyone."

At 9 in the morning, there were already a handful of defendants lining up to meet with Stauffer. She quickly leafed through the stack to identify a borrower's case and spoke to each one in a hushed voice. Stauffer handed out questionnaires requesting details of each person's financial life: employer's name, bank account numbers, whether the defendant rents or owns a home.

Borrowers sued by Loans for Less line up to meet with Valerie Stauffer, far left, a senior collections officer with the company, at the City Hall in South Ogden, Utah, where small claims cases are heard. (Kim Raff for ProPublica)

I spoke to Stauffer in between her meetings. She said that Loans for Less is "a little more aggressive than most." Not all lenders will take borrowers to court, garnish their wages or request bench warrants, she said. Stauffer quickly added that she tackles the "more extreme" cases: "The ones that

have taken the money and ran," she said. "The ones who have no intention of paying their money back."

Zachery Limas and his wife, Amber Greer, both 24, waited in the lobby area for their audience with Stauffer. Limas had borrowed $700 from Loans for Less last summer for a down payment on a 2012 Hyundai Santa Fe, an SUV with enough space to accommodate car seats for three children, one of whom was then on the way. (Limas and Greer had another loan with a different company to cover the balance of the purchase price.) Since the $700 loan came with a 180% APR, Limas would have to pay back around $1,400 — double the amount borrowed — within 10 months. At the time, he earned $16.87 an hour driving a forklift at a warehouse; she worked at Subway.

Limas said he made a few payments before a new owner took over his employer and he was laid off. By the time he found a new job, Greer had given birth to their child and stopped working. With his entire paycheck going toward basic expenses like rent and electricity, they could no longer afford to pay back the loan. In March, Loans for Less won a default judgment against Limas for $1,671.23, which included the outstanding balance plus court fees. "We can't catch up. We can't do this," Greer said. "There's no way we're ever going to catch up, especially not with the interest rate that they have."

After Limas missed a court date for the second time, a constable came to their home, threatening to take him to jail unless he paid $200 in bail at the door. "Obviously, we don't have extra money like that lying around," he said. Greer called a friend of her mother's and borrowed the money, jotting down her card details over the phone.

Standing outside the courtroom, the couple told Stauffer they had met with a lawyer and planned to file for Chapter 7 bankruptcy, which would put the lawsuit on hold and eventually discharge their debts. Stauffer was not sympathetic and tried to persuade them to agree to a payment plan. "Even if they're broke," Stauffer said later, "we'll set up $25 a month." The couple refused.

Limas and Greer say they went to court planning to speak to a judge. After addressing their case with Stauffer, they asked her if they were "good to go." When she said yes, according to Greer, they took that to mean that they had fulfilled their obligations at the courthouse. Limas and Greer left. They were absent when their case was heard before a judge an hour later.

These hallway negotiations between payday lenders and borrowers are ubiquitous in small claims courts across Utah. They raise red flags, according to consumer advocates. Borrowers are typically unfamiliar with the courts and can't afford to hire lawyers; collectors deal with dozens of cases every month. Consumers might not understand that they are meeting with a representative from a payday loan company rather than a court-appointed official, said April Kuehnhoff, an attorney at the National Consumer Law Center. They might not understand that they have a right to a hearing before a judge or that government benefits like Social Security and disability are exempt from collection. "The settlement agreement just gets rubber-stamped by the court and people get railroaded through this process," she said.

Stauffer maintained that she is trying to help. "We try and set up arrangements outside of court to make it easier on them. That way, they don't have to go in front of the judge," she said. "Any judge intimidates people, so it's easier just to try and set up arrangements outside."

Defendants wait to meet with Stauffer. (Kim Raff for ProPublica)

At a quarter to 10, Stauffer gathered her folders and walked inside the courtroom. She had 52 cases to be heard, which represented all but two of the cases on the court's docket that day. Stauffer had been able to strike a deal with a handful of debtors. None of them followed her inside the courtroom. I sat with a handful of people in the gallery.

Judge Bryan Memmott was presiding. Temporarily stationed in South Ogden, he spends most of his time handling minor criminal and civil matters in the justice court in Plain City, about 15 miles away. A former partner at a small law firm near Phoenix, specializing in real estate and bankruptcy law, Memmott began his legal career in the Judge Advocate General's Corps in the Air Force. He seemed at ease with Stauffer and talked to her as though they were colleagues. (Memmott declined to be interviewed for this article.)

"Why don't you tell me what cases you've got and we'll go through them that way?" he said.

Stauffer laughed. "OK," she said. "So I'll go in alphabetical order."

The judge moved quickly, approving judgments as soon as Stauffer shared a defendant's name and the amount they owed. When the judge lingered once on a case for more than 30 seconds, he begged her pardon: "Sorry. My computer's being a little slow. I was going between screens. I apologize."

"No, you're OK," Stauffer said.

In many cases, a judgment had been previously entered and borrowers had missed the follow-up hearing. "Can we get a bench warrant?" Stauffer asked in one such case. Memmott obliged, setting the bail amount at $200.

During the half-hour hearing, Memmott issued 21 such warrants. He never refused a request by Stauffer.

When they came to Limas' case, Stauffer told the judge that Limas had paid $200 in bail but had told her he was planning to file for bankruptcy. "We were going to set up arrangements," she explained. "He walked out."

Memmott didn't wait for Stauffer to request that the Limas' bail be transferred to Loans for Less. "He hasn't filed bankruptcy yet," the judge said, "so we'll forfeit the bail [to the company] and issue a new warrant. If he files bankruptcy, we'll stay the proceedings."

"So, what's your new warrant," he said, glancing at Stauffer. "$300?"

"OK," she said.

After the hearing was over, Stauffer stepped into the hallway to talk to a constable stationed by the metal detectors outside the courtroom. He works for Wasatch Constables, a company hired by South Ogden to serve as bailiffs in its courthouses.

The company is also deputized by payday lenders, who pay them a fee to serve warrants on debtors. S. Steven Maese, who was then Wasatch's chief operating officer, defended his company's work for payday lenders. "The biggest misconception, I would say, is that people think that they are being punished for owing money — they are not," he said. "A warrant is a wake-up call to say that you need to comply with court proceedings."

Stauffer lowered her stack of folders to the gray folding tables near the metal detectors. The officer leaned over and snapped a picture of an address in one of her folders, ready for his next job.

A few weeks after the hearing, a constable showed up at the home of Limas and Greer to arrest him. Greer said she was able to provide evidence of the couple's bankruptcy filing and the constable went away, but not before informing her that court records indicated Limas had missed his court date.

At first blush, Utah would seem an unlikely home to a concentration of companies that specialize in peddling high-interest loans to low-income, often minority customers. Utah has one of the lowest unemployment rates in the country, and its population is more middle class and white than the rest of the U.S. Yet a quarter of the state's population lives in a household that earns less than $39,690 a year.

The presence of 417 payday and title loan stores in Utah — more than the number of McDonald's, 7-Eleven, Burger King and Subway stores combined — is symptomatic of an age in which financial precariousness is widespread. Across the country, wages have stagnated for decades, failing to keep up with the cost of living. That helps explain why 12 million Americans take out payday loans every year, according to Pew Charitable Trusts. As an often-quoted study by the Federal Reserve Board has noted, a quarter of adults in the U.S. would not be able to handle an unexpected $400 expense without borrowing or selling something to pay for it.

Twelve million Americans take out payday loans each year, according to Pew Charitable Trusts, including in Utah, a state with one of the lowest unemployment rates in the country. (Kim Raff for ProPublica)

There's also a policy reason behind the ubiquity of payday lenders in Utah. After the U.S. Supreme Court relaxed restrictions on interest rates in 1978, Utah became one of the first states to scrap its interest rate limits in the hopes of luring credit card and other finance companies. A favorable regulatory climate in Utah made lenders feel welcome. The first payday loan store opened in Salt Lake City in 1985, and other companies soon flocked.

Today, Utah is home to some of the most expensive payday loans in the country. The average annual interest rate hovers at 652%, according to the Center for Responsible Lending, a nonprofit research and policy organization. (The center was started with support from the Sandler Foundation, which is also a major funder of ProPublica.) Payday lenders charged annual percentage rates as high as 2,607% in 2019, according to the Utah Department of Financial Services. Utah is one of six states where there are no interest rate caps governing payday loans.

When it comes time to pay, just a few weeks after getting a loan, most borrowers find they can't afford to do so, according to the federal Consumer Financial Protection Bureau. As a result, the vast majority of payday loans — 80% — are rolled over or renewed within two weeks. Most loans go to borrowers who have taken out at least seven loans in a row. Many people pay more in fees than the amount borrowed and get stuck in a cycle of debt.

Payday lenders counter that they offer a crucial service to people with poor credit. Loans for Less says it helps people who are short on rent, behind on utility bills or at risk of overdrafting on their bank accounts. Many of the company's customers can't qualify for bank loans, credit cards or a paycheck advance. "It's not our intention to take people to jail over debt," the company wrote in a statement. "Warrants are issued for their failure to appear in court. We are more than willing to work with our customers."

The federal government has never regulated payday lenders. Under the Obama administration, the CFPB began the laborious process of drafting federal regulations. The agency finished writing what were meant to be the final rules in 2017, after the Trump administration had taken office. The most notable provision would require payday, vehicle title and some installment lenders to ascertain, in advance, a borrower's ability to repay the loan without sacrificing basic living expenses like rent and food. The industry aggressively lobbied against the provision, which would have curtailed its profits, and so far it has not gone into effect. The Trump administration has delayed the payday lending rules and is considering a proposal to gut them.

Utah has a favorable climate for high-interest lenders. As a result, it's home to 417 payday and auto title loan stores. (Kim Raff for ProPublica)

In the absence of federal regulation, rules vary wildly among states. Fifteen states and the District of Columbia have banned payday loans entirely. A handful have strictly limited the industry. For example, South Dakota, once a leader in lifting interest rate limits, voted in 2016 to cap rates for short-term loans at 36% APR. Payday lenders have since left the state.

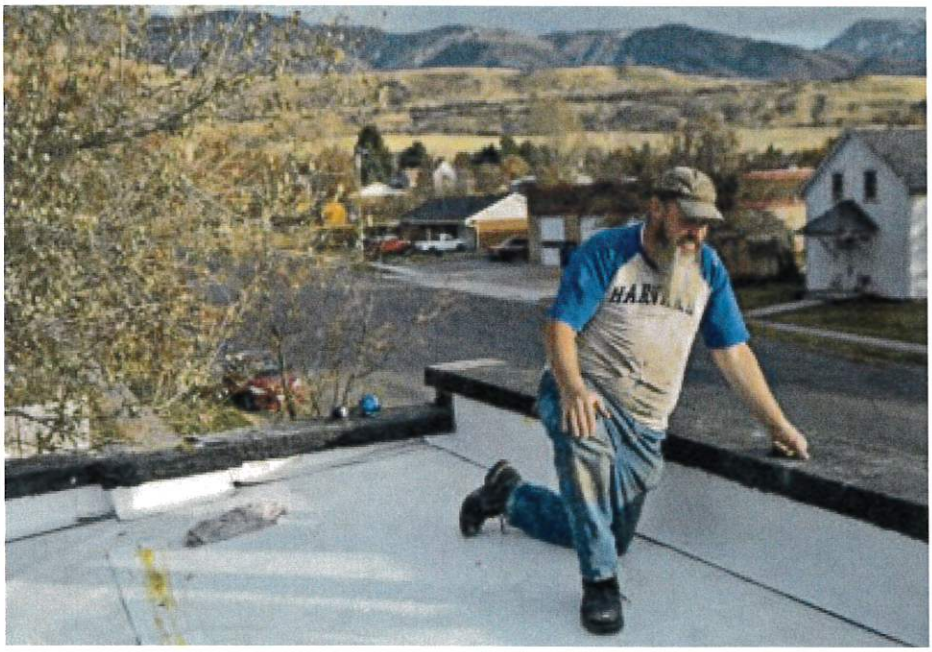
In Utah, by contrast, efforts to regulate the industry have faced fierce opposition. In 2009 and 2012, two bills, one to cap payday loans at an APR

of 100% and a second to prevent lenders from issuing more than one loan per consumer, both failed. The second bill prompted the industry to flood the sponsor's constituents with robocalls and direct mail, contributing to his defeat at the polls. (He won again in 2016). In 2014, Utah lawmakers passed their bill to allow bail to be paid to creditors in civil cases.

Over the past few years, there's been a steady resurgence in the number of small claims suits filed by high-interest lenders. The numbers are now approaching the previous peak, which occurred during the Great Recession. Peterson's study found that, in addition to the high volume of suits, lenders had a lower-dollar threshold for suing than others do: Lenders took people to court for a median of $994, about one-third of the median amount claimed by other plaintiffs.

"They just fight more aggressively," Peterson said.

It's unclear how many people across the country are arrested every year for missing hearings over payday loans. Tens of thousands of arrest warrants are issued every year in debt-related lawsuits, according to the American Civil Liberties Union, which examined cases in 26 states in a 2018 report. Arrest warrants were issued against debtors who owed as little as $28.



David Gordon, who was arrested at his church after he failed to repay a high-interest loan, works on his roof in Richmond, Utah. (Kim Raff for ProPublica)

Some policymakers have proposed a federal interest rate cap that would effectively ban payday loans. In May, presidential candidate Sen. Bernie Sanders, I-Vt., and Rep. Alexandria Ocasio-Cortez, D-N.Y., introduced the

Loan Shark Prevention Act, which would cap interest rates at 15%. Last month, a group of lawmakers introduced the Veterans and Consumers Fair Credit Act, which would extend the 36% interest rate maximum for active-duty service members to everyone. "You have to ask yourself, if it's immoral to give this type of loan to somebody who is in the military now, how is it OK to give the loan to anybody else?" said Rep. Glenn Grothman, R-Wis., the only Republican sponsor of the bill. Both bills will face substantial difficulty getting through the Senate, according to experts.

Advocates are also calling on state legislatures to take action. The ACLU would like to see a complete ban on arrest warrants in debt collection cases. In the absence of this, consumer advocates have recommended a number of reforms: creditors should give consumers 30 days notice before filing a lawsuit; they should do more to verify that a consumer lives at an address on file; debtors should be immediately released after a warrant is served or taken to a hearing on the same day that they are arrested.

In December 2016, Jessica Albritton took out a $700 auto title loan from Loans for Less. Albritton had four kids under the age of 8 and barely scraped by on her $10-an-hour wage. It had been a hard year. Christmas was coming up.

Albritton used the title of her 1984 Fleetwood trailer as collateral. She signed a contract with a 192% APR. If Albritton fulfilled the agreement, she would be paying $1,383.76 over six months to extinguish a $700 loan.

On Christmas morning that year, her children woke up to gifts from Santa Claus: new clothes and shoes, Legos and other toys. They recounted the day in a journal tucked inside a compartment underneath the family's nativity set. "We've written in it every year," Albritton said, recalling the tradition that started before she had kids. "It's literally almost full."

Albritton made some payments but struggled to keep up. She cut back her work hours to go to school part time to study cosmetology and barbering. The school fees ate at her budget. Bills like rent and car payments took priority. Albritton said she informed the company when she couldn't meet a payment because of an electricity bill. "When times got hard," she said, "they were not understanding."

In April 2017, Loans for Less filed a small claims suit against Albritton in South Ogden. In Utah, the plaintiff is usually responsible for making arrangements to serve papers to defendants in a civil case. Instead of

delivering the court notice to Albritton, records show, Loans for Less hired a constable who left the documents with her father.

Albritton with her children at home. (Kim Raff for ProPublica)

Albritton missed the hearing at the end of July 2017. Loans for Less won the case by default. At that point, her outstanding balance was $1,239.96. The company also asked her to shoulder the cost of filing the case and hiring a constable to serve the papers.

Two months later, Albritton missed another hearing. She'd run out of vacation days and couldn't take time off, she said. The judge issued a bench warrant, setting the bail at $200.

James Houghtalen, the constable hired by Loans for Less, served the warrant on a Sunday morning. "She informed me that I woke her upon my arrival," he wrote in his notes, which were included in a court filing. Houghtalen gave her the option of paying $200 in bail or going to jail. Albritton didn't have the money, so her mother paid, borrowing the $200 from Check City, another payday lender.

Two weeks later, Albritton filed for Chapter 7 bankruptcy. "They were constantly after me," she said. Filing bankruptcy shields debtors from collections, at least temporarily, but the process can be cumbersome and expensive. Albritton wasn't able to complete her case; it was terminated on Jan. 29, 2018.

The next day, Albritton got up early and pulled into the parking lot at work. It was cold outside. As she stepped out of her car, someone called her name. Houghtalen, the constable, had been waiting for her. "You didn't show up to court," he said. Confused, she responded, "But I have a bankruptcy case."

Without further explanation, Albritton asserted in an interview with ProPublica, Houghtalen "slammed" her against his car and handcuffed her. Albritton said the constable didn't give her a chance to pay and took her phone away so she couldn't make any calls. Albritton was taken to Weber County Jail, where she was held in a cell with other women. She was released four hours later after paying another $300 in bail. That money, along with $200 in bail from the previous arrest, was forfeited to Loans for Less.

Houghtalen delivered the borrower to jail in every such case ProPublica could find involving Loans for Less. He has a history of misconduct, according to public records. In 2013, the Utah Peace Officer Standards and Training Council concluded that he had failed to turn in $450 in cash from two defendants. Houghtalen told investigators he didn't know what happened to the money. The council suspended his peace officer certificate for three years as a result.

Houghtalen is also the subject of an ongoing disciplinary investigation, according to the Utah Department of Public Safety's response to a public records request. The department declined to comment on the specific charges. Houghtalen did not respond to multiple requests for comment. Loans for Less said it was unaware of the ongoing investigation.

After Albritton's arrest last year, Loans for Less tried to garnish her wages. That effort was stymied, Albritton said, because 25% of her paycheck was already being withdrawn over an unpaid electric bill.

Albritton's life began spiraling as her debts mounted. In March 2018, she split up with her partner. Albritton and her four children moved into a domestic-violence shelter and then a government-subsidized apartment. Her ex surrendered the trailer to Loans for Less against her wishes, she said. The company sold it at auction for $500 but continued to pursue her for the remaining balance. Albritton agreed to contribute $25 a week but then struggled to pay up. Loans for Less re-initiated legal proceedings. ("We've been willing to work with her a ton," said Kimberly Jones, the legal manager at Loans for Less. "I don't want anyone to go to jail." Jones added, "from time to time she would make these arrangements and [then] she

would just go MIA for three to four months and obviously not keep the arrangements.")

In late September, a constable came by and notified her of a new $400 warrant. On a Monday night a few weeks after that, Albritton stood in her kitchen, defrosting bags of frozen meat and green beans. The kids jumped up and down on the gray couch in the living room. The previous weekend, they picked pumpkins at a farm. She was going to take them trick or treating in her parents' neighborhood.

Albritton had a court date in two weeks. "This is too much for me right now," she said. "I'm moving. I just had a death in the family. I have four kids. I have a friggin $10-an-hour job. It's more than what I can handle."

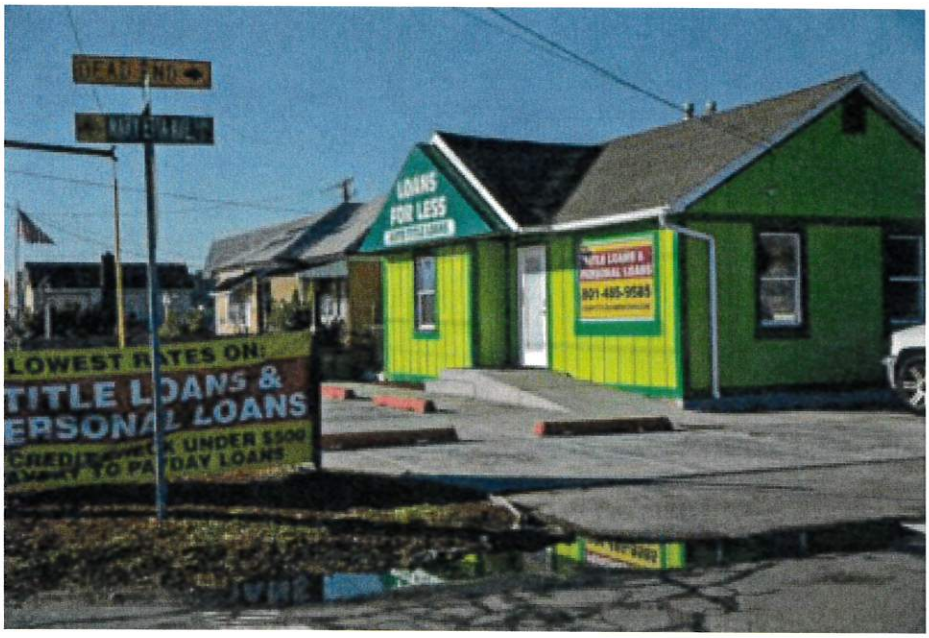
Albritton felt under constant scrutiny by Loans for Less. Her cellphone was filled with messages from constables. She scrolled through her phone, reading aloud text messages she said were sent by different constables. "This is what got me," Albritton said, repeating one message: "Hi Jessica, if you want to see me again, just say so. Don't keep putting it off so I have to come back."

Loans for Less occupies a bungalow south of Salt Lake City. A bold yellow banner outside declares the company offers the "lowest rates" with "no credit check."

Inside the store on the counter, a green pen holder has a different message on it: "If you think nobody cares if you're alive, try missing a payment."

I visited with a photographer in October and asked to speak to the company's owner, Ralph Sivertson. The receptionist said he wasn't in the office but promised to pass on a message. Our photographer obtained her permission to photograph the pen holder.

We were walking back to our car moments later when Sivertson bolted out into the parking lot. He was furious about the pen holder photo. "It's a joke!" he said.



A Loans for Less store in Salt Lake City. (Kim Raff for ProPublica)

Sivertson, 54, has a stocky build and salt-and-pepper stubble. He was reluctant to be interviewed, he said, because he thinks payday lenders get a bad rap. Sivertson said he's in business to help people. But he was also blunt about how integral lawsuits are to his operation. "At this point, small claims court is in the model," he said. "If we didn't have that avenue, I'll be honest ... we could be out of business."

When we asked about arresting customers, Sivertson said he had heard about it happening a few times. "I don't see a need for that. I don't like it. And I'm going to make sure that doesn't happen." He then insisted that constables should have some discretion to arrest debtors who are threatening or belligerent. He promised to take a second look at the practice. "That's unnecessary," he said. "Not over a $500 loan."

Two weeks later, another constable working for Loans for Less texted Albritton about an upcoming court date.

"My lawyer told me not to go," Albritton texted back. "She is taking care of it."

"Okay," the constable wrote. "I was hoping that I wouldn't have to come out and arrest you for not appearing so I am glad that's not going to happen."

Protect Independent Journalism

ProPublica is a nonprofit newsroom that produces nonpartisan, evidence-based journalism to expose injustice, corruption and wrongdoing. We were founded ten years ago to fill a growing hole in journalism: newsrooms were (and still are) shrinking, and legacy funding models failing. Deep-dive reporting like ours is slow and expensive, and investigative journalism is a luxury in many newsrooms today — but it remains as critical as ever to democracy and our civic life. A decade (and five Pulitzer Prizes) later, ProPublica has built the largest investigative newsroom in the country. Our work has spurred reform through legislation, at the voting booth, and inside our nation's most important institutions.

This story you've just finished was funded by our readers and we hope it inspires you to make a gift to ProPublica so that we can publish more investigations like this one that holds people in power to account and produces real change.

Your donation will help us ensure that we can continue this critical work. From the Trump Administration, criminal justice, health care, immigration and so much more, we are busier than ever covering stories you won't see anywhere else. Make your gift of any amount today and join the tens of thousands of ProPublicans across the country, standing up for the power of independent journalism to produce real, lasting change. Thank you.

DONATE NOW

Anjali Tsui

Anjali Tsui is a reporting fellow at ProPublica. She covers business and consumer finance.

anjali.tsui@propublica.org @anjalitsui 718-772-1038

Signal: 718-772-1038

Ursillo, Teitz & Ritch, Ltd.
Counsellors At Law

2 Williams Street
(at South Main Street)
Providence, Rhode Island 02903-2918

Michael A. Ursillo *
Andrew M. Teitz, AICP * †
Scott A. Ritch * †

Troy L. Costa †
Amy H. Goins * †
Peter F. Skwirz * †
Gina A. DiCenso * ‡ (Of Counsel)
Admitted in RI*, MA†, NY‡

Tel (401) 331-2222
Fax (401) 751-5257
amygoins@ursi.com

December 16, 2019

Hon. Alice Bridget Gibney
Presiding Justice
R.I. Superior Court
Frank Licht Judicial Complex
250 Benefit Street
Providence, RI 02903

Re: Superior Court Clerk's Office policy regarding waiver of expungement fees

Dear Presiding Justice Gibney,

This office runs an expungement legal clinic through the Roger Williams University School of Law Pro Bono Collaborative. The clinic takes place on a monthly basis at McAuley House, a Providence-based meal site and house of hospitality for people in need. Through the clinic, this office regularly represents indigent clients on a *pro bono* basis seeking an expungement of Superior Court criminal records. Indigent clients often have difficulty in paying, or an inability to pay, the $100 expungement fee set forth in RIGL 12-1.3-3(c). Accordingly, we often ask for the fee to be waived, based upon the client's indigency.

In making these waiver requests, we have been informed on several occasions that waiver is not allowed pursuant to a policy of the Superior Court Clerk's Office. In seeking the origin of this policy, we have been provided with the enclosed interoffice memorandum, dated July 28, 2009. In pertinent part, the memorandum states, "The fee must be paid prior to entry of an order to expunge. No *in forma pauperis* motions are to be granted in connection with this new statutory change. **The one hundred dollar ($100) fee shall not be waived.**" (Emphasis in original). The "new statutory change" mentioned in the memorandum appears to refer to P.L. 2009, ch. 68, art. 11, § 1, which amended RIGL 12-1.3-3(c) to provide that an expungement order shall enter "after payment by the petitioner of a one hundred-dollar ($100) fee to be paid to the court."

Respectfully, we disagree with the position of the Clerk's Office. Just because RIGL 12-1.3-3(c) was amended in 2009 to require a $100 expungement fee, it does not mean that the fee cannot be waived in appropriate circumstances. RIGL 12-20-10 gives a Justice discretion to remit costs in criminal cases. Further, RIGL 12-20-10 was amended through P.L. 2008, ch. 326, § 4 to

recognize "the court's inherent power to remit any fine, fee, assessment or other costs of prosecution," other than restitution. The 2008 amendment to RIGL 12-20-10 also lists a series of factors for the Court to consider in deciding whether a defendant is indigent and, thus, unable to pay a fine, fee or assessment. We believe that it is well within the Court's discretion to remit the $100 expungement fee for an indigent defendant pursuant to RIGL 12-20-10, either as a cost of prosecution or under the Court's inherent authority to waive fees in criminal cases.

If the position of the Clerk's Office were a correct reading of the expungement statutes, it would raise serious constitutional concerns. Equal protection under the Fourteenth Amendment requires that, when a state establishes a certain procedure for criminal cases, "it may not foreclose indigents from access to any phase of that procedure because of their poverty." See Lane v. Brown, 372 U.S. 477, 484 (1963) (state court must provide procedure for allowing indigent defendants free appeal transcripts when appealing the denial of a writ of error *coram nobis* challenging a criminal conviction). A motion to expunge is the final procedure available in many criminal cases and is often the most important procedure to a defendant, as it gives a defendant an opportunity for a fresh start that may otherwise be unavailable. This fresh start often means the ability to get housing, employment, or other resources to help pull a person out of poverty. It would raise serious constitutional concerns to deny an indigent defendant access to that procedure simply because she lacks the means to pay the $100 expungement fee.

For these reasons, we respectfully request that the Clerk's Office be instructed to retract the policy stated in the July 28, 2009, interoffice memorandum. We would ask that a second interoffice memorandum be circulated clarifying that a Justice of the Superior Court has the authority to waive the $100 expungement fee in appropriate circumstances, in order to allow an indigent defendant to obtain an expungement.

Thank you for your consideration of this matter. Please do not hesitate to contact us with any questions or concerns.

Sincerely,

Amy Goins
Participating attorney
Pro Bono Collaborative
McAuley House Expungement Clinic

Peter Skwirz
Participating attorney
Pro Bono Collaborative
McAuley House Expungement Clinic

Eliza Vorenberg
Director of Pro Bono &
Community Partnerships
RWU School of Law

Andrew Horwitz
Assistant Dean for
Experiential Education
RWU School of Law

State of Rhode Island and Providence Plantations

Superior Court

Inter-office Memorandum

To: Court Clerks

From: Stephen Burke SB

Date: July 28, 2009

Subject: **Expungements (Revised Procedure)**

COURT CLERKS PROCEDURE FOR EXPUNGEMENTS:

If a case is expunged please have sheriff bring defendant, file and order granting expungement to the Criminal Office. *(please note difference between sealed and expungement cases)*

~~Sealed cases are~~ Dismissals (48A), ~~Judgment of Acquittal~~, and Not Guilty.

Expungements are cases with any disposition including Filed for One Year. DO NOT enter $100.00

If the court grants a motion to expunge, a one hundred dollar ($100) fee is DEFERRED - NO FEE now to be charged.

This fee is only assessed if the motion is granted by the court. The fee must be paid prior to the entry of an order to expunge.

No *in forma pauperis* motions are to be granted in connection with this new statutory change.
The one hundred dollar ($100) fee shall not be waived.

See attachment (R.I.G.L. 12-1.3-3)

WHO PAYS?
FINES, FEES, BAIL, AND THE COST OF COURTS

The Twenty-First Annual Liman Colloquium
April 5 & 6, 2018

Sponsored by
The Arthur Liman Center for Public Interest Law
The Class Action Litigation Fund
The Robert H. Preiskel & Leon Silverman Fund

Yale Law School

Co-Editors

Judith Resnik, Arthur Liman Professor of Law,
Founding Director, Arthur Liman Center for Public Interest Law

Anna VanCleave, Director, Arthur Liman Center for Public Interest Law

Kristen Bell, Senior Liman Fellow in Residence

Skylar Albertson, Yale Law School Class of 2018

Natalia Friedlander, Yale Law School Class of 2018

Illyana Green, Yale Law School Class of 2019

Michael Morse, Yale Law School Class of 2019

Revised April 18, 2018

Preface

In the last decades, growing numbers of people have sought to use courts, government budgets have declined, new technologies have emerged, arrest and detention rates have risen, and arguments have been leveled that private resolutions are preferable to public adjudication. Lawsuits challenge the legality of fee structures, money bail, and the imposition of fines. States have chartered task forces to propose changes, and new research has identified the effects of the current system on low-income communities and on people of color. The costs imposed through fees, surcharges, fines, and bail affect the ability of plaintiffs and defendants to seek justice and to be treated justly.

This volume, prepared for the 21st Annual Arthur Liman Center Colloquium, explores the mechanisms for financing court systems and the economic challenges faced by judiciaries and by litigants. We address how constitutional democracies can meet their obligations to make justice accessible to disputants and to make fair treatment visible to the public. Our goals are to understand the dimensions of the problems, the inter-relationships among civil, criminal, and administrative processes, and the opportunities for generating the political will to bring about reform.

Like the many Liman publications of the last two decades, these materials reflect the commitments of the Arthur Liman Center for Public Interest Law, which works to promote access to justice and fair treatment of individuals and groups seeking to use the legal system. This work began in 1997, when Yale Law School established what was then called the Arthur Liman Program to honor one of its most distinguished graduates. Arthur Liman spent much of his professional career at Paul, Weiss, Rifkind, Wharton & Garrison, even as he also devoted years to work in the public sector, including as counsel to the New York State Special Commission on Attica and as counsel to the Senate Iran-Contra Committee. Liman also served as president of the Legal Aid Society of New York and of Neighborhood Defender Services of Harlem, he was a trustee of the Vera Institute of Justice, chair of the New York State Capital Defender's Office, and he was a founder of the Legal Action Center.

That Arthur Liman was both wise and unusually smart marked him as an outstanding attorney. That he also cared passionately about social justice and devoted himself to its pursuit made him a great lawyer-citizen. Supported by the many family members and friends of the Liman family and Yale Law School, this Center is dedicated to ensuring that generations of public interest lawyers continue to combine expert lawyerly skills with public spiritedness.

In 1997, we awarded one Liman Fellowship. We now award six to ten Fellowships annually. As of 2018, we have provided funding for 132 law graduates to spend a year working on behalf of individuals and communities with diverse needs. More than one hundred organizations have hosted Liman Fellows, and ninety percent of our former Fellows continue their work at nonprofits, in government, or in the academy. In addition, each year, the Center welcomes Summer Fellows, who are students enrolled at Barnard, Brown, Bryn Mawr, Harvard, Princeton, Spelman, Stanford, or Yale and who find placements, often with organizations that have employed Liman Fellows. Further, Senior Liman Fellows in Residence guide students on projects and co-teach classes.

The Liman Center has also undertaken major research projects, including a series co-authored with the Association of State Correctional Administrators and focused on the use of solitary confinement in U.S. prisons. Fellows have authored monographs on a range of issues emerging from their work, such as new research on the needs of veterans, immigrants, juveniles, and families. At Yale Law School, the Liman Center teaches a workshop each spring. Illustrative is this year's seminar, *Rationing Access to Justice in Democracies*, which intersects with the 2018 Colloquium. In 2017, the class, *Imprisoned*, focused on the law of prisons and the history of movements aiming to limit the use of confinement. In short, through funding fellowships, annual colloquia, classes, and scholarship, the Liman Center follows in Arthur Liman's tradition by devoting our energies and resources to working towards a justice that remains elusive.

***

A word about preparation of this volume is also in order. Kristen Bell, who is one of the current Senior Fellows in Residence, played an important role in shaping the materials. And, we who are the faculty and directors of the Center, have the delight of working intensely with thoughtful, committed, insightful, and knowledgeable students, and hence to enjoy the pleasure of new colleagues. The members of the 2018 Liman Workshop have been extraordinarily engaged in exploring the problems of courts and litigants. The Liman Student Directors who are this volume's co-editors—Skylar Albertson, Natalia Friedlander, Illyana Green, and Michael Morse—were at the center of finding and editing materials that span decades and continents and that illuminate the complexities of making justice systems accessible and fair. But for their work, this volume would not exist. We are also indebted to the many participants in the 2018 Colloquium who suggested materials, of which those reproduced are just a subset. To keep these readings to a manageable length, the excerpts have been extensively pruned; most footnotes and citations have been omitted.

Special thanks are also in order to several people at Yale Law School. The Center's good fortune is that Elizabeth Keane, who joined recently, is remarkable. She has coordinated, with grace and patience, so much of our work. But for her, we would not have been able to bring together the group of scholars, judges, politicians, policy analysts, litigators, and students to discuss the issues set out through these readings. Bonnie Posick is now deservedly famous for her expert editorial assistance and insights into shaping accessible materials. Adrienne Webb, Program Coordinator, Public Affairs, and Janet Conroy, Director of Communications & Public Affairs at Yale Law School, bring all our publications to completion.

No introduction would be complete without acknowledging the pivotal role played by the Liman Director, Anna VanCleave, who left the New Orleans Public Defenders' Capital Defense Division two years ago to be at the helm of the Center. She mixes agility at classroom teaching with wisdom as an advisor to current, future, and former fellows, and she juggles so many tasks to run the many and growing facets of the Center. Her kindness, insights, and leadership make all that we do possible.

Judith Resnik,
Arthur Liman Professor of Law
Founding Director, the Liman Center
March 28, 2018

Chapters

Table of Contents

III. Bail and Bond

The operation of bail systems across the country has come under renewed scrutiny, as research has documented the impact of money bail on individuals and communities. This session explores the function and harms of the current system and the reforms underway.

IV. The Consequences of Legal Debt

New initiatives and research projects aim to document the impact of LFOs upon individuals and the court systems. This session explores the existing research and the direction of future work.

V. Legal Theories of Mandates for Change: Litigating Economic Barriers to Courts

Litigation is underway to challenge fines, fees, and bail. Legal arguments are based on state and federal equal protection and due process clauses, provisions prohibiting excessive fines, commitments to open and accessible courts, and statutory claims. In the U.K. and in Canada, recent decisions have relied on governments' commitments to provide courts as the bases for finding unlawful fees that impose "substantial" hardships. This segment explores the range of legal theories in order to understand whether and how law can intervene.

VI. Political Will and Making Change

How and when do social and political movements mobilize to bring about new practices? What are the roles of communities, policymakers, lawyers, judges, and court officials? Examples of reform efforts come from task forces in Connecticut and Illinois, which have recently issued reports and proposed reforms, and other local, state, and national initiatives seeking to reframe practices.

VII. Alternative Financing and Alternative Norms

Changing systems means developing new models of costs, services, and processes in order to support both courts and users. Possibilities include innovative technologies, new structures for assessments and collections for those able to pay, and alternative revenue sources. This session explores ways to make change sustainable.

I. FINES, FEES, BAIL, AND THE FINANCING OF JUSTICE: POLITICAL WILL AND PATHS TO REFORM

Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas, Address to the 85th Texas Legislature (Feb. 1, 2017).

Hon. Diane P. Wood, Chief Judge, U.S. Court of Appeals for the Seventh Circuit, Partners in Justice for All, Address Before the Texas Supreme Court Historical Society (Sept. 8, 2017).

Nat'l Task Force on Fines, Fees, and Bail Practices, Nat'l Ctr. for State Courts, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES (Dec. 2017).

Press Release, Office of Gov. Dannel P. Malloy, Gov. Malloy Signs Legislation Reforming the State's Pretrial Justice System to Help Break the Cycle of Crime and Poverty: Systemic Reforms Provide Solutions to Pretrial Challenges that Discriminate Against the Poor (June 28, 2017).

Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010).

Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Katharine G. Young, ed., forthcoming 2018).

Address to the 85th Texas Legislature (2017)[*]

Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas

. . . You have heard me say many times, the justice system must be accessible to all. Justice only for those who can afford it is neither justice for all nor justice at all. The rule of law, so revered in this country, has no integrity if its promises and protections extend only to the well-to-do.

The Texas Legislature's funding for access to justice has been critical. For veterans returning home to the freedoms they risked their lives to protect, basic legal services can help them manage their bills, stay in their homes, keep their jobs, and sadly, resolve family frictions. Last Session, the Legislature appropriated $3 million for basic civil legal services specifically for veterans. Please do it again. It changed many lives. Last Session, the Legislature appropriated $10 million from the Sexual Assault Program Fund for basic civil

[*] *Excerpted from* Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas, Address to the 85th Texas Legislature (Feb. 1, 2017), http://www.txcourts.gov/media/1437289/soj-2017.pdf.

legal services for sexual assault victims. Please do it again. In only a very short time, these funds have helped more than 4,000 victims.

Legal aid providers handled over 100,000 cases last year. In addition, they helped direct cases to lawyers willing to handle them for free, pro bono publico—for the public good. Every dollar for legal aid thus provides many dollars in legal services. Every year, Texas lawyers donate millions of dollars and millions of hours. A million hours, by the way, is 500 work-years. Legal aid helps the poor be productive and adds to the economy's bottom line. . . . And besides all that, it's the right thing to do. As much as has been done, only 10% of the civil legal needs are actually being met. Access to justice still desperately needs your help. . . .

Legal fees are also beyond the means of middle-income families and small businesses. There is a justice gap in this country: people who need legal services, lawyers who need jobs, and a market that cannot bring them together. More and more people try to represent themselves out of desperation. In 2015, the Supreme Court of Texas formed a commission, chaired by my predecessor, Wallace Jefferson, to examine ways to help lawyers provide legal services at lower cost. The commission has reported its recommendations, and we will work to implement them. One way is to continue support for the State Law Library, which makes resources available to lawyers and non-lawyers free of charge.

If justice were food, too many would be starving. If it were housing, too many would be homeless. If it were medicine, too many would be sick. If it were faith, too many houses of worship would be closed. The Texas Judiciary is committed to doing all it can to close the justice gap. We are grateful for the Legislature's support. . . .

In the past two Sessions, the Judiciary has joined forces with the Legislature to decriminalize truancy and student misconduct at school. Children and families have been the beneficiaries. Now it is time for us to take up reform of the bail system and criminal pretrial release.

Twenty years ago, not quite one-third of the state's jail population was awaiting trial. Now the number is three-fourths. Liberty is precious to Americans, and any deprivation must be scrutinized. To protect public safety and ensure that those accused of a crime will appear at trial, persons charged with breaking the law may be detained before their guilt or innocence can be adjudicated, but that detention must not extend beyond its justifications. Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to re-offend. And if all this weren't bad enough, taxpayers must shoulder the cost—a staggering $1 billion per year.

Take a recent case in point, from *The Dallas Morning News*. A middle-aged woman arrested for shoplifting $105 worth of clothing for her grandchildren sat in jail almost two months because bail was set at $150,000—far more than all her worldly goods. Was she a

threat to society? No. A flight risk? No. Cost to taxpayers? $3,300. Benefit: We punished grandma. Was it worth it? No. And to add to the nonsense, Texas law limits judges' power to detain high-risk defendants. High-risk defendants, a threat to society, are freed; low-risk defendants sit in jail, a burden on taxpayers. This makes no sense.

Courts in five counties use readily available risk assessment tools to determine that the overwhelming majority of people charged with non-violent crimes can be released on their personal recognizance without danger to the public or risk of flight, and at less cost to the taxpayers. The Judicial Council recommends that this be standard practice throughout Texas. Liberty, and common sense, demand reform. . . .

Last year, Texas' 2,100 justices of the peace and municipal judges handled 7 million traffic, parking, and other minor offenses. Most people ticketed just paid the fine and court costs. Others needed a little time and were put on payment plans for an extra fee. Altogether, over $1 billion was collected. Some defendants said they couldn't pay at all. Judges believed them in about 100,000 cases, waiving the fines or sentencing them to community service. In 640,000 cases—16%—defendants went to jail for minor offenses.

Jailing criminal defendants who cannot pay their fines and court costs— commonly called debtors' prison—keeps them from jobs, hurts their families, makes them dependent on society, and costs the taxpayers money. Most importantly, it is illegal under the United States Constitution. Judges must determine whether a defendant is actually unable, not just unwilling, to pay a fine. A defendant whose liberty is at stake must be given a hearing and may be entitled to legal counsel. For the indigent, the fine must be waived and some alternative punishment arranged, such as community service or training. For those who can pay something but only by struggling, adding multiple fees threatens to drown the defendant in debt: there are extra fees for payment plans, for missed payments, for making payments—yes, there is even a fee for making a payment—pay to pay—warrant issuance fees, warrant service fees—the list goes on and on. And revoking a defendant's driver's license just keeps him from going to work to earn enough to pay the fines and fees.

A parent disciplining a child may say, this hurts me more than it hurts you. When taxpayers have to say to criminal defendants, this hurts us more than it hurts you, something's wrong. The Judicial Council has concluded that the system must be revamped. I urge you to adopt its recommendations. . . .

———————

Partners in Justice for All (2017)[*]

Hon. Diane P. Wood, Chief Judge, U.S. Court of Appeals for the Seventh Circuit

The current world reminds me . . . of William Butler Yeats's poem "The Second Coming," where he laments "Things fall apart; the center cannot hold; Mere anarchy is loosed upon the world." Years ago we were horrified by the massacres in Rwanda and Bosnia; more recently we have watched the disintegration of Syria; and today it is hard to look at any general round-up of the news . . . without frightening reports about North Korea. And these are just the worst examples . . . .

. . . Fortunately, things at home are not so dire. Nevertheless, there are troubling signs in our own country, and those of us who are dedicated to the rule of law ignore them at our peril. We know that a great many people in our country feel left behind. Remember that the federal poverty level is set at a very low level: for a household of one, income of $12,060 per year; for a household of four, income of $24,600 per year. Just to put that in perspective, let's look at the cost of living in Austin. One website estimates that it costs a family of four a little over $3,000 a month (without rent) to live in Austin. And Austin is definitely not the priciest city in the country. And it is not just the poorest of the poor who feel left behind. Quite to the contrary, as we learned in the election of 2016. Many people who once hoped to have a respectable middle-class standard of living find that they are struggling. They want to understand why, but no one so far has offered answers that add up. It's safe to assume that many of their problems are not the kind of thing courts can do anything about: the march of technology; the loss of good-paying but lower skilled jobs; the decline in unionization; globalization; a gap between the education people receive in formal settings and the kinds of skills that the marketplace demands; and probably much more.

But some problems not only are amenable to better legal services, and better access to courts—they cry out for these improvements. You should all be proud of your Chief Justice, Nathan Hecht, who has been a national leader in these efforts. I've known Nathan for more years than I care to reveal, but of late I have had the pleasure of working with him on this problem. He has lent his assistance to the Legal Services Corporation and to the American Academy of Arts and Sciences . . . .

In 2017, the Legal Services Corporation [LSC] issued a report entitled "The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans." That report had the grim news that in the past year, 86% of the civil legal problems reported by low-income Americans received either inadequate or no legal help. And the overall number of those in need was great. Some 70% of low-income households (those at 125% of the poverty line) experienced at least one civil legal problem in the last year, including problems with health

[*] *Excerpted from* Hon. Diane P. Wood, Chief Judge, U.S. Court of Appeals for the Seventh Circuit, Partners in Justice for All, Address Before the Texas Supreme Court Historical Society (Sept. 8, 2017).

care, housing conditions, disability access, veterans' benefits, and domestic violence. More than 60 million Americans have family incomes "low" enough to qualify for LSC assistance, including about 6.4 million seniors, 11.1 million persons with disabilities, 1.7 million veterans, and about 10 million rural residents. A shocking number of them had no legal help at all. For the entire United States, the LSC has been working with an appropriation of about $375 million. Hardly a drop in the bucket, but a drop that nearly dried up earlier this year, when there was talk of zeroing out LSC altogether.

Other pressing legal needs exist too: those charged with crimes, ranging from minor misdemeanors that do not trigger a right to counsel, all the way to those charged with the most serious felonies; people caught in the immigration system, which gives them the right only to hire their own lawyer, not to a lawyer supplied by the state; to problems that can economically be solved only at the aggregate level.

What are the unrepresented people doing today? Many have no idea that the problem they are facing is one that might be addressed by the legal system. Those people need not only education, but also pro-active efforts on the part of the courts and bar to guide them through the system. Some have thought that the Internet holds the key to success here, and it can certainly be helpful. Nevertheless, wonderful though the web-based tools that many organizations are developing are, many of the un-served do not have access to the Internet and are not web-savvy. They need an intermediary to help them use these tools; otherwise they continue to be left out.

For those who do have enough skill to use resources at a public library, for instance, some are taking advantage of the do-it-yourself approach touted by such services as LegalZoom. Sometimes that may work, but often it leads to worse problems. Some try to use the court system on a pro se basis.

This problem plagues both the federal courts and the state courts. Indeed, the federal courts are hardly a footnote to the experience of the state courts. The flood of pro se cases has led the National Center for State Courts to create a Self-Representation Guide available on the Internet . . . . Again, that is fine for people on one side of the digital divide, but it may not help the elderly, or those who do not have the ability to buy the right access plan for their smart phone.

Estimates of the numbers of self-represented litigants (the term favored by the National Center) range by state, by type of case, and by definition used. For some kinds of cases, however (such as domestic relations), the number is sometimes as high as 80% of cases; for others (torts, for instance), it is much lower.

There is an explosion of pro se litigants in the federal courts as well. Virtually every federal district has resources on its website for people who file a civil case without an attorney. The same is true at the court of appeals level. In the Seventh Circuit, the percentage of pro se cases filed each year has soared to 65%—nearly 2/3! Many, but certainly not all, of these filers are prisoners, but a great number are ordinary citizens who

are seeking relief from such practices as employment discrimination, unfair credit practices, and police brutality.

On the criminal side, the problem of lack of representation must be viewed through a different lens, because most people technically do have a lawyer. I will turn to that point in more detail in a moment.

What can be done to address this? First, it is essential that we enlist more help from the bar. This market is not operating well at the moment—great mismatch between young lawyers especially who have taken the bar exam but cannot find a job, on the one side, and the hordes of people who need legal services but cannot afford them. Think of costs of supply and matching supply and demand.

At the same time, given increasing longevity, we have more senior lawyers than ever who are quite capable of continuing to practice through their 70s and 80s (think of the senior federal judges who fit this description!), who could serve as mentors to those younger lawyers.

There is an interesting big city/small city/rural divide here. There are countless lawyers in Chicago, for example, who would love to have the experience of handling some cases on a pro bono basis, and at the same time, there are cases pending in the Central District of Illinois that would benefit from legal help. A district judge from that court told me, however, that recently the court contacted every member of its bar (some 9,000 lawyers) by email to see if they would be willing to take an appointment from the court. One thousand of the emails bounced back as bad addresses (itself a stunning number to me), but even worse, the judge said, only about 15 lawyers answered affirmatively. Much more common was the response "are you kidding?" What a disappointment! But perhaps better use of video technology and limited-purpose appointments (for instance, for settlement discussions only) might enable places like Central or Southern Illinois to take advantage of willing lawyers in Chicago, New York, or any other major city. Law school clinics are great, but I am dubious that they can expand much further than they already have done. Our job there is to prevent market exit more than it is to facilitate more entry.

Second, the time has more than come for the bar to loosen its monopoly on the provision of legal services, and to recognize, just as the medical profession did (sometimes kicking and screaming) some years ago. In the medical profession, they refer to "physician extenders." We need to think of lawyer "extenders"—people who are skilled enough to perform some kinds of legal services, working under the supervision of a lawyer, yet who can do this at a much more affordable cost.

This may be upon us already, and so it may be that realism alone counsels taking this step. Information that was presented to the ABA's Commission on Ethics 2020 suggests that the market has left the organized bar in the dust. Internet sites abound that offer do-it-yourself legal kits for everything from incorporation, to divorce, to bankruptcies, to wills. Those of us inside the guild may bemoan this development, since

the quality varies wildly and there is a serious risk that people may be harmed more than helped, but my guess is that such sites are here to stay. Rather than wring our hands and try to stamp them out, we should take a lesson from King Canute and recognize that we cannot stop the tide. There may be ways to turn these sites to positive uses, if we are clever enough to find a way to link them with qualified counsel.

Non-lawyers who can be of some assistance to pro se litigants have been a fixture in the prisons for many years. And many of them become quite good with experience! Experimentation along these lines has already begun. One striking program is Washington State's new "Limited License Legal Technician" program. In 2012, the Washington Supreme Court adopted a rule allowing non-lawyers to train for 3,000 hours, gain a license in a specific field, and practice limited forms of law. Like a nurse-practitioner, these Limited License Legal Technicians can help clients with specific legal problems, with minimal attorney supervision. The program has initially been geared toward family law matters—including domestic violence and child custody—but it could expand to other areas of law, including public benefits, veteran's needs, consumer protection, and employment issues.

Additionally, we need to bring legal services to the people who need them, rather than demanding that they come to us. Desks could be placed in readily accessible community locations—Social Security offices, public libraries, elementary schools, health clinics, or the local Wal-Mart. Partnerships with willing companies could expand access. Again, the medical profession has done just this—think of the walk-in clinics now found in many CVS and Walgreen's pharmacies. Our corporate partners might be willing to make a desk available for trained legal service providers, too. The people staffing those desks would then either handle the problem directly or refer the potential client to the lawyer-in-charge. That lawyer would not necessarily need to be on-site.

Finally, we cannot leave this subject without acknowledging the gravity of the problems we face on the criminal side of the ledger. As long ago as 2004, the American Bar Association published a report entitled "Gideon's Broken Promise," which examined what it called "America's continuing quest for equal justice." The report was not a good one, as these excerpts from the Executive Summary confirm:

"Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not understand English. The fundamental right to a lawyer that Americans assume appl[ies] to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States." . . .

Former Chief Judge Jonathan Lippman of the New York Court of Appeals confirmed in a recent Foreword to a special issue of the *Albany Law Review* dedicated to research in indigent defense that these problems have not materially changed over the last 10 years, as we moved from *Gideon*'s 40th anniversary to its 50th, although he did describe a number of very promising initiatives that New York has undertaken, including the adoption of nationally recognized binding caseload limits for indigent defense providers in New York City (400 misdemeanors and 150 felonies in a 12-month period) and the establishment of an independent State Office of Indigent Legal Services, which he chairs.

A closer look at the question of indigent defense caseloads confirms the gloomier side of this picture. Here are just a few examples for you:

> In 2001, the *New York Times* found a lawyer handling 1,600 criminal defense clients in one year.
>
> . . . Former Attorney General Eric Holder supported two lawsuits against local public defender systems in the states of Washington and New York. He has called the state of indigent defense "unconscionable." In 2013, public defenders in Miami, Florida were handling 400 felony cases each. . . .
>
> In 2009, each attorney at the New York Legal Aid Society handled 103 criminal defense cases at a time, and 592 per year.
>
> "Free" legal services for criminal defendants are no longer free. In 2007, 92% of public defender offices charged some sort of fee[] for public defender services. Of the offices permitting cost recoupment, 69% charged for the cost of the defender's services, 63% allowed recoupment of court related expenses, and 53% charged standard statutory fees. Forty-four percent charged an up-front application or administrative fee ranging from $10 to $200. In Missouri in 2014, a criminal defendant with a yearly income of $11,000 would not qualify for a public defender.
>
> In 2007, more than seven in ten (73%) county-based public defender offices had an insufficient number of attorneys to meet the professional guidelines set by the National Advisory Commission.
>
> In 2007, 15% of county-based offices had formal caseload limits, and 36% had the authority to refuse appointments due to excessive caseloads. Fifty-nine percent had neither. Of those with the highest caseloads (more than 5,000 per year), 49% had the authority to refuse cases, as opposed to 28% of offices that received 1,000 or fewer cases.
>
> In 2007, roughly 40% of county-based public defender offices employed no investigators. Only 7% of county-based public defender offices with at least 1.5

> full-time equivalent (FTE) attorneys met the professional guideline for the ratio of investigators to attorneys.
>
> In 2007, state-based public defender offices nationwide received a median caseload of 82 new felonies per FTE lawyer, and 217 new misdemeanor cases that carry a jail sentence per FTE lawyer. Unweighted, this worked out to 358 cases received per attorney.
>
> In 2007, county-based public defender offices nationwide received a median caseload of 100 new felonies per FTE lawyer, and 146 new misdemeanor cases that carry a jail sentence per FTE lawyer. In county- and state-funded offices receiving more than 5,000 cases per year, the median caseload is 169 new felonies per FTE attorney and 174 new misdemeanor cases that carry a jail sentence. Unweighted, this worked out to 358 cases received per attorney.
>
> In 2007, Colorado PD offices averaged 229 new felony cases per FTE attorney.

Nothing more really needs to be said. We are not, in fact, keeping the promise of *Gideon* and the Sixth Amendment for far too many people caught up in the criminal justice system. And the elephant in the room needs to be acknowledged: the quality of legal representation makes a great difference for an accused person (and for that matter for a person with immigration problems, or civil problems, or anything else).

When the criminal justice system is perceived to be unfair, biased toward the "haves" or other favored groups, and hostile to certain communities, social unrest—even violence—can ensue, as we have seen to our sorrow. We must do better. Many of the people in this room are already engaged in this effort, and I hope very much that we in the federal courts and you in the state courts can join hands and redouble our efforts. . . .

Principles on Fines, Fees, and Bail Practices (2017)[*]

National Center for State Courts, Task Force on Fines, Fees, and Bail Practices

. . . State courts occupy a unique place in a democracy. Public trust in them is essential, as is the need for their independence, accountability, and a service-oriented approach in all they do. Important questions have arisen over the last several years concerning the manner in which courts handle the imposition and enforcement of legal financial obligations and about the ways court systems manage the release of individuals awaiting trial. Local, state, and national studies and reports have generated reliable, thorough, and newsworthy examples of the unfairness, inefficiency, and individual harm

[*] *Excerpted from* Nat'l Task Force on Fines, Fees, and Bail Practices, Nat'l Ctr. for State Courts, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES, (Dec. 2017), https://www.ncsc.org/~/media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx.

that can result from unconstitutional practices relating to legal financial obligations and pretrial detention.

As a way of drawing attention to these issues and promoting ongoing improvements in the state courts, in 2016 the Conference of Chief Justices and the Conference of State Court Administrators established the National Task Force on Fines, Fees, and Bail Practices (the "National Task Force").

The goals of the National Task Force are to develop recommendations that promote the fair and efficient enforcement of the law; to develop resources for courts to use to ensure that no person is denied their liberty or access to the justice system based on race, culture, or lack of economic resources; and to develop policies relating to . . . legal financial obligations that promote access, fairness, and transparency. . . .

The National Task Force is now pleased to offer its Principles on Fines, Fees, and Bail Practices. Developed with input from a variety of stakeholders, these principles are designed to be a point of reference for state and local court systems in their assessment of current court system structure and state and local court practice. The principles can also be used as a basis for developing more fair, transparent, and efficient methods of judicial practice regarding bail practices and the imposition and collection of legal financial obligations.

The National Task Force's . . . principles [fall into] seven categories:

- Structural and Policy-Related Principles
- Governance Principles
- Transparency Principles
- Fundamental Fairness Principles
- Pretrial Release and Bail Reform Principles
- Fines, Fees and Alternative Sanctions Principles
- Accountability Principles

The National Task Force expects these principles to be refined over time as jurisdictions put them into practice and the court community gains insight into the strategies associated with their implementation.

Structural and Policy-Related Principles

Principle 1.1. Purpose of Courts. The purpose of courts is to be a forum for the fair and just resolution of disputes, and in doing so to preserve the rule of law and protect individual rights and liberties. States and political subdivisions should establish courts as part of the judiciary and the judicial branch shall be an impartial, independent, and coequal branch of government. It should be made explicit in authority providing for courts at all levels that, while they have authority to impose legal financial obligations and collect the

revenues derived from them, they are not established to be a revenue-generating arm of either the executive or legislative branch of government.

Principle 1.2. Establishment of Courts. The authority for establishing any court or its jurisdiction should be clearly established in the constitution or laws of the state or, if such authority is delegated to a political subdivision, in ordinances duly adopted by it. . . .

Principle 1.3. Oversight of Courts. Each state's court of last resort or its administrative office of the courts should have knowledge of every court operating within the state and supervisory authority over its judicial officers.

Principle 1.4. Access to Courts. All court proceedings should be open to the public, subject to clearly articulated legal exceptions. Access to court proceedings should be open, as permissible, and administered in a way that maximizes access to the courts, promotes timely resolution, and enhances public trust and confidence in judicial officers and the judicial process. Judicial branch leaders should increase access to the courts in whatever manner possible, such as by providing flexibility in hours of service and through the use of technology innovations, e.g., online dispute resolution where appropriate, electronic payment of fines and costs, online case scheduling and rescheduling, and email or other electronic reminder notices of court hearings.

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 generally not be supported by revenues generated from court-ordered fines, fees, or surcharges. Under no circumstances should judicial performance be measured by, or judicial compensation be related to, a judge's or a court's performance in generating revenue. A judge's decision to impose a legal financial obligation should be unrelated to the use of revenue generated from the imposition of such obligations. Revenue generated from the imposition of a legal financial obligation should not be used for salaries or benefits of judicial branch officials or operations, including judges, prosecutors, defense attorneys, or court staff, nor should such funds be used to evaluate the performance of judges or other court officials.

Principle 1.6. Fee and Surcharge. . . . While situations occur where user fees and surcharges are 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 primarily funded by general tax revenues.

Principle 1.7. Court Facilities. Court facilities should be provided for and operated in a manner that ensures an impartial and independent judiciary.

Principle 1.8. Court Management and Staffing. Courts should be operated in a manner that ensures an impartial and independent judiciary. Court staff should not be managed or directed by officials in either the executive or legislative branch.

Principle 1.9. Judicial Officers Exclusively Within Judicial Branch. All judges, judicial officers, and other individuals exercising a judicial or administrative function in support of judicial proceedings should be members of the judicial branch of government. Such individuals should also be independent of management by or direction from officials in the executive or legislative branch. All judges and judicial officers, including those serving in a court established by a political subdivision, should be subject to the authority of the court of last resort or the administrative office of the courts, bound by the state's code of judicial conduct, and subject to discipline by the state's judicial conduct commission or similar body.

Principle 1.10. Accessible Proceedings, Assistance for Court Users, and Payment Options. Court proceedings, services provided by the clerk's office, other assistance provided to court users, and methods for paying legal financial obligations should be easily accessible during normal business hours and during extended hours whenever possible. Judicial branch leaders should consider providing 24/7 access to online services, without any additional fees other than those reasonable and necessary to support such services.

Governance Principles

Principle 2.1. Policy Formulation and Administration. All states should have a well-defined structure for policy formulation for, and administration of, the state's entire court system. . . .

Principle 2.2. Judicial Selection and Retention. Judicial officers should be selected using methods that are consistent with an impartial and independent judiciary and that ensure inclusion, fairness, and impartiality, both in appearance and in reality. In courts to which judges are appointed and re-appointed, selection and retention should be based on merit and public input where it is authorized. Under no circumstances should judicial retention decisions be made on the basis of a judge's or a court's performance relative to generating revenue from the imposition of legal financial obligations.

Principle 2.3. Statewide Ability to Pay Policies. States should have statewide policies that set standards and provide for processes courts must follow when doing the following: assessing a person's ability to pay; granting a waiver or reduction of payment amounts; authorizing the use of a payment plan; and using alternatives to payment or incarceration.

Transparency Principles

Principle 3.1. Proceedings. All judicial proceedings should be recorded, regardless of whether a court is recognized in law as a "court of record."

Principle 3.2. Financial Data. All courts should demonstrate transparency and accountability in their collection of fines, fees, costs, surcharges, assessments, and restitution, through the collection and reporting of financial data and the dates of all case dispositions to the state's court of last resort or administrative office of the courts. This reporting of financial information should be in addition to any reporting required by state or local authority.

Principle 3.3. Schedule for Legal Financial Obligations. The amounts, source of authority, and authorized and actual use of legal financial obligations should be compiled and maintained in such a way as to promote transparency and ease of comprehension. Such a listing should also include instructions about how an individual can be heard if they are unable to pay.

Principle 3.4. Public Access to Information. Except as otherwise required by state law or court rule, all courts should make information about their rules, procedures, dockets, calendars, schedules, hours of operation, contact information, grievance procedures, methods of dispute resolution, and availability of off-site payment methods accessible, easy to understand, and publicly available. All "Advice of Rights" forms used by a court should be accessible.

Principle 3.5. Caseload Data. Court caseload data should reflect core court functions and be provided by each court or jurisdiction to the court of last resort or administrative office of the courts on a regular basis, at least annually. Such data should be subject to quality assurance reviews. Case data, including data on race and ethnicity of defendants, should be made available to the public.

Fundamental Fairness Principles

Principle 4.1. Disparate Impact and Collateral Consequences of Current Practices. Courts should adopt policies and follow practices that promote fairness and equal treatment. Courts should acknowledge that their fines, fees, and bail practices may have a disparate impact on the poor and on racial and ethnic minorities and their communities.

Principle 4.2. Right to Counsel. Courts should be diligent in complying with federal and state laws concerning guaranteeing the right to counsel as required by applicable law and rule. Courts should ensure that defendants understand that they can request court-appointed counsel at any point in the case process, starting at the initiation of adversarial judicial proceedings. Courts should also ensure that procedures for making such a request are clearly and timely communicated.

Principle 4.3. Driver's License Suspension. Courts should not initiate license suspension procedures until an ability to pay hearing is held and a determination has been made on the record that nonpayment was willful. Judges should have discretion in reporting nonpayment of legal financial obligations so that a driver's license suspension is not

automatic upon a missed payment. Judges should have discretion to modify the amount of fines and fees imposed based on an offender's income and ability to pay.

Principle 4.4. Cost of Counsel for Indigent People. Representation by court-appointed counsel should be free of charge to indigent defendants, and the fact that such representation will be free should be clearly and timely communicated in order to prevent eligible individuals from missing an opportunity to obtain counsel. No effort should be made to recoup the costs of court-appointed counsel from indigent defendants unless there is a finding that the defendant committed fraud in obtaining a determination of indigency.

Pretrial Release and Bail Reform Principles

Principle 5.1. Pretrial Release. Money-based pretrial release practices should be replaced with those based on a presumption of pretrial release by least restrictive means necessary to ensure appearance in court and promote public safety. States should adopt statutes, rules, and policies reflecting a presumption in favor of pretrial release based on personal recognizance, and such statutes should require the use of validated risk assessment protocols that are transparent, do not result in differential treatment by race or gender, and are not substitutes for individualized determinations of release conditions. Judges should not detain an individual based solely on an inability to make a monetary bail or satisfy any other legal financial obligation. Judges should have authority to use, and should consider the use of, all available non-monetary pretrial release options and only use preventative detention for individuals who are at a high risk of committing another offense or of fleeing the jurisdiction.

Principle 5.2. Bail Schedules. Fixed monetary bail schedules should be eliminated and their use prohibited.

Principle 5.3. Pre-Payment or Non-Payment. Courts should not impose monetary bail as prepayment of anticipated legal financial obligations or as a method for collecting past-due legal financial obligations.

Fines, Fees, and Alternative Sanctions Principles

Principle 6.1. Legal Financial Obligations. Legal financial obligations should be established by the state legislature in consultation with judicial branch officials. Such obligations should also be uniform and consistently assessed throughout the state, and periodically reviewed and modified as necessary to ensure that revenue generated as a result of their imposition is being used for its stated purpose and not generating an amount in excess of what is needed to satisfy the stated purpose.

Principle 6.2. Judicial Discretion with Respect to Legal Financial Obligations. State law and court rule should provide for judicial discretion in the imposition of legal financial obligations. States should avoid adopting mandatory fines, fees, costs, and other legal financial obligations for misdemeanors and traffic-related and other low-level

offenses and infractions. Judges should have authority and discretion to modify the amount of fines, fees and costs imposed based on an individual's income and ability to pay. Judges should also have authority and discretion to modify sanctions after sentencing if an individual's circumstances change and their ability to comply with a legal financial obligation becomes a hardship.

Principle 6.3. Enforcement of Legal Financial Obligations. As a general proposition, in cases where the court finds that the failure to pay was due not to the fault of the defendant/respondent but to lack of financial resources, the court must consider measures of punishment other than incarceration. Courts cannot incarcerate or revoke the probation of a defendant/respondent for nonpayment of a legal financial obligation unless the court holds a hearing and makes one of the following findings: 1) that the defendant's/respondent's failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or 2) that even if the failure to pay was not willful or was due to inability to pay, no adequate alternatives to imprisonment exist to meet the State's interest in punishment and deterrence in the defendant's/respondent's particular situation.

Principle 6.4. Judicial Training with Respect to Ability to Pay. Judges should receive training on how to conduct an inquiry regarding a party's ability to pay. Judges also should have discretion to impose modified sanctions (e.g., affordable payment plans, reduced or eliminated interest charges, reduced or eliminated fees, reduced fines) or alternative sanctions (e.g., community service, successful completion of an online or in-person driving class for moving violations and other non-parking, ticket-related offenses) for individuals whose financial circumstances warrant it.

Principle 6.5. Alternative Sanctions. Courts should not charge fees or impose any penalty for an individual's participation in community service programs or other alternative sanctions. Courts should consider an individual's financial situation, mental and physical health, transportation needs, and other factors such as school attendance and caregiving and employment responsibilities, when deciding whether and what type of alternative sanctions are appropriate.

Principle 6.6. Probation. Courts should not order or extend probation or other court-ordered supervision exclusively for the purpose of collecting fines, fees, or costs.

Principle 6.7. Third-Party Collections. All agreements for services with third party collectors should contain provisions binding such vendors to applicable laws and policies relating to notice to defendant, sanctions for defendant's nonpayment, avoidance of penalties, and the availability of non-monetary alternatives to satisfying defendant's legal financial obligation.

Principle 6.8. Interest. Courts should not charge interest on payment plans entered into by a defendant, respondent, or probationer.

Accountability Principles

Principle 7.1. Education and Codes of Conduct. Continuing education requirements for judges and court personnel on issues relating to all relevant constitutional, legal, and procedural principles relating to legal financial obligations and pretrial release should be enacted. Codes of conduct for judges and court personnel should be implemented or amended, as applicable, to codify these principles.

Gov. Malloy Signs Legislation Reforming the State's Pretrial Justice System to Help Break the Cycle of Crime and Poverty: Systemic Reforms Provide Solutions to Pretrial Challenges that Discriminate Against the Poor (2017)[*]

Governor Dannel P. Malloy today announced that he has signed into law legislation he introduced and developed with a number of lawmakers and advocates that will create a major reform to the state's methods of detention for people who have only been charged with a crime in order to continue efforts reducing the state's historically low crime rates and provide solutions to challenges that discriminate against the poor.

The legislation is Public Act 17-145, *An Act Concerning Pretrial Justice Reform*. It was adopted in both chambers of the General Assembly with broad, bipartisan support.

The reforms, which will take effect beginning this Saturday, July 1, target adults accused of committing misdemeanors who are unable to afford money bail and languish in jail for weeks or months. In turn, this situation often creates deteriorating conditions where those being held are unable to earn a paycheck to support themselves and their families, intensifying their economic instability and potentially increasing their inability to lead productive, healthy lives within the community.

"The system of pretrial justice that we have been operating under for many decades has resulted in many unintended consequences that often have adverse effects on public safety," Governor Malloy said. "The effect of a few days of detention for people who have been accused of misdemeanors and not released simply because they do not have the ability to pay can be devastating and far reaching—possibly leading to the loss of employment and housing, which only exacerbates the kind of instability that can lead to a life of crime. If we want to continue the progress we've made in lowering crime, reducing recidivism,

[*] Press Release, Office of Gov. Dannel P. Malloy, Gov. Malloy Signs Legislation Reforming the State's Pretrial Justice System to Help Break the Cycle of Crime and Poverty: Systemic Reforms Provide Solutions to Pretrial Challenges that Discriminate Against the Poor (June 28, 2017), http://portal.ct.gov/Office-of-the-Governor/Press-Room/Press-Releases/2017/06-2017/Gov-Malloy-Signs-Legislation-Reforming-the-States-Pretrial-Justice-System.

and making our communities safer, then we must focus on what happens at the front-end of the justice system."

Developed based on input from the Connecticut Sentencing Commission, the Connecticut Civil Liberties Union, the Yankee Institute of Connecticut, and a number of lawmakers, the legislation:

- Ends the practice of "cash only" bail, where defendants are prohibited from using a surety to post bail;
- Prohibits judges from setting money bail for misdemeanor charges unless they make a finding that the defendant is charged with a family violence crime, is likely to fail to appear in court, is likely to obstruct justice, or otherwise presents a danger to the community;
- Reduces the time between a first and second court appearance for misdemeanor charges from 30 to 14 days for persons who are being held in jail pretrial; and
- Establishes a study of the feasibility of establishing a state bail fund for indigent defendants with a report due on January 1, 2018.

Governor Malloy noted that reforms of these kinds have been supported by leaders on both sides of the aisle—Republicans and Democrats—in both blue and red states all across our country because of the positive results they produce.

The Governor added, "I would like to also thank the Judicial Branch for promptly issuing guidelines to judges and undertaking a special training at the Judges of the Superior Court Annual Meeting last week."

Today in Connecticut there are 3,343 people being held in jail because they cannot post bond—accounting for 23 percent of the entire prison population. The state spends approximately $168 per day to keep a person behind bars. With the implementation of these reforms, it is expected that the state will save approximately $31.3 million over the upcoming biennium. It is estimated that the new law will reduce the pretrial population by 330 inmates—approximately 10 percent of the total pretrial population. These changes—in conjunction with other recently implemented reforms—are anticipated to result in the closure of an additional correctional facility later this year. The Governor, Republican legislative leaders, and Democratic legislative leaders, all incorporated the savings that are produced from these reforms into each of their respective budget proposals for this year.

Earlier this month, the Governor and First Lady Cathy Malloy held the Reimagining Justice conference in Hartford, where bipartisan leaders from across the country discussed the impact these kinds of reforms will have when it comes to reducing crime and helping people lead healthy lives.

Drawing Blood from Stones:
Legal Debt and Social Inequality in the Contemporary United States (2010)[*]

Alexes Harris, Heather Evans, and Katherine Beckett

The massive expansion of the U.S. penal system is an unparalleled institutional development, one that has given rise to substantial bodies of sociological scholarship. The U.S. incarceration rate is 6-12 times higher than those found in Western European countries and is now the highest in the world. . . . As a result, the lives of a large and growing number of U.S. residents are profoundly shaped by criminal justice institutions. Between 1980 and 2007, the total number of people under criminal justice supervision—which includes the incarcerated and those on probation and parole—jumped from roughly 2 million to over 7 million. . . . More than one in every 100 adult residents of the United States now lives behind bars. . . . Yet penal expansion has affected various demographic groups quite differently. An estimated one-third of all adult black men, for example, have been convicted . . . and nearly 60% of young black men without a high school degree have spent time behind prison bars. . . . Criminal punishment is also overwhelmingly concentrated in poor urban neighborhoods. . . .

We refine the theoretical and empirical understanding of the processes by which penal institutions reproduce inequality by examining a previously ignored dimension of penal expansion: the imposition of monetary sanctions. Although the causes and consequences of mass incarceration have been extensively studied, we are aware of no previous studies of the prevalence, extent, accumulation, or consequences of monetary sanctions in the contemporary United States. Criminological discussions of fines and other monetary penalties focus instead on the advantages of using monetary sanctions as an alternative to incarceration and criminal justice supervision, a common practice in many Western European countries. . . . The implicit—and sometimes explicit—assumption in this literature is that monetary sanctions are (or ought to be) alternatives to confinement and criminal justice supervision; the U.S. commitment to incarceration therefore means that monetary sanctions are "rarely imposed for felonies" . . . .

At the same time, many observers note that federal authorities, states, counties, and cities have authorized criminal justice decision makers to impose a growing number of monetary sanctions on people who are convicted—and sometimes merely accused—of crimes. . . . Although it is clear that the number of monetary sanctions potentially imposed has increased, the imposition of monetary sanctions by criminal justice actors is often discretionary and sometimes limited statutorily to those who are determined to be "able to pay." Because levels of indigence among felons are high, and because data regarding the actual imposition of monetary sanctions are scarce, it is not clear how frequently the criminal justice actors who are increasingly allowed to impose monetary sanctions actually

[*] *Excerpted from* Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010).

do so. Nor do we know much about the magnitude of the monetary sanctions that are imposed, how legal debt accumulates over time in the lives of people with criminal histories, or how it affects those who possess it.

We explore these questions here. Our findings indicate that monetary sanctions are now imposed by the courts on a substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year. We also present evidence that legal debt is substantial relative to expected earnings and usually long term. Interviews with legal debtors suggest that this indebtedness contributes to the accumulation of disadvantage in three ways: by reducing family income; by limiting access to opportunities and resources such as housing, credit, transportation, and employment; and by increasing the likelihood of ongoing criminal justice involvement.

These findings have important implications for theoretical understanding of the role of the penal system and debt in the reproduction of poverty and inequality. Sociological research shows that people who are convicted of crimes are, as a group, highly disadvantaged before their conviction; criminal conviction and incarceration exacerbate this disadvantage, most directly by reducing employment and earnings . . . . Criminal justice involvement, then, is recognized as both consequence and cause of poverty. However, because the prevalence and consequences of monetary sanctions have not been systematically explored, the extent to which penal expansion contributes to inequality, and the full array of mechanisms by which it does so, has not been fully recognized. Similarly, although consumer debt is widely understood to be both a measure and a cause of poverty . . . analyses of the role of debt in the stratification system have not considered the impact of legal debt. Our findings indicate that penal institutions are increasingly imposing a particularly burdensome and consequential form of debt on a significant and growing share of the poor. . . .

[A] substantial body of scholarship indicates that the U.S. penal system plays an important role in the accumulation of disadvantage over the life course, across generations, and at the community level. . . . Yet if the imposition of monetary sanctions is also considered, the impact of penal expansion on the stratification system may be far greater than these studies suggest, and the mechanisms by which poverty and inequality are reproduced are even more numerous. Similarly, many sociologists have noted that people with a criminal conviction are at high risk of reoffending and that rearrest and reincarceration reproduce poverty. . . . Yet the fact that nonpayment of monetary sanctions may trigger a warrant, arrest, or incarceration has not been widely recognized. Indeed, warrants may be issued, and arrests and confinement may occur, solely due to nonpayment of legal debt. . . . Although some researchers claim, perhaps rightly, that "it is unconstitutional to imprison offenders for nonpayment of debt" . . ., this does not mean that it does not occur, as the U.S. Supreme Court has ruled that debtors may be incarcerated for "willful" nonpayment of legal debt.

Even if it does not lead to arrest or incarceration, having a warrant issued—that is, being "wanted" by the police—has important social and economic consequences for people with warrants and their families. . . . [F]ederal welfare legislation adopted in 1996 prohibits states from providing Temporary Assistance for Needy Families, Supplemental Security Income, general assistance, public and federally assisted housing, and food stamps to individuals who are "fleeing felons" (i.e., have a bench warrant stemming from a felony conviction) or are in violation of any condition of probation or parole. The Social Security Administration (SSA) database is now linked to state warrant databases, so that the cessation of benefits occurs automatically on issuance of an arrest warrant (provided that warrant appears in the state database). People who have a warrant for their arrest are also unable to obtain or renew driver's licenses; this barrier to transportation reduces their employment prospects. . . . Warrants are thus a unique and consequential aspect of legal debt.

In short, the sociological literature recognizes that criminal convictions and mass incarceration exacerbate inequality. Yet monetary sanctions' additional stratifying effects have not been recognized. Similarly, sociological studies show that debt is both a cause and a consequence of poverty but have not previously recognized that penal institutions are an important source of a particularly deleterious form of debt. . . .

Monetary Sanctions: Prevalence and Trends

The Survey of Inmates in State and Federal Correctional Facilities provides nationally representative data regarding state and federal prison inmates (who, by definition, were convicted of at least one felony offense). The survey asks inmates about any monetary sanctions imposed by the courts; the results do not include monetary sanctions imposed on prisoners by departments of corrections, jails, or other noncourt agencies. These data therefore understate the prevalence with which monetary sanctions are imposed on felons sentenced to prison. Nonetheless, the results indicate that two-thirds (66%) of the prison inmates surveyed in 2004 had been assessed monetary sanctions by the courts, a dramatic increase from 25% in 1991. . . .

These survey results thus indicate that the proliferation of authorized fees and fines has in fact led to the increased imposition of monetary sanctions in the federal and state courts. Although fees are the most common type of monetary sanction imposed on felons sentenced to prison, the percentage of prison inmates who received fines and restitution orders as part of their court sentence has also jumped notably, from 11% to 34% and 25%, respectively. Thus, although fees are most frequently imposed by the courts on felons sentenced to prison, one-third of all felons sentenced to prison are also fined, and one-quarter are obligated to pay restitution by the courts.

When disaggregated by jurisdiction, the results of the inmate survey indicate that the use of monetary sanctions is now common in the majority of U.S. states and in the federal system. . . . Specifically, in 2004, a majority of inmates reported that they had been

assessed monetary sanctions by the courts in 36 of the 51 jurisdictions [representing all 50 states plus Washington, D.C.].

These prison inmate survey data include only felons sentenced to prison. Yet 30% of felons are sentenced to probation rather than confinement, and some felons serve their confinement sentence in jail . . . . Moreover, misdemeanants are not sentenced to prison. As a result, the prison inmate survey results do not shed light on the frequency with which monetary sanctions are imposed on either felons not sentenced to prison or misdemeanants.

Court and survey data collected by the Bureau of Justice Statistics help to fill these lacunae. These data indicate that misdemeanants and felons not sentenced to prison are even more likely than felons who are sentenced to prison to receive monetary sanctions. Specifically, 84.2% of felons sentenced to probation were ordered by the courts to pay fees or fines in 1995; 39.7% were also required to pay restitution to victims. Similarly, 85% of misdemeanants sentenced to probation were assessed fees, fines, or court costs; 17.6% were also assessed restitution. It thus appears that felons sentenced to probation and misdemeanants are more likely than felons sentenced to prison to receive monetary sanctions.

The data . . . provide additional evidence that the frequency with which fines are imposed on persons convicted of felony offenses in state courts has increased. For example, the percentage of felons sentenced to jail who were also fined rose from 12% in 1986 to 37% in 2004. The share of felons sentenced to probation and prison who also receive fines has also increased since 1986. . . . These data thus challenge the claim that fines are rarely imposed for felonies in the United States . . . it appears instead that monetary sanctions are now a common supplement to confinement and criminal justice supervision.

In sum, the national inmate survey and court data support three conclusions regarding the use of monetary sanctions. First, the imposition of monetary sanctions is increasing, and a majority of felons and misdemeanants now receive monetary sanctions as part of their criminal sentence. Insofar as these data include only information about monetary sanctions imposed by the courts, the true prevalence of monetary sanctions is likely even greater than indicated by our findings. Second, misdemeanants and felons sentenced to probation are even more likely than felons sentenced to prison to be assessed monetary sanctions by the courts. Finally, although fees are the most frequently imposed monetary sanction, the use of fines has also increased over time.

Given estimates of the number of people who are sentenced as felons and misdemeanants each year, these findings suggest that millions of mainly poor people living in the United States have been assessed monetary sanctions by the courts. Below, we analyze data provided by the [Washington State Administrative Office of the Courts (WSAOC)] to empirically assess the dollar value of the monetary sanctions imposed and to analyze their accumulation over time.

The Magnitude and Accumulation of Monetary Sanctions

The results described in this section shed light on the magnitude and accumulation of the monetary sanctions imposed in Washington State. . . . [D]escriptive statistics [are provided] regarding the monetary penalties assessed for all felony cases sentenced in Washington State superior courts during the first two months of 2004. The minimum and maximum amounts shown indicate that there is wide variation in LFO assessment. Specifically, the minimum amount assessed for conviction of a single felony charge was $500; the maximum was a surprising $256,257. As a result of this variation, the median and mean dollar values were quite disparate. Specifically, the median dollar value of the LFOs assessed per felony conviction was $1,347; the mean LFO assessment was $2,540.

These data illuminate the nature of the monetary penalties imposed by Washington State courts for conviction of a single felony charge. However, they do not include other sources of legal debt or show how legal debt accumulates over the life course of persons with criminal histories. Toward these ends, [an omitted table] shows the total LFO amounts assessed to, and owed by, 500 of the (randomly selected) defendants sentenced by theWashington State superior courts in the first two months of 2004. In this table, the value of LFOs assessed includes monetary sanctions imposed by juvenile, district, and superior courts over the life course as of May 2008; legal debt refers to the amount currently owed and also includes fees assessed by the Washington State DOC and the accumulation of interest over time. Neither of these two categories includes any fees potentially assessed by jails, clerks, private collection agencies, or offices of public defense/assigned counsel. The results therefore underestimate the accumulation of legal debt in the lives of people with criminal histories.

Nonetheless, the results . . . indicate that average LFO assessments to, and the average legal debt possessed by, persons convicted of a felony offense in 2004 are substantial. On average, these 500 individuals had been assessed $11,471 by the courts by 2008; the mean amount these same individuals owed was similar, at $10,840. Overall, the mean ratio of LFO assessments to LFO debt is 0.77, meaning that in 2008, felons in our subsample owed 77% of what they had been assessed by the courts over their lifetime. If we focus on median LFO assessment and legal debt, the pattern is similar: felons included in the sample had typically been assessed $7,234 and owed $5,254, with a median ratio of 0.77. It thus appears that legal debt is sustained over time for many of those who receive monetary sanctions. . . .

In summary, Washington State court data indicate that the dollar value of the monetary sanctions levied against, and owed by, persons convicted of a felony offense is substantial relative to expected earnings. Even those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later, and it will take more than a decade for those who regularly pay $100 a month to eradicate their legal debt, even assuming no additional monetary sanctions are imposed. These findings suggest that

monetary sanctions create long-term legal debt and significantly extend punishment's effects over time. . . .

The Consequences of Legal Debt

Our interview findings suggest that legal debt has three sets of adverse consequences. First, respondents who made LFO payments lose income and experience heightened financial stress. This drain on their income represents an additional economic liability that compounds the challenge of securing employment. Second, possession of legal debt—and resulting poor credit ratings—constrains opportunities and limits access to status-affirming institutions such as housing, education, and economic markets. Third, when respondents do not make regular payments, they often experience criminal justice sanctions, including warrants, arrest, and reincarceration. As a result, our interviewees conveyed a strong sense that they were unable to disentangle themselves from the criminal justice system and, in addition to carrying the stigma of a felony conviction, were burdened with an economic punishment that constrained their daily lives and future life chances. . . .

Courts *and* Economic and Social Rights/Courts *as* Economic and Social Rights (forthcoming 2018)[*]

Judith Resnik

Courts play a prominent role in many discussions of economic and social rights. Once the proposition is accepted that states have obligations to support human flourishing through providing services such as health, education, housing, and welfare, a myriad of issues emerge about the universality of these entitlements, their allocation, and whether such rights are enforceable in courts. If the hurdle of justiciability is overcome, the focus shifts to the potential for and propriety of the judiciary serving as mediator, intervener, overseer, and guarantor of economic and social rights.

Yet little attention has been paid to courts themselves as services that governments must provide to individuals. Because courts are a longstanding feature of political orders (democratic or not), their provisioning (along with the related services of policing and prisons) goes unseen as a welfarist form of resource distribution. Yet, as is familiar in analyses of economic and social rights, courts-as-services raise questions about what branches of government decide levels of funding; when taxes (called "fees" in this context) can be imposed on users and when subsidies are required or discounts accorded to avoid imposing economic obligations that poorer litigants cannot meet. Thus, issues about when and how rationing is licit abound.

[*] *Excerpted from* Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS (Katharine G. Young, ed., forthcoming 2018).

I put courts into economic and social rights discourse with three aims in mind. A first is to understand what can be learned about courts by seeing them through this lens. A second is to understand more about economic and social rights once justice systems are seen as within that fold. A third is to use the example of courts to analyze the impact of privatization and globalization on the sovereignty of states and the array of services that they have come to provide.

My argument is that by classifying courts as economic and social rights, the challenges and the fragility of judicial systems in democratic orders become vivid. Pre-democratic systems did not welcome all persons as eligible to participate in courts. Indeed, courts were often instruments of subordination, as famously and tragically illustrated in the United States by enforcing slavery.

But egalitarian social and political movements of the twentieth century changed the persons to whom courts had to provide fair treatment and expanded the kind and nature of rights claims to be advanced. The result has been soaring demands for services, bringing questions about levels of funding for both the justice apparatus and its users to the fore. Courts thus provide an example of a successful universal entitlement under stress, as diverse individuals and groups regularly seek services. Detailed below are debates about funding and subsidies that reflect the commitments to, the challenges of, and the backlash against open courthouse doors. I use the United States as a central example because it is categorized as less committed to welfarist rights than many other constitutional democracies.

But rights-to-courts have a special character. Arguments for constitutionalizing economic and social rights often rest on their ability to enable individuals to have a "decent life" by supporting their autonomy and well-being. Rights-to and rights-in courts not only are in service of users, but also statist; governments depend on courts to implement their norms, to develop and to protect their economies, and to prove their capacity to provide "peace and security." Indeed, much of courts' work comes from other branches of government, seeking enforcement of criminal and civil laws. Putting courts into the literature on economic and social rights as a site of (rather than a guarantor of) those rights raises the question of whether other such rights confer comparable benefits on the body politic so as to be seen as also part of the fabric of a well-functioning government.

The goal of a well-functioning government brings me to a third point, addressing the risks of unraveling "the governmental," which puts an array of rights in jeopardy. The phrase "aspiring states"—used in reference to subnational entities seeking their own identity in conflicts within extant governments—is apt for all sorts of polities, beleaguered by internal conflicts, hyper-nationalism, transnationalism, globalization, and privatization. These words have become part of the lexicon. But an additional term needs to be manufactured—"statization"—to capture the movement from the private to the public sector, such that a myriad of government-based services came into being during the last centuries.

But efforts to insist on the privatization of government services, in pursuit of deregulation, aim to denude the state of its identity as a provider of goods and services. Focusing on my example here of courts, new rules of process push for "alternative dispute resolution" (ADR), which shifts activities away from public observation either through non-public exchanges in courts or by delegation to agencies and outsourcing to private providers. Moreover, in the last decades, judges in the United States have enforced mandates imposed by employers, providers of goods and services, and manufacturers that require waiver of access to courts and the use of private arbitrators who have no obligations to the public.

This movement is part of the backlash against the egalitarian redistributive aspirations that the moniker "economic and social rights" encodes and that transformed courts into institutions protecting rights across classes, from the propertied to the prisoner. My hope is that seeing courts as economic and social rights clarifies the utility of government services committed to norms of fairness. If courts make true on their obligations to accord dignified and equal treatment to all disputants and do so in public, courts may be one venue in which to garner popular support for the continuation of democratic sovereignties, struggling as "aspiring states" to fulfill commitments to equality.

Courts as Obligations and as Rights

The lack of attention paid to courts-as-services comes in part from conventions of political and constitutional discourse. The framing provided by T.H. Marshall's classic 1949 essay *Citizenship and Social Class* distinguished the "civil and political" from the "social and economic." But even as Marshall located the "right to justice" as a part of a description of civil and political rights ("the institutions most directly associated with civil rights are the courts of justice,") Marshall also saw that "formal recognition of an equal capacity for rights was not enough" and that welfarist support, akin to those provided for health and education, was needed.

Mid-century U.N. Conventions, shadowed by the Cold War, likewise separated government commitments to civil and political rights from socioeconomic rights. And constitutional democracies such as the United States developed a jurisprudence of "positive" and "negative" liberties that, in contrast to other political orders, gave an impression that characterizing something as a "positive" right placed costs on the state that "negative" rights did not. Thus, less attention has been paid to how the very structures of government are themselves a species of positive rights that undermine the assumption that services deemed economic and social rights impose obligations for government-provisioning that political and civil rights do not.

A few details are therefore needed on how constitutions create courts as entitlements and generate what Jeremy Waldron has termed "waves of duty," instantiating rights over time and with variation rather than through a single act. Judiciaries are common features of constitutions, and many insist on access to justice. But what do those provisions mean? Below, I use examples from the United States to outline the translation of some of

those commitments to dispute resolution services and to supporting subsets of litigants. I then turn to law from several jurisdictions to illustrate the elaboration of constitutional obligations that courts be open to all persons and, as a consequence, to waive fees for some; to equip certain indigent litigants with counsel or experts; to take ability-to-pay into account when deciding on bail and fines; to reconfigure processes to try to lower per capita costs of cases; and, on rare occasion, to order the political branches to comply with the mandate to support the judiciary itself.

1. Rights to Adjudication and Roles for Litigants and the Public

A first step is the promise to provide courts, found in constitutions around the globe. In addition to creating a judicial branch, constitutions specify methods to select judges, protect their terms of office and independence, set the parameters of jurisdiction, detail rights of litigants, and build in roles for jurors, witnesses, victims, and the public. Further, many constitutions address access to courts and to judicial remedies. . . .

The idea of courts as *sources* of the recognition of all persons as equal rights-holders and as ready *resources* for the array of humanity is an artifact in the United States of both the first and second Reconstruction and of social movements around the globe. Not until well into the twentieth century did United States law and practice fully embrace the proposition that race, gender, and class ought not preclude an individual from any role in courts—from litigant to judge. "Every person" only came to reference all of "us" as a result of twentieth-century aspirations that democratic orders provide "equal justice under law" (to borrow a phrase not in the U.S. Constitution but appearing on the U.S. Supreme Court's 1935 façade). Moreover, new forms of harm fell within the rubric of what constituted an injury. Constitutional interpretation and statutes interacted to generate rights across a wide spectrum of activities. To be free from discrimination and criminal defendants' protections are vivid examples, but part of the developments of rights for consumers, employees, and household members, for safe water and clean air.

2. Ordering Support for Courts

The ability to provide dispute resolution systems requires resources from governments for funding of courts' budgets and raises questions about subsidies for users. Legislative investments in judiciaries reflect the taken-for-grantedness of courts as pillars of the state. The struggle is not over whether but rather how much a state can afford, and how to allocate investments in a portfolio of services ranging from criminal prosecution, defense, and detention to family conflicts, traffic cases, and general civil litigation. While politicians sometimes threaten to withhold money and strip jurisdiction, dollars and authority generally remain intact. Indeed, during the twentieth century, courthouses became icons of government, as countries around the world built monumental structures reflecting commitments to their justice systems.

While the workload of federal courts is comparatively small, state courts face almost 100 million cases filed annually. Estimates are that most states devote two to three

percent of their budgets to courts, but demand outstrips supply, especially in this "age of austerity." Not only did court budgets decline after the 2008 recession, six states closed courthouses a day a week; and nine sent judges on unpaid furloughs. Political efforts to obtain or restore funds has been one direction taken, as judiciaries enlist the bar and business communities to argue the vital need for courts. Another route is a small line of cases over decades that recognize court authority (as a matter of inherent powers, under the rubric of separation of powers, and to protect individual rights) to compel provision of resources when legislatures fail to do so.

For example, a few state courts have held that legislative support of their services is obligatory. The Texas Supreme Court put it simply in 1995—that the state's open-court clause required that "courts must actually be open and operating." Likewise, an Alabama decision explained that courts had a "constitutional duty . . . to be available for the delivery of justice . . . . Absent adequate and reasonable judicial resources, the people of our State are denied their constitutional rights." In 2010, New York's Chief Judge took the unusual step of suing the legislature to obtain increased judicial salaries. And, an odd-lot set of judgments insist that courts can, as a matter of "self-preservation" (to borrow a term from a 1930 California decision) order specific payments of small sums due individuals such as employees and to require repairs of their facilities. Outside the United States, a famous 1997 Canadian Supreme Court decision insisted that an independence commission had to be chartered to set judicial salaries. . . .

3. Making Rights Material: Asymmetries and Subsidies

Turn from the structure, funding, and jurisdiction of courts to their users. The question of the costs of dispute resolution services is not new. In the nineteenth century, Jeremy Bentham saw the problems, as he inveighed against "law-taxes" (a "tax upon distress") as well as against "Judge and Company" and the common law more generally. A part of Bentham's proposed solution was to create an "Equal Justice Fund," to be supported by "the fines imposed on wrongdoers" as well as by government and by charities. Bentham wanted to subsidize legal assistance, the transport of witnesses, and the costs of producing other evidence. Bentham also suggested that judges be available "every hour on every day of the year," and that courts be put on a "budget" to produce one-day trials and immediate decisions.

Bentham's recommendations echo in contemporary arguments to obtain user subsidies from the public and private sectors, to lower costs by simplifying procedures and through new technologies—which are strategies deployed not only in courts but across the spectrum of government services. Yet adjudication's adversarial structure poses distinct questions about deciding whom to subsidize. Asymmetries abound, as some litigants are defendants facing the state (whose litigation costs are paid by taxpayers), while other disputes involve private parties, albeit often with vastly different access to resources. The costs vary widely, as do the stakes and the nature of the claims.

Yet once governments became committed to showing "equal concern for the fate of every person over which it claims dominion" (to borrow Ronald Dworkin's description of entailments of equality), the costs of litigation become troubling. Just as poll taxes fell (even as they could support the apparatus of elections), so too might user fees for courts. Moreover, pursuing the analogy to voting, one could argue that in addition to not charging voters to vote, governments should fund and cap campaign costs so as to level playing fields. In the United States, that approach has been rejected as undermining First Amendment freedoms, but some litigation costs have been seen as requiring public support, even if opponents remain free from caps on spending.

Thus, courts have decided who merits what kind of subsidies for what costs of litigation. The issues arise ex ante, when filing fees are imposed, and run thereafter to a myriad of other court-imposed fees (such as record searches, public defender fees, document request fees) and fees paid to third parties (bail bondspersons, lawyers, experts, investigators, mediators and arbitrators, probation officers). For example, in 2016, 43 states had some form of "cost-recovery" for public defenders, and 27 imposed upfront "registration fees." . . . In addition, after decisions are rendered, litigants may also face fees, to pay the costs of their opponents or to pay penalties such as restitution to victims and fines paid to the state, as well as the costs of special services like probation and parole.

The coherence of adjudication comes under strain when litigants are patently unable to participate. The doctrine in U.S. law that a criminal prosecution cannot proceed unless a defendant is able to understand the charges and assist in a defense is one acknowledgment of court *dependence* on litigants to function. Further, because enforcement of court orders rests largely on voluntary compliance, courts rely on popular acceptance of the legitimacy of their processes and rulings. The universality of rights of access and remedies become illusory when courts charge fees for entry that systematically exclude sets of claimants; the idea of adjudication producing accurate or fair results is undermined when the resources of the disputants are widely asymmetrical.

Constitutional courts around the world have responded to arguments from litigants that their economic disadvantages *in* courts requires redress *by* courts. Parallel discussions of mandates for government subsidies occur, of course, in other forms of social and economic rights litigation, although the methods proposed for thinking through such allocations have not been engaged by judges focused on rights of support to use their own services. Instead, decisions center on what a promise of a court system entails and the import of terms such as due process, equal protection, fair hearing, and effective remedy. . . .

Turn from the questions of resources ex ante and during litigation to the imposition of fines or efforts to recoup costs ex post. If states can impose fines, what happens to those who cannot afford to pay? In the 1970 decision of *Williams v. Illinois*, Chief Justice Warren Burger wrote that the state could not extend a person's time of incarceration "beyond the maximum duration fixed by statute" based solely on the fact that a defendant was "financially unable to pay a fine." In a subsequent decision, the Court concluded that once

a state decided that an "appropriate and adequate penalty" for a crime was a fine or restitution, it could not "imprison a person solely" because of the inability to pay. Rather, imprisonment could only take place after determining a willful refusal to pay and that "alternative measures are not adequate to meet the State's interest in punishment and deterrence."

One summary that translates the rules into contemporary U.S. constitutional law doctrine is that "an absolute deprivation of liberty based on wealth creates a suspect classification deserving of heightened scrutiny." For litigants who are not detained, federal constitutional mandates to waive fees or provide support are uneven. The legacy of *Gideon* has produced both a keen awareness of unfairness and inequality in courts and an acute awareness of how much fairness and equality cost. Thus courts continue to grapple with the challenges that economically disparate claimants (both criminal and civil) raise for the effort of applying twentieth-century egalitarian norms to eighteenth-century statements that courts were government institutions for "every person." . . .

Progressive De-realization? Privatization and Backlash

Not all celebrate the trajectory producing more rights and more claimants knocking at courthouse doors. The intersection of high demand curves for courts, the burdens of procedures, the costs of lawyers, and the regulatory successes achieved by some plaintiffs have prompted diverse critiques, styling the criminal justice system as dysfunctional and the civil justice system as overburdened, overreaching, and overly adversarial. New social movements of the later part of the twentieth century, funded by institutions identified with repeat-player defendants, argued that courts were unduly broadening their own mandates and chilling productive economic exchanges. At times joined by judges worried about docket overloads and undue adversarialism, they have succeeded in "playing for the rules" by pushing a great deal of dispute resolution out of public courts and into alternatives. In the language of social and economic rights, retrogressive measures have become commonplace. . . .

State Dependency on and the Democratic Potential in Courts

Economic and social rights are often explained as predicates to human flourishing. By putting courts into that mix, another justification comes to the fore—as predicates to flourishing governments. . . .

Courts in democracies have the potential to contribute beyond serving to support government authority and respond to individual needs. Many tasks that have historically been associated with sovereignty—war-making, peace-making, taxing, and legislating—are remote from wide segments of the population because the activities occur offshore, are episodic, or concentrated at the site where a legislature sits. In contrast, the institutions on which sovereigns have relied to monitor and control—courts, along with police and prisons—turn the abstraction of government into a material presence, personifying the state and demonstrating its capacity to provide goods and services that have utilities for the

private as well as the public sector. Once these activities moved to the public sector, they provided springboards for the development of norms about the state, shaping values about the relationship of governed and government. . . .

Thus, while courts have long provided experiences of sovereignty, their current constitutional obligations are novel. When working well, courts generate collective narratives of identity and obligation. . . .

The current obligations of courts to provide services and subsidies are exemplary of the success of egalitarian regulatory policies, just as the efforts to limit that form of government provisioning reflect widespread efforts to restrict government efforts in favor of privatization. The struggles of courts to make good on promises of fair treatment ought to be put into the narrative of the progressive—and uneven and challenging—realization of rights. Yet continuation of accessible courts for ordinary disputants seeking state dispute resolution assistance is far from assured but requires, as it always has, political commitments to sustaining the services that courts, and the governments of which they are a part, provide.

———————

II. UNDERSTANDING THE CHALLENGES FACED BY LOW-INCOME LITIGANTS

Boddie v. Connecticut, 401 U.S. 371 (1971).

Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L. J. (forthcoming 2019).

THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, LEGAL SERVS. CORP. (June 2017).

R (on the application of UNISON) v. Lord Chancellor, [2017] UKSC 51.

Devon Porter, PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES, ACLU OF S. CAL. (June 2017).

Monica Bell, *What Happens When Low-Income Mothers Call the Police*, TALKPOVERTY.ORG, CTR. FOR AMER. PROGRESS (Mar. 10, 2016).

Jeffrey Selbin, Stephanie Campos-Bui, Hamza Jaka, Tim Kline, Ahmed Lavalais & Alynia Phillips, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA, BERKELEY LAW POL'Y ADVOCACY CLINIC (Mar. 2017).

Boddie v. Connecticut
U.S. Supreme Court
401 U.S. 371 (1971)

Mr. Justice HARLAN delivered the opinion of the Court.

Appellants, welfare recipients residing in the State of Connecticut, brought this action in the Federal District Court for the District of Connecticut on behalf of themselves and others similarly situated, challenging, as applied to them, certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict their access to the courts in their effort to bring an action for divorce.

It appears from the briefs and oral argument that the average cost to a litigant for bringing an action for divorce is $60. Section 52-259 of the Connecticut General Statutes provides: "There shall be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars . . . ." An additional $15 is usually required for

the service of process by the sheriff, although as much as $40 or $50 may be necessary where notice must be accomplished by publication.

There is no dispute as to the inability of the named appellants in the present case to pay either the court fees required by statute or the cost incurred for the service of process. The affidavits in the record establish that appellants' welfare income in each instance barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce. Also undisputed is appellants' "good faith" in seeking a divorce.

Assuming, as we must on this motion to dismiss the complaint, the truth of the undisputed allegations made by the appellants, it appears that they were unsuccessful in their attempt to bring their divorce actions in the Connecticut courts, simply by reason of their indigency. The clerk of the Superior Court returned their papers "on the ground that he could not accept them until an entry fee had been paid." . . . Subsequent efforts to obtain a judicial waiver of the fee requirement and to have the court effect service of process were to no avail. . . .

Appellants thereafter commenced this action in the Federal District Court seeking a judgment declaring that Connecticut's statute and service of process provisions, "requiring payment of court fees and expenses as a condition precedent to obtaining court relief (are) unconstitutional (as) applied to these indigent (appellants) and all other members of the class which they represent." As further relief, appellants requested the entry of an injunction ordering the appropriate officials to permit them "to proceed with their divorce actions without payment of fees and costs." A three-judge court was convened pursuant to 28 U.S.C. § 2281, and on July 16, 1968, that court concluded that "a state (may) limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein." . . .

We now reverse. Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

At its core, the right to due process reflects a fundamental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible. . . .

. . . [O]ur society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.

Recognition of this theoretical framework illuminates the precise issue presented in this case. As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. . . . It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum. . . .

. . . [W]e conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process.

The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs

to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiffs right to access is reasonable.

In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit, but it is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few. In the same vein we think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. . . . We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper.

We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process. While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case.

In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Mr. Justice DOUGLAS, concurring in the result.

The Due Process Clause on which the Court relies has proven very elastic in the hands of judges. "The doctrine that prevailed in *Lochner* . . . and like cases—that due

process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." . . . I would not invite its revival.

Whatever residual element of substantive law the Due Process Clause may still have, it essentially regulates procedure. . . . The Court today puts "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excused if he does not obtain a license which requires payment of money that he does not have? How about a requirement of an onerous bond to prevent summary eviction from rented property? The affluent can put up the bond, though the indigent may not be able to do so. . . . Is housing less important to the mucilage holding society together than marriage? The examples could be multiplied. I do not see the length of the road we must follow if we accept my Brother Harlan's invitation. . . .

The reach of the Equal Protection Clause is not definable with mathematical precision. But in spite of doubts by some, as it has been construed, rather definite guidelines have been developed: *race* is one . . . *alienage* is another . . . *religion* is another . . . *poverty* is still another (*Griffin* . . .); and *class* or *caste* yet another . . . .

The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions. But could a State deny divorces to domiciliaries who were Negroes and grant them to whites? Deny them to resident aliens and grant them to citizens? Deny them to Catholics and grant them to Protestants? Deny them to those convicted of larceny and grant them to those convicted of embezzlement?

Here the invidious discrimination is based on one of the guidelines: *poverty*.

An invidious discrimination based on poverty is adequate for this case. While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce. Connecticut says in its brief that this is justified because "the State does not favor divorces; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together."

Thus, under Connecticut law divorces may be denied or granted solely on the basis of wealth. Just as denying further judicial review in *Burns* and *Smith*, appellate counsel in *Douglas*, and a transcript in *Griffin* created an invidious distinction based on wealth, so, too, does making the grant or denial of a divorce to turn on the wealth of the parties. Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate. . . .

Mr. Justice BRENNAN, concurring in part.

I join the Court's opinion to the extent that it holds that Connecticut denies procedural due process in denying the indigent appellants access to its courts for the sole reason that they cannot pay a required fee. . . .

But I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually "the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." In this case, the Court holds that Connecticut's unyielding fee requirement violates the Due Process Clause by denying appellants "an opportunity to be heard upon their claimed right to a dissolution of their marriages" without a sufficient countervailing justification. . . . I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law. If fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of a marriage. The right to be heard in some way at some time extends to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis.

In addition, this case presents a classic problem of equal protection of the laws. The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. . . .

Where money determines not merely "the kind of trial a man gets," . . . but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. . . . In my view, Connecticut's fee requirement, as applied to an indigent, is a denial of equal protection.

Mr. Justice BLACK, dissenting.

. . . The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages. The power of the States over marriage and divorce is complete except as limited by specific constitutional provisions. . . .

The Court here holds, however, that the State of Connecticut has so little control over marriages and divorces of its own citizens that it is without power to charge them practically nominal initial court costs when they are without ready money to put up those costs. The Court holds that the state law requiring payment of costs is barred by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. Two members of the majority believe that the Equal Protection Clause also applies. I think the Connecticut court costs law is barred by neither of those clauses.

It is true, as the majority points out, that the Court did hold in *Griffin* . . . that indigent defendants in criminal cases must be afforded the same right to appeal their convictions as is afforded to a defendant who has ample funds to pay his own costs. But in *Griffin* the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases.

Criminal defendants are brought into court by the State or Federal Government to defend themselves against charges of crime. They go into court knowing that they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes. Because of this great governmental power the United States Constitution has provided special protections for people charged with crime. . . . With all of these protections safeguarding defendants charged by government with crime, we quite naturally and quite properly held in *Griffin* that the Due Process and Equal Protection Clauses both barred any discrimination in criminal trials against poor defendants who are unable to defend themselves against the State. Had we not so held we would have been unfaithful to the explicit commands of the Bill of Rights, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime.

Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

. . . Thus the Court's opinion appears to rest solely on a philosophy that any law violates due process if it is unreasonable, arbitrary, indecent, deviates from the fundamental, is shocking to the conscience, or fails to meet other tests composed of similar words or phrases equally lacking in any possible constitutional precision. These concepts, of course, mark no constitutional boundaries and cannot possibly depend upon anything

but the belief of particular judges, at particular times, concerning particular interests which those judges have divined to be of "basic importance." . . .

Pleading Poverty in Federal Court (forthcoming 2019)[*]

Andrew Hammond

Since 1892, Congress has authorized the federal courts to grant *in forma pauperis* (IFP) status to litigants who submit a financial affidavit declaring their poverty. Yet, the regime now in place—28 U.S.C. § 1915(a) and Federal Rule of Civil Procedure 83—affords federal judges broad discretion in how to determine a litigant's poverty. As a result, how people plead poverty in federal court varies dramatically across the federal system. This pleading structure burdens judges and litigants and does so in ways that depart from other poverty determinations by federal agencies, state agencies, and state courts.

This Article builds its argument from the ground up by tracing the distinct practices in the United States' 94 federal trial courts. Then, drawing on federal law and state court practice, the Article proposes a coherent IFP standard. It connects this inquiry with broader debates in procedure including those around access to justice and the future of civil adjudication. More broadly, this Article typifies what could be called bottom-up procedural scholarship. Such an approach will often prioritize poor litigants over wealthy ones, trial courts over appellate, and routine adjudications over precedent-shattering rulings.

To begin, the Article identifies and documents the range of federal *in forma pauperis* practice. By granting IFP status, the federal court waives the initial filing fee and sometimes confers other benefits on the litigant, including assistance effectuating service of process and even appointed counsel. Beyond these concrete benefits, IFP status instantiates the federal system's purported commitment to not let a litigant's indigence interfere with the merits of that litigant's claims. However, the federal statute, 28 U.S.C. § 1915(a), and the Federal Rules give judges much discretion in how to determine a litigant's poverty. That discretion, in turn, has produced a dizzying degree of variation across and within the 94 U.S. district courts.

In forma pauperis motions do not equip federal judges with the tools to accurately assess a movant's poverty. Part I demonstrates how this lack of uniformity across and within courts creates disparate practices in the federal judiciary. Federal courts differ on how they obtain information about litigants' financial situations to ascertain their qualifications for *in forma pauperis* status. The coding summarized in Part I highlights these differences, with some forms asking more specific questions along with questions that seem to demand more information than necessary.

---

[*] *Excerpted from* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L. J. (forthcoming 2019).

Also, few federal courts provide any back-end guidance for judges presented with an *in forma pauperis* motion. With no standard ex ante, judges are left to determine how much income is too low, how many expenses are too high, and how many assets are too few. This status quo is particularly troublesome in any district court made up of several judges. What's more, computing a movant's income and expenses is arithmetic and does not demand the attention or skills of an Article III judge.

As for the litigants, the federal courts are unnecessarily asking poor people to plead too much to prove their poverty. Some of the IFP forms resemble a rich person's idea of income—asking would-be litigants to appraise their jewelry and art work, divulge their stock holdings, and itemize their inheritances. A poor litigant should not need to plead the make and model of any vehicle in their possession or disclose their educational attainment. A judge need not require, as one of the Judicial Conference's forms does, a litigant to list income from a dozen categories, fifteen types of expenses, and ten types of assets. Such a cumbersome, standard-less pleading system needlessly burdens judges and litigants.

Part II disproves that this degree of irrationality is inherent in poverty pleadings. Indeed, one cannot fully appreciate the flaws in federal practice until surveying the landscape of federal and state poverty determinations. By comparing federal IFP determinations to other poverty determinations in federal law, the Article proves that federal practice need not be so irrational. Federal and state agencies determine the poverty of applicants regularly and routinely. These agencies apply means tests to determine whether an individual or family is eligible for government assistance, including Medicaid, food assistance, and welfare. Federal courts should do the same.

To be sure, it is unusual to liken federal courts to welfare agencies. But in this context, both institutions are engaged in an identical enterprise—attempting to target a means-tested benefit in a rational, efficient manner. Their constitutional origins and their other functions do not interfere with comparing how they make those poverty determinations. For those who would prefer to compare federal courts only to other courts, state court systems serve as ready-made analogs. Here too, state courts use a variety of mechanisms to make their own poverty determinations to confer IFP status. Some state courts already use bright-line income tests and adjunctive eligibility, revealing how rudimentary the federal system truly is. In fact, state courts borrow some of the very lessons from human services agencies that the federal courts should also adopt.

Part III draws on these lessons from federal law and state court practice to propose a coherent IFP standard. This national standard would not only bring IFP status in line with federal law and state court practice, but also better promote access to justice for poor Americans. Federal judges could take back some of their time by streamlining this fairly ministerial function. Such a standard would borrow from the lessons of other poverty determinations by clarifying the income threshold and allowing for adjunctive eligibility based on other federal programs. The new IFP standard would preserve judicial discretion

in those cases in which the court determines that paying the fees and costs would cause the litigant substantial hardship.

Much of procedural scholarship considers additional protections for poor litigants (and access to justice reforms generally) to be at odds with the demands of rationalized judicial administration. The values of due process are understood to be in conflict with preserving judicial resources. This Article engages in that debate in an unconventional way. In Part IV, the Article shows why the tradeoff between procedural protections and judicial resources is not preordained. It suggests that these principles should not always be treated as competing ones or as "either/or" design choices, but rather as mutually reinforcing features that legitimize a procedural system. The Article reconciles this seeming conflict in a specific instance: a poor litigant's first step into federal court.

In the process, the Article models a different approach to the study of procedure. By concentrating on an admittedly obscure procedure, the Article stresses the lived reality for litigants when they seek redress in federal court. In doing so, this project emphasizes not the appellate courts of the federal system, but the trial courts that are, for most, the face of justice. It dwells not on the rulings and reasoning of the highest court, but on the run-of-the-mill procedures that litigants encounter every day in the federal system. Put simply, this is procedure not from the top down, but from the bottom up. . . .

[Section 1915(a) of title 28 of the U.S. Code] and Rule 83 afford federal judges broad discretion in how to determine a litigant's poverty. This Article argues, based on analysis of all IFP forms and financial affidavits used in the 94 U.S. district courts, that current federal practice is inconsistent across and within districts and, because of the lack of standards for interpreting the various forms, within them as well. This Part lays out the survey of the district courts and identifies the flaws of the status quo.

1. Summary Statistics of the IFP Forms

Twenty-two district courts use the AO239 form. The AO239 form is the long form application created by the Judicial Conference. Consisting of five pages, the AO239 asks movants to list sources of income across twelve categories, expenses across fifteen categories, employment history for the past two years, any cash on hand, assets, and debts owed to the litigant or spouse, dependents. The AO239 form also asks the applicant whether she "expect[s] any major changes" to the applicant's income, expenses, assets, or liabilities in the next year. The AO239 form also asks whether the applicant has spent or will spend any money for expenses or attorney fees in conjunction with the lawsuit. The AO239 also asks about the litigant's age and years of schooling. Twenty-four district courts opt for the shorter AO240 form. At two pages, the AO240 form covers much of the same ground as the AO239 form, but in less detail. Thirteen district courts accept both the AO239 and the AO240 forms.

Forty-six district courts have created and use their own forms and/or affidavits. Of these 46 districts, 11 have forms that resemble the AO239. Fourteen district courts that

have created their own forms resemble the AO240 form. However, in each of these 46 district courts, there is a substantial amount of variation both in terms of the types of questions asked and the level of detail required of the movant. In one way, this survey is an illustrative example of the variation that follows from a federal system that permits local rulemaking. . . .

III. Toward a Coherent *In Forma Pauperis* Standard

In a nation where half of households have an annual income of less than $60,000, it is an open (and interesting) question who should pay for the federal courts. One could imagine a pay-per-use system, a system that is financed entirely by general tax revenues, or, what is most likely, a combination of both. Rather than entering that debate about how best to finance a court system, this Article fastens itself to the institutional limits of the federal courts. By binding itself to the federal system's commitment laid out in 28 U.S.C. § 1915, the Article uses that statutory commitment of access for indigent litigants as the baseline from which to analyze current federal practice. Taking Congress's commitment to access for poor litigants seriously, this Part proposes a coherent *in forma pauperis* standard.

A. Designing a National IFP Standard for the Federal Courts

Federal courts should allow litigants to proceed *in forma pauperis* if they meet one of four conditions. First, any litigant whose net income is at 125% of the federal poverty level and who has assets of less than $5,000 should be considered indigent by the court. That income calculation should include at least partial deductions for necessary expenses like medical expenses, childcare, housing, and transportation. Such an income threshold would be consistent with [Supplemental Nutrition Assistance Program (SNAP)], Medicaid, legal aid providers, and many state court systems.

In calculating eligibility for *in forma pauperis* status, the federal courts should also consider assets. LSC-funded organizations must set reasonable asset ceilings for eligible households. A court should still look at a litigant's assets even if that litigant's income is below the federal poverty guidelines. If a movant is low-income, but has significant assets that could be used to pay the filing fee without hardship, those assets should be considered. The rule could allow the court to look into whether a litigant has recently tried to reduce their assets to avoid using them in the pursuit of their litigation. In practice, it seems unlikely that the federal courts would see such a litigant, but to ensure accurate targeting, the federal rule should include an asset limit. That asset limit should exclude the movant's residence, but should be limited to $5,000 in liquid assets.

The second way a litigant could proceed *in forma pauperis* should be through adjunctive eligibility through federal public assistance programs. Today, public assistance is included as a source of income on most IFP forms. As a result, receipt of food stamps can just as easily be used by a federal judge to discredit a litigant's pleading of poverty instead of as evidence of the litigant's indigence. Instead of counting benefit receipt as a

source of income, federal judges should follow the lead of various states and use it as a bureaucratic shortcut to prove the movant's poverty. As mentioned above, the federal judiciary could take advantage of the accurate screening conducted by agencies administering federal public assistance with little fear of fraud.

Third, along the lines of Minnesota, South Carolina, and other states, the federal courts could adopt a rule that litigants represented by a legal aid organization, including those funded by the federal Legal Services Corporation, can proceed *in forma pauperis*. Such a rule would eliminate the contradictory practice that a litigant is needy enough to merit a federally-funded legal services lawyer, but not needy enough for a federal court to waive fees and costs. As with adjunctive eligibility for public benefits, such a rule would shift the burden of determining need from the judges to legal aid organizations who must make that determination in the first instance. Plus, this rule would encourage under-resourced litigants to seek assistance (or simply advice) from these organizations, cutting down on the litigants who proceed pro se.

Finally, this new proposed standard should preserve the discretionary authority of the federal courts. By providing a catch-all category, a federal judge would still be able to permit a litigant to proceed *in forma pauperis* even if they could not prove their indigence through the three mechanisms outlined above. This discretionary category would allow judges to grant *in forma pauperis* status to an individual who, for instance, is disqualified on the basis of income, but has significant expenses not included in the new means test.

There will be opposition to these proposed changes. Some may believe there is value in regional, state, and intra-state variations—especially in a country that spans a continent. This national standard would neglect differences in costs of living. In a related vein, discretion, some say, is a feature, not a bug, of the Federal Rules. However, federal law is chock-full of means tests that apply nationwide and even more that apply to the lower 48 states. Also, a discretionary system does not necessarily mean the decisionmaker must be robbed of standards. Federal law often provides rules of decision to assist federal judges including in instances that are committed to the judge's discretion.

Some might worry that adjunctive eligibility will lead to false negatives and false positives. Of course, there are individuals who are poor enough to receive SNAP, but do not want to receive assistance or may have recently been kicked off of the program. One would not want a system that penalizes poor litigants who fail to enroll in anti-poverty programs. However, that would only be true if adjunctive eligibility was the only way to proceed *in forma pauperis*. As for false positives, such inaccurate determinations are less of a concern for the public assistance programs used in the proposed test. SNAP is currently experiencing record-low levels of fraud. Fraud rates among beneficiaries in the Medicaid and TANF [Temporary Assistance for Needy Families] programs are also low.

Others might be concerned that tying eligibility to other programs ties *in forma pauperis* determinations to the often-embattled American safety net and the vicissitudes of Congressional funding. If Congress were to eliminate the Legal Services Corporation or

block grant Medicaid or SNAP, participation in those programs could plummet. A criticism in the same vein, but from a different angle, might posit that the United States is fitfully moving toward universalism, in the provision of old-age insurance, education, and healthcare. Some argue that means tests are stigmatizing and should be abandoned altogether.

Yet, participation in these programs is far more secure than the first criticism suggests and far more widespread than the other criticism allows. As for the concern about tying *in forma pauperis* determinations to other federal programs, attempts to block grant Medicaid and SNAP have repeatedly failed since 1996. As for the second, Medicaid pays for close to half of births in the U.S. One in seven Americans receive SNAP benefits. A substantial portion of the United States receives Medicaid or SNAP.

The sheer unpredictability of the current regime means that some people who once obtained IFP status would not under this proposal. But, if this proposal is sound, those are people who should not have received IFP status in the first place. In the bargain, truly poor people will not be blocked by the whims of a particularly parsimonious judge. This Article proposes a streamlined system that sharply reduces the number of people who are asked to pay the costs and fees and litigation who should not rather than a system that permits some litigants to avoid costs and fees that they could afford to pay.

Moreover, all these criticisms fail to see this proposal in light of current practice. The sensible approach is not to maintain the status quo, but to take all possible steps to rationalize federal practice, making it more efficient for judges and less demeaning for litigants. In light of the irrationality of current federal practice, it would be ill-advised to eschew effective albeit imperfect improvements simply because the improvements themselves are not flawless.

Finally, Congress, the Judicial Conference, and district courts could adopt any of these proposed pathways without necessarily adopting the others. Each of the proposed changes above would ease the administrative burden for the federal courts and reduce the likelihood of discrepancies across and within district courts. Taken together, this national standard offers a no-wrong-door solution: litigants may receive IFP status based on a simple calculation of net income and assets based on federal law, adjunctive eligibility based on other federal programs, representation by a legal aid attorney, or through the judge's discretion.

B. Adopting a National IFP Standard for the Federal Courts

Now that we have a more coherent *in forma pauperis* standard to offer, the question is how to implement it. These institutional avenues are inspired by the Rules Enabling Act and other scholars' reform proposals. Most proceduralists would welcome a reasoned Supreme Court decision that fashions a workable, national standard for *in forma pauperis* determinations by construing 28 U.S.C. § 1915(a). But it is unlikely we will see such a decision. As a result, there are three ways the federal courts could replace the status quo of

in forma pauperis determinations: 1) Congress could amend 28 U.S.C. § 1915, 2) the Judicial Conference could amend (and the Supreme Court could approve) the Federal Rules of Civil Procedure and/or propose a new form, or 3) district court practice could converge as district courts adopt the new standard. . . .

The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (2017)*

Legal Services Corporation (LSC)

The Legal Services Corporation (LSC) contracted with [the National Opinion Research Center (NORC)] at the University of Chicago to help measure the justice gap among low-income Americans in 2017. LSC defines the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs. NORC conducted a survey of approximately 2,000 adults living in households at or below 125% of the Federal Poverty Level (FPL) using its nationally representative, probability-based AmeriSpeak® Panel. This report presents findings based on this survey and additional data LSC collected from the legal aid organizations it funds.

Eighty-six percent of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.

In the past year, 71% of low-income households experienced at least one civil legal problem, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care.

In 2017, low-income Americans will approach LSC-funded legal aid organizations for support with an estimated 1.7 million problems. They will receive only limited or no legal help for more than half of these problems because of a lack of resources.

More than 60 million Americans have family incomes at or below 125% of FPL, including:

- About 6.4 million seniors
- More than 11.1 million persons with disabilities
- More than 1.7 million veterans
- About 10 million rural residents

---

* *Excerpted from* THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, LEGAL SERVS. CORP. (June 2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

Key Findings: Experience with Civil Legal Problems

- 71% of low-income households have experienced a civil legal problem in the past year. The rate is even higher for some: households with survivors of domestic assault (97%), with parents/guardians of kids under 18 (80%), and with disabled persons (80%).
- 1 in 4 low-income households has experienced 6+ civil legal problems in the past year, including 67% of households with survivors of domestic violence or sexual assault.
- 7 in 10 low-income Americans with recent personal experience of a civil legal problems say a problem has significantly affected their lives.
- 71% of households with veterans or other military personnel have experienced a civil legal problem in the past year. They face the same types of problems as others, but 13% also report problems specific to veterans.

Key Findings: Seeking Legal Help

- Low-income Americns seek professional legal help for only 20% of the civil legal problems they face.
- Top reasons for not seeking professional legal help are: [d]eciding to deal with a problem on one's own[, n]ot knowing where to look for help or what resources might exist[, n]ot being sure whether their problem is "legal[.]" . . .

Key Findings: Reports from the Field

- The 133 LSC-funded legal aid organizations across the United States, Puerto Rico, and territories will serve an estimated 1 million low-income Americans in 2017, but will be able to fully address the civil legal needs of only about half of them.
- Among the low-income Americans receiving help from LSC-funded legal aid organizations, the top three types of civil legal problems relate to family, housing, and income maintenance.
- In 2017, low-income Americans will receive limited or no legal help for an estimated 1.1 million eligible problems after seeking help from LSC-funded legal aid organizations.
- A lack of available resources accounts for the vast majority (85%-97%) of civil legal problems that LSO-funded organizations do not fully address. . . .

R (on the application of UNISON) v. Lord Chancellor
Supreme Court of the United Kingdom
[2017] UKSC 51

LORD REED: (with Whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson, and Lord Hughes agree)

1. The issue in this appeal is whether fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal ("EAT") are unlawful because of their effects on access to justice.

2. ETs have jurisdiction to determine numerous employment-related claims, most of which are based on rights created by or under Acts of Parliament, sometimes giving effect to EU law. They are the only forum in which most such claims may be brought. The EAT hears appeals from ETs on points of law. Until the coming into force of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 ("the Fees Order"), a claimant could bring and pursue proceedings in an ET and appeal to the EAT without paying any fee. The Fees Order prescribes various fees, as will be explained.

3. In these proceedings for judicial review, the trade union UNISON (the appellant), supported by the Equality and Human Rights Commission and the Independent Workers Union of Great Britain as interveners, challenges the lawfulness of the Fees Order, which was made by the Lord Chancellor in the exercise of statutory powers. It is argued that the making of the Fees Order was not a lawful exercise of those powers, because the prescribed fees interfere unjustifiably with the right of access to justice under both the common law and EU law, frustrate the operation of Parliamentary legislation granting employment rights, and discriminate unlawfully against women and other protected groups. . . .

6. Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. In more recent times, further measures have also been adopted under legislation giving effect to EU law. In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice. . . .

8. ETs are intended to provide a forum for the enforcement of employment rights by employees and workers, including the low paid, those who have recently lost their jobs, and those who are vulnerable to long term unemployment. They are designed to deal with issues which are often of modest financial value, or of no financial value at all, but are nonetheless of social importance. Their procedural rules, which include short limitation

periods and generous rights of audience, reflect that intention. It is also reflected in the fact that, unlike claims in the ordinary courts, claims in ETs could until recently be presented without the payment of any fee. The Leggatt Report (the Report of the Review of Tribunals, 2001) identified the absence of fees as one of the three elements which had rendered ETs successful.

9. In January 2011 the Government published a paper entitled *Resolving Workplace Disputes: A Consultation*, in which it announced its intention to introduce fee-charging into ETs and the EAT. Charging fees was considered to be desirable for three reasons. First, and most importantly, fees would help to transfer some of the cost burden from general taxpayers to those that used the system, or caused the system to be used. Secondly, a price mechanism could incentivise earlier settlements. Thirdly, it could dis-incentivise unreasonable behaviour, such as pursuing weak or vexatious claims.

10. Detailed proposals were published in December 2011 in a consultation paper issued by the Ministry of Justice entitled *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal*. Two alternative options for ETs were discussed, one of which went on to form the basis of the system set out in the Fees Order. The option which was ultimately preferred (Option 1) based the fee on the subject-matter of the claim (since the level of tribunal resources used generally depends on the complexity of the issues raised by the claim) and on the number of claimants (since claims brought by two or more people that arise from the same circumstances are processed together as multiple claims). It was proposed that an "issue fee" should be paid at the time of lodging the claim, and that a further "hearing fee" should be paid in advance of a final hearing.

11. The paper explained that the main purpose of a fee structure was to transfer part of the cost burden from the taxpayer to the users of the service, since a significant majority of the population would never use ETs but all taxpayers were being asked to provide financial support for this service. However, fees must not prevent claims from being brought by making it unaffordable for those with limited means. A fee remission system would therefore be a key component of the fee structure. The other issues taken into account were the importance of having a fee structure which was simple to understand and administer, and the importance of encouraging parties to think more carefully about alternative options before making a claim.

12. The paper noted that the impact of fees on the number of claims was difficult to forecast, in the absence of research concerned specifically with ET users. Research into the impact of fee-charging in the civil courts suggested that tribunal users required to pay a fee would not be especially price sensitive. The charging of fees in two stages, at the commencement of the proceedings and prior to a final hearing, was intended to reflect the cost of the services provided at each stage, and to encourage users to consider settlement during as well as before the tribunal process.

13. An impact assessment was published in May 2012. It concluded that it was not possible to predict how claimants would respond to the introduction of fee-charging. Two

alternative assumptions were therefore made for modelling purposes. On the low response scenario, demand was assumed to decrease by 1% for every £100 of fee. On the high response scenario, demand was assumed to decrease by 5% for every £100 of fee. The methodology was then to place an economic value on the costs and benefits of implementing Option 1. One of the non-monetised benefits was identified as being "reduced 'deadweight loss' to society as consumption of ET/EAT services is currently higher than would be the case under full cost recovery." In that regard, the analysis proceeded on the basis that the consumption of ET and EAT services without full cost recovery resulted in a "deadweight loss" to society. . . .

16. The Fees Order makes provision for fees to be payable in respect of any claim presented to an ET and any appeal to the EAT. So far as the ET is concerned, article 4 provides that an "issue fee" is payable when a claim form is presented, and a "hearing fee" is payable on a date specified in a notice accompanying the notification of the listing of a final hearing of the claim. Fees are also chargeable on the making of various kinds of application.

17. The amounts of the issue fee and hearing fee vary depending on whether the claim is brought by a single claimant or by a group, and also depending on whether the claim is classified as "type A" or "type B". There are over 60 types of claim which are defined as type A. All other types of claim are type B. Type A claims were described in the consultation documents as claims which generally take little or no pre-hearing work and usually require approximately one hour to resolve at hearing. Unfair dismissal claims, equal pay claims and discrimination claims are classified as type B. Type B claims generally require more judicial case management, more pre-hearings, and longer final hearings, because of their greater legal and factual complexity. . . .

39. Although there are differences between the figures given in the different sources, the general picture is plain. Since the Fees Order came into force on 29 July 2013 there has been a dramatic and persistent fall in the number of claims brought in ETs. Comparing the figures preceding the introduction of fees with more recent periods, there has been a long-term reduction in claims accepted by ETs of the order of 66-70%. The Review Report considered possible explanations, besides the introduction of the fees, and suggested that improvements in the economy would have been expected to result in a fall in single claims of about 8%. . . .

50. In addition to the tribunal statistics, the Review Report and the Acas research, the appellant has also produced details of the effect of the fees on a number of hypothetical claimants in low to middle income households. Two examples may be given.

51. The first hypothetical claimant is a single mother with one child, working full-time as a secretary in a university. She has a gross income from all sources of £27,264 per annum. Her liability to any issue or hearing fee is capped under the remission scheme at £470 per fee. She therefore has to pay the full fees (£390) in order to pursue a type A claim to a hearing, and fees totalling £720 in order to pursue a type B claim. The net monthly

income which she requires in order to achieve acceptable living standards for herself and her child, as assessed by the Joseph Rowntree Foundation in its report, *Minimum Income Standards for the UK in 2013*, is £2,273: an amount which exceeds her actual net monthly income of £2,041. On that footing, in order to pursue a claim she has to suffer a substantial shortfall from what she needs in order to provide an acceptable living standard for herself and her child.

52. The Lord Chancellor disputes the use made of the Joseph Rowntree Foundation's minimum income standards. On the Lord Chancellor's approach, no provision should be made for any expenditure on clothing (for which £10 per week had been allowed), personal goods and services (£12 per week), social and cultural participation (£48 per week), or alcohol (£5 per week), on the basis that all spending of these kinds can be stopped for a period of time in order to save the amount required to bring a claim. On that basis, the amount of the claimant's net monthly income, after minimum living standards are met, is £202 per month. In order to meet the fees, she therefore has to sacrifice all other spending, beyond the matters accepted by the Lord Chancellor to be necessities, for a period of two months, in order to bring a type A claim, and for three and a half months, in order to bring a type B claim.

53. The second hypothetical claimant has a partner and two children. She and her partner both work full-time and are paid the national minimum wage. They have a gross income, when benefits and tax credits are also taken into account, of £33,380 per annum. The claimant's liability to fees is capped under the remission scheme at £520. She therefore has to pay the full fees of £390 in order to pursue a type A claim, and fees totalling £770 in order to bring a type B claim. The net monthly income the family require in order to achieve an acceptable living standard, as assessed by the Joseph Rowntree Foundation, is £3,097: an amount which exceeds their actual net monthly income of £2,866. They therefore have to make further inroads into living standards which are already below an acceptable level if a claim is to be brought.

54. On the Lord Chancellor's approach, the family have a net monthly income available, after excluding all expenditure on clothing, personal goods and services and so forth, of £593 per month. On that basis, a claim can be brought if spending is restricted to items accepted by the Lord Chancellor to be necessities for a period of about a month.

55. One problem with the Lord Chancellor's approach to these calculations is that some of the expenditure which he excludes, such as spending on clothing, may not in fact be saved, but is simply postponed. For example, if the children need new clothes because they have outgrown their old ones, replacements have to be purchased sooner or later. The impact of the fees on the family's ability to enjoy acceptable living standards is not avoided merely by postponing necessary expenditure. A second problem is that claimants may not have prolonged periods of time available to them during which to save the amount required to pay the fees. Claimants are expected to bring their claims promptly, in keeping with the intention that the process should be speedy. The usual time limit for bringing a claim in the

ET is three months . . . . The issue fee must be paid then, although more time is available before the hearing fee will be due. More fundamentally, the question arises whether the sacrifice of ordinary and reasonable expenditure can properly be the price of access to one's rights. . . .

70. Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. The written case lodged on behalf of the Lord Chancellor in this appeal itself cites over 60 cases, each of which bears the name of the individual involved, and each of which is relied on as establishing a legal proposition. The Lord Chancellor's own use of these materials refutes the idea that taxpayers derive no benefit from the cases brought by other people.

71. But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.

72. When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution. . . .

92. In that regard, it is necessary to bear in mind that the use which people make of ETs is governed more by circumstances than by choice. Every individual who is in employment may require to have resort to an ET, usually unexpectedly: for example, if they find themselves unfairly dismissed or the victim of discrimination. . . . Conciliation can be a valuable alternative in some circumstances, but as explained earlier the ability to

obtain a fair settlement is itself dependent on the possibility that, in the absence of such a settlement, a claim will be presented to the ET. It is the practical compulsion which many potential claimants are under, which makes the fall in the number of claims indicative of something more than a change in consumer behaviour.

93. Secondly, . . . the Review Report itself estimated that around 10% of the claimants, whose claims were notified to Acas but did not result either in a settlement or in a claim before an ET, said that they did not bring proceedings because they could not afford the fees. The Review Report suggests that they may merely have meant that affording the fees meant reducing "other" areas of non-essential spending in order to save the money. It is not obvious why the explanation given by the claimants should not be accepted. But even if the suggestion in the Review Report is correct, it is not a complete answer. The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can *reasonably* be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.

94. Thirdly, that conclusion is strengthened by consideration of the hypothetical examples, which provide some indication of the impact of the fees on claimants in low to middle income households. It is common ground that payment of the fees would result in the hypothetical households having less income than is estimated by the Joseph Rowntree Foundation as being necessary to meet acceptable living standards. The Lord Chancellor argues that, if the households sacrifice all spending on clothing, personal goods and services, social and cultural participation, and alcohol, the necessary savings can be made to enable the fees to be paid. As was explained earlier, the time required to make the necessary savings varies, in the examples, between about one month and three and a half months. Leaving aside the other difficulties with the Lord Chancellor's argument discussed earlier, the fundamental problem is the assumption that the right of access to courts and tribunals can lawfully be made subject to impositions which low to middle income households can only meet by sacrificing ordinary and reasonable expenditure for substantial periods of time. . . .

98. For all these reasons, the Fees Order effectively prevents access to justice, and is therefore unlawful. . . .

Paying for Justice: The Human Cost of Public Defender Fees (2017)[*]

Devon Porter

Fans of crime television shows are familiar with the standard *Miranda* warning: "You have the right to an attorney . . . If you cannot afford an attorney, one will be appointed to you by the [government] at no expense."

This bedrock constitutional protection for indigent defendants—the right to an attorney at no expense—was first recognized by the Supreme Court in *Gideon v. Wainwright* more than 50 years ago. Yet today in California, a "free" public defense often comes with costs. In many California counties, defendants are required to pay a $50 upfront "registration fee" to be represented by a public defender. At the end of proceedings, judges are also allowed to bill defendants for the time public defenders spent on their case.

For the poorest defendants, upfront registration fees are especially troubling. These fees discourage some defendants from exercising their right to a lawyer and can frustrate a public defender's attempts to build trust with clients. For low-income defendants and their families, the fees also add to a mountain of criminal justice debt that makes it increasingly difficult for people to successfully reintegrate into society. . . .

Public defender registration fees are flat fees that indigent defendants are told to pay in order to obtain the services of a public defender. Registration fees are incurred at the beginning of representation and are typically assessed by the public defender's office. The fees supplement the more traditional practice of recoupment . . . in which defendants pay back some or all of the cost of representation by a public defender after the termination of criminal proceedings upon an independent judicial finding that defendants have the financial resources to contribute to their defense. . . .

California is not alone in charging these types of fees. Public defender registration fees emerged in the 1990s as a method for state and local governments to recover part of the cost of providing counsel. Forty-three states use some form of cost-recovery for public defenders, and 27 of these charge upfront registration fees. Though the maximum amount in California is $50, fees range from $10 up to $480 in other states.

In courthouses across California, it is a familiar scene: a homeless or indigent defendant appears for a minor crime, such as sleeping in a public structure without permission. The judge tells these defendants to go speak with a public defender. The public defender greets the defendants and immediately hands them a form stating that they must send a check for $50 to a private collections agency to "register" for their public defender.

[*] *Excerpted from* Devon Porter, PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES, ACLU OF S. CAL. (June 2017).

The fee is due in five days, and the form doesn't say anything about what defendants can do if they can't afford to pay it.

> "I am essentially required to say: 'Hi, if you pay $50, I can work with you.'"
> – Deputy Public Defender (anonymous), Los Angeles

This is how registration fees are often administered throughout California. While practices vary by county (and even among public defenders in the same office), defendants are often not informed that they can seek a waiver of the fee if they can't afford it, nor that they have the right to a public defender regardless of their ability to pay. In a recent case in San Bernardino, for example, a judge told indigent defendants that they would need to pay $157 in total for the services of the public defender, with $50 to be paid within the month. The judge did not inform defendants that they still had the right to counsel regardless of whether or not they could afford to pay the $50 on time or that they would not have to pay any fee if they could not afford it. . . .

California counties' practice of requiring a registration fee to obtain a public defender—in particular, the automatic assessment of these fees without consideration of ability to pay—interferes with defendants' constitutionally protected right to counsel and violates state law. . . .

Public defender registration fees further undermine the Sixth Amendment right to counsel by interfering with public defenders' ability to build the trust needed to effectively represent their clients. Many clients distrust their appointed public defender from the start, either because they assume the quality of representation will be poor or because they doubt that a government-provided attorney would truly be on their side. Requiring public defenders to hand their clients a fee form—usually during their first face-to-face interaction—undermines public defenders' efforts to build trust and rapport with clients. This makes it more difficult for public defenders to effectively represent their clients and may ultimately jeopardize the quality of representation.

By undermining the right to counsel and effective representation, public defender registration fees can have especially serious consequences for certain vulnerable classes of defendants. Fifty dollars can be a significant sum for the poorest defendants, including homeless individuals, disabled individuals, and very low-income families. Moreover, people with limited literacy or English proficiency may be less aware of their constitutional right to an attorney at no expense or less comfortable asserting this right, and therefore more likely to be burdened with fees they cannot afford. . . .

For those who decline to retain a public defender or fail to establish trust with an attorney due to the fees, the consequences can be dire. Defendants typically need the assistance of competent, trusted counsel to help them navigate their cases and mount an effective defense. This is particularly true for noncitizen defendants, who need the assistance of counsel to determine the possible immigration consequences of the resolution of their criminal cases. . . .

Registration fees were initially proposed as a way to raise revenue for underfunded public defenders' offices. In reality, however, revenue from registration fees has fallen far short of proponents' expectations, all while exacting a serious toll on indigent defendants. In an early report on registration fees, the American Bar Association found that of 28 jurisdictions studied nationwide, "those programs which had data on fee collection rates reported collection rates from 6 to 20%." The report therefore warned that "[a]pplication fees should not be implemented with the expectation that the revenue they produce will be a panacea for indigent defense under-funding problems."

. . . [S]ome counties have opted to contract with private collections companies, both to collect the fees upfront and to pursue nonpayers whose debt has become delinquent. These private companies then take a percentage of the fees recovered from indigent defendants. In Los Angeles, for example, the county contracts with a private company called GC Services to collect registration fees and other court debt. Under the terms of the GC Services contract with the county, if defendants fail to pay the fee within fifteen days, GC Services refers the debt to its comprehensive collections program. GC Services then uses debt collection methods including "wage and bank account garnishments," referral to the tax authority for garnishment of tax refunds, and the use of skip tracing and DMV record checks "to locate delinquent debtors." . . .

Ultimately, registration fees raise little revenue for the state and local governments while causing severe hardship to defendants and their families.

What Happens When Low-Income Mothers Call the Police (2016)[*]

Monica Bell

Amid the national discourse on policing, it is easy to lose sight of the day-to-day functions that police are expected to perform—the noise reduction, the carrying of groceries, the stopgap plumbing, the parenting support. But so much of their work is that mundane.

Shay [name changed to protect confidentiality], mother of 17-year-old Lamar and a participant in my research with low-income African-American mothers in Washington, D.C., reminded me of this. A few months before I interviewed her, she had called the police to take her son away. "He looked at it like I had set him up because I had to get him to the house for them to get him," Shay explained. "He was being a disrespectful child, talking back and being aggressive, not listening."

[*] *Excerpted from* Monica Bell, *What Happens When Low-Income Mothers Call the Police*, TALKPOVERTY.ORG, CTR. FOR AMER. PROGRESS (Mar. 10, 2016), https://talkpoverty.org/2016/03/10/when-low-income-mothers-call-the-police/.

Shay had grown increasingly alarmed by Lamar's behavior in recent months. He was hanging out with friends who committed petty crime, and he had even gotten a few court summonses for minor offenses, appearances he usually skipped. Despite Shay's distrust of police—a skepticism honed growing up in one of D.C.'s most violent housing projects—she reached out to them. She hoped they would link Lamar with resources he could use to avoid criminality, such as effective counseling and expanded educational and employment opportunities—resources she had not been able to provide.

Lamar wound up in a youth detention facility out of state. The statistics on long-term outcomes for teens who spend time in juvenile detention are not especially promising, but Shay insists that she made the best decision. "He knows now that mommy saved him," she said.

The conventional wisdom is that poor African-Americans have nearly universal disdain for police, seeing them only as an occupying force. Yet research shows that African-American women living in high-poverty neighborhoods are part of groups most likely to report crime and disturbance to the police, even when researchers control for the higher crime rates they tend to experience. The key, though, is that when these women (especially mothers) call the police, they aren't calling because they have faith in police officers' crime-solving prowess or trust that police have their best interests at heart. They make the difficult choice to rely on police because they are one of the most readily available providers of social support—help that police are actually ill-equipped to furnish.

Of course, mothers are well aware that calling the police, especially on teenage sons, is risky. Those risks have gained national attention only recently, but nothing that Black Lives Matter activists brought to light is news to them.

Pam, another mother I interviewed, rattled off grievances against the police, including the shooting of an unarmed boy in a high-poverty, predominantly African-American neighborhood in Southeast Washington, D.C. some years ago. "There's a lot of police brutality going on out there, a lot of crooked stuff. What can we do?" she lamented. Yet she reports calling the police on her drug-addicted son several times, hoping he could take advantage of a diversion program and get into drug treatment. Much to her chagrin, he's now incarcerated instead.

For mothers living in poverty, the stakes of choosing not to contact police when a child is truant, addicted, or out of control can be high. Child welfare investigation is a regular occurrence for poor mothers, especially if they are African-American and living in central cities. Although calling the police can trigger a child welfare investigation, it can also serve as a gesture of diligent parenting. Thus the risk of reporting can seem worth taking to avoid the appearance of child neglect, a charge that could put the entire family in jeopardy. . . .

Against the backdrop of police bias and misconduct, police organizations have taken to publicizing dancing, jumping rope, and making music with children of color as if

dance-offs will render forgettable the legacy of violence. These displays of goodwill are positive initial gestures. But long-term delivery of effective and respectful policing, coupled with a more robust and more usable landscape of non-criminal social services, is what's really needed for violence reduction and police legitimacy. A dual strategy of police reform and safety net reform can ultimately aid in the fight against poverty by stemming the tide that inexorably pushes poor parents and kids toward penal entanglement, which tends to exacerbate hardship.

This moment invites deeper questions about the functions and scope of police work. It beckons us toward reconsideration of how police regulation fits into a broader reform agenda. Body cameras and use of force standards are reasonable places to begin, but it will take more than police-specific reform to recast the work of police in communities. The Ferguson Commission, for example, integrated child well-being and economic opportunity into its agenda for change. Other proposals have suggested that multidisciplinary teams that include social workers respond to police calls, a helpful proposal even though it still operates in a crime control framework. Most towns and cities aiming to avoid becoming the next Ferguson, the next Baltimore, have turned their attention to police regulation, but they have not simultaneously sought ways to make social support more accessible in heavily policed communities beyond the criminal justice system.

As governments redefine the contours of policing, they can also tackle the deeper challenges of parenting in the toughest communities. They can make decisions like Shay's and Pam's less necessary.

Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California (2017)[*]

Jeffrey Selbin, Stephanie Campos-Bui, Hamza Jaka,
Tim Kline, Ahmed Lavalais & Alynia Phillips

In the wake of tragedies in cities like Ferguson, Missouri, national attention is focused on the regressive and racially discriminatory practice of charging fines and fees to people in the criminal justice system. People of color are overrepresented at every stage in the criminal justice system, even when controlling for alleged criminal behavior. Racially disproportionate treatment in the system leaves people of color with significantly more criminal justice debt, including burdensome administrative fees.

While regressive and discriminatory criminal justice fees have been described and critiqued in the adult system, the issue has received very little attention in the juvenile system. Nevertheless, families with youth in the juvenile system are charged similar fees,

[*] *Excerpted from* Jeffrey Selbin, Stephanie Campos-Bui, Hamza Jaka, Tim Kline, Ahmed Lavalais & Alynia Phillips, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA, BERKELEY LAW POL'Y ADVOCACY CLINIC (Mar. 2017).

which significantly undermine the system's rehabilitative goals. The harmful practice of charging poor people for their interaction with the criminal justice system is not limited to places like Ferguson, Missouri. California, too, makes families pay for their children's involvement in the juvenile system.

This report presents findings about the practice of assessing and collecting administrative fees from families with youth in the California juvenile system. We use the term "administrative fees" to describe the charges imposed by local jurisdictions on families for their child's involvement in the juvenile system. State law permits counties to charge administrative fees for legal representation, detention, and probation, but only to families with the ability to pay. Most counties in California charge these administrative fees, imposing millions of dollars of debt on families with youth in the juvenile system.

Our research over the last three years reveals that juvenile administrative fees undermine the rehabilitative purpose of the juvenile system. Counties charge these fees to families already struggling to maintain economic and social stability. Fee debt becomes a civil judgment upon assessment. If families do not pay the fees, counties refer the debt to the state Franchise Tax Board, which garnishes parents' wages and intercepts their tax refunds. Under state law, these fees are meant to help protect the fiscal integrity of counties. They are not supposed to be retributive (to punish the family), rehabilitative (to help the youth) or restorative (to repay victims). . . .

HARMFUL: Juvenile administrative fees cause financial hardship to families, weaken family ties, and undermine family reunification. Because Black and Latino youth are overrepresented and overpunished relative to White youth in the juvenile system, families of color bear a disproportionate burden of the fees. Criminologists recently found that juvenile debt correlates with a greater likelihood of recidivism, even after controlling for case characteristics and youth demographics. These negative outcomes from fees undermine the rehabilitative purpose of the juvenile system.

UNLAWFUL: Some counties charge juvenile administrative fees to families in violation of state law, including fees that are not authorized in the juvenile setting, fees that exceed statutory maximums, and fees for youth who are found not guilty. Some counties violate federal law by charging families to feed their children while seeking reimbursement for the same meals from national breakfast and lunch programs. Further, counties engage in fee practices that may violate the state Constitution by depriving families of due process of law through inadequate ability to pay determinations and by denying families equal protection of the law in charging certain fees.

COSTLY: Counties are authorized to charge families for juvenile administrative fees to pay for the care and supervision of their children. Yet counties net little revenue from the fees. Because of the high costs and low returns associated with trying to collect fees from low-income families, most of the fee revenue pays for collection activities, not for the care and supervision of youth. Further, the fee debt can cause families to spend less on positive social goods, such as education and preventative healthcare, which imposes

long term costs on families, communities, and society by prolonging and exacerbating poverty.

Based on our findings, fixing the system is not an option. Charging administrative fees to families with youth in the juvenile system does not serve rehabilitative purposes. Other mechanisms in the system punish youth for their mistakes and address the needs of victims. Further, we did not find a single county in which fee practices were both fair and cost-effective. Counties either improperly charge low-income families and net little revenue, or they fairly assess families' inability to pay and net even less. Counties that have recently considered the overall harm, lawfulness, and costs of juvenile administrative fees have all ended the practice.

In light of our findings, we make the following recommendations to policymakers:

Recommendations

1. To end their harmful impact on youth and families, the state should repeal laws that permit the assessment and collection of juvenile administrative fees.

2. To redress unlawful practices, counties should reimburse families for all payments they made on improperly charged juvenile administrative fees.

3. To understand the consequences of costly practices like juvenile administrative fees, the state and counties should collect and maintain better data in the juvenile system. . . .

III. BAIL AND BOND

Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, WORKING PAPER, NAT'L CONF. ON BAIL AND CRIMINAL JUSTICE (May 1964).

Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

Public Safety Assessment: Risk Factors & Formula, LAURA & JOHN ARNOLD FOUNDATION (2016).

Brief for Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia's Sheriffs' Association in Support of Defendant-Appellant and Reversal of Preliminary Injunction, Walker v. City of Calhoun, 2016 WL 3452938 (11th Cir. 2016).

David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, Working Paper No. 23421, NAT'L BUREAU OF ECON. RESEARCH (May 2017).

Bail Reform: Shifting Practices in Prosecutors' Offices (2018).

Nina Rabin, Amicus Brief on Behalf of 46 Social Science Researchers and Professors in Support of Petitioners-Appellees/Cross-Appellants and Urging Affirmance, Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) *rev'd. sub nom.* Jennings v. Rodriguez, 138 S.Ct. 830 (2018).

Jennings v. Rodriguez, 138 S.Ct. 830 (2018).

Bail in the United States: 1964[*]

Daniel J. Freed & Patricia M. Wald

. . . The National Conference on Bail and Criminal Justice is designed to examine the bail system, review its criteria for pretrial release, consider the law enforcement stakes involved, the human as well as monetary costs of pretrial detention, and explore the available alternatives. Launched on June 1, 1963 with the assistance of a grant under Public Law 87-274 from the President's Committee on Juvenile Delinquency and Youth Crime, the Conference seeks to focus public attention on the defects in the bail system, the need

[*] *Excerpted from* Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, WORKING PAPER, NAT'L CONF. ON BAIL AND CRIMINAL JUSTICE (May 1964).

for its overhaul and the methods of improving it. It plans to do this through a national and several regional conferences, through staff assistance to communities which request aid, and through publications dealing with various aspects of pretrial release and detention. . . .

A study conducted by the United Nations recently disclosed that the United States and the Philippines are the only countries to allot a significant role to professional bail bondsmen in their systems of criminal justice. Commercial bondsmen emerged in this country to meet the needs of accused persons whose right to bail would otherwise be thwarted by the lack of a personal surety, real estate or adequate cash. For the vast numbers of defendants unable to raise the bail themselves, the bondsman is on tap twenty-four hours a day to secure their freedom for a price. It is the bondsman to whom courts turn if the defendant fails to appear, and who is supposed to go to great lengths to apprehend an escapee to avoid forfeiture of his bond. As a bailor, he enjoys a private power to arrest his bailee. He can even surrender him to the court before trial if he suspects that flight is imminent. The bondsman notifies the accused of the trial date and personally accompanies him to court. The profit motive is presumed to insure diligent attention to his custodial obligations. . . .

Since its inception, the institution of commercial bail has enjoyed a hybrid status, somewhere between a free enterprise and a public utility. Some states regulate the premiums bondsmen may charge; others allow whatever the traffic will bear. Some regulate only insurance surety company bonds; others control the fees charged by individual bondsmen as well.

Premium rates differ markedly throughout the country. New York bondsmen charge 5% on the first $1,000, 4% on the second $1,000, and 3% on the balance. Philadelphia bondsmen charge 8% plus a service charge, but in the rest of Pennsylvania the rate is 10% on the first $100, and 5% on the balance. Baltimore's rate is 7% up to $2,000, and 6% thereafter; while in New Jersey it is 10% on the first $2,500, then 6%. . . . The standard premium rate in the United States seems to be 10%, known to prevail in Atlanta, Cincinnati, Detroit, Denver, St. Louis, Illinois, California, and most federal courts. Rates as high as 12% have been reported in Wisconsin and 20% on some offenses in Birmingham. Within the legal maximums, however, bondsmen frequently bargain for special rates, particularly in high volume, low risk offenses like gambling. Disputes between bondsmen over price cutting are not uncommon. Neither are allegations of illegal overcharging.

Premium rates do not tell the whole story on the cost of commercial bail. Service charges are added in many jurisdictions. Bondsmen in Baltimore charge a minimum fee of $25 no matter how small the bond, and in California a standard $10 fee is added to the premium.

In some states, bonds written at the time of arrest must guarantee the presence of the accused until the case is finally disposed of by the trial court. In every state, a new bond may be required on appeal. In some places, a defendant may be forced to pay premiums on

four different bonds in the course of a criminal proceeding: from arrest to preliminary hearing, preliminary hearing to indictment, indictment to trial, and verdict to appeal. In such cases, the defendant may be amenable to a "deal" for a single bond at a higher premium rate to carry him through the case. The bondsman's legal right to cancel a bond (and keep the premium) any time he surrenders the defendant to court may sometimes be used as a lever to collect additional fees just to keep the original bond in force. . . .

Most bondsmen are backed by surety companies. These are licensed under state insurance laws, which require them to maintain funds sufficient to satisfy all forfeitures. Either by statute, court rule or practice, it is common to find that only bonds backed by surety companies will be accepted by the courts. This insures that payment of forfeitures will not depend on the financial condition of the individual bondsman.

But surety companies for the most part have been extremely successful in avoiding losses. In addition to the 2% each company receives out of every bond written by its agents, the company extracts an additional ½% or 1% of the bond premium to be placed in a "build-up fund." The fund is drawn upon whenever a forfeiture occurs, and the amount each agent has in his build-up fund determines the amount of bonds he may write. If a forfeiture exceeds the build-up fund, the company takes the balance out of future premiums. This system enables the surety company to do a large business with little risk. Examination of one New York company's books showed that from 1956 to 1958 it wrote bonds in the face amount of $70,000,000, received $1,400,000 in surety premiums, and suffered no losses.

Surety companies assign the management of their bail bond business to general agents, who take charge of different geographical areas. The general agent controls the amount of bonds written by bondsman agents in two ways. First, state statutes or court rules frequently require each bondsman to fill out a power of attorney from his surety company to show authorization for each bond he writes; the general agent may limit issuance of these powers. New ones are usually issued only as outstanding powers of attorney are disposed of through termination of the bail obligation, although it is not uncommon for a large number of powers to be outstanding simultaneously. Secondly, most companies limit the agent's discretion in writing large bonds and require specific authorization before each one is issued. Depending upon the company and the agent, a large bond may be one which exceeds $1,000; certainly most bonds over $5,000 require approval from the general agent. . . .

To hedge against inadequate premiums and the ever-present threat of forfeiture, many bondsmen require a defendant or his relatives to furnish collateral equal to all or part of the bond. Because collateral and indemnity agreements are usually not regulated by statute, the bondsman may "insist on the deed to the home of the accused or require a relative to put up his home or act as co-signer before posting bond." In cities like Baltimore, Chicago and Detroit, bondsmen attempt to secure full collateral, reportedly because of strict forfeiture enforcement policies. In Nassau County, New York one bondsman reported that "the indemnifiers mean everything, the defendant nothing." Washington, D.C.

bondsmen ordinarily do not require collateral, but decide on a case by case basis. The criterion used by one New York bondsman is: "If a person comes in and I don't know him or his lawyer, we look for collateral; if they don't have it, we don't bother with them."

The amount of security which the bondsman is able to obtain from accused persons varies. 100% collateral is rarely obtainable and is required only in cases the bondsman considers to be very bad risks, such as narcotics, or where the bond is unusually large. Some efforts to obtain collateral serve not to assure indemnification against monetary loss, but as a psychological deterrent to flight by the accused. A D.C. bondsman has even taken a lap dog as collateral. A story current among bondsmen in Florida is that one of their number used to carry a collateral box in which he collected items of sentimental value, such as wedding rings, or of practical value, such as false teeth. On one occasion he is supposed to have kept the child of the accused. . . .

Those who cannot afford a bondsman generally go to jail. They lose their freedom not on any rational criteria for separating good risks from bad, but because they are unable to raise a cash premium as low as $25 or $50, or to furnish the required collateral. . . .

In fiscal year 1960, 23,811 persons accused of federal offenses were held in custody pending trial. The average length of their detention was 25.3 days. Detention ranged from a low average of two days in some districts to a high average of 110 days in others. In 1963 federal detainees spent an estimated 600,000 jail days in local prisons, at a cost to the federal government of $2 million. In the same year, 30 to 40% of the inmates of the District of Columbia jail were detainees awaiting trial or sentence; 84% were eligible for release on bond but couldn't raise it. In 1962, they averaged 51 days in jail at a cost of $200 per defendant for a total of almost $500,000. In Philadelphia in 1954, the average was 33 days in jail for a total of 131,683 jail days. Today, ten years later, detainees account for 20% of Philadelphia's jail population and average 26 days at a cost of $4.25 per day or $1,300,000 a year. In Los Angeles pretrial detainees average 78 days before disposition of their cases. . . . Approximately 75% of the defendants in Baltimore are detained, while ABA sample surveys of 1962 felony cases show 71% detained in Miami, 57% in San Francisco, 54% in Boston, 48% in Detroit and 44% in New Orleans. . . .

Smaller communities show considerably lower percentages of detained defendants but often longer periods of detention. For instance, 31% or 342 out of 1086 grand jury defendants in Passaic, New Jersey in 1961 were detained an average of four months in jail if indicted; 4 to 5 weeks in jail if no indictment was returned. In Essex County, New Jersey, 71% are detained for a 54 day average. In upstate New York, detainees may spend months awaiting action by grand juries which meet only 3 or 4 times a year. In Pennsylvania, a defendant accused of driving without a license, and unable to raise a $300 bond, recently spent 54 days in jail awaiting trial, even though the offense carried a maximum penalty of 5 days.

The most complete figures on the costs of detention for want of bail come from New York City. In 58,458 persons spent an average of 30 days apiece in pretrial detention,

or a total of 1,775,778 jail days, at a cost to the city of $6.25 per day, or over $10,000,000 per year. In 1961 detainees accounted for 45% of the 9,406 daily census of city prisoners. The Women's House of Detention, 40% of whose present inmates are held for want of bail, is so overcrowded that a new $24,000,000 detention facility is being planned. Women are confined there an average of 13 days prior to trial; one out of four is ultimately acquitted. The 58,458 figure also includes 12,955 adolescents in the 16-21 age group who, in 1962, spent 396,025 days in pretrial detention. In the Brooklyn House of Detention, the average pretrial confinement of adolescent boys is 32 days; 70% are ultimately found not guilty or otherwise released. . . .

> The wastage of millions of dollars yearly in building and maintaining jails for persons needlessly detained before trial loses significance when measured against the vast wastage of human resources represented by defendants and their families and the resulting costs to the community in social values as well as dollars.

More important than the economic burden is the personal toll on the defendant. His home may be disrupted, his family humiliated, his relations with wife and children unalterably damaged. The man who goes to jail for failure to make bond is treated by almost every jurisdiction much like the convicted criminal serving a sentence. In the words of James V. Bennett, Director of the United States Bureau of Prisons:

> When a poor man is arrested, he goes willy-nilly to the same institution, eats the same food, and suffers the same hardships as he who has been convicted. The well-to-do, the rich, and the influential, on the other hand, find it requires only money to stay out of jail, at least until the accused has had his day in court.

Bail, devised as a system to enable the release of accused persons pending trial, has to a large extent developed into a system to detain them. The basic defect in the system is its lack of facts. Unless the committing magistrate has information shedding light on the question of the accused's likelihood to return for trial, the amount of bail he sets bears only a chance relation to the sole lawful purpose for setting it at all. So it is that virtually every experiment and every proposal for improving the bail system in the United States has sought to tailor the bail decision to information bearing on that central question. For many, release on their personal promise to return will suffice. For others, the word of a personal surety, the supervision of a probation officer or the threat of loss of money or property may be necessary. For some, determined to flee, no control at all may prove adequate.

Recognizing the unfairness and waste entailed by needless detention, a number of authorities have already taken steps to restore to bail its historical mission. Attorney General Robert F. Kennedy, on March 11, 1963, issued instructions to all United States Attorneys "to take the initiative in recommending the release of defendants on their own recognizance when they are satisfied that there is no substantial risk of the failure to appear at the specified time and place." The Advisory Committee on Criminal Rules has recommended that Rule 46, governing "Bail" in federal courts, be replaced by a rule entitled "Release on Bail," specifying that among the facts to be considered in deter-

mining the terms of bail shall be "the policy against unnecessary detention of defendants pending trial." Programs to secure the same objective are now under way in state or federal courts in New York, Washington, Detroit, Des Moines, St. Louis, San Francisco, Los Angeles, Chicago, Tulsa and Nassau County, New York. Reported to be in the planning stage are projects in Seattle, Reading, Akron, Cleveland, Atlanta, Boston, Milwaukee, Newark, Iowa City, Oakland, New Haven, Philadelphia and Syracuse, as well as the states of New Jersey and Massachusetts. The emphasis in all projects is on identifying the good risks; none undertakes to release defendants indiscriminately. The sorting of the good from the bad enables the system to pay closer attention to the handling of the accused whose release poses problems of flight or crime. . . .

To set bail on the basis of the criteria laid down in appellate decisions, statutes and rules, a judge or magistrate needs to have verified information about the defendant's family, employment, residence, finances, character and background. . . .

In the fall of 1961, the Vera Foundation's Manhattan Bail Project pioneered the fact-finding process in New York City by launching a program in the Felony Part of Magistrates Court (now Criminal Court). Assisted by a $115,000 grant from Ford Foundation and staffed by New York University Law students under the supervision of a Vera Foundation director, the project interviews approximately thirty newly arrested felony defendants in the detention pens each morning prior to arraignment. . . . The accuseds for the most part are indigents who will be represented by assigned counsel. . . . In evaluating whether the defendant is a good parole risk, four key factors are considered: (1) residential stability; (2) employment history; (3) family contacts in New York City; and (4) prior criminal record. Each factor is weighted in points. If the defendant scores sufficient points and can provide an address at which he can be reached, verification will be attempted. Investigation is confined to references cited in the defendant's signed statement of consent. Verification is generally completed within an hour, obtained either by telephone or from family or friends in the courtroom; occasionally a student is dispatched into the field to track down a reference. . . .

For each defendant determined by the project to be a good parole risk, a summary of the information is sent to the arraignment court, and copies of the recommendation and supporting data are given to the magistrate, the assistant district attorney and defense counsel. Counsel reads the recommendation into the record.

Since notification is so essential to a successful parole operation, Vera sends a letter to each parolee telling him when and where to appear in court. If he is illiterate, he is telephoned; if he cannot speak or understand English well, he will receive a telephone call or letter in his native tongue. Notification is also sent to any reference who has agreed to help the defendant get to court. The parolee is asked to visit the Vera office in the courthouse on the morning his appearance is due. If he fails to show in court, Vera personnel attempt to locate him; if his absence was for good cause, they seek to have parole reinstated. . . .

Once the facts about the accused's community roots are known, the court is in a position to individualize the bail decision. Increasing attention has· been given in recent years to opportunities for the widespread release of defendants on their own recognizance (r.o.r.), i.e., their promise to appear without any further security. A great many state and federal courts have long employed this device to allow pretrial freedom for defendants whom the court or prosecutor personally know to be reliable or "prominent" citizens. But the past three years have seen the practice extended to many defendants who cannot raise bail. The Manhattan Bail Project and its progeny have demonstrated that a defendant with roots in the community is not likely to flee, irrespective of his lack of prominence or ability to pay a bondsman. To date, these projects have produced remarkable results, with vast numbers of releases, few defaulters and scarcely any commissions of crimes by parolees in the interim between release and trial.

Such projects serve two purposes: (1) they free numerous defendants who would otherwise be jailed for the entire period between arraignment and trial, and (2) they provide comprehensive statistical data, never before obtainable, on such vital questions as what criteria are meaningful in deciding to release a defendant, how many defendants paroled on particular criteria will show up for trial, and how much better are a defendant's chances for acquittal or a suspended sentence if he is paroled. . . .

The Downstream Consequences of Misdemeanor Pretrial Detention (2017)[*]

Paul Heaton, Sandra Mayson & Megan Stevenson

The United States likely detains millions of people each year for inability to post modest bail. There are approximately eleven million annual admissions into local jails. Many of those admitted remain jailed pending trial. At midyear 2014, there were an estimated 467,500 people awaiting trial in local jails, up from 349,800 at the same point in 2000 and 298,100 in 1996. Available evidence suggests that the large majority of pretrial detainees are detained because they cannot afford their bail, which is often a few thousand dollars or less.

This expansive system of pretrial detention has profound consequences both within and beyond the criminal justice system. A person detained for even a few days may lose her job, housing, or custody of her children. There is also substantial reason to believe that detention affects case outcomes. A detained defendant "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." This is thought to increase the likelihood of conviction, either by trial or by plea, and may also increase the severity of any sanctions imposed. More directly, a detained person may plead guilty—even if innocent—simply to get out of jail. Not least importantly, a money bail system that

[*] *Excerpted from* Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

selectively detains the poor threatens the constitutional principles of due process and equal protection.

To date, however, empirical evidence of the downstream effects of pretrial detention has been limited. There is ample documentation that those detained pretrial are convicted more frequently, receive longer sentences, and commit more future crimes than those who are not (on average). But this is precisely what one would expect if the system detained those who pose the greatest flight or public safety risk. One key question for pretrial law and policy is whether detention actually *causes* the adverse outcomes with which it is linked, independently of other factors. On this question, past empirical work is inconclusive.

This Article presents original evidence that pretrial detention causally affects case outcomes and the commission of future crimes. Using detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas (the third-largest county in the United States), this Article deploys two quantitative methods to estimate the causal effect of detention: (1) a regression analysis that controls for a significantly wider range of confounding variables than past studies, and (2) a quasi-experimental analysis related to case timing. The results provide compelling evidence that pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes.

This Article intentionally focuses on misdemeanor cases. "Misdemeanor" may sound synonymous with "trivial," but that connotation is misleading. Misdemeanors matter. Misdemeanor convictions can result in jail time, heavy fines, invasive probation requirements, and collateral consequences that include deportation, loss of child custody, ineligibility for public services, and barriers to finding employment and housing. Beyond the consequences of misdemeanor convictions for individuals, the misdemeanor system has a profound impact because it is enormous: while national data on misdemeanors are lacking, a 2010 analysis found that misdemeanors represented more than three-quarters of the criminal caseload in state courts where data were available.

For misdemeanor defendants who are detained pretrial, the worst punishment may come before conviction. Conviction generally means getting out of jail; people detained on misdemeanor charges are routinely offered sentences for "time served" or probation in exchange for tendering a guilty plea. And their incentives to take the deal are overwhelming. For defendants with a job or apartment on the line, the chance to get out of jail may be impossible to pass up. Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones. This is also, perversely, the realm where the utility of cash bail or pretrial detention is most attenuated. . . .

Other jurisdictions also detain people accused of misdemeanors at surprising rates. There are several possible reasons for this. A money bail system may be easier to operate than a system of broad release with effective pretrial services. The bail bondsman lobby is a potent political force. The individual judges or magistrates who make pretrial custody

decisions suffer political blowback if they release people (either directly or via affordable bail) who subsequently commit violent crimes, but they suffer few consequences, if any, for setting unaffordable bail that keeps misdemeanor defendants detained. In short, institutional actors in the misdemeanor system have strong incentives to rely on money bail practices that result in systemic pretrial detention.

Given the inertia, misdemeanor bail policy is unlikely to shift in the absence of compelling empirical evidence that the status quo does more harm than good. This Article provides such evidence through the use of two types of quantitative analysis. The first is a regression analysis that controls for a wide range of confounding factors: defendant demographics, extensive criminal history variables, wealth measures (zip code and claims of indigence), judge effects, and 121 different categories of charged offense. Importantly, the analysis also controls for the precise amount of bail set at the initial hearing, meaning that the effects of bail are assessed by comparing defendants presumably viewed by the court as representing equal risk but who nonetheless differ in whether they are ultimately detained. In addition, this Article undertakes a quasi-experimental analysis that, akin to a randomized controlled trial that would be used to determine the effect of a treatment in an experimental setting, measures the effects of detention by leveraging random variation in the access defendants have to bail money based on the timing of arrest. These quasi-experimental results are very similar to those produced through regression analysis with detailed controls.

This Article finds that defendants who are detained on a misdemeanor charge are much more likely than similarly situated releasees to plead guilty and serve jail time. Compared to similarly situated releasees, detained defendants are 25% more likely to be convicted and 43% more likely to be sentenced to jail. On average, their incarceration sentences are nine days longer, more than double that of similar releasees. Furthermore, we find that pretrial detainees are more likely than similarly situated releasees to commit future crimes. Although detention reduces defendants' criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects. These results raise important constitutional questions and suggest that with modest changes to misdemeanor pretrial policy, Harris County could save millions of dollars per year, increase public safety, and reduce wrongful convictions. . . .

The study is set in a populous urban area with criminal justice structures comparable to those in many large cities in the United States. Harris County is the third-largest county in the United States and is home to Houston, the nation's fourth-largest city. Harris County boasts a diverse population of about 4.5 million residents, 19.6% of whom are African American, 42% Hispanic/Latino, 25.3% foreign-born, and 17.3% living below the federal poverty line. In Houston, which houses nearly half the county's population, the 2014 Federal Bureau of Investigation (FBI) index crime rate was 1 per 100 residents for

violent crime and 5.7 per 100 residents overall, placing Houston thirtieth among the 111 U.S. cities with populations above 200,000.

While the Bureau of Justice Statistics has collected extensive information about more serious crimes, there are no nationally representative data available on the numbers of misdemeanor arrests and convictions, let alone data about pretrial detention rates, bail, or sentencing. Nonetheless, other empirical studies on the effects of pretrial detention provide some insight into misdemeanor pretrial practices in other large urban areas and suggest that Harris County is not an outlier. In New York City, about 35% of misdemeanor defendants spend more than a week detained pretrial and 14% of misdemeanor defendants remain in jail during the entire pretrial period. Sixty-seven percent of misdemeanor defendants in New York City are convicted, and the vast majority of these convictions are guilty pleas. Ten percent of misdemeanor defendants in New York City receive a sentence of incarceration.

In Philadelphia, 25% of misdemeanor defendants remain in jail for more than three days after the bail hearing, and 50% are found guilty of at least one charge. Philadelphia, however, differs from many other jurisdictions in its broad use of bench trials (trials in front of a judge instead of a jury), which are the default for misdemeanor cases. As a result, the plea rate is much lower: only half of misdemeanor convictions in Philadelphia are achieved through plea negotiation. Sixteen percent of misdemeanor defendants receive a sentence of incarceration, including those who receive a sentence of time served.

The statistics in Harris County differ somewhat, but not dramatically, from those in New York City and Philadelphia. The detention rate is a bit higher: about 53% of misdemeanor defendants in Harris County are detained for more than seven days. The conviction rate is similar (68%), and, as in New York City, most convictions come about through guilty pleas (65%). The misdemeanor incarceration rate in Harris County is much higher than in the other two cities; 58% of those convicted receive a jail sentence, including time served. The average jail sentence, however, is relatively short at less than a month.

Other pretrial practices in Harris County are regularly observed in other jurisdictions. For example, the use of a schedule specifying bail amounts based on the charge and prior convictions is not uncommon. A 2009 survey of pretrial services around the country indicates that 57% of jurisdictions use videoconferencing for bail hearings,[106] as Harris County does. This same survey also indicates that about half of U.S. jurisdictions, like Harris County, do not provide representation at bail hearings. The use of commercial bail bondsmen is also fairly widespread. Four states—Illinois, Kentucky, Oregon, and Wisconsin—have banned the commercial bail bond industry, but bail bondsmen remain a common source for bail funds in most other states. Thus, although Harris County has unique features, it is similar to many other jurisdictions in detaining substantial numbers of misdemeanor defendants pretrial; in its reliance on a cash bail schedule; in holding short, videoconference bail hearings without court-appointed representation for the accused; and in the prominent role of a commercial bail bond industry. . . .

Study data are derived from the court docket sheets maintained by the Harris County District Clerk. These docket sheets include the universe of unsealed criminal cases adjudicated in the county and document considerable detail regarding each case. This Article focuses on 380,689 misdemeanor cases filed between 2008 and 2013. For each case, the docket data include the defendant's name, address, and demographic information; prior criminal history; and most serious charge. To obtain information about the neighborhood environment for each defendant, the court data were linked by the defendant's zip code of residence—which was available for 85% of defendants—to zip code-level demographic data from the 2008-2012 American Community Survey. The docket data also report the time of the bail hearing; the bail amount; whether and when bail was posted, the judge and courtroom assignment; motions and other metrics of procedural progress; and the final case outcome, including whether the case was resolved through a plea. . . .

Regression Estimates of the Effect of Pretrial Detention on Other Case Outcomes

		Estimated Effect of Pretrial Detention		
Outcome	Average for Those Released	No Controls	Limited Controls	Preferred Specification
Conviction	0.557	0.236**	0.266**	0.140**
		(0.001)	(0.002)	(0.002)
Guilty plea	0.528	0.240**	0.264**	0.133**
		(0.002)	(0.002)	(0.002)
Received jail sentence	0.402	0.348**	0.317**	0.172**
		(0.002)	(0.002)	(0.002)
Jail sentence stays		18.0**	15.85**	8.67**
		(0.10)	(0.10)	(0.12)
Received probation		-0.167**	-0.125**	-0.076**
		(0.001)	(0.001)	(0.001)
Probation days		-57.5**	-41.2**	-25.3**
		(0.45)	(0.46)	(0.55)

[Note:] This table reports coefficient estimates from linear regressions estimating the relationship between case outcomes and whether a defendant was detained pretrial. Each entry represents results from a unique regression. . . . The "jail sentence days" and "probation days" outcomes include defendants assigned no jail or probation. ** indicates an estimate that is statistically significant at the 0.01 level. Standard errors are reported in parentheses.

The table demonstrates that nearly all of the difference in convictions can be explained by higher plea rates among those who are detained, with detainees pleading at a 25% (thirteen percentage points) higher rate than similarly situated releasees. We also find

that those detained are more likely to receive jail sentences instead of probation. In our preferred specification, those detained are 43% (seventeen percentage points) more likely to receive a jail sentence and receive jail sentences that are nine days longer than (or more than double that of) nondetainees. This estimate of the impact of pretrial detention includes in the sample those without a jail sentence, so it incorporates both the extensive effect on jail time (those detainees who, but for detention, would not have received a jail sentence at all) and the intensive effect on jail time (those who would have received a jail sentence regardless but whose sentence may be longer as a result of detention). Those detained are both less likely to receive sentences of probation and receive fewer days of probation (including, once again, both the extensive and intensive margin). . . .

[Our data] reveals that defendants without prior records are disproportionately affected by detention. Detention has more than twice the effect on conviction for first-time offenders and appreciably increases their likelihood of being given a custodial sentence. Although other explanations are possible, this pattern is consistent with a scenario in which defendants detained for the first time are particularly eager to cut a deal to escape custody as quickly as possible; more experienced defendants, who perhaps have become acclimated to the jail environment or who face more serious consequences of conviction, are less influenced by their detention status. It appears that one consequence of pretrial detention, at least as practiced in Harris County, is that it causes large numbers of first-time alleged misdemeanants to be convicted and sentenced to jail time, rather than receiving intermediate sanctions or avoiding a criminal conviction altogether. . . .

Public Safety Assessment: Risk Factors & Formula (2016)[*]

Laura & John Arnold Foundation

In partnership with leading criminal justice researchers, the Laura and John Arnold Foundation (LJAF) developed the Public Safety Assessment™ (PSA) to help judges gauge the risk that a defendant poses. This pretrial risk assessment tool uses evidence-based, neutral information to predict the likelihood that an individual will commit a new crime if released before trial, and to predict the likelihood that he will fail to return for a future court hearing. In addition, it flags those defendants who present an elevated risk of committing a violent crime.

LJAF created the PSA using the largest, most diverse set of pretrial records ever assembled—1.5 million cases from approximately 300 jurisdictions across the United States. Researchers analyzed the data and identified the nine factors that best predict whether a defendant will commit new criminal activity (NCA), commit new

[*] *Excerpted from Public Safety Assessment: Risk Factors & Formula*, LAURA & JOHN ARNOLD FOUNDATION (2016).

violent criminal activity (NVCA), or fail to appear (FTA) in court if released before trial.

The table below outlines the nine factors and illustrates which factors are related to each of the pretrial outcomes—that is, which factors are used to predict NCA, NVCA, and FTA.

RELATIONSHIP BETWEEN RISK FACTORS AND PRETRIAL OUTCOMES

Risk Factor	FTA	NCA	NVCA
1. Age at current arrest		X	
2. Current violent offense			X
Current violent offense & 20 years old or younger			X
3. Pending charge at the time of the offense	X	X	X
4. Prior misdemeanor conviction		X	
5. Prior felony conviction		X	
Prior conviction (misdemeanor or felony)	X		X
6. Prior violent conviction		X	X
7. Prior failure to appear in the past two years	X	X	
8. Prior failure to appear older than two years	X		
9. Prior sentence to incarceration		X	

Note: Boxes where an "X" occurs indicate that the presence of a risk factor increases the likelihood of that outcome for a given defendant.

Each of these factors is weighted—or, assigned points—according to the strength of the relationship between the factor and the specific pretrial outcome. The PSA calculates a raw score for each of the outcomes. Scores for NCA and FTA are converted to separate scales of one to six, with higher scores indicating a greater level of risk. The raw score for NVCA is used to determine whether the defendant should be flagged as posing an elevated risk of violence.

Risk Factor	Weights
Failure to Appear (maximum total weight = 7 points)	
Pending charge at the time of the offense	No = 0; Yes = 1
Prior conviction	No = 0; Yes = 1
Prior failure to appear pretrial in past 2 years	0 = 0; 1 = 2; 2 or more = 4
Prior failure to appear pretrial older than 2 years	No = 0; Yes = 1
New Criminal Activirty (maximum weiht = 13 points)	
Age at current arrest	23 or older = 0; 22 or younger = 2
Pending charge at the time of the offense	No = 0; Yes = 3
Prior misdemeanor conviction	No = 0; Yes = 1
Prior felony conviction	No = 0; Yes = 1
Prior violent conviction	0 = 0; 1 or 2 = 1; 3 or more = 2
Prior failure to appear pretrial in past 2 years	0 = 0; 1 = 1; 2 or more = 2
Prior sentence to incarceration	No = 0; Yes = 2
New Violent Criminal Activity (maximum total weiht = 7 points)	
Current violent offense	No = 0; Yes = 2
Current violent offense & 20 years old or younger	No = 0; Yes = 1
Pending charge at the time of the offense	No = 0; Yes = 1
Prior conviction	No = 0; Yes = 1
Prior violent conviction	0 = 0; 1 or 2 = 1; 3 or more = 2

Brief for Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia's Sheriffs' Association*

Walker v. City of Calhoun (11th Cir. 2016)

. . . American Bail Coalition is a non-profit professional trade association of national bail insurance companies that underwrite criminal bail bonds throughout the United States. The Coalition's primary purpose is to protect the constitutional right to bail by bringing best practices to the system of release from custody pending trial. The Coalition works with local communities, law enforcement, legislators, and other criminal justice stakeholders to use its expertise to develop more effective and efficient criminal justice solutions. Coalition member companies currently have 17,368 bail agents under appointment to write bail bonds in the United States.

The Georgia Association of Professional Bondsmen is a non-profit professional trade association dedicated to encouraging professionalism among bondsmen, providing educational opportunities to its members, and promoting cooperation between the bail bonding profession and the criminal justice system. The Association has over 175 members who represent bonding companies and agents throughout Georgia. By Georgia law, the Association is responsible for approving and conducting all mandatory continuing education programs for all bail bond and bail recovery agents operating in Georgia. . . . The Association thus educates and trains approximately 1,500 bail agents in the State of Georgia.

The Georgia Sheriffs' Association is a non-profit professional organization for Georgia's 159 elected sheriffs. Among other things, the Association provides training for sheriffs and related personnel, and it advocates for crime control measures and laws that promote professionalism and enhanced effectiveness in the Office of the Sheriff throughout Georgia.

The outcome of this case will determine the extent to which bond schedules remain a constitutional way for communities to set bail for defendants when a judge is not present. Amici believe that bond schedules and bail systems like Appellant's are constitutionally permissible and, when set appropriately, allow for the timely and expedited release of defendants. . . .

The alternatives to monetary bail—uniform release or uniform detention—are both unpalatable. A system of uniform pretrial detention would promote community safety and secure every defendant's appearance at trial, but impose significant burdens on criminal

* *Excerpted from* Brief for Amici Curiae American Bail Coalition, Georgia Association of Professional Bondsmen & Georgia's Sheriffs' Association in Support of Defendant-Appellant and Reversal of Preliminary Injunction, Walker v. City of Calhoun, 2016 WL 3452938, (11th Cir. 2016). This brief was filed on appeal to the 11th Circuit for reversal of preliminary injunction after a federal district court in Georgia found irreparable harm when indigent misdemeanor defendant detained pretrial "simply because he could not afford to post money bail."

defendants' liberty interests. While in jail, a criminal defendant has less access to his defense attorney and the materials useful in preparing a defense. Pretrial detention can also reduce a defendant's ability to raise money to hire counsel, particularly where incarceration results in job loss. Detained individuals, moreover, suffer in their employment and familial relationships, leaving lasting ramifications even for defendants who are later acquitted. And uniform pretrial detention would impose a significant cost-burden on local communities, while placing additional stress on overcrowded jail facilities.

But releasing all accused on the mere promise to appear would wreak untold consequences on our communities. Released defendants would have significantly less incentive to appear for their court hearings and might commit additional crimes while released. . . . When a defendant fails to appear, local courts must reschedule proceedings, wasting the time of court personnel, judges, lawyers, and testifying witnesses, including victims, and inhibiting the community's ability to enforce its laws. . . . Studies conservatively estimate that the cost to the public for each failure to appear is approximately $1,775. . . . Most communities, quite logically, have no interest in inviting these harms.

A defendant who fails to appear for a scheduled court hearing also incurs an additional criminal charge and an associated warrant, which imposes more costs on law enforcement who must track down missing defendants, diverting scarce community resources from other law enforcement efforts. . . . This is no trifling concern. To take an example, Philadelphia releases approximately half of its criminal suspects on personal recognizance and for a long time prohibited commercial bail. As of November 2009, Philadelphia's "count of fugitives (suspects on the run for at least a year) numbered 47,801," and in 2007 and 2008 alone, "19,000 defendants each year—nearly one in three—failed to appear in court for at least one hearing." . . .

Outlawing monetary bail or commercial sureties would produce similarly high failure-to-appear rates throughout the country. Law enforcement is not staffed or funded to re-arrest defendants who fail to appear. Thus, without monetary bail and the commercial surety system, the community risks encouraging further criminal behavior and losing any incentive for securing appearance, which adds to the public costs of crime—which already total in the hundreds of billions of dollars, . . . and further diminishes the rule of law. Surety bonds are the best way of preventing these risks to the public because the probability of being recaptured while released on a surety bond is 50% higher than for those released on other types of bonds or on their own recognizance. . . .

Even *with* the protection of bail, 16% of felony defendants in large urban counties are rearrested before trial . . . Without any surety to guarantee appearance, these rates are sure to increase. And innocent Americans bear the brunt of these additional crimes, through additional victimization and the deterioration of communities. . . .

Monetary bail systems strike an efficient balance between these competing interests. Pretrial release is preferred only so long as courts can assure communities of their

safety and ensure the appearance of defendants in court. Thus, through commercial sureties, criminal defendants are able to gain pretrial release, while maintaining a strong incentive to appear for trial and to avoid additional arrest. The accused thus suffer minimal disruption to their family life and employment and maximize their ability to prepare a defense. And local communities can be confident in defendants' appearance at trial without the significant costs of wide-scale pretrial detention or the significant concerns with an unsecured system of pretrial release. . . .

Any attack on the modern bail system thus bears the heavy burden of proposing a workable alternative. But plaintiff has offered none. And the evidence suggests there is none. The modern commercial surety system has statistically proven to be the most effective means of enabling defendants to obtain pretrial release while ensuring they appear in court. . . .

. . . [The lawsuit alleging that Walker County's bail system is unconstitutional] is an assault on the traditional American system of secured monetary bail. Plaintiff demands that anyone arrested in Calhoun who merely states that he cannot afford bail must be released on his own recognizance. Indeed, the practical effect of the District Court's injunction is to require precisely that system of mandatory unsecured bail. According to plaintiff, an individualized indigency determination within forty-eight hours is not enough. And this is hardly an isolated case: Plaintiff's attorneys have sought similar injunctions across the country, while touting their goal of "ending the American money bail system." . . .

But the Constitution clearly permits communities to adopt monetary bail procedures aimed at securing appearance at trial and protecting society from dangerous individuals. As a textual matter, the Eighth Amendment pre-supposes the permissibility of monetary bail. If plaintiff's theory were correct, the Eighth Amendment would read: "no bail shall be required." But instead it provides only that "*[e]xcessive* bail shall not be required." . . . And the American criminal justice system has long relied on secured bail to balance the interest of pretrial liberty with the interest in protecting the community.

Thus, as with any other system of monetary bail, bail schedules serve the same well-founded interests in enabling defendants to obtain pretrial release—in many cases even more quickly than in traditional systems—while protecting the community and securing the defendants' later appearance for prosecution and sentencing. That the method begins with a presumption that can be adjusted to meet the needs of unique cases renders it logical and efficient, not unconstitutional. . . .

Racial Bias in Bail Decisions (2017)[*]

David Arnold, Will Dobbie & Crystal S. Yang

In this paper, we propose a new outcome test for identifying racial bias in the context of bail decisions. Bail is an ideal setting to test for racial bias for a number of reasons. First, the legal objective of bail judges is narrow, straightforward, and measurable: to set bail conditions that allow most defendants to be released while minimizing the risk of pre-trial misconduct. In contrast, the objectives of judges at other stages of the criminal justice process, such as sentencing, are complicated by multiple hard-to-measure objectives, such as the balance between retribution and mercy. Second, mostly untrained bail judges must make on-the-spot judgments with limited information and little to no interaction with defendants. These institutional features make bail decisions particularly prone to the kind of inaccurate stereotypes or categorical heuristics that exacerbate racial bias. . . . Finally, bail decisions are extremely consequential for both white and black defendants, with prior work suggesting that detained defendants suffer about $30,000 in lost earnings and government benefits alone. . . .

. . . [W]e develop an instrumental variable . . . estimator for racial bias that identifies the difference in pre-trial misconduct rates for white and black defendants at the margin of release. . . .

Specifically, we use the release tendencies of quasi-randomly assigned judges to identify local average treatment effects (LATEs) for white and black defendants near the margin of release. We then use the difference between these race-specific LATEs to estimate a weighted average of the racial bias among bail judges in our data.

In the first part of the paper, we formally establish the conditions under which our . . . estimate of racial bias converges to the true level of racial bias. We show that two conditions must hold for our empirical strategy to yield consistent estimates of racial bias. The first is that our instrument for judge leniency becomes continuously distributed so that each race-specific estimate approaches a weighted average of treatment effects for defendants at the margin of release. The estimation bias from using a discrete instrument decreases with the number of judges and, in our data, is less than 1.1 percentage points. The second condition is that the judge weights are identical for white and black defendants near the margin of release so that we can interpret the difference in the race-specific LATEs as racial bias and not differences in how treatment effects from different parts of the distribution are weighted. This second condition is satisfied if, as is suggested by our data, there is a linear first-stage relationship between pre-trial release and our judge instrument.

[*] *Excerpted from* David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, Working Paper No. 23421, NAT'L BUREAU OF ECON. RESEARCH (May 2017).

The second part of the paper tests for racial bias in bail setting using administrative court data from Miami and Philadelphia. We find evidence of significant racial bias in our data, ruling out statistical discrimination as the sole explanation for the racial disparities in bail. Marginally released white defendants are 19.8 percentage points more likely to be rearrested prior to disposition than marginally released black defendants, with significantly more racial bias among observably high-risk defendants. . . .

In the final part of the paper, we explore which form of racial bias is driving our findings. The first possibility is that, as originally modeled [in the 1950s by Gary Becker], racial animus leads judges to discriminate against black defendants at the margin of release. This type of taste-based racial bias may be a particular concern in our setting due to the relatively low number of minority bail judges, the rapid-fire determination of bail decisions, and the lack of face-to-face contact between defendants and judges. A second possibility is that bail judges rely on incorrect inferences of risk based on defendant race due to anti-black stereotypes, leading to the relative over-detention of black defendants at the margin. These inaccurate anti-black stereotypes can arise if black defendants are overrepresented in the right tail of the risk distribution, even when the difference in the riskiness of the average black defendant and the average white defendant is very small. . . . As with racial animus, these racially biased prediction errors in risk may be exacerbated by the fact that bail judges must make quick judgments on the basis of limited information, with virtually no training and, in many jurisdictions, little experience working in the bail system.

We find three sets of facts suggesting that our results are driven by bail judges relying on inaccurate stereotypes that exaggerate the relative danger of releasing black defendants versus white defendants at the margin. First, we find that both white and black bail judges exhibit racial bias against black defendants a result that is inconsistent with most models of racial animus. Second, we find that our data are strikingly consistent with the theory of stereotyping developed by [others]. For example, we find that black defendants are sufficiently overrepresented in the right tail of the predicted risk distribution, particularly for violent crimes, to rationalize observed racial disparities in release rates under a stereotyping model. We also find that there is no racial bias against Hispanics, who, unlike blacks, are not significantly overrepresented in the right tail of the predicted risk distribution. Finally, we find substantially more racial bias when prediction errors (of any kind) are more likely to occur. For example, we find substantially less racial bias among both the full-time and more experienced part-time judges who are least likely to rely on simple race-based heuristics, and substantially more racial bias among the least experienced part-time judges who are most likely to rely on these heuristics.

Our findings are broadly consistent with parallel work by [others], who use machine learning techniques to show that bail judges make significant prediction errors for defendants of all races. Using a machine learning algorithm to predict risk using a variety of inputs such as prior and current criminal charges, but *excluding* defendant race, they find that the algorithm could reduce crime and jail populations while simultaneously reducing racial disparities. Their results also suggest that variables that are unobserved in the data,

such as a judge's mood or a defendant's demeanor at the bail hearing, are the source of prediction errors, not private information that leads to more accurate risk predictions. . . .

. . . In total, 20.8 percent of defendants are rearrested for a new crime prior to disposition, with 9.1 percent of defendants being rearrested for drug offenses and 5.9 percent of defendants being rearrested for property offenses.

We find convincing evidence of racial bias against black defendants. . . . [W]e find that marginally released white defendants are 18.5 percentage points more likely to be rearrested for any crime compared to marginally detained white defendants . . . . In contrast, the effect of pre-trial release on rearrest rates for the marginally released black defendants is a statistically insignificant 0.5 percentage points . . . . Taken together, these estimates imply that marginally released white defendants are 18.0 percentage points more likely to be rearrested prior to disposition than marginally released black defendants . . . , consistent with racial bias against blacks.

Importantly, we can reject the null hypothesis of no racial bias. . . . Our results therefore rule out statistical discrimination as the sole determinant of racial disparities in bail.

[W]e find suggestive evidence of racial bias against black defendants across all crime types, although the point estimates are too imprecise to make definitive conclusions. Most strikingly, we find that marginally released whites are about 9.7 percentage points more likely to be rearrested for a violent crime prior to disposition than marginally released blacks . . . Marginally released white defendants are also 3.0 percentage points more likely to be rearrested for a drug crime prior to case disposition than marginally released black defendants . . . and 8.2 percentage points more likely to be rearrested for a property crime. . . . These results suggest that judges are racially biased against black defendants even if they are most concerned about minimizing specific types of new crime, such as violent crimes. . . .

In this section, we attempt to differentiate between two alternative forms of racial bias that could explain our findings: (1) racial prejudice . . . and (2) racially biased prediction errors. . . .

The first potential explanation for our results is that judges either knowingly or unknowingly discriminate against black defendants at the margin of release . . . . Bail judges could, for example, harbor explicit animus against black defendants that leads them to value the freedom of black defendants less than the freedom of observably similar white defendants. Bail judges could also harbor implicit biases against black defendants—similar to those documented among both employers . . . and doctors . . .—leading to the relative over-detention of blacks despite the lack of any explicit prejudice. Racial prejudice may be a particular concern in bail setting due to the relatively low number of minority bail judges, the rapid-fire determination of bail decisions, and the lack of face-to-face contact between

defendants and judges. Prior work has shown that it is exactly these types of settings where racial prejudice is most likely to translate into the disparate treatment of minorities . . . .

[Like others], we also find that . . . estimates of racial bias are similar among white and black judges, although the confidence intervals for these estimates are extremely large. These estimates suggest that either racial animus is not driving our results, or that black and white bail judges harbor equal levels of racial animus towards black defendants. A second piece of evidence against racial animus comes from the subsample results discussed above, where we find that racial bias varies across groups where there are no a priori reasons to believe that racial animus should vary. Taken together, these results suggest that racial animus is unlikely to be the main driver of our results.

A second explanation for our results is that judges are making racially biased prediction errors in risk, potentially due to inaccurate anti-black stereotypes. [R]epresentativeness heuristics—that is, probability judgments based on the most distinctive differences between groups—can exaggerate perceived differences between groups. In our setting, these kinds of race-based heuristics or anti-black stereotypes could lead bail judges to exaggerate the relative danger of releasing black defendants versus white defendants at the margin. These race-based prediction errors could also be exacerbated by the fact that bail judges must make quick judgments on the basis of limited information and with virtually no training . . . .

Taken together, our results suggest that bail judges make racially biased prediction errors in risk. In contrast, we find limited evidence in support of the hypothesis that bail judges harbor racial animus towards black defendants. [Rather], bail judges make significant prediction errors in risk for all defendants, perhaps due to over-weighting the most salient case and defendant characteristics such as race and the nature of the charged offense. Our results also provide additional support for the stereotyping model . . . , which suggests that probability judgments based on the most distinctive differences between groups—such as the significant overrepresentation of blacks relative to whites in the right tail of the risk distribution—can lead to anti-black stereotypes and, as a result, racial bias against black defendants. . . .

———————

Bail Reform: Shifting Practices in Prosecutors' Offices (2018)[*]

Several prosecutors' offices reviewed their approaches to bail and implemented new policies in 2017-2018.

In Philadelphia, District Attorney Larry Krasner, elected in November 2017, announced that his office would no longer ask judges to set money bail for people charged with certain misdemeanors and nonviolent felonies. Chris Palmer, *Philly DA Larry Krasner Won't Seek Cash Bail in Certain Cases*, PHILADELPHIA INQUIRER/PHILLY.COM (Feb. 21, 2018 6:26 PM), http://www.philly.com/philly/news/crime/philadelphia-larry-krasner-cash-bail-reform-20180221.html. That office also issued a memorandum requiring prosecutors, *inter alia*, to "state on the record their reasoning for requesting a particular sentence . . . [including] the unique benefits and costs of the sentence . . . [and] the financial cost of incarceration." PHILADELPHIA OFFICE OF THE DISTRICT ATTORNEY, NEW POLICIES ANNOUNCED FEBRUARY 15, 2018, SCRIBD (uploaded by SLATE MAGAZINE, Mar. 13, 2018), https://www.scribd.com/document/ 373860422/Finalized-Memo-Mar-13-2018.

In Chicago, Cook County District Attorney Kim Foxx directed prosecutors in June 2017 not to ask for bail to be set when they determine that defendants facing certain charges have no past convictions for violent crimes and do not otherwise pose risks to public safety. Megan Crepeau, *Bail Reform in Cook County Gains Momentum*, CHICAGO TRIBUNE (June 17, 2017 4:58 PM), http://www.chicagotribune.com/news/local/breaking/ct-cook-county-prosecutors-bail-policy-20170612-story.html.

In New York City, the Brooklyn and Manhattan District Attorneys have also announced new bail policies. In April 2017, Brooklyn District Attorney Eric Gonzalez ended his office's practice of automatically asking for bail in certain cases. James C. McKinley, Jr., *Some Prosecutors Stop Asking for Bail in Minor Cases*, N.Y. TIMES (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/nyregion/bail-prosecutors-new-york.html. In January 2018, Manhattan District Cyrus R. Vance, Jr. ordered prosecutors not to request cash bail for people charged with nonviolent misdemeanors. *Id.*

---

[*] This section relies on the following articles: Chris Palmer, *Philly DA Larry Krasner Won't Seek Cash Bail in Certain Cases*, PHILADELPHIA INQUIRER/PHILLY.COM (Feb. 21, 2018 6:26 PM), http://www.philly.com/philly/news/crime/philadelphia-larry-krasner-cash-bail-reform-20180221.html; PHILADELPHIA OFFICE OF THE DISTRICT ATTORNEY, NEW POLICIES ANNOUNCED FEBRUARY 15, 2018, SCRIBD (uploaded by SLATE MAGAZINE, Mar. 13, 2018), https://www.scribd.com/document/373860422/Finalized-Memo-Mar-13-2018; Megan Crepeau, *Bail Reform in Cook County Gains Momentum*, CHICAGO TRIBUNE (June 17, 2017 4:58 PM), http://www.chicagotribune.com/news/local/breaking/ct-cook-county-prosecutors-bail-policy-20170612-story.html; and James C. McKinley, Jr., *Some Prosecutors Stop Asking for Bail in Minor Cases*, N.Y. TIMES (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/nyregion/bail-prosecutors-new-york.html.

Nina Rabin, Amicus Brief of 46 Social Science Researchers and Professors in Support of Petitioners-Appellees/Cross-Appellants and Urging Affirmance (2014) [*]

Rodriguez v. Robbins
United States Court of Appeals, Ninth Circuit
804 F.3d 1060 (9th Cir. 2015)

. . . The practice of detaining immigrants longer than six months without an individualized hearing to determine the need for such detention inflicts significant harms on detainees, their families, and society at large. Prolonged detention exacerbates the physical, mental, societal, and economic harms of transitory detention, and presents unique harms and risks of its own. Immigrants held in prolonged detention suffer physically and psychologically from substandard medical and mental health care, inadequate recreation, severely limited visitation, isolation, and increased risk of physical and sexual assault. Detainees' financial and legal interests are also harmed as a result of long-term detention. Beyond these individualized harms, prolonged detention destabilizes families and communities. It also harms society, causing lasting harm to a generation of children impacted by their family members' prolonged detention, and costing taxpayers billions of dollars.

These harms are particularly concerning given the lack of evidence that prolonged detention without individualized consideration of release provides a countervailing societal benefit. Immigration detention serves two purposes: to prevent the release of individuals who present a public safety risk and to ensure that individuals do not abscond during their immigration proceedings. Recent analysis of government data suggests few immigrants subject to mandatory detention, who will face prolonged detention in the absence of the individualized bond hearings ordered by the District Court, in fact present high levels of risk with regard to either public safety or flight.

The number of immigrant detainees subject to prolonged detention is by no means negligible. For example, in December 2012, U.S. Immigration and Customs Enforcement ("ICE") held 4,793 individuals who had spent at least six months in immigration detention. The average detention time of these detainees was more than one year, and a dozen of these individuals had already spent between six and eight years in ICE detention. . . .

---

[*] *Excerpted from* Nina Rabin, Amicus Brief on Behalf of 46 Social Science Researchers and Professors in Support of Petitioners-Appellees/Cross-Appellants and Urging Affirmance, Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) *rev'd. sub nom.* Jennings v. Rodriguez, 138 S.Ct. 830 (2018). The amicus brief was written to the Ninth Circuit urging affirmance of the District Court's order prohibiting the government's prolonged detention of individuals without a demonstration that further detention necessary and justified. The Ninth Circuit affirmed, and the U.S. Supreme Court granted certiorari on the statutory and constitutional issues.

Jennings v. Rodriguez
U.S. Supreme Court
138 S.Ct. 830 (2018)

Justice ALITO delivered the opinion of the Court, except as to Part II:

. . . Every day, immigration officials must determine whether to admit or remove the many aliens who have arrived at an official "port of entry" (e.g., an international airport or border crossing) or who have been apprehended trying to enter the country at an unauthorized location. Immigration officials must also determine on a daily basis whether there are grounds for removing any of the aliens who are already present inside the country. The vast majority of these determinations are quickly made, but in some cases deciding whether an alien should be admitted or removed is not as easy. As a result, Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made.

In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. All parties appear to agree that the text of these provisions, when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue.

Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must interpret the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings. . . .

To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering. . . .

Respondent Alejandro Rodriguez is a Mexican citizen. Since 1987, he has also been a lawful permanent resident of the United Sttes. In April 2004, after Rodriguez was convicted of a drug offense and theft of a vehicle, the Government detained him under § 1226 and sought to remove him from the country. At his removal hearing, Rodriguez argued both that he was not removable and, in the alternative, that he was eligible for relief from removal. In July 2004, an Immigration Judge ordered Rodriguez deported to Mexico. Rodriguez chose to appeal that decision to the Board of Immigration Appeals, but five months later the Board agreed that Rodriguez was subject to mandatory removal. Once

again, Rodriguez chose to seek further review, this time petitioning the Court of Appeals for the Ninth Circuit for review of the Board's decision.

In May 2007, while Rodriguez was still litigating his removal in the Court of Appeals, he filed a habeas petition in the District Court for the Central District of California, alleging that he was entitled to a bond hearing to determine whether his continued detention was justified. Rodriguez's case was consolidated with another, similar case brought by Alejandro Garcia, and together they moved for class certification. The District Court denied their motion, but the Court of Appeals for the Ninth Circuit reversed. . . . It concluded that the proposed class met the certification requirements of Rule 23 of the Federal Rules of Civil Procedure, and it remanded the case to the District Court. . . .

On remand, the District Court certified the following class:

> [A]ll non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified. . . .

The District Court named Rodriguez as class representative of the newly certified class . . . and then organized the class into four subclasses based on the four "general immigration detention statutes" under which it understood the class members to be detained: Sections 1225(b), 1226(a), 1226(c), and 1231(a). . . .

In their complaint, Rodriguez and the other respondents argued that the relevant statutory provisions—§§ 1225(b), 1226(a), and 1226(c)—do not authorize "prolonged" detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that the class member's detention remains justified. Absent such a bond-hearing requirement, respondents continued, those three provisions would violate the Due Process Clause of the Fifth Amendment. In their prayer for relief, respondents thus asked the District Court to require the Government "to provide, after giving notice, individual hearings before an immigration judge for ... each member of the class, at which [the Government] will bear the burden to prove by clear and convincing evidence that no reasonable conditions will ensure the detainee's presence in the event of removal and protect the community from serious danger, despite the prolonged length of detention at issue." . . .

[T]he meaning of the relevant statutory provisions is clear—and clearly contrary to the decision of the Court of Appeals. But the dissent is undeterred. It begins by ignoring the statutory language for as long as possible, devoting the first two-thirds of its opinion to a disquisition on the Constitution. . . .

Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. . . .

Before the Court of Appeals addresses those claims, however, it should reexamine whether respondents can continue litigating their claims as a class. When the District Court certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, it had their statutory challenge primarily in mind. Now that we have resolved that challenge, however, new questions emerge.

Specifically, the Court of Appeals should first decide whether it continues to have jurisdiction despite 8 U.S.C. § 1252(f)(1). Under that provision, "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." Section 1252(f)(1) thus "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–123[2]." . . . The Court of Appeals held that this provision did not affect its jurisdiction over respondents' *statutory* claims because those claims did not "seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct ... not authorized by the statutes." . . . This reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims. If not, and if the Court of Appeals concludes that it may issue only declaratory relief, then the Court of Appeals should decide whether that remedy can sustain the class on its own. . . .

The Court of Appeals should also consider whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims in light of *Wal-Mart Stores, Inc. v. Dukes* . . . (2011). We held in *Dukes* that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." … That holding may be relevant on remand because the Court of Appeals has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter. . . .

Similarly, the Court of Appeals should also consider on remand whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause claims. "[D]ue process is flexible," we have stressed repeatedly, and it "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer* . . . (1972). . . .

Justice THOMAS, with whom Justice GORSUCH joins [in part] and concurring in the judgment:

In my view, no court has jurisdiction over this case. Congress has prohibited courts from reviewing aliens' claims related to their removal, except in a petition for review from

a final removal order or in other circumstances not present here. . . . Respondents have not brought their claims in that posture, so § 1252(b)(9) removes jurisdiction over their challenge to their detention. I would therefore vacate the judgment below with instructions to dismiss for lack of jurisdiction. But because a majority of the Court believes we have jurisdiction, and I agree with the Court's resolution of the merits, I join Part I and Parts III–VI of the Court's opinion. . . .

Justice BREYER, with whom Justice GINSBURG and Justice SOTOMAYOR join, dissenting:

This case focuses upon three groups of noncitizens held in confinement. Each of these individuals believes he or she has the right to enter or to remain within the United States. The question is whether several statutory provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.,* forbid granting them bail.

The noncitizens at issue are asylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear entitlement to enter the United States, claim to meet the criteria for admission. . . . The Government has held all the members of the groups before us in confinement for many months, sometimes for years, while it looks into or contests their claims. But ultimately many members of these groups win their claims and the Government allows them to enter or to remain in the United States. Does the statute require members of these groups to receive a bail hearing, after, say, six months of confinement, with the possibility of release on bail into the community *provided* that they do not pose a risk of flight or a threat to the community's safety?

The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. In my view, the majority's interpretation of the statute would likely render the statute unconstitutional. Thus, I would follow this Court's longstanding practice of construing a statute "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." . . .

The majority reads the relevant statute as prohibiting bail and hence prohibiting a bail hearing. In my view, the relevant constitutional language, purposes, history, tradition, and case law all make clear that the majority's interpretation at the very least would raise "grave doubts" about the statute's constitutionality. . . .

Consider the relevant constitutional language and the values that language protects. The Fifth Amendment says that "[n]o person shall be ... deprived of life, liberty, or property without due process of law." An alien is a "person." See *Wong Wing v. United States* . . . (1896). To hold him without bail is to deprive him of bodily "liberty." . . . And, where there is no bail proceeding, there has been no bail-related "process" at all. The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention. Indeed, "[f]reedom from bodily restraint has always been at the core of the liberty protected

by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana* . . . (1992). . . .

The Due Process Clause foresees eligibility for bail as part of "due process." . . . Bail is "basic to our system of law." . . . It not only "permits the unhampered preparation of a defense," but also "prevent[s] the infliction of punishment prior to conviction." . . . It consequently limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect the public, or to assure his appearance at, say, a trial or the equivalent. Why would this constitutional language and its bail-related purposes not apply to members of the classes of detained persons at issue here?

The Eighth Amendment reinforces the view that the Fifth Amendment's Due Process Clause does apply. The Eighth Amendment forbids "[e]xcessive bail." It does so in order to prevent bail being set so high that the level itself (rather than the reasons that might properly forbid release on bail) prevents provisional release. . . . That rationale applies *a fortiori* to a refusal to hold any bail hearing at all. Thus, it is not surprising that this Court has held that both the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Bail Clause apply in cases challenging bail procedures.

It is clear that the Fifth Amendment's protections extend to "all persons within the territory of the United States." But the Government suggests that those protections do not apply to asylum seekers or other arriving aliens because the law treats arriving aliens as if they had never entered the United States; hence they are not held within its territory.

This last-mentioned statement is, of course, false. All of these noncitizens are held within the territory of the United States at an immigration detention facility. Those who enter at JFK airport are held in immigration detention facilities in, e.g., New York; those who arrive in El Paso are held in, e.g., Texas. At most one might say that they are "constructively" held outside the United States: the word "constructive" signaling that we indulge in a "legal fiction," shutting our eyes to the truth. But once we admit to uttering a legal fiction, we highlight, we do not answer, the relevant question: Why should we engage in this legal fiction here?

The legal answer to this question is clear. We cannot here engage in this legal fiction. No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries? If not, then, whatever the fiction, how can the Constitution authorize the Government to imprison arbitrarily those who, whatever we might pretend, are in reality right here in the United States? The answer is that the Constitution does not authorize arbitrary detention. And the reason that is so is simple: Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries. . . .

The Due Process Clause, among other things, protects "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors," and which were brought by them to this country. . . . A brief look at Blackstone makes clear that at the time of the American Revolution the right to bail was "settled"—in both civil and criminal cases.

The cases before us, however, are not criminal cases. Does that fact make a difference? The problem is that there are not many instances of civil confinement (aside from immigration detention, which I address below). Mental illness does sometimes provide an example. Individuals dangerous to themselves or to others may be confined involuntarily to a mental hospital. . . . Those persons normally do not have what we would call "a right to a bail hearing." But they do possess equivalent rights: They have the right to a hearing prior to confinement and the right to review of the circumstances at least annually. . . . And the mentally ill persons detained under these schemes are being detained *because* they are dangerous. That being so, there would be no point in providing a bail hearing as well. . . . But there is every reason for providing a bail proceeding to the noncitizens at issue here, because they have received no individualized determination that they pose a risk of flight or present a danger to others, nor is there any evidence that most or all of them do.

The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself. And I can find no relevant difference in respect to bail-related purposes. . . .

The relevant constitutional language, purposes, history, traditions, context, and case law, taken together, make it likely that, where confinement of the noncitizens before us is prolonged (presumptively longer than six months), bail proceedings are constitutionally required. Given this serious constitutional problem, I would interpret the statutory provisions before us as authorizing bail. Their language permits that reading, it furthers their basic purposes, and it is consistent with the history, tradition, and constitutional values associated with bail proceedings. I believe that those bail proceedings should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed.

The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that *all* men and women have "certain unalienable Rights," and that among them is the right to "Liberty." We need merely remember that the Constitution's Due Process Clause protects each person's liberty from arbitrary deprivation. And we need just keep in mind the fact that, since Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail. It is neither technical nor unusually difficult to read the

words of these statutes as consistent with this basic right. I would find it far more difficult, indeed, I would find it alarming, to believe that Congress wrote these statutory words in order to put thousands of individuals at risk of lengthy confinement all within the United States but all without hope of bail. I would read the statutory words as consistent with, indeed as requiring protection of, the basic right to seek bail. . . .

———————

IV. THE CONSEQUENCES OF LEGAL DEBT

Bearden v. Georgia, 461 U.S. 660 (1983).

Mathilde Lasine, Jon Wool, and Christian Henrichson, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS, Vera Institute of Justice (2017).

Cain v. City of New Orleans, 281 F. Supp. 3d 624 (E.D. La. 2017), *appeal filed*.

Ryan Gentzler, THE COST TRAP: HOW EXCESSIVE FEES LOCK OKLAHOMANS INTO THE CRIMINAL JUSTICE SYSTEM WITHOUT BOOSTING STATE REVENUE, Oklahoma Policy Institute (2017).

Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEG. STUD. 309 (2017).

Bearden v. Georgia
U.S. Supreme Court
461 U.S. 660 (1983)

Justice O'CONNOR delivered the opinion of the Court.

The question in this case is whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution. Its resolution involves a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources. We conclude that the trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist. We therefore reverse the judgment of the Georgia Court of Appeal . . . upholding the revocation of probation, and remand for a new sentencing determination.

In September 1980, petitioner was indicted for the felonies of burglary and theft by receiving stolen property. He pleaded guilty, and was sentenced on October 8, 1980. Pursuant to the Georgia First Offender's Act . . . the trial court did not enter a judgment of guilt, but deferred further proceedings and sentenced petitioner to three years on probation for the burglary charge and a concurrent one year on probation for the theft charge. As a condition of probation, the trial court ordered petitioner to pay a $500 fine and $250 in restitution. Petitioner was to pay $100 that day, $100 the next day, and the $550 balance within four months.

Petitioner borrowed money from his parents and paid the first $200. About a month later, however, petitioner was laid off from his job. Petitioner, who has only a ninth grade education and cannot read, tried repeatedly to find other work but was unable to do so. The record indicates that petitioner had no income or assets during this period.

Shortly before the balance of the fine and restitution came due in February 1981, petitioner notified the probation office he was going to be late with his payment because he could not find a job. In May 1981, the State filed a petition in the trial court to revoke petitioner's probation because he had not paid the balance. After an evidentiary hearing, the trial court revoked probation for failure to pay the balance of the fine and restitution, entered a conviction and sentenced petitioner to serve the remaining portion of the probationary period in prison. The Georgia Court of Appeals, relying on earlier Georgia Supreme Court cases, rejected petitioner's claim that imprisoning him for inability to pay the fine violated the Equal Protection Clause of the Fourteenth Amendment. The Georgia Supreme Court denied review. Since other courts have held that revoking the probation of indigents for failure to pay fines does violate the Equal Protection Clause, we granted certiorari to resolve this important issue in the administration of criminal justice. . . .

This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19 (1956) (plurality opinion). *Griffin*'s principle of "equal justice," which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. . . . Most relevant to the issue here is the holding in *Williams v. Illinois,* 399 U.S. 235 (1970), that a State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine. *Williams* was followed and extended in *Tate v. Short,* 401 U.S. 395 (1971), which held that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full. But the Court has also recognized limits on the principle of protecting indigents in the criminal justice system. For example, in *Ross v. Moffitt,* 417 U.S. 600 (1974), we held that indigents had no constitutional right to appointed counsel for a discretionary appeal. . . .

Due process and equal protection principles converge in the Court's analysis in these cases. . . . Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. . . . As we recognized in *Ross v. Moffitt* . . . we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

The question presented here is whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. The parties, following the framework of *Williams* and *Tate,* have argued the question primarily in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review. There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose. . . ."

In analyzing this issue, of course, we do not write on a clean slate, for both *Williams* and *Tate* analyzed similar situations. The reach and limits of their holdings are vital to a proper resolution of the issue here. In *Williams,* a defendant was sentenced to the maximum prison term and fine authorized under the statute. Because of his indigency he could not pay the fine. Pursuant to another statute equating a $5 fine with a day in jail, the defendant was kept in jail for 101 days beyond the maximum prison sentence to "work out" the fine. The Court struck down the practice, holding that "[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." . . . In *Tate* . . . we faced a similar situation, except that the statutory penalty there permitted only a fine. . . .

The rule of *Williams* and *Tate,* then, is that the State cannot "impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." . . . . In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. As the Court made clear in *Williams,* "nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs." . . . Likewise in *Tate,* the Court "emphasize[d] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." . . .

This distinction, based on the reasons for non-payment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. . . . Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a "substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate. . . ."

The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources. . . . As we said in *Williams,* "[a]fter having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law."

The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment. . . . A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests. But a probationer who has made sufficient bona fide efforts to pay his fine and restitution, and who has complied with the other conditions of probation, has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms. The State nevertheless asserts three reasons why imprisonment is required to further its penal goals.

First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.

Second, the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. . . .

Third, and most plausibly, the State argues that its interests in punishing the lawbreaker and deterring others from criminal behavior require it to revoke probation for failure to pay a fine or restitution. The State clearly has an interest in punishment and deterrence, but this interest can often be served fully by alternative means. As we said in *Williams* . . . and reiterated in *Tate* . . . "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine. Justice Harlan appropriately observed in his concurring opinion in *Williams* that "the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment." . . . Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine . . . a sentencing court can often establish a reduced fine or alternate public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources. Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.

We hold, therefore, 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. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. . . .

———————

Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans (2017)[*]

Mathilde Lasine, Jon Wool, and Christian Henrichson

In 2015, government agencies in New Orleans collected $4.5 million in the form of bail, fines and fees from people involved in the criminal justice system and, by extension, from their families. Another $4.7 million was transferred from the pockets of residents to for-profit bail bond agents. These costs have become the subject of considerable public attention. Some view them as a necessary way to offset the expense of operating the criminal justice system. But because many "users" of the system have very low incomes or none at all, there is growing concern that charging for justice amounts to a criminalization of poverty, especially when people who can't pay become further entangled in the justice system.

Bail, fines and fees are not new, but they have become more numerous, costly, and consequential as officials around the country began looking for ways to offset the expense of arresting, prosecuting, and incarcerating more and more people. In New Orleans, as in many other cities, nearly every phase of the criminal justice system—including before someone is actually convicted of a crime—imposes a financial cost on the users of that system. These costs take a steep toll on the people they impact, often including jail time.

By focusing on two critical junctures in a criminal case: bail decisions, and fines and fees assessed at conviction, this report reveals the hidden costs of running a criminal justice system that extracts money from mainly low-income and poor people—or tries to—and then punishes them with jail when they can't pay. On any given day in 2015, 558 people were in jail because they couldn't afford bail or were arrested for unpaid fines and fees. These jail stays cost the city of New Orleans $6.4 million, significantly more than the revenue generated that year from bail, fines and fees.

In New Orleans, where nearly a quarter of residents live below the poverty line, the median income among black residents is a mere $26,819—57 % lower than the median income of white residents. Black people also represent a disproportionate share of those involved in the justice system. Eight out of ten people in jail are black, in a city where black people make up 59% of the population.

In this context, collecting millions of dollars annually from individuals and families involved in the criminal justice system represents a siphoning of resources from historically under-resourced black communities. Yet these millions in revenue represent a drop in the bucket of funding overall for criminal justice in New Orleans—just 4%. The enormous cost to people to extract a relative penny raises serious questions about whether charging

[*] *Excerpted from* Mathilde Lasine, Jon Wool, and Christian Henrichson, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS, Vera Institute of Justice (Jan. 2017)

users is worth it, let alone appropriate given that it leads to jailing those who can't pay. By detailing the status quo, this report is paving the way to developing alternatives to the current reliance on user-generated revenue in New Orleans and elsewhere.

Cain v. City of New Orleans
United States District Court for the Eastern District of Louisiana
281 F. Supp. 3d 624 (E.D. La. 2017), *appeal filed*

SARAH S. VANCE, United States District Judge

. . . Plaintiffs are former criminal defendants in the Orleans Parish Criminal District Court (OPCDC). Each named plaintiff pleaded guilty to various criminal offenses between 2011 and 2014. . . .

. . . The Judges impose various costs on convicted criminal defendants at their sentencing. First, the Judges may impose a fine, which is divided evenly between OPCDC and the District Attorney (DA). . . . Second, the Judges may order a criminal defendant to pay restitution to victims. . . . Third, the Judges impose various fees that go to OPCDC. . . . Fourth, the "court costs" imposed by Judges also include fees that go to other entities, such as the Orleans Public Defender, the DA, and the Louisiana Supreme Court. After sentencing, OPCDC may further assess criminal defendants for the costs of drug treatment and drug testing. . . . .

Separately, the Sheriff collects a 3% fee on bail bonds secured by commercial sureties. . . . Sixty percent of this fee, or 1.8% of the bonds, goes to OPCDC. . . .

As a result of their criminal convictions, the named plaintiffs were assessed fines and fees ranging from $148 (imposed on Long) to $901.50 (imposed on Cain). Cain pleaded guilty to felony theft on May 30, 2013. At sentencing, the court stated that payment of fines and fees was a special condition of probation. The court directed Cain to make the first $100 payment at the courthouse on July 8, 2013, and stated, "[e]ven if you don't have the money, you have to come here to the courtroom . . . for an extension." The court later ordered Cain to pay $1,800 in restitution.

Brown received a 90-day suspended sentence after pleading guilty to misdemeanor theft on December 16, 2013. The court imposed $500 in fees: $146 for the Judicial Expense Fund, $100 for the Indigent Transcript Fund, $234 in court costs, and a $20 special assessment for the DA. As with Cain, the court instructed Brown to make his first $100 payment at the courthouse on January 13, 2014. The judge told Brown that if he could not pay on that date, he should go to the judge's courtroom and request an extension.

Reynajia Variste was sentenced to two years of probation after she pleaded guilty to aggravated battery on October 21, 2014. Variste was assessed fees in the amount of

$886.50: $286.50 in court costs, $200 for the Indigent Transcript Fund, and $400 for the Judicial Expense Fund. The judge warned Variste that "[f]ailure to make those payments will result in contempt of Court proceedings."

Vanessa Maxwell was sentenced to eighteen months imprisonment for battery and six months for simple criminal damage after pleading guilty on March 6, 2012. Maxwell was assessed $191.50 in court costs, although the judge did not specify this amount at sentencing.

. . . The Judges manage the budget of OPCDC. From 2012 through 2015, the court's revenue ranged from $7,567,857 (in 2012) to $11,232,470 (in 2013). Some of this revenue could be used only for specified purposes and went into a restricted fund; unrestricted revenue went into OPCDC's Judicial Expense Fund, which is the general operating fund for court operations. . . . The Judges exclusively control this fund and may use it "for any purpose connected with, incidental to, or related to the proper administration or function of the court or the office of the judges thereof." . . . They may not use it to supplement their own salaries. . . . . Most money for salaries and benefits of OPCDC employees (apart from the Judges) comes from the Judicial Expense Fund.

From 2012 through 2015, the Judicial Expense Fund's annual revenue was approximately $4,000,000. Roughly half of this revenue came from other governmental entities, especially the City of New Orleans. About $1,000,000 came from bail bond fees, and another $1,000,000 from fines and other fees. Since at least 2013, all fines and fees revenue has gone to the Judicial Expense Fund. . . .

All named plaintiffs were subject to OPCDC's debt collection practices. At least until September 18, 2015, the Judges delegated authority to collect court debts to the Collections Department, which the Judges and Administrator Kazik jointly instructed and supervised. The Collections Department created payment plans for criminal defendants, accepted payments, and granted extensions. Some Judges also delegated authority to the Collections Department to issue alias capias warrants against criminal defendants who failed to pay court debts.

Before the Collections Department issued these alias capias warrants, its agents were trained to send two form letters to criminal defendants who had missed payments. The first letter stated: "Recently, at your sentencing in court, you were given probation. At such time the Judge instructed you, that as a condition of probation you were to report to our office and make arrangements to pay your fines that are now delinquent." The letter also directed its recipient to appear at the court "to resolve this matter" by a given date. "Failure to comply with the conditions of probation," the letter warned, "will result in your immediate arrest." The second letter stated: "Unless arrangements are made with [the collections agent] or payment is received in full within 72 hours[,]... we will request your immediate arrest."

The Collections Department then checked court dockets to determine whether the court had granted an extension on or accepted a payment toward an individual's court debts. The Collections Department also checked probation and local jail records. If these checks revealed no reason for an individual's failure to pay, the Collections Department issued an alias capias warrant for the individual's arrest.

These alias capias warrants stated that the individual named in the warrant was charged with contempt of court. The warrants usually set surety bail at the predetermined amount of $20,000. Although the Judges did not review these warrants, the Collections Department affixed a judge's signature to each one. OPCDC's Collections Department issued such warrants to arrest the named plaintiffs for failure to pay fines and fees.

Individuals arrested pursuant to these warrants ordinarily remained in jail until their family or friends could make a payment on their court debt, or until a judge released them. The named plaintiffs were imprisoned for periods ranging from six days to two weeks. . . .

After this suit was filed, the Judges revoked the Collections Department's authority to issue warrants. . . .

[T]he Judges themselves now issue alias capias warrants for failure to pay fines and fees. There is no evidence that the Judges now consider, or have ever considered, ability to pay before imprisoning indigent criminal defendants for failure to pay fines and fees. Indeed, the Judges do not routinely solicit financial information from criminal defendants who fail to pay court debts, though they state that they do consider ability to pay when the issue is brought to their attention. . . .

Plaintiffs argue that the Judges' power over this revenue creates a financial conflict of interest, depriving criminal defendants of a neutral tribunal to determine their ability to pay.

. . . In *Tumey v. Ohio*, 273 U.S. 510 (1927), a defendant was convicted of possessing liquor in violation of Ohio's Prohibition Act. The Act provided for trial in a "liquor court," in which the village mayor served as judge. . . . The money raised by fines levied in these courts was divided between the state, the village general fund, and two other village funds. . . . One of these other funds covered expenses associated with enforcing the Prohibition Act, including nearly $700 paid to the mayor "as his fees and costs, in addition to his regular salary." . . .The Supreme Court overturned Tumey's conviction, and held that the mayor, acting as judge, was disqualified from deciding Tumey's case "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." . . .

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court considered a challenge to traffic fines imposed by another Ohio mayor's court. Fines generated by the mayor's court at issue in *Ward* provided a "major part" of the total operating funds for the municipality that the mayor oversaw. . . . The Court viewed the case as controlled by *Tumey*

and noted, "that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle" of judicial bias articulated in that case. . . . . Instead, the Court offered a general test to determine whether an arrangement of this type compromises a criminal defendant's right to a disinterested and impartial judicial officer:

> [T]he test is whether the [judge's] situation is one "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."

. . . In holding that the mayor's court in *Ward* violated due process, the Court found that the impermissible temptation "[p]lainly . . . may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."

. . . The Judges' power over fines and fees revenue creates a conflict of interest when those same Judges determine (or are supposed to determine) whether criminal defendants are able to pay the fines and fees that were imposed at sentencing. As explained earlier, the Judges have a constitutional obligation to inquire into criminal defendants' ability to pay court debts. But the Judges have a financial stake in the outcome of ability-to-pay determinations; if they determine that a criminal defendant has the ability to pay, and collect money from her, then the revenue goes directly into the Judicial Expense Fund. . . . The Judges therefore have an institutional incentive to find that criminal defendants are able to pay fines and fees.

The Judges' dual role, as adjudicators who determine ability to pay and as managers of the OPCDC budget, offer a possible temptation to find that indigent criminal defendants are able to pay their court debts. This "inherent defect in the legislative framework" arises not from the bias of any particular Judge, but "from the vulnerability of the average man—as the system works in practice and as it appears to defendants and to the public." . . .

The Judges' practice of failing to inquire into ability to pay is itself indicative of their conflict of interest. . . . As is the dramatic increase in assessments for indigent transcript fees between 2012 and 2013—from $9,841.50 to $271,581.75—when OPCDC shifted revenue from such fees from the restricted fund to the Judicial Expense Fund. Defendants insist that they do not benefit from this revenue, which solely aids indigent criminal defendants. This assertion is undercut by financial statements for the Judicial Expense Fund, which show expenditures on transcripts of $0 in 2013 and 2015 and $7,044 in 2014.

Further evidence of an actual conflict of interest is that the Judges have sought ways to increase collections from criminal defendants. At a City Council hearing in July 2014, a judge explained that the Judges were sharing ideas "in an effort to increase [their] collection" of fines and fees. The Collections Department itself was created by the Judges in the 1980s to facilitate collection efforts. Moreover, at least from 2013 through 2015, the

amount of fees (which go entirely to OPCDC) imposed by the Judges far exceeded the amount of fines (only half of which goes to OPCDC). This suggests that the Judges prefer to impose fees for OPCDC rather than share fines with the DA. . . .

That the Judges have an institutional, rather than direct and individual, interest in maximizing fines and fees revenue is immaterial. . . . Likewise, the Judges' interest in fines and fees revenue is related to their executive responsibilities for OPCDC finances. . . .

The Cost Trap: How Excessive Fees Lock Oklahomans Into the Criminal Justice System without Boosting State Revenue (2017)[*]

Ryan Gentzler

Tens of thousands of Oklahomans enter the justice system each year and come out with thousands of dollars in legal financial obligations. For poor Oklahomans, this debt can amount to most of their family's income, and it often leads to a cycle of incarceration and poverty. The system does nothing to improve public safety but incurs high costs to law enforcement, jails, and the courts. Lawmakers should reduce the financial burdens of the criminal justice system for poor defendants, and they can do that without jeopardizing critical sources of revenue for state agencies.

- Growth of Criminal Court Fees: The costs charged to criminal defendants have skyrocketed in recent years as the Legislature has added or increased fees that fund various state agencies. In many cases, costs have more than doubled. A speeding ticket for driving 20 mph over the speed limit has increased almost 150 percent since 1992, from $107 to $250. Felony and misdemeanor costs multiply with each charge, often totaling in the thousands of dollars for a single case. Jail fees alone often total in the thousands of dollars in jurisdictions where counties charge inmates a daily rate.

- Defendants' Inability to Pay: Because most defendants are economically disadvantaged, very little criminal court debt is actually collected. About 80 percent of criminal defendants are indigent and eligible for a public defender, and jail inmates typically make less than half the income of their peers even before their arrest. A judge in Oklahoma County estimates that only 5 to 11 percent of criminal court debt is collected. Despite this fact, those who can't pay are repeatedly arrested, jailed, and brought before a judge, at great expense to the state.

- Fine and Fee Revenue in Agency Budgets: Fine and fee revenue contributes to many agencies' budgets. The District Courts and the Council on Law Enforcement Education and Training, for example, each receive over 80% of their funding from

[*] *Excerpted from* Ryan Gentzler, THE COST TRAP: HOW EXCESSIVE FEES LOCK OKLAHOMANS INTO THE CRIMINAL JUSTICE SYSTEM WITHOUT BOOSTING STATE REVENUE, Oklahoma Policy Institute (Jan. 2017).

fines and fees. However, District Court financial records show that criminal case collections for the courts decreased slightly between 2003 and 2015, while civil case collections nearly doubled. This indicates that little if any new revenue can be raised from new fees in the criminal justice system.

- Recommendations: Because such a small percentage of criminal court debt is collected, reducing financial burdens on poor defendants would likely have little, if any, effect on fee revenue for the state. Lawmakers should reform court collections practices to ensure a standardized process for ability to pay, end incarceration and license suspension for failure to pay, and improve court administrative infrastructure to consolidate and collect payments. Instituting court debt forgiveness and amnesty programs may improve collections and offer temporary boosts in revenue.

Discretionary Disenfranchisement: The Case of Legal Financial Obligations[*]

Marc Meredith & Michael Morse

. . . States have broad, and increasingly unique, autonomy to determine which convicted defendants are stripped of their voting rights as well as the process by which these rights can be restored. While a majority of current disenfranchisement laws share the same broad outlines—felonies are disenfranchising and voting rights are restored at the end of prison, probation, or parole—nine states condition the restoration of the right to vote on the payment of legal financial obligations (LFOs), which include court costs, fines, and victim restitution. . . .

Although courts continually hear objections about tying LFOs to the right to vote, such objections are generally dismissed, at least in part because of the limited, anecdotal evidence available about the nature of LFO assessment and payback. A fragmented criminal justice system, spread across thousands of counties and other judicial districts, makes it difficult for those challenging felon disenfranchisement laws to compile systematic data on the type, burden, and disparate impact of LFOs. We undertake a massive data collection effort to remedy this by compiling electronic court records, state corrections data, and administrative voting rights decisions to estimate a number of such quantities of interest for representative, statewide samples in both Alabama and Tennessee. Our empirical findings are relevant for assessing, and perhaps revising, current jurisprudence.

While most previous legal challenges focused on cases where ex-felons' voting rights were conditioned on criminal fines and restitution, recent scholarship highlights the growth of offender-funded justice through the assessment of fees. . . . These LFOs, the most common of which is a docket fee, resemble a poll tax in both their uniform application

[*] *Excerpted from* Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations,* 46 J. LEG. STUD. 309 (2017).

to almost all defendants and their prescribed use in support of government programs. Criminal justice agencies often use these fees to reimburse themselves for the costs of operation and maintenance. Conditioning the restoration of the right to vote on such fees might pose a different set of legal questions than fines or restitution because they are assessed without respect to offenders' actions, fund programs wholly disconnected from offenders' crime of conviction, and can vary widely from courtroom to courtroom, even in the same state. But the extent of these fees remains unknown. To address this, we construct a dataset tracking individuals' criminal histories in the State of Alabama, including the specific LFOs assessed and paid back in each court case, going as far back as the early 1990s. We show that the median amount of LFOs assessed to discharged felons in Alabama, across all of their criminal convictions, is $3,956 and that more than half of individuals' total criminal debt stems from court fees.

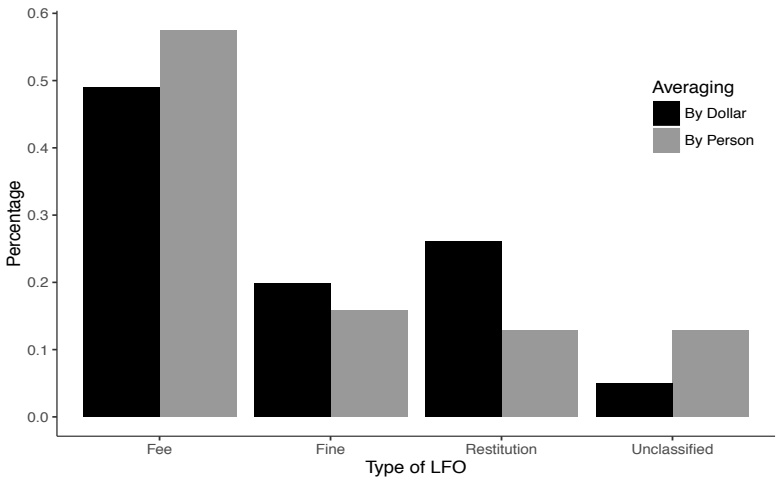
Policies like Alabama's, which distinguish among offenders on the basis of wealth, may also pay insufficient attention to indigency. Although less-wealthy individuals are not a suspect class, conditioning the restoration of the right to vote on LFOs without evaluating whether someone is truly unable to pay might not even satisfy a rational basis test. While we cannot observe whether a defendant is indigent in our dataset of criminal convictions, we can observe whether they were provided a public defender. We find a strong, and statistically significant, correlation between the probability of having an outstanding LFO balance and the use of a public defender, suggesting that current policy may be disenfranchising a number of people who cannot afford, rather than refuse, to buy back their right to vote.

Criminal disenfranchisement laws are rarely subject to heightened scrutiny, but neither the judges nor those challenging the laws have yet had data available to them on the incidence of LFOs by race, which is a suspect class. Using the same individual-level dataset on court cases, we find that black defendants are significantly more likely to be ineligible to restore their voting rights due to LFOs.

We find the same disparate impact—by both class and race—in applications to restore voting rights in Alabama. We find similar racial differences in applications to restore voting rights in Tennessee, which we present as a robustness check in the online appendix. Black ex-felons in the state are more likely to have their voting rights applications denied due to outstanding child support, a particular type of legal debt that is only tied to voting rights in Tennessee. Together, these findings suggest that LFOs are a general threat to racial equality above and beyond the forces of mass incarceration. . . .

Figure 1 . . . shows that a substantial share of LFOs assessed in Alabama are fees, rather than fines and restitution. . . . We show that fees comprise about 44% of the total amount of LFOs assessed . . . [and] that, on average, fees make up about 57% of an individual's total LFO assessment. . . .

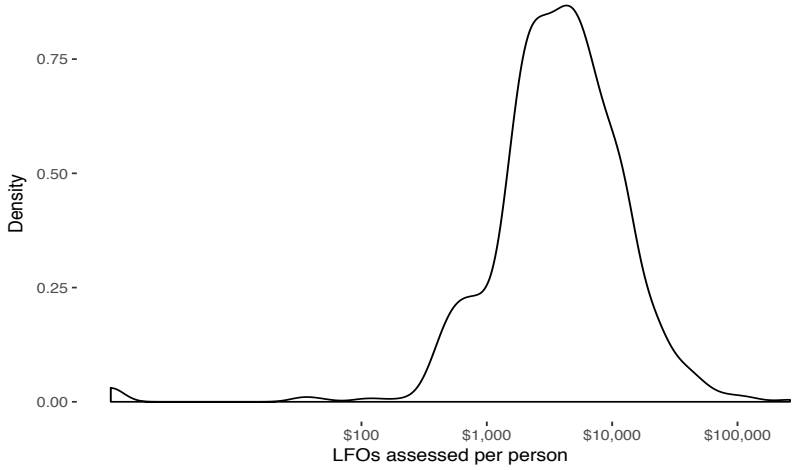
[Figure 1]



. . . The most common fee is a docket fee, which is assessed in all cases and uniform within, but not across, judicial districts. . . . The next most common fee is assessed to defendants who make use of a public defender. The District Attorney's Collection Fee, a surcharge equal to 30% of outstanding debt after 90 days, is the third most common fee. These three fees together make up about 70% of all fees assessed.

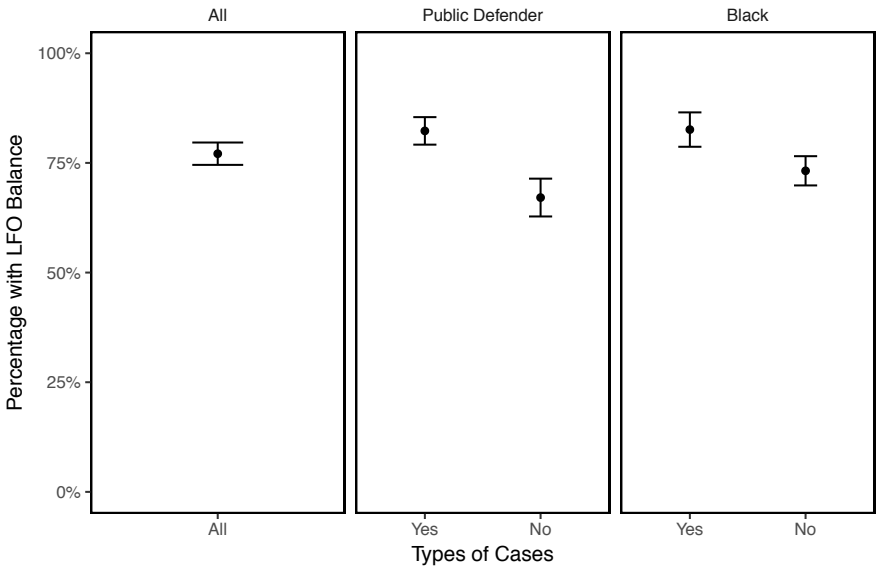
It is hard to understand how burdensome these fees might be without understanding the total amount of LFOs assessed. Figure 2 shows a kernel density plot of the total amount of criminal LFOs assessed to individuals who have completed their maximum sentence. We log-scale the x-axis because of the considerable right-skew, in which a few ex-felons are assessed more than $100,000 over all of their cases. . . . [The 25th, 50th and 75th] percentiles of the distribution of total assessments are $1,995, $3,956, and $7,720, respectively. . . .

[Figure 2]



Because reinstatement of voting rights requires having no LFO balance, we are particularly interested in knowing the likelihood that an ex-felon who has completed supervision is carrying an LFO balance on at least one of their cases. . . . The left panel of Figure 3 uses our sample of more than 1,000 individuals who have completed their sentence(s) to estimate that about 75% have such a remaining balance. . . .

[Figure 3]



To further study how indigency plays a role in disenfranchisement, we next consider whether an individual's use of a public defender—a proxy for their ability to pay—is associated with their LFO balance. . . . If ability to pay is preventing payment, we expect to observe that those who use a public defender are more likely to carry an LFO balance than those who do not. The center panel of Figure 3 confirms this hypothesis—82.3% of public defense users have a balance compared to 67.1% of those who retain counsel. . . . These findings are particularly relevant given Justice O'Connor's recent decision in *Harvey* [*v. Brewer*, 605 F. 3d 1067 (9th Cir. 2010)] in which she speculated that "perhaps withholding voting rights from those who are truly unable to pay . . . due to indigency would not pass [a] rational basis test."

. . . These findings are consistent with plaintiffs' claims in [earlier cases] that conditioning voting rights on LFOs has a disparate impact on the poor. However, courts generally have not recognized this as grounds for overturning state disenfranchisement policies. Courts distinguishing between the right to vote and the restoration of the right to vote already limits a potential avenue to increase judicial scrutiny. The fact that wealth is also not considered a protected class has meant that these laws have been considered under a deferential rational basis review, where they are unlikely to be struck down.

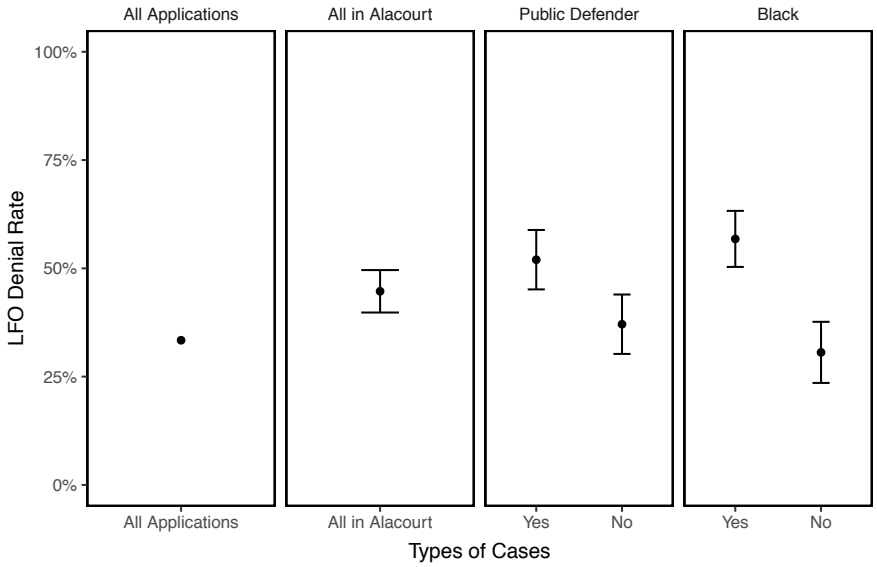
Many laws that have a disparate impact on the poor also are likely to have a disparate racial impact because of the strong link between race and wealth in America. . . .

The right panel of Figure 3 supplies the missing data and demonstrates that black ex-felons are about 9.4 percentage points . . . less likely to be eligible to vote because of an outstanding LFO debt. . . . This table [omitted] also shows that there is little difference in the distribution of the total amount assessed to black and non-black defendants. . . .

While the vast majority of ex-felons, despite completing their sentence, are not eligible to regain their vote in Alabama, ex-felons are not equally harmed because not all are interested in voting. [Here], we shift our focus from the population of ex-felons in the state to the subset of ex-felons who applied to the Board of Pardons and Paroles for a Certificate of Eligibility to Register to Vote. We do this to investigate whether there exists a detectable interest in voting among those who are ineligible to restore their voting rights because of LFOs.

Figure 4 presents the share of applications denied due to LFOs when all other conditions for re-enfranchisement are met. . . . The left panel shows that a third of all applications, otherwise complete, are denied to an outstanding debt. . . .

[Figure 4]



The third and fourth panels of Figure 4 reveal that the disparate impact in eligibility is reproduced in the share of applications denied. Applicants who used a public defender are 15 [percentage points] more likely to be denied due to an outstanding debt than applicants who retained counsel, while black applicants are 26 [percentage points] more likely to be denied due to an outstanding debt than non-black applicants. These patterns suggest that the disparate impact in the probability of having a non-zero LFO balance is also present within the subpopulation that is most harmed, because they want to restore their voting rights. . . .

V. LEGAL THEORIES OF MANDATES FOR CHANGE

Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L. J. 1153 (1974).

ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

ODonnell v. Harris Cty., Texas, 882 F.3d 528 (5th Cir. 2018).

In re Humphrey, 228 Cal. Rptr. 3d 513 (Cal. Ct. App. 2018).

Stinnie v. Holcomb, 2017 WL 963234 (W.D. Va. Mar. 13, 2017), appeal pending (4th Cir. 2018)

Robinson v. Purkey, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017).

Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014).

Petition for Writ of Certiorari, Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017), *cert.denied*, 2018 WL 942466 (Feb. 20, 2018).

Cary Franklin, *The New Class Blindness*, 128 YALE L.J. (forthcoming 2018).

In this segment, we examine constitutional and statutory claims arguing that the current pricing systems do impermissible harm to people of limited means. Frank Michelman's 1974 classic analysis, written soon after *Boddie v. Connecticut* (excerpted in Chapter II), compares filing fees to poll taxes and explores the values animating access to courts.

We then turn to a few examples drawn from contemporary litigation challenging bail systems and fines as unconstitutional. The *ODonnell* district court decision identified substantive due process and equality arguments when it invalidated in part the county's bail system, found to hold individuals solely because they could not afford to pay. The Fifth Circuit decision centered its analysis on the procedural due process deficits, as well as agreeing that the system violated the Equal Protection Clause. The *Humphrey* decision from California likewise concluded that holding a person because of inability to pay was constitutionally illicit. *Stinnie*, pending on appeal, is illustrative of both the arguments that automatic suspensions of drivers' licenses for failure to pay fines violated due process and the hurdles of bringing such claims. In *Robinson*, the district court concluded it had jurisdiction and reached the merits of a similar set of practices, which the court found did not meet the rational basis standard it applied.

Beth Colgan explores a role for the Excessive Fines Clause, while the brief excerpt from *Bauer* argued in the context of fees for gun registration that the revenue garnered by fees had to go exclusively to the services provided. The *Cain* decision, excerpted earlier, held unlawful the Louisiana system in which judges could benefit from the fines that they had the power to impose. Cary Franklin explores the more general question of the role that class has and could play in constitutional jurisprudence in arenas other than fines, fees, and bail. These materials return us to the themes of this volume about the affirmative obligations of governments to provide court services and to make them accessible to individuals who would otherwise be priced out of activities that could be framed as substantive constitutional rights.

The Supreme Court and Litigation Access Fees:
The Right to Protect One's Rights (1974)[*]

Frank Michelman

. . . [T]here are generally accepted *reasons* for making litigation possible. I think we take little risk of serious distortion if we try to frame those reasons in terms of the values (ends, interests, purposes) that are supposed to be furthered by allowing persons to litigate. . . .

I have been able to identify four discrete, though interrelated . . . values. . . . *Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs. . . .

Dignity values. These seem most clearly offended when a person confronts a formal, state-sponsored, public proceeding charging wrongdoing, failure, or defect, and the person is either prevented from responding or forced to respond without the assistance and resources that a self-respecting response necessitates.

The damage to self-respect from the inability to defend oneself properly seems likely to be most severe in the case of criminal prosecution, where representatives of civil society attempt in a public forum to brand one a violator of important societal norms. . . .

---

[*] *Excerpted from* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L. J. 1153 (1974).

Of course, one immediately sees that there are some nominally "civil" contexts where the would-be litigant is trying to fend off accusatory action by the government threatening rather dire and stigmatizing results (for example, a proceeding to divest a parent of custody of a child on grounds of unfitness), which are exceedingly difficult to distinguish from standard criminal contexts in dignity value terms. Still these cases do not by themselves show that the dignity notion is uncontainable. Challenging though it may be in a few cases to draw the line between the quasi-criminal and the noncriminal context, the determination usually will not be insuperably difficult.

But this is hardly to say that dignity considerations are entirely absent from civil contexts. Perhaps there is something generally demeaning, humiliating, and infuriating about finding oneself in a dispute over legal rights and wrongs and being unable to uphold one's own side of the case. How serious these effects are seems to depend on various factors including, possibly, the identity of the adversary (is it the government?), the origin of the argument (did the person willingly start it himself?), the possible outcomes (will the person, or others, feel that he has been determined to be a wrongdoer?), and how public the struggle has become (has it reached the courts yet?).

That listing of factors might seem to lend a degree of plausibility to a general right of court access for civil defendants though not for civil plaintiffs. But the idea is really not very persuasive on close inspection. . . . That a person's self-respect might be seriously injured by inability to have that charge tested in a credibly impartial tribunal seems entirely likely.

Nor does it seem that such a likelihood can readily be ruled out in various other plaintiff contexts that easily come to mind: a citizen wishes to sue a governmental body for breach of contract or for tax refund; a customer wishes to sue an automobile mechanic for breach of warranty; a member wishes to challenge his expulsion from a private association (or a worker, his dismissal from private employment); a tenant wishes to sue his landlord for having evicted him for a malicious or erroneous (and allegedly unlawful) reason; an aggrieved party wishes to sue another for defamation, or for assault, or for malpractice, or for breach of trust. It seems that denial of access would noticeably arouse dignity concerns in all these cases. No doubt, there are variations in the degree of injury, depending on permutations of relevant factors; but dignity concerns seem widespread through the judicial sector.

Participation values. The illumination that may sometimes flow from viewing litigation as a mode of politics has escaped neither courts nor legal theorists. But I can see no way of trenchantly deploying that insight so as to rank litigation contexts for purposes of a selective access-fee relief rule. . . . But if participation values cannot help us differentiate among litigation contexts, they can contribute significantly to the argument for a broad constitutional right of court access. Participation values are at the root of the claim that such a right can be derived from the first amendment … [and] they also help inspire the analogy between general litigation rights and general voting rights. . .

Deterrence values. Litigation is often, and enlighteningly, viewed as a process, or part of a process, for constraining all agents in society to the performance of duties and obligations imposed with a view to social welfare. A possible link between deterrence values and access fees is, of course, supplied by the obvious frustration of those values which results if the person in the best position, or most naturally motivated, to pursue judicial enforcement of such constraints is prevented by access fees from doing so. . . .

Effectuation values. In the effectuation perspective we view the world from the standpoint of the prospective litigant as distinguished from that of society as a whole or as a collectivity. Value is ascribed to the actual protection and realization of those interests of the litigant which the law purports to protect and effectuate (in this perspective one would shamelessly refer to those interests as the litigant's "rights") and more generally to a prevailing assurance that those interests will be protected; and litigation is regarded as a process, or as a part of a process, for providing such protection and assurance. . . . Elaborations may range from the extremely abstract and deontological (inferring legal rights, say, from a transcendental Idea of Freedom) to the borderline utilitarian (viewing rights as necessary to the preservation of a satisfying social order). They may vary in tone and emphasis from the legalistic (strict social contract theories, or looser contractarian theories which entail legal protection for rights as a necessary part of the ethical justification for civil society's coercive aspects) to the humanitarian and psychologically oriented (rights regarded as one of the lenses through which we view and find meaning in, or media through which we express and give meaning to, our notions of self, personality, social relationship). However articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value, can fairly be called rampant in our culture and traditions. Of course, this sense is aroused more naturally and appropriately by some claims and predicaments than by others. . . .

ODonnell v. Harris County, Texas
United States District Court for the Southern District of Texas, Houston Division
251 F.Supp.3d 1052 (S.D. Tex. 2017)

LEE H. ROSENTHAL, Chief Judge:

. . . This case requires the court to decide the constitutionality of a bail system that detains 40 percent of all those arrested only on misdemeanor charges, many of whom are indigent and cannot pay the amount needed for release on secured money bail. These indigent arrestees are otherwise eligible for pretrial release, yet they are detained for days or weeks until their cases are resolved, creating the problems that Chief Justice Hecht identified. The question addressed in this Memorandum and Opinion is narrow: whether the plaintiffs have met their burden of showing a likelihood of success on the merits of their claims and the other factors necessary for a preliminary injunction against Harris County's policies and practices of imposing secured money bail on indigent misdemeanor defendants. Maranda Lynn ODonnell, Robert Ryan Ford, and Loetha McGruder sued while

detained in the Harris County Jail on misdemeanor charges. They allege that they were detained because they were too poor to pay the amount needed for release on the secured money bail imposed by the County's policies and practices. … They ask this court to certify a Rule 23(b)(2) class and preliminarily enjoin Harris County, the Harris County Sheriff, and—to the extent they are State enforcement officers or County policymakers—the Harris County Criminal Court at Law Judges, from maintaining a "wealth-based post-arrest detention scheme." . . .

This case is difficult and complex. The Harris County Jail is the third largest jail in the United States. . . . Although misdemeanor arrestees awaiting trial make up about 5.5 percent of the Harris County Jail population on any given day, . . . about 50,000 people are arrested in Harris County on Class A and Class B misdemeanor charges each year. . . . Harris County's bail system is regulated by State law, local municipal codes, informal rules, unwritten customary practices, and the actions of judges in particular cases. The legal issues implicate intertwined Supreme Court and Fifth Circuit precedents on the level of judicial scrutiny in equal protection and due process cases and on the tailoring of sufficient means to legitimate ends.

Bail has a longstanding presence in the Anglo-American common law tradition. Despite this pedigree, the modern bail-bond industry and the mass incarceration on which it thrives present important questions that must be examined against current law and recent developments. Extrajudicial reforms have caused a sea change in American bail practices within the last few years. Harris County is also in the midst of commendable and important efforts to reform its bail system for misdemeanor arrests. The reform effort follows similar work in other cities and counties around the country. This work is informed by recent empirical data about the effects of secured money bail on a misdemeanor defendant's likely appearance at hearings and other law-abiding conduct before trial, as well as the harmful effects on the defendant's life.

The plaintiffs contend that certainly before, and even with, the implemented reforms, Harris County's bail system for misdemeanor arrests will continue to violate the Constitution. This case is one of many similar cases recently filed around the country challenging long-established bail practices. Most have settled because the parties have agreed to significant reform. This case is one of the first, although not the only one, that requires a court to examine in detail the constitutionality of a specific bail system for misdemeanor arrestees. This case is also one of the most thoroughly and skillfully presented by able counsel on all sides, giving the court the best information available to decide these difficult issues.

One other complication is worth noting at the outset. Since this case was filed, the 2016 election replaced the Harris County Sheriff and the presiding County Judge of Criminal Court at Law No. 16. . . . The new Sheriff and County Judge have taken positions adverse to their codefendants, although each continues to oppose certain aspects of the plaintiffs' request for preliminary injunctive relief. . . .

Even with the factual and legal complexities, at the heart of this case are two straightforward questions: Can a jurisdiction impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? If so, what do due process and equal protection require for that to be lawful? Based on the extensive record and briefing, the fact and expert witness testimony, the arguments of able counsel, and the applicable legal standards, the answers are that, under federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused.

Because Harris County does not currently supply those safeguards or protect those rights, the court will grant the plaintiffs' motion for preliminary injunctive relief. . . .

Texas law does not provide for pretrial release on no financial conditions. Texas law permits Harris County's Hearing Officers and County Judges to choose between making financial release conditions secured—requiring a misdemeanor defendant or a surety to pay the amount up front to be released from jail—or unsecured—allowing release with the bond coming due only if the defendant fails to appear at hearings and a magistrate orders the bond forfeited. In setting the bail amount, whether secured or unsecured, Texas law requires Hearing Officers to consider five factors, including the defendant's ability to pay, the charge, and community safety. A federal court consent decree requires Hearing Officers to make individualized assessments of each misdemeanor defendant's case and adjust the scheduled bail amount or release the defendant on unsecured or nonfinancial conditions.

Harris County Hearing Officers and County Judges follow a custom and practice of interpreting Texas law to use secured money bail set at prescheduled amounts to achieve pretrial detention of misdemeanor defendants who are too poor to pay, when those defendants would promptly be released if they could pay. Complying with the County Judges' policy in the bail schedule and the County Rules of Court, Harris County Assistant District Attorneys apply secured bail amounts to the charging documents. The schedule is a mechanical calculation based on the charge and the defendant's criminal history. Although Texas and federal law require the Hearing Officers and County Judges to make individualized adjustments to the scheduled bail amount and assess nonfinancial conditions of release based on each defendant's circumstances, including inability to pay, the Harris County Hearing Officers and County Judges impose the scheduled bail amounts on a secured basis about 90 percent of the time. When the Hearing Officers do change the bail amount, it is often to conform the amount to what is in the bail schedule, if the Assistant District Attorneys have set it "incorrectly." The Hearing Officers and County Judges deny release on unsecured bonds 90 percent of the time, including in a high majority of cases in which Harris County Pretrial Services recommends release on unsecured or nonfinancial conditions based on a validated risk-assessment tool. When Hearing Officers and County Judges do grant release on unsecured bonds, they do so for reasons other than the defendant's inability to pay the bail on a secured basis.

The Hearing Officers and County Judges follow this custom and practice despite their knowledge of, or deliberate indifference to, a misdemeanor defendant's inability to pay bail on a secured basis and the fact that secured money bail functions as a pretrial detention order. The Hearing Officers follow an unwritten custom and practice of denying release on unsecured bonds to all homeless defendants. Those arrested for crimes relating to poverty, such as petty theft, trespassing, and begging, as well as those whose risk scores are inflated by poverty indicators, such as the lack of a car, are denied release on unsecured financial conditions in the vast majority of cases, when it is obvious that pretrial detention will result. Hearing Officers style their orders as findings of "probable cause for further detention," when the only condition of further detention is the misdemeanor defendant's inability to pay secured money bail. . . .

As a result of this custom and practice, 40 percent of all Harris County misdemeanor arrestees every year are detained until case disposition. Most of those detained—around 85 percent—plead guilty at their first appearance before a County Judge. Reliable and ample record evidence shows that many abandon valid defenses and plead guilty in order to be released from detention by accepting a sentence of time served before trial. Those detained seven days following a bail-setting hearing are 25 percent more likely to be convicted, 43 percent more likely to be sentenced to jail, and, on average, have sentences twice as long as those released before trial.

Harris County is required by Texas and federal law to provide a probable cause and bail-setting hearing for those arrested on misdemeanor charges without a warrant within 24 hours of arrest. At the hearing, Hearing Officers are supposed to provide "a meaningful review of alternatives to pre-scheduled bail amounts." . . . Although Texas law requires Harris County to release misdemeanor defendants who have not had a hearing within 24 hours, over 20 percent of detained misdemeanor defendants wait longer than 24 hours for a hearing. In some, but not all, of these cases, the Hearing Officers determine probable cause in the defendant's absence, but the Hearing Officers admit that they do not provide a meaningful bail setting in absentia. For those misdemeanor arrestees who are detained for significant periods by the City of Houston Police Department before they are transported to the Harris County Jail, or for those booked into the Harris County Jail on a Friday, the Next Business Day Setting before a County Judge will not occur until after three or four days in pretrial detention.

The record shows that County Judges adjust bail amounts or grant unsecured personal bonds in fewer than 1 percent of the cases. Prosecutors routinely offer, and County Judges routinely accept, guilty pleas at first setting and sentence the misdemeanor defendants to time served, releasing them from detention within a day of pleading guilty. Those who do not plead guilty remain detained until they have a lawyer who can file a motion to contest the charge or the bail setting and request a motion hearing. These hearings are generally held one or two weeks later. The record shows that the motion hearing is the first opportunity a misdemeanor defendant has to present evidence of inability to pay and to receive a reasoned opinion explaining the bail setting. Testimony from the defendants'

expert on Harris County court administration establishes that the Next Business Day Setting rule codifies, rather than alters, these customs and practices.

The court finds and concludes that Harris County has a custom and practice of using secured money bail to operate as de facto orders of detention in misdemeanor cases. Misdemeanor arrestees who can pay cash bail up front or pay the up-front premium to a commercial surety are promptly released. Indigent arrestees who cannot afford to do so are detained, most of them until case disposition. Because the County Judges know and acquiesce in this custom and practice in their legislative capacity as rulemakers, this consistent custom and practice amounts to an official Harris County policy. . . .

Under the Equal Protection Clause as applied in the Fifth Circuit, pretrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest. . . . In this case, the plaintiffs bear the burden of meeting the preliminary injunction requirements, but at the trial on the merits, the County will have the burden under heightened scrutiny to show that there is no reasonable alternative to a policy, custom, and practice of setting money bail on a secured basis in misdemeanor cases. . . .

In *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court held that a state court's detention order for civil contempt violated the Due Process Clause. . . . The Court reasoned that while a civil contempt proceeding exposing the defendant to detention for up to one year did not require the assistance of counsel, the state had to provide "alternative procedural safeguards" such as "adequate notice of the importance of ability to pay [as an element to prove at the hearing], fair opportunity to present, and to dispute relevant information, and court findings." . . . The Court made clear that these were examples, not a complete description of what was needed for due process. The state could provide different procedures "equivalent" to those the Court listed. . . .

Turner is a helpful starting point for examining the plaintiffs' likelihood of succeeding on their due process claim. Although the Supreme Court has not defined with precision the federal due process requirements for pretrial detention of misdemeanor defendants, at a minimum, state or local governments must provide notice of the importance of ability to pay in the judicial determination of detention, a fair opportunity to be heard and to present evidence on inability to pay, and a judicial finding on the record of ability to pay or a reasoned explanation of why detention is imposed despite an inability to pay the financial condition. *Turner* clarified that these procedures are required by the Due Process Clause even when the Sixth Amendment does not guarantee a right to counsel. Courts are divided over whether an initial bail-setting is a "critical stage" in the criminal process requiring counsel. . . . Harris County does not currently provide counsel at the probable cause and bail-setting hearing but is exploring a pilot program to do so in July 2017. . . .

The court finds and concludes on the present record that the plaintiffs have demonstrated a clear likelihood of success on the merits of their allegations. Based on the Pretrial Services monthly and annual public reports, the court finds and concludes that the County Judges know that Harris County detains over 40 percent of all misdemeanor defendants until the disposition of their cases. The County Judges know that Hearing Officers deny Pretrial Services recommendations for release on unsecured and nonfinancial conditions around 67 percent of the time. They know that Hearing Officers deviate from the bail schedule—up or down—only about 10 percent of the time. The County Judges understand—because all but one of them share the same view—that what Hearing Officers mean when they say they "consider" an arrestee's ability to pay is that they disregard inability to pay if any other factor in the arrestee's background provides a purported basis to confirm the prescheduled bail amount and set it on a secured basis. Harris County's Director of Pretrial Services testified that there is an "[u]nwritten custom" to deny all homeless arrestees release on unsecured or nonfinancial conditions. The County Judges know that Pretrial Services and the Hearing Officers treat homeless defendants' risk of nonappearance as a basis to detain them on a secured financial condition of release they cannot pay. . . . The County Judges testified that they could change these customs and practices legislatively in their Rules of Court, but that they choose not to. . . .

This policy is not narrowly tailored to meet the County's compelling interest in having misdemeanor defendants appear for hearings or refrain from new criminal activity before trial. Even applying the less stringent standard of intermediate scrutiny, the present record does not show that rates of court appearance or of law-abiding behavior before trial would be lower absent the use of secured money bail against misdemeanor defendants. . . . Recent rigorous, peer-reviewed studies have found no link between financial conditions of release and appearance at trial or law-abiding behavior before trial. . . .

Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest. . . .

The court concludes that the plaintiffs are likely to succeed on at least parts of their due process claim. Of the requirements listed above, Harris County meets only one at the probable cause and bail-setting hearing: an impartial decisionmaker. The County usually provides the hearing within 24 hours, but 20 percent of misdemeanor defendants who remain detained until the hearing wait longer than 24 hours for that hearing. The record evidence shows that misdemeanor defendants are sometimes confused about the financial and other resource information they are asked to provide and how it will affect their eligibility for release, and Hearing Officers do not make written findings or give reasons for their decisions. . . .

The court concludes that Harris County does not provide due process for indigent or impecunious misdemeanor defendants it detains for their inability to pay a secured financial condition of release. Those who cannot pay the secured money bail set at the probable cause hearing before a Hearing Officer must wait days, sometimes weeks, before a County Judge provides a meaningful hearing to review the bail determination. Harris County is liable for the County Judges' policies issued in their legislative or rulemaking capacities that result in systemwide delays in any meaningful determination of the conditions for release.

ODonnell v. Harris County, Texas
United States Court of Appeals, Fifth Circuit
882 F.3d 528 (5th Cir. 2018)

Before CLEMENT, PRADO, and HAYNES, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

. . . Procedural due process claims are subject to a two-step inquiry: "The first question asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." . . . Applying this framework, we disagree with the district court's formulation of the liberty interest created by state law, but agree that the procedural protections of bail-setting procedures are nevertheless constitutionally deficient.

Liberty interests protected by the due process clause can arise from two sources, "the Due Process Clause itself and the laws of the States." . . . Here, our focus is the law of Texas, which has acknowledged the two-fold, conflicting purpose of bail. This tension defines the protected liberty interest at issue here.

On the one hand, bail is meant "to secure the presence of the defendant in court at his trial." . . . Accordingly, "ability to make bail is a factor to be considered, [but] ability alone, even indigency, does not control the amount of bail." . . . On the other hand, Texas courts have repeatedly emphasized the importance of bail as a means of protecting an accused detainee's constitutional right "in remaining free before trial," which allows for the "unhampered preparation of a defense, and . . . prevent[s] the infliction of punishment prior to conviction. . . . Accordingly, the courts have sought to limit the imposition of "preventive [pretrial] detention" as "abhorrent to the American system of justice." . . . Notably, state courts have recognized that "the power to . . . *require* bail," not simply the denial of bail, can be an "instrument of [such] oppression." . . .

These protections are also ensconced in the Texas Constitution. Specifically, Article 1 § 11 reads in relevant part, "[a]ll prisoners shall be bailable by sufficient sureties."

Tex. Const. art. 1, § 11. The provision is followed by a list of exceptions—i.e., circumstances in which an arrestee may be "denied release on bail." . . . The only exception tied to misdemeanor charges pertains to family violence offenses. . . . The scope of these exceptions has been carefully limited by state courts, which observe that they "include the seeds of preventive detention." . . .

The district court held that § 11 creates a state-made "liberty interest in misdemeanor defendants' release from custody before trial. Under Texas law, judicial officers . . . have no authority or discretion to order pretrial preventive detention in misdemeanor cases." This is too broad a reading of the law. The Constitution creates a right to bail on "sufficient sureties," which includes both a concern for the arrestee's interest in pretrial freedom and the court's interest in assurance. Since bail is not purely defined by what the detainee can afford, . . . the constitutional provision forbidding denial of release on bail for misdemeanor arrestees does not create an automatic right to pretrial release.

Instead, Texas state law creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance. Yet, as noted, state law forbids the setting of bail as an "instrument of oppression." Thus, magistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order. Accordingly, such decisions must reflect a careful weighing of the individualized factors set forth by both the state Code of Criminal Procedure and Local Rules.

Having found a state-created interest, we turn now to whether the procedures in place adequately protect that interest. As always, we are guided by a three-part balancing test that looks to "the private interest . . . affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards"; and "the Government's interest, including the function involved and the fiscal and administrative burdens" that new procedures would impose. . . .

As the district court found, the current procedures are inadequate—even when applied to our narrower understanding of the liberty interest at stake. The court's factual findings (which are not clearly erroneous) demonstrate that secured bail orders are imposed almost automatically on indigent arrestees. Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an "instrument of oppression."

The district court laid out specific procedures necessary to satisfy constitutional due process when setting bail. Specifically, it found that,

> Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest.

The County challenges these requirements on appeal. We find some of their objections persuasive.

As this court has noted, the quality of procedural protections owed a defendant is evaluated on a "spectrum" based on a case-by-case evaluation of the liberty interests and governmental burdens at issue. . . . We note that the liberty interest of the arrestees here are particularly important: the right to pretrial liberty of those accused (that is, presumed innocent) of misdemeanor crimes upon the court's receipt of reasonable assurance of their return. . . . So too, however, is the government's interest in efficiency. After all, the accused also stands to benefit from efficient processing because it "allow[s] [for his or her] expeditious release." . . . The sheer number of bail hearings in Harris County each year—according to the court, over 50,000 people were arrested on misdemeanor charges in 2015—is a significant factor militating against overcorrection.

With this in mind, we make two modifications to the district court's conclusions regarding the procedural floor. First, we do not require factfinders to issue a written statement of their reasons. While we acknowledge "the provision for a written record helps to insure that [such officials], faced with possible scrutiny by state officials . . . [and] the courts . . . will act fairly," . . . such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good. We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process. . . . Moreover, since the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy.

Second, we find that the district court's 24-hour requirement is too strict under federal constitutional standards. The court's decision to impose a 24-hour limit relied not on an analysis of present Harris County procedures and their current capacity; rather, it relied on the fact that a district court imposed this requirement thirty years ago (that is, prior to modern advancements in computer and communications technology). . . .

We conclude that the federal due process right entitles detainees to a hearing within 48 hours. Our review of the due process right at issue here counsels against an expansion of the right already afforded detainees under the Fourth Amendment by *McLaughlin*. We note in particular that the heavy administrative burden of a 24-hour requirement on the

County is evidenced by the district court's own finding: the fact that 20% of detainees do not receive a probable cause hearing within 24 hours despite the statutory requirement. Imposing the same requirement for bail would only exacerbate such issues.

The court's conclusion was also based on its interpretation of state law. But while state law may define liberty interests protected under the procedural due process clause, it does not define the procedure constitutionally required to protect that interest. . . . Accordingly, although the parties contest whether state law imposes a 24- or 48-hour requirement, we need not resolve this issue because state law procedural requirements do not impact our federal due process analysis. . . .

The district court held that the County's bail-setting procedures violated the equal protection clause of the Fourteenth Amendment because they treat otherwise similarly-situated misdemeanor arrestees differently based solely on their relative wealth. The County makes three separate arguments against this holding. It argues: (1) ODonnell's disparate impact theory is not cognizable under the equal protection clause . . . (2) rational basis review applies and is satisfied; (3) even if heightened scrutiny applies, it is satisfied. We disagree.

First, the district court did not conclude that the County policies and procedures violated the equal protection clause solely on the basis of their disparate impact. Instead, it found the County's custom and practice purposefully "detain[ed] misdemeanor defendants before trial who are otherwise eligible for release, but whose indigence makes them unable to pay secured financial conditions of release." The conclusion of a discriminatory purpose was evidenced by numerous, sufficiently supported factual findings, including direct evidence from bail hearings. This custom and practice resulted in detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any "meaningful consideration of other possible alternatives." . . . Under this circuit's binding precedent, the district court was therefore correct to conclude that this discriminatory action was unconstitutional. … Because this conclusion is sufficient to decide this case, we need not determine whether the equal protection clause requires a categorical bar on secured money bail for indigent misdemeanor arrestees who cannot pay it.

Second, the district court's application of intermediate scrutiny was not in error. It is true that, ordinarily, "[n]either prisoners nor indigents constitute a suspect class." . . . But the Supreme Court has found that heightened scrutiny is required when criminal laws detain poor defendants *because of* their indigence. . . . Reviewing this case law, the Supreme Court later noted that indigents receive a heightened scrutiny where two conditions are met: (1) "because of their impecunity they were completely unable to pay for some desired benefit," and (2) "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." . . .

We conclude that this case falls into the exception created by the Court. Both aspects of the *Rodriguez* analysis apply here: indigent misdemeanor arrestees are unable to

pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration. Moreover, this case presents the same basic injustice: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County's policy is appropriate.

Third, we discern no error in the court's conclusion that the County's policy failed to meet the tailoring requirements of intermediate scrutiny. In other words, we will not disturb the court's finding that, although the County had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior, its policy was not narrowly tailored to meet that interest.

The court's thorough review of empirical data and studies found that the County had failed to establish any "link between financial conditions of release and appearance at trial or law-abiding behavior before trial." For example, both parties' experts agreed that the County lacked adequate data to demonstrate whether secured bail was more effective than personal bonds in securing a detainee's future appearance. Notably, even after analyzing the incomplete data that were available, neither expert discerned more than a negligible comparative impact on detainees' attendance. Additionally, the court considered a comprehensive study of the impact of Harris County's bail system on the behavior of misdemeanor detainees between 2008 and 2013. The study found that the imposition of secured bail might *increase* the likelihood of unlawful behavior. *See* Paul Heaton et al. . . . (2017) (estimating that the release on personal bond of the lowest-risk detainees would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the following eighteen months). These findings mirrored those of various empirical studies from other jurisdictions.

The County, of course, challenges these assertions with empirical studies of its own. But its studies at best cast some doubt on the court's conclusions. They do not establish clear error. We are satisfied that the court had sufficient evidence to conclude that Harris County's use of secured bail violated equal protection.

In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree. . . .

———————

In re Kenneth Humphrey, on Habeas Corpus
California Court of Appeals, First District, Division 2
228 Cal.Rptr.3d 513 (Cal. Ct. App. 2018)

Kline, P.J., Appellate Judge:

Nearly forty years ago, during an earlier incarnation, the present Governor of this state declared in his State of the State Address that it was necessary for the Legislature to reform the bail system, which he said constituted an unfair "tax on poor people in California. Thousands and thousands of people languish in the jails of this state even though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present law requires." Proposing that California move closer to the federal system, the Governor urged that we find "a way that more people who have not been found guilty and who can meet the proper standards can be put on a bail system that is as just and as fair as we can make it." . . . The Legislature did not respond.

Undaunted, our Chief Justice, in her 2016 State of the Judiciary Address, told the Legislature it cannot continue to ignore "the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor." Questioning whether money bail genuinely ensures public safety or assures arrestees appear in court, the Chief Justice suggested that better risk assessment programs would achieve the purposes of bail more fairly and effectively. . . . The Chief Justice followed up her address to the Legislature by establishing the Pretrial Detention Reform Workgroup in October 2016 to study the current system and develop recommendations for reform.

This time the Legislature initiated action. Senate Bill No. 10, the California Money Bail Reform Act of 2017, was introduced at the commencement of the current state legislative session. The measure, still before the Legislature, opens with the declaration that "modernization of the pretrial system is urgently needed in California, where thousands of individuals held in county jails across the state have not been convicted of a crime and are awaiting trial simply because they cannot afford to post money bail or pay a commercial bail bond company." We hope sensible reform is enacted, but if so it will not be in time to help resolve this case.

Meanwhile, as this case demonstrates, there now exists a significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts. As we will explain, although the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order. Petitioner is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to

money bail, and, if it determines petitioner is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention. . . .

Petitioner Kenneth Humphrey was detained prior to trial due to his financial inability to post bail. Claiming bail was set by the court without inquiry or findings concerning either his financial resources or the availability of a less restrictive nonmonetary alternative condition or combination of conditions of release, petitioner maintains he was denied rights guaranteed by the Fourteenth Amendment.

Acknowledging that a bail scheme that "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" . . . petitioner does not claim California's money bail system is facially unconstitutional. However, he maintains that requiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order. . . . Because the liberty interest of an arrestee is a fundamental constitutional right entitled to heightened judicial protection . . . such an order can be constitutionally justified, petitioner says, only if the state "first establish [es] that it has a *compelling* interest which justifies the [order] and then demonstrate[s] that the [order is] *necessary* to further that purpose." . . .

We shall explain why we agree with the parties that the trial court erred in failing to inquire into petitioner's financial circumstances and less restrictive alternatives to money bail, and that a writ of habeas corpus should therefore issue for the purpose of providing petitioner a new bail hearing. . . .

Petitioner's claim that the due process and equal protection clauses of the Fourteenth Amendment required the trial court to determine the availability of less restrictive non-monetary conditions of release that would achieve the purposes of bail is based on two related lines of cases.

The first, exemplified by *Bearden v. Georgia* (1983) . . . does not relate to bail directly but more generally to the treatment of indigency in cases in which a defendant is exposed to confinement as a result of his or her financial inability to pay a fine or restitution. These cases establish that a defendant may not be imprisoned solely because he or she is unable to make a payment that would allow a wealthier defendant to avoid imprisonment. In the second line are bail cases, primarily Salerno, . . . establishing that, because the liberty interest of a presumptively innocent arrestee rises to the level of a fundamental constitutional right, the right to bail cannot be abridged except through a judicial process that safeguards the due process rights of the defendant and results in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee's appearance in court and/or protect public safety, thereby demonstrating a compelling state interest warranting abridgment of an arrestee's liberty prior to trial.

As we shall describe, the principles underlying these cases dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community. . . .

In imposing a judicial responsibility to inquire into the financial circumstances of an allegedly indigent defendant, the *Bearden* court relied heavily on the reasoning of its earlier opinions in *Williams v. Illinois* (1970) . . . both of which advanced the process of mitigating the disparate treatment of indigents in the criminal justice system initially set in motion by *Griffin v. Illinois* (1956) . . . .

The rule the *Bearden* court distilled from *Williams* and *Tate* is that the state "cannot '"[impose] a fine as a sentence and then automatically [convert] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."' . . . In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine." . . .

As *Bearden* explained, the Fourteenth Amendment ameliorates, even if it does not cure, the differential treatment it protects against by mandating careful and consequential judicial inquiry into the circumstances. A probationer who willfully refuses to pay a fine or restitution despite having the means to do so, or one who fails to "make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution," may be imprisoned as a "sanction to enforce collection" or "appropriate penalty for the offense." . . . "But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." . . .

Here the relevant governmental interests are ensuring a defendant's presence at future court proceedings and protecting the safety of victims and the community. The liberty interest of the defendant, who is presumed innocent, is even greater; consequently, as will be further explained, it is particularly important that his or her liberty be abridged only to the degree necessary to serve a compelling governmental interest. . . . When money bail is imposed to prevent flight, the connection between the condition attached to the defendant's release and the governmental interest at stake is obvious: If the defendant fails to appear, the bail is forfeited. . . . A defendant who is unable to pay the amount of bail ordered—assuming appropriate inquiry and findings as to the amount necessary to protect against flight—is detained because there is no less restrictive alternative to satisfy the

governmental interest in ensuring the defendant's presence. . . . Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed. Accordingly, when the court's concern is protection of the public rather than flight, imposition of money bail in an amount exceeding the defendant's ability to pay unjustifiably relieves the court of the obligation to inquire whether less restrictive alternatives to detention could adequately protect public or victim safety and, if necessary, explain the reasons detention is required.

Bearden and its progeny "'stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest.' Otherwise, the government has no way of knowing if the detention that results from failing to post a bond in the required amount is reasonably related to achieving that interest." . . .

Turning to the present case, petitioner asserts and it is undisputed that he was detained prior to trial due to his financial inability to post bail in the amount of $350,000, an amount that was fixed by the court without consideration of either his financial circumstances or less restrictive alternative conditions of release. The court's error in failing to consider those factors eliminated the requisite connection between the amount of bail fixed and the dual purposes of bail, assuring petitioner's appearance and protecting public safety. . . . Due to its failure to make these inquiries, the trial court did not know whether the $350,000 obligation it imposed would serve the legitimate purposes of bail or impermissibly punish petitioner for his poverty. "[W]hen the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual's financial circumstances and alternative ways of accomplishing its purpose." . . .

A determination of ability to pay is critical in the bail context to guard against improper detention based only on financial resources. Unlike the federal Bail Reform Act, however, our present bail statutes only require a court to consider a defendant's ability to pay if the defendant raises the issue. . . . This leaves in the hands of the defendant a matter that is the trial court's responsibility to ensure—that a defendant not be held in custody solely because he or she lacks financial resources. . . . Furthermore, section 1270.1, subdivision (c), applies only where a person arrested for specified offenses (expressly excluding first degree residential burglary, petitioner's offense) is to be released on his or her own recognizance or bail in an amount that is more or less than that specified for the offense on the bail schedule. (§ 1270.1, subd. (a)) While section 1275 identifies factors to be considered by the court in setting, reducing or denying bail, including factors pertaining

to whether release of the arrestee would endanger public safety, it does not include consideration of the defendant's ability to fulfill a financial condition of release. Nor does section 1269c, which authorizes the setting of bail in amounts greater or lower than that specified in the bail schedule, require any judicial consideration of the arrestee's financial circumstances. . . .

Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances. This requirement is implicit in the principles we have discussed—that a defendant may not be imprisoned solely due to poverty and that rigorous procedural safeguards are necessary to assure the accuracy of determinations that an arrestee is dangerous and that detention is required due to the absence of less restrictive alternatives sufficient to protect the public. . . .

Stinnie v. Holcomb

United States District Court for the Western District of Virginia, Charlottesville Division
2017 WL 963234 (W.D. Va. Mar. 13, 2017), appeal pending (4th Cir. 2018)

NORMAN K. MOON, United States District Judge:

Damian Stinnie owes fees, fines, and costs to Virginia's courts. He cannot pay them, so Virginia law requires that his driver's license be suspended until he pays. But the suspension makes it difficult to get and keep a job. In other words, because he cannot pay the fees, his license is suspended, but because his license is suspended, he cannot pay the fees. Caught in this cycle, Stinnie and others have sued the Commissioner of Virginia's Department of Motor Vehicles ("DMV"). They argue that the Commissioner suspended their licenses and that those suspensions violated their federal constitutional rights to due process and equal protection.

Because jurisdiction is absent from the current iteration of this lawsuit, the Constitution prevents this Court from ruling on the substance of Plaintiffs' due process and equal protection challenges, however meritorious they may prove to be when decided in a proper forum.

First, Congress and the Constitution have not granted federal district courts the authority to hear appeals from state courts. The U.S. Supreme Court is the only federal court authorized to do so. Because this case involves allegedly unconstitutional suspension orders of Virginia state courts, Plaintiffs must seek relief from Virginia's appellate courts and ultimately the U.S. Supreme Court, not this Court.

Second, the Constitution empowers a federal court to hear a case only if the court could fix the harm plaintiffs allegedly suffered at the hands of the defendant. Here, because the state courts (not the Commissioner) suspended the licenses, the complained-of injury

is not fairly traceable to the Commissioner and cannot be fixed by a court order against him.

Third, the Constitution's Eleventh Amendment forbids certain kinds of lawsuits in federal court against States. The Supreme Court has recognized, however, that the Eleventh Amendment does not prohibit lawsuits seeking to stop a state official from violating federal law. But this exception applies only when the state official has a special relationship to the supposedly unlawful conduct. Because that special relationship is absent here, the exception is inapplicable, and the Eleventh Amendment bars the case against the Commissioner.

This Court reiterates it is not deciding whether Virginia's license suspension scheme is unconstitutional. All this Court is deciding (indeed, all it has the legal authority to decide) is that it lacks the lawful ability to rule on the merits of Plaintiffs' challenge, at least as this lawsuit is currently constituted. Thus, the Commissioner's motion to dismiss will be granted. . . .

Plaintiffs Damian Stinnie, Demetrice Moore, Robert Taylor, and Neil Russo are indigent Virginians who have suspended driver's licenses "for failure to pay court costs and fines that they could not afford." . . . They allege that their suspensions were "automatic and mandatory upon default." . . . They request declaratory and injunctive relief against the Commissioner to:

> address and remedy the systemic, pervasive, and ongoing failure of the Commonwealth to provide basic protections afforded by the Due Process and Equal Protection Clauses of the United States Constitution before taking the harsh enforcement measure of suspending driver's licenses against indigent people whose poverty prevents them from paying debts owed to courts.

. . . Plaintiffs "seek to represent a class consisting of all persons whose Virginia's driver's licenses are suspended due to unpaid court debt and who, *at the time of the suspension*, were not able to pay due to their financial circumstances." . . .

They contend that "DMV is the entity responsible for the issuance, suspension, and revocation of driver's licenses." . . . A driver's license is critical for life functions such as employment, education, and family care. . . . In recent years, hundreds of thousands of Virginians allegedly have had their licenses suspended for failure to pay court costs and fines. . . . Such suspensions "can trap the poor in an impossible situation: inability to reinstate their licenses without gainful employment, yet inability to work without a license." . . .

"Plaintiffs' licenses," they claim, "were suspended *by the Defendant* immediately upon their default, without any inquiry into their individual financial circumstances, or the reasons underlying their failure to pay." . . . They cannot enter into repayment installment plans, either because the state courts to which they owe money do not have such plans or because they cannot afford the plans that are offered. . . .

Mr. Stinnie is the lead named plaintiff. He received four traffic citations in late 2012 or early 2013, three of which resulted in conviction and over $1,000 in fines and court costs. . . . Earning only $300 per week, he was unable to pay off this debt, leading—according to him—the Commissioner to suspend his license on May 20, 2013, without assessing whether he had the ability to pay. . . . Stinnie was cited seven days later for driving on a suspended license. . . . He was convicted of this offense on September 19, 2013, while still hospitalized for lymphoma. . . . He incurred additional fines and court costs for that conviction, further hampering his financial situation, as did medical treatments he needed to fight lymphoma. . . .

This cycle repeated itself in 2016 when—after battling poor health, homelessness, and a dire financial situation—he received more fines and costs for reckless driving and driving on a suspended license. . . . As of July 2016, Stinnie owed $1,531 in costs and fines to various state courts. . . . He cannot afford to pay this amount given his limited income and payments for his car, which doubles as shelter when he cannot procure housing. . . .

Under Virginia law, a judge in a criminal case resulting in conviction notifies the clerk of the costs incident to the proceeding. . . . The clerk then aggregates this information into a statement; the total is considered both a criminal fine and a judgment in favor of the Commonwealth. . . . Interest begins to accrue on the 41st day after the final judgment. . . . Particular kinds of costs and fees may be assessed depending on the nature of the case. . . . However, Virginia's general district and circuit courts have uniform cost-and-fee schedules that do not vary based on the ability to pay. . . .

At trial (or by mail to those convicted in absentia), the general district and circuit courts provide defendants with forms . . . explaining that nonpayment of costs or fines results in a suspended license; these Suspension Forms—which are attached to and referenced in the Complaint—do not mention the ability to pay. . . . Significantly, both Suspension Forms indicate that the defendant:

> can avoid this suspension [of his driver's license] going into effect only if the court actually receives payment in full . . . by the effective date of this suspension. . . . If payment in full is not received by the Court within 30 days of sentencing, the suspension goes into effect. . . .

If "immediate payment" is not received, the person's driver's license is suspended "automatically," without any inquiry into the reasons for default. . . . According to Plaintiffs, the Commissioner suspends the licenses. . . . Through administrative channels, the suspension is communicated to the DMV, where an employee makes a data entry concerning it. . . . Individuals who cannot pay their costs or fines within 30 days may make alternative payment arrangements with the state court to toll the effectiveness of their suspensions; the contours of these payment plans, however, vary and are not available in all of Virginia's trial courts. . . .

The Complaint is often critical of Virginia's courts' failure to consider Plaintiffs' indigency or ability to pay fines and costs. . . . Plaintiffs also oppose Virginia's overall legal structures and procedures for assessing court costs, suspending licenses, communicating the suspensions, and reinstating licenses: They bundle these aspects together and label them collectively as a "payment-for-license scheme" or "system," or an "unlawful court debt collection scheme" or "system." . . .

Plaintiffs maintain they "are simply asking this Court to order Defendant to stop engaging in an unconstitutional practice—the automatic suspension of driver's licenses without notice, without a hearing, and without regard for inability to pay." . . . They "simply ask that Defendant cease suspending driver's licenses" and reinstate their own. . . . But an examination of Va. Code § 46.2-395 reveals the matter is not as simple as Plaintiffs contend. . . .

The Supreme Court has reviewed the archetypal situation to which the doctrine historically and currently applies. In both Rooker and Feldman:

> the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment. Plaintiffs in both cases, alleging federal-question jurisdiction, called upon the District Court to overturn an injurious state-court judgment.

. . . So too here. . . . license suspension orders are issued by the state court pursuant to Va. Code § 46.2-395(B). This is apparent from the statute's text and structure, as well as the Suspension Forms used by Virginia's trial courts. And now, Plaintiffs ask this Court to undo those very judgments as violations of due process and equal protection. . . . But a plaintiff "may not escape the jurisdictional bar of *Rooker–Feldman* by merely refashioning its attack on the state court judgments as a § 1983 claim." . . .

Lastly, Plaintiffs argue they have no other forum in which to raise their constitutional objections to suspension, thus implying that this Court must have jurisdiction. . . . The absence of alternative forums is a poor reason to decide an otherwise jurisdictionally defective case. Regardless, the contention illustrates how *Rooker-Feldman's* underlying principles and function are frustrated by this Complaint, so the Court will discuss it.

. . . The Supreme Court has long . . . [held that] state courts are capable of deciding questions of federal law. . . . Thus, indigent individuals (or anyone) challenging their suspension orders can press their arguments in the state trial and appellate courts, and before the U.S. Supreme Court.

"All citizens are presumptively charged with knowledge of the law." . . . Virginia law states that—for any conviction resulting in fines or costs—payment is due "immediately" and, when not immediately made, the court suspends the license

immediately (or in statutory parlance, "forthwith"). . . . Armed with this knowledge, there is no reason a defendant could not present in state court the very constitutional arguments pressed in this case. All he need do is raise them during the proceeding (for instance, after a finding of guilt, like any other objection to a sentence or punishment).

Additionally, the Court holds that Plaintiffs lack constitutional standing. The Constitution extends the "judicial power" of federal courts to only "cases" or "controversies." . . . The Supreme Court has cautioned that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." . . . Inherent in that role—and derived from "the Constitution's central mechanism of separation of powers"—is the concept of "standing," which "is part of the common understanding of what it takes to make a justiciable case." . . . Plaintiffs bear the burden of establishing that they have standing, which they have failed to do. . . .

Plaintiffs sue the Commissioner in his official capacity for his supposed actions "in suspending their licenses pursuant to Va. Code § 46.2-395(B)." . . . But "contrary to [Plaintiffs'] characterization," the Commissioner under Subsection (B) does not suspend the licenses—state courts do—and so he is not "responsib[le] for the challenged state action." . . . Subsection (B) barely mentions the DMV, referencing only its role in collecting fees for license reinstatement, which . . . is different from suspension. . . . *Ex parte Young* does not apply to the Commissioner in this particular instance, and thus the suit is barred by the Eleventh Amendment. . . .

Robinson v. Purkey
United States District Court for the Middle District of Tennessee, Nashville Division
2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017)

ALETA A. TRAUGER, United States District Judge:

. . . Before the court is Fred Robinson and Ashley Sprague's Motion for Temporary Restraining Order Directing Immediate Restoration of their Driver's Licenses . . . . The court held a hearing on that motion on October 4, 2017 ("TRO Hearing"). For the reasons below, the TRO Motion will be granted and Commissioner Purkey will be ordered to direct the [Tennessee Department of Safety and Homeland Security (TDSHS)] to reinstate the driver's licenses of Robinson and Sprague pending a hearing on a preliminary injunction. . . .

Based on the briefing of the parties and representations by counsel at the TRO Hearing, the parties appear to agree that TDSHS itself is not charged with the initial collection of Traffic Debt, which is instead overseen by county and municipal court clerks. If a driver fails to pay Traffic Debt, however, the relevant clerk provides notice of the nonpayment to the TDSHS, which then effects the suspension of the driver's license. Tennessee's license suspension statute "authorize[s]," but does not by its language require, the TDSHS to suspend the license of an individual who is eligible for suspension for

nonpayment of Traffic Debt. Robinson and Sprague contend that, despite TDSHS's statutory discretion, its policy and practice is to automatically suspend the license of any driver who is subject to a notice of nonpayment. For the purpose of the instant motion, it is sufficient for the court to observe that there has been no suggestion, by Purkey or otherwise, that Robinson and Sprague's licenses were suspended for any reason other than the TDSHS's receipt of notices of Traffic Debt nonpayment from the relevant clerks. . . .

Robinson and Sprague argue that they are likely to succeed on the merits because their argument that a driver's license cannot be suspended for nonpayment of fines and costs without an indigence determination rests on a straightforward application of a number of relevant Supreme Court precedents, namely *Griffin v. Illinois* . . . (1956); *Williams v. Illinois* . . . (1970); *Tate v. Short* . . . (1971); and *Bearden v. Georgia* . . . (1983) . . . Purkey argues that those cases are inapplicable to the question of driver's license suspensions and that Robinson and Sprague are unlikely to succeed on the merits because the state's scheme is subject only to rational basis review and is rationally related to legitimate government objectives. . . .

The Sixth Circuit gave substantial consideration to the *Bearden* Cases in *Johnson v. Bredesen* . . . (6th Cir. 2010), in which the court held that Tennessee's law requiring felons to pay child support and restitution before having their voting rights restored did not offend constitutional principles, despite lacking an indigence exception. . . . The majority opinion in *Johnson* faulted *Griffin* and *Williams* for "fail [ing] to articulate a precise standard of review," but ultimately found them inapposite based on its conclusion that, because those cases involved access to courts or a risk of imprisonment, they were "concerned [with] fundamental interests" and, therefore, the challenged state actions were "subject to heightened scrutiny." . . . Despite the fact that *Bearden* eschewed the question of strict scrutiny and cited, in its analysis, the Court's consideration of "the rationality of the connection between legislative means and purpose," the *Johnson* majority similarly concluded that *Bearden* applied a heightened level of scrutiny, in light of the underlying threat of imprisonment, and therefore was inapposite. . . .

Although Robinson and Sprague may take issue with aspects of the *Johnson* analysis, the court is required to accept *Johnson* as binding for the purpose of considering their likelihood of success on the merits. Accordingly, the court accepts that, where a plaintiff raises a challenge to the lack of an indigence exception under the principles embodied by the *Bearden* Cases, but the underlying right at issue is not one that has been recognized by the courts as fundamental, then the governing test is the rational basis test set forth in *Johnson*. The *Johnson* court complained of the Supreme Court's history of "propound[ing] inconsistent iterations of the rational basis standard" but offered a formulation intended to "align[ ] with this Circuit's and the Supreme Court's most recent pronouncements." . . . As set forth in *Johnson*, a law challenged under the rational basis standard "will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." . . .

"While a fundamental right to travel exists, there is no fundamental right to drive a motor vehicle." . . . Accordingly, the rational basis test set forth in *Johnson* applies. Even under that comparatively tolerant standard, however, Robinson and Sprague have demonstrated a likelihood of success on the merits, because the ostensible justification for the state's lack of an indigence exception is not merely tenuous, but wholly without basis in reason in light of the underlying dynamics at issue. . . .

Robinson and Sprague have previewed substantial evidence demonstrating the necessity of driving to the ability to earn a living in Tennessee . . . but one needs only to observe the details of ordinary life to understand that an individual who cannot drive is at an extraordinary disadvantage in both earning and maintaining material resources. Suspending a driver's license is therefore not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end. In the parlance of Johnson, taking an individual's driver's license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.

At the core of the *Bearden* cases is not the distinction between fundamental and non-fundamental rights, but the principle that, when it comes to assessing the constitutionality of a material burden, "[l]aw addresses itself to actualities," not merely the abstract. . . . In the abstract, perhaps one could imagine that it makes sense to threaten even the indigent with the loss of their licenses, so as to give the state the harshest and least encumbered tool available to ensure payment by the non-indigent. In the realm of actualities, however, any such rationale collapses under the weight of its own contradictions. Providing a marginally more efficient tool for collecting from the non-indigent is simply no rational justification for aggressively reducing the likelihood of payment by the indigent. Whatever bare minimum of rationality is required to pass muster under Johnson, a law that is transparently counterproductive to the professed legitimate purpose falls short. Robinson and Sprague have therefore demonstrated a likelihood of success on the merits with regard to their legal arguments under the *Bearden* Cases. . . .

Reviving the Excessive Fines Clause (2014)[*]

Beth A. Colgan

. . . The method I propose to reinterpret the [Excessive Fines] Clause has three components that allow the Court to continue using history, while being candid about what historical evidence can and cannot provide. The first component involves identification of relevant questions that can be used as a frame for debating the Clause's scope. The second involves an assessment of the strength of the available historical evidence for use in that debate. The third component involves the debate itself, in which historical evidence is

[*] *Excerpted from* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014).

considered—according to its value—along with contemporary practices and norms, to interpret the Clause's meaning.

The first component—framing the debate—simply requires an identification of the definitional question at hand. Such questions are likely to arise naturally from the nature of the dispute being litigated (e.g., whether the cost of incarceration is a "fine" for the purposes of the Clause). History can also play a role in identifying such questions, by serving as a jumping-off point—a place from which to identify the types of considerations that may have been in play at the Eighth Amendment's ratification. Using history in this way does not push for answers that the historical record cannot provide, acknowledging the indeterminate nature of the evidence. This interpretive method is . . . "common law originalism," a theory that recognizes that there is not one single common law, and as a result the historical record "cannot provid[e] determinant answers that fix the meaning of particular constitutional clauses, but instead . . . supplies[] the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively."

This approach is vastly different than the Court's use of history in the Excessive Fines cases. The Court engaged in . . . "the creation of history a priori by what may be called 'judicial fiat.'" . . .

The additional historical evidence provided in this Article, however, belies the Court's basic premise that history can supply a single, narrow definition of the Clause's key terms. Ironically, the Court acknowledged as much in stepping away from history when interpreting the meaning of "excessive," though in doing so ignored the evidence that colonial and early American history could provide on that point. Put simply, the Excessive Fines doctrine lacks historical justification.

. . . [T]he second component of my proposed reinterpretation is an evaluation of the strength and value of the evidence on any given point. The more evidence showing that a question may have been answered in a particular way, the more credence that answer should be given in interpreting the Clause. For some questions, significant evidence exists as to how they may have been answered. But as is evident from the colonial and early American statutory and court records detailed herein, discrepancies exist across and within jurisdictions, practices and understandings change over time, and even a thorough examination of the record fails to provide definitive proof of the extent to which any particular idea was shared across the colonies and early states. Therefore, where the record reveals inconsistencies and contradictions (as in the case of the punitive/nonpunitive distinction) or where the nature of the evidence itself prohibits a specific understanding (as in the case of the record's silence regarding whether particular considerations of excess rose to a constitutional level), it should be treated as less persuasive. . . .

It is the third component that provides an opportunity to debate the historical evidence with other considerations, including contemporary practices and norms. This method does not stake out a new mode of constitutional interpretation. . . . Further,

considering historical evidence and contemporary practices and understandings has fidelity to the very first interpretations of the Eighth Amendment. In *Wilkerson v. Utah*, in which the Court considered, for the first time, the Cruel and Unusual Punishment Clause, it looked to the historical use of various methods of execution as well as contemporary practices. The third component of the proposed reinterpretation of the Clause allows for these various concepts to be weighed against each other, with the strongest evidence—rather than any particular form (historical, precedential, or contemporary)—winning the day. . . .

The Court has already identified two questions evident in the historical record regarding the scope of the term "fines": whether fines may be paid to third parties or must be paid exclusively to the sovereign; and whether fines can be distinguished by a punitive or nonpunitive purpose. The historical evidence I detail above also raises two additional questions that are likely to surface in modern litigation: to what acts may fines be applied; and what of economic value constitutes a fine. The extent of the evidence on each point varies both in terms of volume and uniformity. Therefore, I address each question in turn.

There is substantial evidence regarding the question of whether fines include sanctions paid to individuals or nongovernmental entities. From the earliest days of the colonies, fines were routinely paid to the sovereign, but also to victims and third parties with no governmental association. . . . Given the similarities between historical and contemporary practices by which criminal sanctions are paid to individuals and private parties, it is likely that there is little need to debate this point in interpreting the Clause today. . . .

Turning next to the question of what a fine's purpose must be, the historical evidence is not so cut-and-dried. The bulk of the evidence detailed in this Article suggests that the type of punitive/nonpunitive distinction the Court announced would not have been contemplated at ratification. Yet there is evidence that in at least some jurisdictions at some points in time, economic sanctions were assessed even absent a conviction, suggesting the sanctions were nonpunitive. In contrast to the prior question regarding the fine's recipient, the Court should take caution in relying on this evidence too heavily given that there is more significant evidence of contradictory understandings.

In contrast, with respect to the question regarding acts for which a defendant may be subjected to fines, there is fairly widespread and uniform treatment. Throughout the colonial and early American record, fines were assessed in cases involving offenses seen as creating a harm that was understood as public in nature. While many offenses also resulted in harm to private parties, in each instance there was at least some element of harm to the public. The consistency of this evidence suggests that the historical use of fines in conjunction to public offenses should be treated as credible within the context of assessing the meaning of the Clause today. . . .

Finally, there is significant evidence that fines would have been understood to include deprivations of anything of economic value. Since the founding of the American

colonies, courts have assessed fines of money or tobacco, required the forfeiture of specific property, or mandated that labor be used to satisfy an economic sanction. The strength of this evidence would be considered in light of contemporary practices—including the widespread use of forfeitures and the less common use of service as a substitute for fines—and modern norms.

But as with public offenses, the historical evidence cannot fully answer this question because it does not reveal whether a present-day deprivation has actually occurred. Colonial and early American understandings of property rights differ in fundamental ways from contemporary norms, particularly given that ownership of others through slavery or indenture and the inferior property interests of women were relevant factors to the assessment and distribution of fines in colonial and early American times. Therefore, the debate on this question must necessarily focus on modern considerations of property rights, including whether the Clause offers protection to a person who suffers a deprivation of a legitimate property interest stemming from another person's conviction, which happens most frequently in the context of family relationships, such as joint marital property, or where parents are assessed fees and costs after a child is found delinquent. . . .

In sum, the historical evidence detailed in this Article weighs heavily in favor of the notion that a "fine"—regardless of recipient—is a deprivation of anything of economic value in response to a public offense. The evidence is less persuasive regarding a fine's purpose, though it leans against the Court's punitive/nonpunitive division. While this historical evidence cannot fully or specifically provide a definition for the term "fine," it—along with contemporary considerations—may be a useful tool in the Court's analysis. . . .

The historical record and modern sentencing practices also raise several key questions regarding the meaning of excessiveness: whether and to what extent are the facts of a particular offense, the characteristics of a particular offender, or the effects of the fine on the defendant and his family relevant to excessiveness?

As with the fines, historical evidence regarding the meaning of "excessive" varies in terms of volume and uniformity. But particular care must be taken here given that—with the exception of the language of the Magna Carta—the available historical evidence may or may not have constitutional pedigree. Because the records are silent as to what drove particular decisions to impose or remit a sentence, we cannot know whether such actions were related to an understanding of constitutional excessiveness as opposed to simply fair sentencing. While the evidence is still useful in interpreting the Clause, the lack of an explicit connection to the Constitution reduces the weight it should carry in assessing the Clause's meaning today.

Starting, then, with what does have a constitutional link, the Magna Carta's requirement of proportional sentencing is explicit. In three separate provisions, the Magna Carta mandates that punishment be proportionate to the magnitude of the crime and the level of the individual's fault.

Likewise, Blackstone's writings on fines suggest that proportionality should be writ large, focusing not just on a bare comparison of the amount of harm and the amount of punishment, but "a thousand other incidents [that] may aggravate or extenuate the crime." With both offense and offender characteristics, the American record reflects that broad view of proportionality as well, with a wide variety of factors specific to a given offense or to a particular offender seen as tied to offender's culpability for the offense. . . .

Yet again, however, this evidence cannot answer questions regarding the extent to which a particular fine might result in impoverishment today. There were serious repercussions for failing to pay fines in colonial and early American times, including incarceration, corporal punishment, and indenture. But the social context of such practices has changed so tremendously that they are at best very difficult to compare to the vast web of collateral consequences in effect today. Therefore, modern practices and norms must be brought to bear in assessing the scope of the Clause's protections.

In sum, the strongest historical evidence on the constitutional meaning of "excessive" would set both proportionality and effect as constitutionally relevant. With respect to proportionality, additional evidence suggests that proportionality was seen as broad in scope, including both offense and offender characteristics that reflect on the level of culpability in a given case. The evidence regarding effect on the offender is more complicated. The only evidence with explicit constitutional roots would support a per se bar on fines that would impoverish the defendant, whereas the weaker evidence from the colonial and early American records at times supports and at other times contradicts such a ceiling. . . .

Bauer v. Becerra

Petition for Writ of Certiorari, U.S. Supreme Court

Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017), *cert. denied* 2018 WL 942466 (2018)

. . . The question presented is:

Whether the exercise of a constitutional right may be conditioned on the payment of a special fee used to fund general law enforcement activities bearing no relation to the fee-payer's own conduct.

. . . Although constitutionally protected conduct may be subject to generally applicable taxes and fees, this Court has long held that such conduct may be singled out for special monetary exactions only when necessary "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." . . . . When a fee is expanded beyond those narrow cost-recovery purposes, it risks becoming nothing more than "a revenue tax," . . . or, worse still, an effort "to control or suppress [the] enjoyment" of a constitutional right . . . .

Adhering to that rule, many lower courts have recognized that the only fees the government may impose on the exercise of a constitutional right are fees commensurate with costs that are reasonably attributable to the activity of the fee-payer himself—not costs attributable to third-party conduct over which the fee-payer has no control. For instance, in *iMatter Utah v. Njord*, . . . (10th Cir. 2014), the Tenth Circuit rejected a state's effort to require anyone who sought a parade permit "to purchase insurance against risks for which the permittee could not be held liable," including actions state officials might take during the parade. . . . Because those costs were generated not by the activity of the permittees, but rather by the potential "conduct of a third party," the provision "impermissibly burden[ed] the plaintiffs' First Amendment rights." . . .

Several courts have applied the same principle to licensing fees, requiring the government "to demonstrate that its licensing fee is reasonably related to recoupment of the costs of administering the licensing program." . . . [T]he Eleventh Circuit held unconstitutional a $1,250 licensing fee on adult businesses after the city failed to show that "its licensing fee is justified by the cost of processing the application" for a license. . . . [T]he Fifth Circuit struck down a modest $6 daily licensing fee on airport solicitors because "the governmental body did not demonstrate a link between the fee and the costs of the licensing process." . . . [T]the First Circuit held that the city violated the First Amendment when it "charged . . . more than the actual administrative expenses of the license" . . . to conduct a march on city streets. . . .

Courts have applied the same principles in the Second Amendment context, reiterating that any fees imposed on activity protected by the Second Amendment must be "designed to defray (and . . . not exceed) the administrative costs associated with" processing a firearm transaction or issuing a firearm license. . . . That critical limitation ensures that the government is "prohibited from raising revenue under the guise of defraying its administrative costs," . . . or from using special fees to try "to suppress the[] exercise" of rights guaranteed by the Constitution. . . .

The decision below marks a sharp departure from that precedent. In the Ninth Circuit's view, "nothing in our case law requires" a fee on a constitutional right to be limited to the "'actual costs' of processing a license or similar direct administrative costs." . . . Instead, the court held that California may constitutionally condition the lawful acquisition of firearms on paying for a law enforcement program designed to catch criminals who unlawfully possess firearms. The court attempted to justify that conclusion by reasoning that these general law enforcement activities are just part of "the expenses of policing the activities in question." . . . But that reasoning cannot be reconciled with the long line of decisions making clear that "the activities in question" mean the activities in which the fee-payer seeks to engage—i.e., holding a parade, or running an adult bookstore, or buying a firearm—not every third-party action that might be deemed loosely attributable to the existence or exercise of the constitutional right. It could hardly be otherwise, as a contrary rule would allow the government to force newspapers to pay into libel funds, or force court-filers to fund those held in contempt or who failed to satisfy judgments. The

decision below is no more reconcilable with the Second Amendment than those results would be with the First and Fifth Amendments.

Yet the Ninth Circuit is not alone in accepting the dubious proposition that policing the activities of those who abuse constitutional rights is a cost that may be imposed on those who seek only to exercise them. . . .

The decision below brings the division between those two lines of authority into sharp relief. While many courts have been careful to ensure that no one seeking to exercise a constitutional right is forced to pay costs that are not reasonably attributable to her own conduct, others have followed a different course, allowing states and localities to condition the exercise of constitutional rights on the payment of costs attributable to enforcing criminal or regulatory requirements against wholly unrelated third parties. This Court should grant certiorari and resolve that division by rejecting the approach that the decision below embraces. . . .

The New Class Blindness (2018)[*]

Cary Franklin

. . . Progressive critics of the Court's abortion jurisprudence often portray the funding decisions as a kind of terminus: the official end of judicial class-consciousness under the Fourteenth Amendment. The preceding section suggests it might be more accurate to think of those decisions as a kind of settlement (albeit a lopsided one). . . .In the 1960s and early 1970s, courts had often held that satisfying the Fourteenth Amendment effectively required (additional) state expenditure—that, for instance, the state was constitutionally obligated to provide free trial transcripts to indigent criminal defendants (when such transcripts were an essential part of appealing a criminal conviction) and to use public funds to pay for poor women's abortions (when the state also paid for childbirth). By the late 1970s, the Court had developed a more circumscribed account of governmental obligation under the Fourteenth Amendment. But the Burger Court's rejection of its predecessor's more capacious understanding of governmental obligation was not tantamount to a declaration that concerns about class have no place in Fourteenth Amendment law. Indeed, the Court emphasized in the funding decisions that the question of whether a state is obligated to pay for abortion is entirely distinct from the question of how substantially the state may burden the right. The Court never suggested that class is irrelevant in the latter context. In fact, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*—the most important abortion decision since *Roe*—the Court developed a doctrinal mechanism that would sometimes require courts to take class into account when determining the constitutionality of state-imposed limitations on the abortion right.

---

[*] *Excerpted from* Cary Franklin, *The New Class Blindness*, 128 YALE L.J. (forthcoming 2018).

In the run-up to *Casey*, commentators variously hoped and feared the Court would seize the opportunity to overrule *Roe*. The Court declined to do so. Instead, it responded to the enormous public conflict over abortion in the 1990s with a compromise. Although the Court declared several times in *Casey* that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed," it modified abortion doctrine in important ways. *Roe*'s trimester framework permitted only very minimal regulation of abortion in the first trimester, on the ground that the state's interests in protecting maternal health and fetal life did not become compelling until the second and third trimesters respectively. *Casey* held "that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"—meaning that the state could regulate abortion "throughout pregnancy." *Casey* also modified the standard of review used to assess the constitutionality of abortion regulation. *Roe* applied strict scrutiny to such regulations. *Casey* adopted an undue burden test instead. Under this test, states may regulate abortion—even in ways designed to persuade women to continue their pregnancies—but not in ways that unduly burden the decision to end a pregnancy. The Court defined undue burden as a "regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." It went on to explain that a "statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."

This new standard generated a significant amount of confusion. In the immediate aftermath of *Casey*, the *New York Times* quoted a prominent pro-choice activist who claimed that abortion was no longer a fundamental right, while the *Los Angeles Times* quoted a prominent pro-life activist who claimed that the decision confirmed the fundamental status of the abortion right. The notion that *Casey* revoked abortion's status as a fundamental right was predicated on the twin assumptions that fundamental rights trigger strict scrutiny and that the undue burden test was not equivalent to strict scrutiny. But as Adam Winkler and others have pointed out, the application of strict scrutiny is not a reliable marker of whether a right is fundamental: "Some fundamental rights trigger intermediate scrutiny, while others are protected only by reasonableness or rational basis review. Other fundamental rights are governed by categorical rules, with no formal 'scrutiny' or standard of review whatsoever." In fact, Winkler shows, "only a small subset of fundamental rights triggers strict scrutiny—and even among those strict scrutiny is applied only occasionally." So the fact that *Casey* did not subject abortion regulation to strict scrutiny did not, in and of itself, indicate that abortion had been demoted from its status as a fundamental right.

Indeed, the Court in *Casey* reaffirmed that abortion rights "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," and are therefore "central to the liberty protected by the Fourteenth Amendment." The Court has reiterated that sentiment in subsequent decisions, and it has never repudiated its holding in *Roe* that abortion is a fundamental right. It seems important to the pro-life movement and to some conservative Justices to reject the idea that abortion

is a fundamental right—a characterization that appears to be motivated by a desire to make clear that abortion regulation is not subject to strict scrutiny. If the fundamentality of a right does not automatically determine the level of scrutiny the Court applies to its regulation, it is not clear how much is at stake in this debate. What does seem clear is that the test the Court now uses to review the constitutionality of abortion regulation—the undue burden test—is neither rational basis nor strict scrutiny, but rather some "middle ground" between the two.

What matters for purposes of this Article are the implications of this doctrinal shift—from strict scrutiny to undue burden—for constitutional concerns about class. As Part I showed, class-related concerns have long informed the Court's thinking about fundamental rights. Those concerns had become so acute by the early 1970s that federal district and circuit courts had begun ordering states that covered the healthcare costs of poor women's pregnancies to cover the costs of abortion as well. The abortion funding decisions curtailed this practice. After those decisions, courts stopped demanding that the state extend funding to abortion in the name of vindicating the constitutional rights of women without financial resources. But those decisions in no way limited the expression of class-related concerns in contexts where the state actually burdens the right to abortion. The question before us now is: What happened to class-related concerns in those contexts when the Court replaced strict scrutiny with the undue burden test?

One of the first questions the Court confronted when it adopted the undue burden test was which set of people it should consider when determining whether a challenged regulation imposes a substantial obstacle to the exercise of the abortion right. In other words, when assessing whether the state has substantially impeded women's access to abortion, whose access are we talking about: All women? All pregnant women? All women actively seeking abortions?

This question arose most sharply in *Casey* in the context of Pennsylvania's husband notification provision. The plaintiffs in *Casey* challenged five provisions of a Pennsylvania abortion law. One of those provisions required a married woman seeking an abortion to produce a signed statement attesting to the fact that she had notified her husband of her intentions. The state argued that, by definition, the notification provision could not constitute a substantial obstacle because it burdened only a very small fraction of women seeking abortions. In fact, the state claimed, because only 20% of women seeking abortions are married, and because 95% of those women voluntarily inform their husbands of their plans, the effects of the notification provision were felt by only 1% of women seeking abortions. The state argued that nothing that affects only 1% of abortion seekers can possibly qualify as "substantial."

The Court in *Casey* rejected that argument. It held that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Thus, it explained, "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." In other words, when assessing

whether a law that restricts abortion constitutes an undue burden, courts must look to the group of women actually burdened by the law and ask, for the women in that group, does the law impose a substantial obstacle to the exercise of their rights? Thus, in the context of the husband notification provision, the Court asked: Does the notification requirement place a substantial obstacle in the path of "married women seeking abortions who do not wish to notify their husbands of their intentions"? The Court concluded that it did create such an obstacle, because in a large fraction of the cases in which married women choose not to inform their husbands that they intend to obtain an abortion, they are concerned for their safety. For women in that position, the notification requirement constituted a substantial obstacle to obtaining an abortion.

The issue of class did not arise in the Court's discussion of the husband notification provision. But elsewhere in the Court's opinion, it did. In addition to requiring married women to notify their husbands of their desire to obtain an abortion, Pennsylvania imposed on all women seeking abortions a 24-hour waiting period, which required that they meet with their provider one day prior to undergoing the procedure. The district court invalidated this requirement on the ground that it imposed a "particular burden" on "those women who have the least financial resources"—women for whom two trips to a provider might require transportation, motel stays, childcare, and missed workdays they could scarce afford. The Supreme Court acknowledged that this situation was "troubling in some respects." But it drew a distinction between a "particular" burden and one that was "undue." All that the district court found was that the waiting period "particularly burdened" women without financial resources: It did not also find that the waiting period constituted a substantial obstacle for such women.This was a problem, in the Court's view, because a "particular burden is not of necessity a substantial obstacle." For the waiting period to be invalid, there would need to be evidence that, in addition to having a disparate impact on women without financial resources, it also significantly impeded their ability to obtain abortions. As the district court's opinion did not contain any such evidence, the Court concluded that, "on the record before us," it was impossible to say that the waiting period constituted an undue burden.

This was not tantamount to a declaration that class is irrelevant to the determination of whether an abortion regulation violates the Fourteenth Amendment. In fact, some lower courts after *Casey* invalidated waiting periods and other such regulations after citing their effects on financially disadvantaged women. Other courts, however, have been relatively accepting of abortion regulations post-*Casey* and unsympathetic to lawsuits challenging those regulations. This trend toward greater leniency has reinforced the perception that the Court, first in the funding decisions and then in *Casey*, excluded concerns about financially disadvantaged women from the ambit of constitutional concern. But it is important to recognize the distinction between these two jurisprudential developments. The funding decisions declined to extend protected class status to poor women under equal protection; jettisoned the fundamental interest equal protection approach, common in the 1960s and early 1970s; and rejected the notion that the state was constitutionally obligated to fund abortion. *Casey*, while lessening constitutional protection for the abortion right, preserved

the relevance of class in abortion law through the introduction of the undue burden standard and the guidelines it developed for applying that standard.

It seems ironic that *Griswold* and *Roe* did not explicitly discuss class and that *Casey* did. The Court decided the first two cases during a period of heightened judicial solicitude for the rights of people without financial resources. As Part I showed, those concerns fueled the Court's expansion of constitutional protection for fundamental rights in that period. *Casey*, on the other hand, contracted the protection afforded the abortion right. Yet, it was in *Casey* that the Court explicitly discussed the effects of abortion restrictions on disadvantaged women and created a doctrinal mechanism for monitoring those effects—one that led some lower courts to invalidate abortion regulations that unduly burdened disadvantaged women's access to abortion. But perhaps it is not so ironic. In the 1960s and early 1970s, the Court might reasonably have assumed that the constitutional inquiry in reproductive rights cases would focus, where relevant, on disadvantaged women. It was only later, when constitutional law began to afford less protection to reproductive rights and to the rights of the poor, that the Court was driven to articulate a form of doctrinal protection explicitly capable of combatting state action that particularly burdened the rights of women without financial resources. Whatever else one might say about *Casey*, it preserved the intersectionality between concerns about class and concerns about reproductive rights: the idea that, at least in some circumstances, class matters when determining whether the state has encroached too far on a fundamental liberty—in this case, a woman's liberty to decide for herself whether or not to continue a pregnancy. . . .

VI. POLITICAL WILL AND MAKING CHANGE

Task Force to Improve Access to Legal Counsel in Civil Matters, REPORT TO THE JUDICIARY COMMITTEE OF THE CONNECTICUT GENERAL ASSEMBLY (2016).

Illinois Statutory Court Task Force, FINDINGS AND RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND ADDITIONAL ISSUES ASSOCIATED WITH FEES AND OTHER COURT COSTS IN CIVIL, CRIMINAL, AND TRAFFIC PROCEEDINGS (2016).

Letter from Lloyd A. Karmeier, Chief Justice, Supreme Court of Illinois, to Hon. John G. Mulroe, Illinois Senate, and Hon. Steven A. Andersson, Illinois House of Representatives (Feb. 26, 2018).

National Task Force on Fines, Fees, and Bail Practices, LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES (2017).

American Legislative Exchange Council, RESOLUTION ON CRIMINAL JUSTICE FINES AND FEES (2016).

Fair and Just Prosecution, FINES, FEES, AND THE POVERTY PENALTY (2017).

Criminal Justice Policy Program, Harvard Law School, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM (2016).

Report to the Judiciary Committee of the Connecticut General Assembly (2016)[*]

Task Force to Improve Access to Legal Counsel in Civil Matters

. . . Connecticut citizens face four principal barriers to access to counsel: (1) inadequate funding of legal services for the poor; (2) lack of affordable attorneys for individuals who are ineligible for legal aid, but unable to afford market rate representation; (3) geographical, cultural, institutional, informational and other impediments facing those in need of legal help; (4) bureaucratic impediments that cause routine needs to devolve into legal problems.

First, most individuals who are income-eligible for legal aid are unable to secure representation in cases addressing basic human needs. A 2008 survey found that more than 70% of the low-income households in Connecticut had experienced a legal problem during the previous year, yet only 1 in 4 successfully obtained outside help because demand far exceeded the availability of services. Lack of funding for legal services has worsened since

[*] *Excerpt from* Task Force to Improve Access to Legal Counsel in Civil Matters, REPORT TO THE JUDICIARY COMMITTEE OF THE CONNECTICUT GENERAL ASSEMBLY (2016), https://www.cga.ct.gov/jud/tfs/20160729_Task%20Force%20to%20Improve%20Access%20to%20Legal%20Counsel%20in%20Civil%20Matters/Final%20Report.pdf

the 2008 financial crisis. Historically, nearly two-thirds of the funds that support lawyers for indigent persons in civil cases came from the revenue generated by Interest On Lawyers' Trust Accounts (IOLTA), but that amount has declined substantially in recent years.

One hundred percent of the federal poverty level (FPL) for a family of four is $24,300. Eligibility for most legal services is set at 125% of the FPL. According to census data, between 2007 and 2015, Connecticut's poverty population (incomes under the FPL) grew from 7.9% to 10.8% (approximately 375,000 people), with much higher rates of poverty among the Black and Latino populations and with the greatest concentration in Connecticut's cities. Connecticut's child poverty level grew during that same period from 11.1% to 14.5% (over 110,000 children living in poverty; an estimated increase of 25,000 children over eight years). Connecticut providers who service the economically disadvantaged report unanimously that these needs continue to increase. There are a number of reasons for these significant increases. First, those living just above the FPL have increased in number and their demand upon available legal services, for instance for the private bar, have reduced the amount of services available for those at or below the FPL. Second, fiscal restraints on Connecticut and its larger cities have limited available benefits and, at a minimum, made them harder to obtain.

There are no other funding sources that can make up for the shortfall. Other funding sources are sporadic, diffuse, unreliable, and insufficient. Private foundation dollars, one of the principal sources of funding for many private organizations, has declined over the last several years, from level of funding which already inadequate to meet the existing needs. Funding sources like the Interest on Lawyers' Trust Accounts ("IOLTA") have also decreased dramatically. Over the last eight years, IOLTA receipts went from a high in 2007 of almost $21 million to a low in 2015 of approximately $2 million. The Judicial Branch, with the support of the Governor and General Assembly, stepped up to replace some of that funding through the allocation of certain court fees and direct grants, but the total in 2015 amounted to only $14.7 million. As a result, the [Connecticut Bar Foundation (CBF)], which is a significant funding arm for ten legal service providers, is only operating at 68% of 2007 revenue.

There is no system-wide data as to how many potential clients cannot be serviced. The 2008 Legal Needs Study, referenced above, estimated 307,000 legal needs by low-income people annually. Given the increase in the poverty population, and the increase in the range and number of legal issues discussed above, the 307,000 number has likely grown exponentially. At best, Connecticut's current network of providers tackles approximately 30,000 legal issues each year based upon data provided to the CBF and by extrapolation to the other providers. That means greater than 92% of the legal needs of Connecticut's poorest and most vulnerable citizens go unanswered. According to the justice index compiled by the National Center for Access to Justice at Cardozo Law School, Connecticut has 1.45 civil legal aid attorneys for every 10,000 people living in poverty.

As a result, the number of applications for legal assistance dwarfs the supply of available help of services and, as confirmed to us by the organizations we interviewed, the current network of programs is turning away or underserving tremendous numbers of people who need their services. This conclusion is borne out by statistics from the Judicial Branch, which estimates that 80-85% of family court cases and 75% of housing court cases involve at least one pro se party. . . .

To address this urgent and overwhelming need, many of the public and private agencies enlist the services of the Connecticut Bar Association and others to assist with the delivery of legal services. . . .

But, these measures do not begin to address the desperate need of tens of thousands of people. More, much more, is necessary.

Second, approximately 330,000 households in Connecticut have incomes above the federal poverty level but below the basic cost of living. . . . The majority of these households—which comprise nearly 25 % of Connecticut's population—do not qualify for free legal services, nor are they able to afford market rate legal representation. Consequently, when members of these households encounter legal problems, they are forced to navigate a complicated legal system on their own or forego participation in the judicial process altogether. The result is that many of these individuals, who often face well-resourced opposing parties such as banks, landlords, or government attorneys, are unable to vindicate their legal rights and obtain meaningful access to justice.

Third, many low-income individuals who are eligible for free legal services are unaware of or unable to obtain available legal services. Forty-three percent of low-income households with a legal problem in Connecticut did not seek assistance because the households did not know about legal aid options. In addition, many low-income households may not recognize the legal nature of the problems they face. Only 27% of low-income households surveyed in the 2008 study felt they had a serious legal problem in the previous year, yet when asked about 41 specific civil legal problems, 77% indicated they had experienced at least one legal problem. Individuals may also be discouraged from seeking legal help because the legal profession fails to reflect or include members of their community. As the American Bar Association's Commission on the Future of Legal Services has observed, the percentage of minorities and persons with disabilities in the total population of the U.S. is far greater than the percentage of minorities and persons with disabilities in the legal profession. . . . Furthermore, Connecticut's main legal services offices do not offer representation in some categories of cases for which there is significant demand among low-income households, such as removal defense and veterans' cases. In addition, physical and mental disabilities and limited financial resources also inhibit the effort of some low-income individuals to secure representation. Of course, even if these families were aware of their legal problems and understood their legal aid options, the fiscal constraints noted above make it unlikely that their needs could be met through any legal aid entity anyway.

Fourth, as a country founded on law, America is more reliant on rules than other countries. While ideally rules and regulations would offer streamlined, standardized practices that are easily understood, in many instances this is not the case. Rather, those with legal issues often find themselves facing a maze of bureaucracy that is often difficult to navigate. Individuals often face complicated forms, "legalese" difficult to understand, websites that do not include necessary forms or information, difficulty reaching an actual live person or the correct person and hours of operation that are not convenient, among other bureaucratic challenges. . . .

We have identified a series of recommendations to the General Assembly that will enable our State and its residents to improve our fiscal and social well-being consistent with the financial burden these recommendations would entail. They are:

1. Establish a statutory right to civil counsel in three crucial areas where the fiscal and social cost of likely injustice significantly outweighs the fiscal cost of civil counsel:
    a. Restraining orders under . . .;
    b. Child custody and detained removal (deportation) proceedings;
    c. Defense of residential evictions;
2. Increase State funding appropriations for civil legal services through the organization designated by the Judicial Branch . . . .
3. Enact fee-shifting statutes in foreclosure, eviction, and debt collection actions, regardless of whether the underlying consumer contract or lease contains an attorney's fee provision.
4. Enact a statute to authorize the Office of the Attorney General to redirect a portion of funds recovered in penalties and fines by the Office of the Attorney General to legal services providers . . . .
5. Enact a Statute That Would Allocate a Portion of the Connecticut Unfair Trade Practices Act Penalties and Punitive Damages Awards to Organizations that Provide Legal Services to Low-Income Residents.
6. Enact a statute directing State agencies to provide state-owned computers at locations accessible to the public so they have access to on-line self-help resources for the protection of legal rights.
7. Enact a statute directing State agencies to make surplus State office space available for low-cost legal services providers.
8. Enact a statute directing State agencies to reduce the impact of bureaucracies and administrative systems on the people of the State, by:
    a. utilizing technology, including mobile technology, to make their processes easier, more efficient and more convenient for individuals;
    b. evaluating the readability of their communications, and to use plain language on websites, guides, and other public notices; and
    c. utilizing virtual systems to improve customer service and address questions more efficiently.
9. Enact a statute requiring an independent "user impact" analysis for new legislation that may influence the way a bureaucracy delivers services to individuals, thus

allowing lawmakers to recognize the burden of any change to State bureaucracies when considering proposed legislation.

10. Enact a statute directing State regulatory agencies to require regulated industries to report on the impact on users of their systems.
11. Enact a statute establishing an accredited representative pilot program allowing trained non-lawyers to assist in matters ancillary to eviction defense proceedings and consumer debt cases . . . .
12. Appropriate funding for legal assistance providers to establish pilot "Legal Check-Up" programs.
13. Enact a statute commissioning studies of the fiscal impact of all legislative enactments intended to enhance access to justice in civil matters.
14. Address the Needs of Connecticut's Low[-]Income Veterans.
15. Funding for New Initiatives.

Findings and Recommendations for Addressing Barriers to Access to Justice and Additional Issues Associated with Fees and Other Court Costs in Civil, Criminal, and Traffic Proceedings (2016)[*]

Illinois Statutory Court Fee Task Force

. . . Illinois imposes a dizzying array of filing fees on civil litigants and court costs on defendants in criminal and traffic cases. Skyrocketing fees in civil cases in recent years have effectively priced many of our state's most economically vulnerable citizens out of the opportunity to participate in the court system. Similar increases in court costs for criminal and traffic proceedings now often result in financial impacts that are excessive for the offense in question and disproportionate to the fines that are intended to impose an appropriate punishment for the offense. In virtually all civil, traffic, and criminal proceedings, wide county-to-county variations in the fees and costs for the same type of proceedings injects additional arbitrariness and unfairness into the system.

Solutions to these problems have been identified. The Access to Justice Act created the Statutory Court Fee Task Force (hereafter "Task Force")—with members appointed by representatives of all three branches of Illinois government and both political parties—to study the current system of fees, fines, and other court costs (collectively, "assessments") and propose recommendations to the Illinois General Assembly and the Illinois Supreme Court to address this growing problem. Drawing upon the broad and varied experience of its members, whose numbers include legislators, judges, lawyers, and court clerks, the Task Force developed the package of recommendations contained in this Report. The members

[*] *Excerpt from* Illinois Statutory Court Task Force, FINDINGS AND RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND ADDITIONAL ISSUES ASSOCIATED WITH FEES AND OTHER COURT COSTS IN CIVIL, CRIMINAL, AND TRAFFIC PROCEEDINGS, http://www.illinoiscourts.gov/2016_Statutory_Court_Fee_Task_Force _Report.pdf (2016).

of the Task Force unanimously support adoption and implementation of these recommendations.

The recommendations address the problems summarized in four key findings by the Task Force presented below. The Task Force developed guiding principles, also summarized below, to articulate a comprehensive and internally consistent philosophy for addressing the findings. The Task Force eventually developed, refined, and finalized six recommendations that collectively will simplify the imposition, collection, and distribution of assessments while making them more transparent, affordable, and fair.

The four key findings of the Task Force are as follows:

1. The nature and purpose of assessments have changed over time, leading to a byzantine system that attempts to pass an increased share of the cost of court administration onto the parties to court proceedings.

The notion of a self-funded court system has gained increased currency in recent years, resulting in a complex web of filing fees, fines, surcharges, and other costs levied against civil litigants and criminal defendants. Cumulatively substantial despite often being individually modest, these assessments undermine the state's commitment to provide its citizens with access to the courts in civil proceedings, while distorting and unduly increasing the financial repercussions associated with criminal and traffic charges.

These problems have been exacerbated by the ability of various special interest groups to finance aspects of their operations on the backs of court users. Today, it is all too common for litigants to pay for services through additional assessments that are wholly unrelated to the court system.

2. Court fines and fees are constantly increasing and are outpacing inflation.

There has been a tremendous growth in the assessments imposed on the parties to court proceedings. Plaintiffs generally pay several hundred dollars simply to file a case. Civil defendants, who lack any say in whether to become involved in litigation, are often required to pay hundreds of dollars to defend themselves or risk a default judgment. Criminal and traffic defendants frequently leave court with hundreds, or even thousands, of dollars in assessments on top of what are supposed to be the only financial consequences intended to punish, namely, fines imposed by the court. The trend shows no sign of abating, as each new legislative session brings with it fresh proposals for increased or additional assessments. At a time when many wages are stagnant, these additional assessments are creating further financial strain on low- and moderate-income litigants.

3. There is excessive variation across the state in the amount of assessments for the same type of proceedings.

The fairness of a court system is often measured in part by its consistency. It is therefore troubling that civil and criminal assessments in our state are wildly inconsistent from county to county. A civil litigant may pay three times as much as a resident in a neighboring county for the exact same court service. Criminal defendants may find that their sentences can be severely impacted by something as insignificant as the side of the street on which their arrest occurred. The resulting inconsistency threatens the fairness, both actual and perceived, of the current system.

4. The cumulative impact of the assessments imposed on parties to civil lawsuits and defendants in criminal and traffic proceedings imposes severe and disproportionate impacts on low- and moderate-income Illinois residents.

The collective impact of the current system of assessments is significant on financially insecure Illinois residents. Individuals and families in need of a legal remedy may go without if the costs of using the courts are too high. Criminal defendants may find their reentry into society severely burdened if their court debt is unmanageable. Without relief from runaway court costs, more and more Illinois residents will be forced to decide between protecting their legal rights and paying their basic living expenses.

These findings led the Task Force to adopt five core principles, which informed and influenced all of its recommendations:

1. Role of Assessments in Funding the Courts.

Courts should be substantially funded from general government revenue sources. Court users may be required to pay reasonable assessments to offset a portion of the cost of the courts borne by the public-at-large.

2. Relationship between Assessments and Access to the Courts.

The amount of assessments should not impede access to the courts and should be waived, to the extent possible, for indigent litigants and the working poor.

3. Transparency and Uniformity.

Assessments should be simple, easy to understand, and uniform to the extent possible.

4. Relationship between Assessments and Their Underlying Rationale.

Assessments should be directly related to the operation of the court system. Assessments imposed for a particular purpose should be limited to the types of court proceedings that are related to that purpose. Monies raised by assessments intended for a specific purpose should be used only for that purpose.

5. Periodic Review.

The General Assembly should periodically review all assessments to determine if they should be adjusted or repealed.

The Task Force developed six recommendations, in accordance with these core principles, to address the findings summarized above. The recommendations are as follows:

6. The Illinois General Assembly should enact a schedule for court assessments that promotes affordability and transparency.

The Task Force proposes enactment of the Court Clerk Assessment Act, a statute that will codify in one place all court assessments other than those imposed in connection with the disposition of criminal and traffic proceedings. The proposed legislation recognizes four classes of civil cases and creates different assessment schedules for each class. The Supreme Court would assign each type of civil case to one of the four classes. For assessments imposed in connection with the filing of a complaint by a plaintiff or an appearance by a defendant, the various permissible assessments are grouped into three categories based on the recipient of those funds (the Court Clerk, the County Treasurer, and the State Treasurer), and a maximum assessment amount for each category is established.

Depending on the category or assessment in question, the county board, clerk of court, or Supreme Court would be authorized to set the applicable category or fee amount, up to the maximum allowed by the Act. Generally speaking, the amount for each category would function akin to a block grant, with the recipient of the fees possessing discretion to decide how to allocate those funds among the purposes authorized by the Act.

While the Court Clerk Assessment Act would not create uniform assessments throughout the State—a goal that the Task Force has concluded cannot realistically be achieved in the immediate future—the Act would reduce variations across counties and would significantly improve the simplicity and transparency of the imposition, collection, and distribution of assessments in civil proceedings.

7. The General Assembly and the Supreme Court should authorize amendments to the current civil fee waiver statute and related Supreme Court Rule, respectively, to provide financial relief from assessments in civil cases to Illinois residents living in or near poverty.

The Task Force proposes expansion of the existing civil fee waiver statute. The current statute uses the federal poverty level as a benchmark, providing automatic waivers to individuals living under 125% of the federal poverty level or otherwise qualifying for public benefits tied to poverty. The Task Force proposes expanding waivers of assessments

in civil cases by creating a sliding scale waiver that offers a partial waiver of assessments to individuals earning between 125% and 200% of the federal poverty level.

The Task Force also recommends providing for periodic review of assessment waivers and giving judges authority to reconsider or revoke waivers. That authority will combat potential fraud in obtaining assessment waivers and will enable judges to better tailor partial or complete waivers to individual needs as they may vary over time. . . .

8. The General Assembly should authorize a uniform assessment schedule for criminal and traffic case types that is consistent throughout the state.

The Task Force proposes enactment of the Criminal/Traffic Assessment Act, a statute that would codify in one place all of the current assessments imposed in connection with the disposition of traffic or criminal charges. Much like the proposed Court Clerk Assessment Act, the legislature would establish fees for various classes of cases (the Criminal/Traffic Assessment Act would create 12 such classes) and the Supreme Court would assign each type of case to the appropriate schedule based on the nature of the alleged offense. Unlike assessments under the Court Clerk Assessment Act, however, assessments imposed under the Criminal/Traffic Assessment Act would be uniform statewide, and counties and circuit clerks would play no role in setting the amounts of those assessments.

9. The General Assembly and the Supreme Court should authorize the waiver or reduction of assessments, but not judicial fines, imposed on criminal defendants living in or near poverty.

The Task Force proposes the enactment of an assessment waiver statute for criminal cases similar to that recommended for civil proceedings. Implemented by Supreme Court Rule, the waivers would *not* include assessments pertaining to alleged violations of the Illinois Vehicle Code or punitive fines or restitution ordered by the court.

10. The General Assembly and the Supreme Court should modify the process by which fines for minor traffic offenses are calculated under Supreme Court Rule 529.

Current Supreme Court Rule 529 provides that, upon a plea of guilty to a minor traffic violation not requiring a court appearance, all fines, penalties, and costs are to be set equal to bail. The Task Force proposes severing the link between bail and fine amounts. Instead, the Criminal/Traffic Assessment Act proposed by the Task Force fixes the total assessment at $150 in all minor traffic cases in which the defendant chooses to plead guilty without coming to court.

11. The General Assembly should routinely consult a checklist of important considerations before proposing new assessments, and should periodically consult the checklist in reviewing existing assessments.

The Task Force has developed a checklist to guide legislators in (1) developing or reviewing new assessment proposals, and (2) periodically reviewing existing assessments to determine whether they should be modified or repealed. The checklist is intended to help ensure that the improvements produced by the Task Force's other recommendations are not eroded over time and that future assessments decisions are well-considered, consistent, and transparent. . . .

V. Court Assessments: An Overview

The process by which court assessments are calculated has become more complex over time. What was once a simple dollar amount directly related to the cost of processing the case before the court has become a much more complicated calculation that can involve hundreds, or even thousands, of dollars divvied up among dozens of recipients. The following discussion describes the process by which court assessments are proposed, authorized, and ultimately assessed against litigants. The first two sections will describe the composition of civil and criminal assessments, respectively. The last section will explain the process by which assessments are proposed and authorized.

Civil Assessments

To participate in civil litigation, each party must first pay the applicable court assessments. While the total amount can vary widely—by both case type and the county in which the case is pending—each county follows the same basic formula in calculating civil assessments.

As shown in Figure 1, an assessment in a civil case is actually a composite of many different categories of fees, each one intended to defray the cost of a different aspect of the court's operations. A civil assessment is akin to a recipe that combines a number of ingredients. The first ingredient is the filing fee for plaintiffs or the appearance fee for defendants. The base filing fee or appearance fee is intended to reimburse the court for the cost of adding one more case to the docket. This fee currently varies in amount depending on case type and county size and forms the baseline cost to which everything else is added.

If either party elects to request a jury trial, that party incurs a jury demand fee. Next, a number of court add-on fees are added to the mix (e.g., court automation or document storage). The revenue collected from the court add-on fees is used to fund court operations.

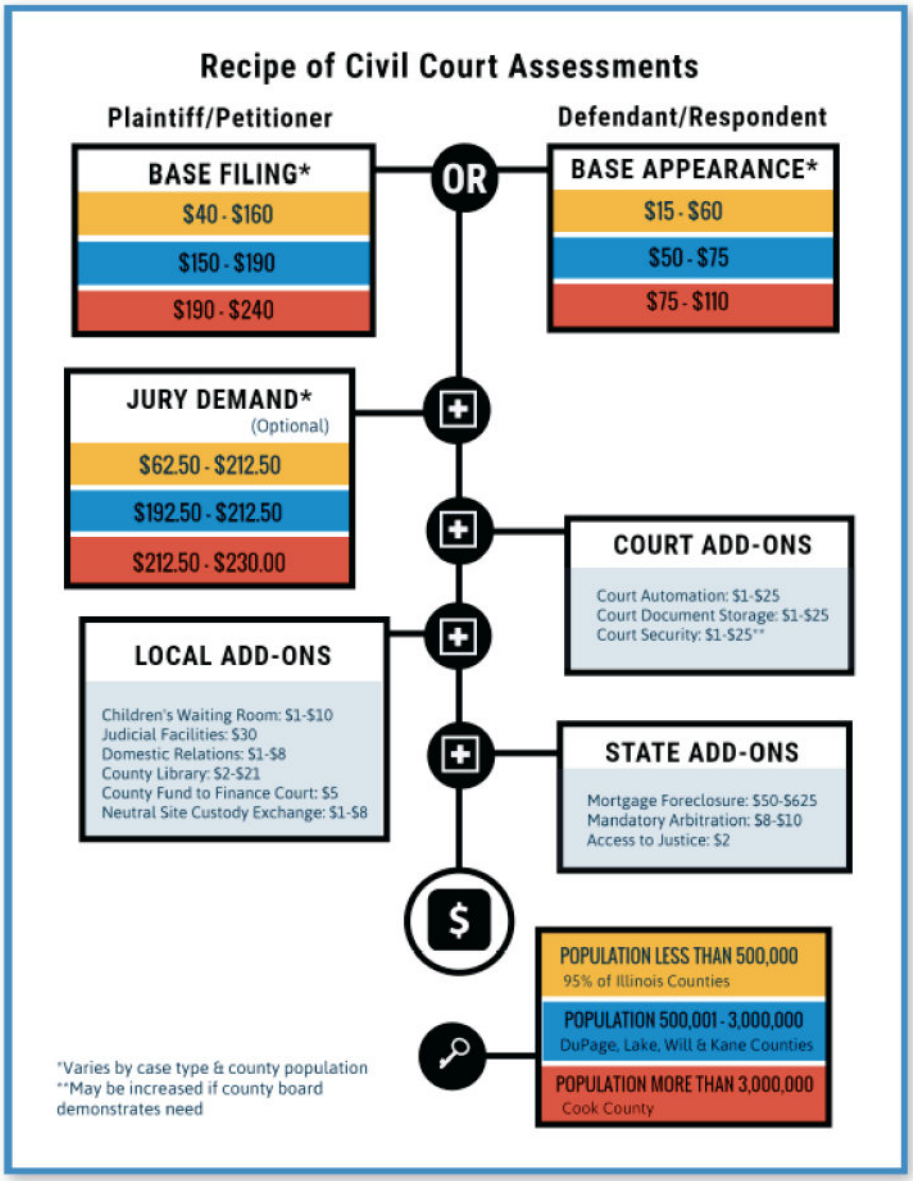
Local and state add-on fees are the final ingredients. The local add-on fees cover services that are specific to a particular jurisdiction (e.g., a law library fee or children's waiting room fee if the local courthouse has one), while the state add-on fees cover broader services (e.g., Access to Justice Fee). The revenue collected from local fees stay in the county where the case is heard, while the money collected from state fees go to the state. Some of these add-on fees are mandated by law in all counties and case types, but others are discretionary and, when imposed, vary in amount from county to county.

It should be noted that most fees are collected twice in each civil case, once from the plaintiff/petitioner and once from the defendant/respondent if he or she chooses to participate.

To understand how this works, consider the following example taken from a recent case involving a married couple in Will County who were seeking to dissolve their marriage. . . . [T]he petitioner paid a $190 base filing fee, $55 in court fees ($15 Court Automation Fund, $15 Document Storage Fund, and $25 Court Security Fee), $8 in state fees ($8 Mandatory Arbitration Fee), and $48 in local fees ($25 Judicial Facilities Fee, $13 Law Library Fee, $5 County Fund to Finance the Court, and $5 Neutral Site Custody Exchange). Once all of the extra court fees and state and local add-ons are calculated, the initial $190 base fee increased by almost 60%, to a total of $301.

The respondent in the Will County proceeding paid a total of $186 to participate in the lawsuit. The $186 in court assessments consists of a $75 appearance fee and the same court, state, and local add-on fees paid by the petitioner ($55 court add-on fees, $8 state add-on fees, and $48 local add-on fees). While the base appearance fee is only $75, the amount paid by the respondent more than doubled once the entire assessment was calculated.

[Figure 1]



Criminal/Traffic Assessments

In criminal and traffic proceedings, assessments are imposed at the conclusion of a case and are not a prerequisite for participation, as they are in civil litigation. Criminal and traffic assessments are a combination of mandatory fines and fees. Restitution and discretionary fines may be imposed by a judge as part of a criminal defendant's punishment and are not included in the court assessments; instead, those costs are tailored to the nature of the crime and the judge has broad discretion to set them within the parameters laid out by statute. Mandatory court fees and fines, however, are set amounts fixed by the county

board or authorized by state statute. The mandatory amounts are applied, without discretion, to all criminal defendants regardless of the specific facts of their cases.

Similar to a civil litigant's assessments, a criminal defendant's assessments are calculated by adding a variety of state and local charges to the baseline filing fee. Because fines also must be considered on the criminal side, the recipe for calculating criminal and traffic assessments involves more ingredients. The recipe is harder to generalize than that for assessments in civil cases because there is far more variance, both from county to country and from case type to case type. Nevertheless, it is still useful to examine the core costs included in the assessments imposed in criminal and traffic cases.

. . . [T]he first ingredient in calculating criminal court assessments is the base fee which is paid by the criminal defendant and varies by offense and county population size. Payment of the base fee essentially requires a criminal defendant to subsidize the prosecution's costs in bringing the case against him or her. Next, the defendant is charged the same court fees that civil litigants are assessed in every courthouse across the state (*e.g.,* court security and document storage). Depending on the jurisdiction and case type, the defendant may also have to pay fees to cover the cost of attorneys in the case, including both the costs of the public defender's office defending the case and the state's attorney's office prosecuting it, and to the police department to subsidize the costs of the arresting officer's time. In addition, a defendant is often assessed DNA and/or lab analysis fees, which cover the costs of any lab fees involved in prosecution of the case.

Mandatory state and local add-on fees and fines come next. These are amounts authorized by the state or county (some the same as the local add-ons for civil cases, some unique to criminal proceedings), and are usually relatively small in size but large in number. It is not uncommon for a traffic or criminal defendant to be charged dozens of these "minor" fines which can, in the aggregate, create a significant financial burden. The number of fines varies depending on location and case type, but every criminal and traffic defendant can expect to face some of them at the time of conviction. The total criminal assessment is calculated once all of the additional court, state, and local statutory fees are added to the base filing fee. However, this amount does not include any judicial fines or restitution ordered in the judge's discretion as punishment for the defendant's crime.

Consider the recent example of a defendant in McHenry County who was convicted of Driving Under the Influence (DUI) and fined $150 by the judge. That defendant paid a total of $1,625 in court assessments (in addition to the $150 fine imposed by the judge). . . . [T]his amount is calculated by assessing $75 as a base fee and then adding $90 in court fees ($15 Court Automation Fee, $15 Court Document Storage Fund, $30 Circuit Court Fund, $25 Court Security Fee, and $5 E-Citation Fee) and $12 for the cost of attorneys ($2 State's Attorney Automation Fee and $10 State's Attorney Fee). Finally, the defendant was assessed a series of 11 state and local add-on fees totaling $1,448 (including fees for Children's Advocacy Centers, Drug Court, Driver Education, Spinal Cord Research, and Roadside Memorial Funds, among others). All told, the assessments totaled $1,625,

increasing the base filing fee of $75 by more than 2,000%. The total assessments were more than ten times the $150 judge-ordered fine. This example highlights the disconnect that can occur between the discretionary fine ordered by a judge as punishment and the fixed costs—ostensibly not intended to punish—which are unrelated to the specific offense and set by statute.

On top of the judicial fine and court assessments, the defendant will also be charged for mandatory DUI treatment, a program which routinely costs several thousands of dollars. Similar requirements exist for defendants convicted on Domestic Violence charges. Some criminal charges also add on a surcharge, an additional cost calculated as a percentage of the fine, at the end of the case. For example, the Criminal and Traffic Surcharge provides that a court may assess an additional $15 fine for every $40 in fines assessed, or a 37.5% surcharge, against a defendant as part of the punishment. It is not uncommon for a criminal defendant to leave court with total expenses in the thousands of dollars.

As these examples demonstrate, under the current system court fees are complicated to understand and calculate. The final cost assessed against a litigant often bears little or no relation to the actual cost of the court in administering the case. This Report will explain in more detail what the consequences of the current system are and how they negatively impact court users and the courts, before proposing a number of recommendations to address these issues.

Legislative Process for Creating New Fees and Fines

Any county, branch of government, agency, or special interest group can lobby a legislator to sponsor a bill that would add a new cost to be assessed against civil litigants, traffic or criminal defendants, or both. All such bills must include a provision for distributing the revenue to the appropriate county, agency, or special interest group after it is paid by the litigants and collected by the court.

. . . [C]ourt assessments originate as bills which must be passed by the General Assembly and signed by the governor. Many bills then require the additional step of a county ordinance before the assessment can be collected. Statutory fines, however, do not require local approval; the law itself typically sets out to which entity the fine is remitted. Once the new law authorizing the fee or fine goes into effect, the clerk (for fees) or the judge (for fines) is tasked with assessing the cost against all applicable litigants. . . .

[T]here is no one entity responsible for proposing and administering court fees. Nor is there one statute that lays out all of the existing fees. Instead, dozens of different agencies have proposed fees that are codified in dozens of different statutes—which has allowed filing fees to take on broader and broader purposes that are less directly related to litigation and court administration.

Letter to the Illinois Senate and House of Representatives (Feb. 26, 2018)[*]
Lloyd A. Karmeier, Chief Justice of Supreme Court of Illinois

Dear Senator Mulroe and Representative Andersson:

I am writing you today to express support for House Bill 4594 and Senate Bill 2590.

It is my understanding that those bills, if enacted, would codify the recommendations of the Statutory Court Fee Task Force, created by authority of the Access to Justice Act. . . . Among those recommendations were enactment of an assessment schedule for civil cases that promotes affordability and transparency, changing the fee waiver provisions to permit financial relief from assessments in civil cases for residents living at or near the poverty line, establishing a uniform statewide assessment schedule for criminal and traffic cases, providing authorization for waiver or reduction of assessments imposed on indigent criminal defendants, and modifying the process for calculating fines for minor traffic offenses.

The foregoing recommendations were formulated with the direct input and support of the Administrative Office of the Illinois Courts and reflect the Supreme Court's considered position regarding the urgent and compelling need to reform the current tangle of fees, fines, surcharges and other costs faced by litigants in our court system. The Supreme Court commends you for sponsoring the legislation.

Lawful Collection of Legal Financial Obligations: A Bench Card for Judges (2017)[**]
National Task Force on Fines, Fees, and Bail Practices

Courts may not incarcerate a defendant/respondent, or revoke probation, for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or
2. The failure to pay was not the fault of the defendant/respondent and alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence.

[*] Letter from Lloyd A. Karmeier, Chief Justice, Supreme Court of Illinois, to Hon. John G. Mulroe, Illinois Senate, and Hon. Steven A. Andersson, Illinois House of Representatives (Feb. 26, 2018).

[**] *Excerpt from* National Task Force on Fines, Fees, and Bail Practices, LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES (2017), http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

If a defendant/respondent fails to pay a court-ordered legal financial obligation but the court, after opportunity for a hearing, finds that the failure to pay was not due to the fault of the defendant/respondent but to lack of financial resources, the court should consider alternative measures of punishment other than incarceration. *Bearden v. Georgia*. . . . Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed. . . .

Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

1. Adequate Notice of the Hearing to Determine Ability to Pay

Notice should include the following information:

a. Hearing date and time;
b. Total amount claimed due;
c. That the court will evaluate the person's ability to pay at the hearing;
d. That the person should bring any documentation or information the court should consider in determining ability to pay;
e. That incarceration may result only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
f. Right to counsel; and
g. That a person unable to pay can request payment alternatives, including, but not limited to, community service and/or a reduction of the amount owed.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

a. Whether the amount charged as due is incorrect; and
b. The reason(s) for any nonpayment (e.g., inability to pay).

3. Factors the Court Should Consider to Determine Willfulness

a. Income, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG);
b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits (Such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);
c. Financial resources, assets, financial obligations, and dependents;
d. Whether the person is homeless, incarcerated, or resides in a mental health facility;

e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
f. The person's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;
g. Other LFOs owed to the court or other courts;
h. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and
i. Any other special circumstances that may bear on the person's ability to pay.

4. Findings by the Court

The court should find, on the record, that the person was provided prior adequate notice of:

a. Hearing date/time;
b. Failure to pay an LFO is at issue;
c. The right to counsel;
d. The defense of inability to pay;
e. The opportunity to bring any documents or other evidence of inability to pay; and
f. The opportunity to request an alternative sanction to payment or incarceration.

After the ability to pay hearing, the court should also find on the record that the person was given a meaningful opportunity to explain the failure to pay.

If the Court determines that incarceration must be imposed, the Court should make findings about:

1. The financial resources relied upon to conclude that nonpayment was willful; or
2. If the defendant/respondent was not at fault for nonpayment, why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

Alternative Sanctions to Imprisonment That Courts Should Consider When There Is an Inability to Pay

a. Reduction of the amount due;
b. Extension of time to pay;
c. A reasonable payment plan or modification of an existing payment plan;
d. Credit for community service (*Caution*: Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);

e. Credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment); or
f. Waiver or suspension of the amount due.

Resolution on Criminal Justice Fines and Fees (2016)[*]
American Legislative Exchange Council

This Resolution supports ensuring that fines and fees imposed by the criminal justice system are reasonable, transparent, and proportionate, and not in conflict with the goals of improving public safety, reducing recidivism, ensuring victims receive restitution, and enabling offenders and ex-offenders to meet obligations to their families, especially children. . . .

WHEREAS, reasonable and proportionate fines are often appropriate to penalize conduct that is appropriately criminal and reasonable and proportionate fees can be appropriate mechanisms for offsetting taxpayers' costs for such functions as probation and drug court provided those who are simply unable to pay are not excluded on that basis; and

WHEREAS, excessive criminal justice financial obligations can contribute to unnecessary incarceration as some studies have found 20 percent of those in local jails are incarcerated because of failure to pay a fine or fee, which can make it even harder for the person to obtain employment and add to the burden on taxpayers; and

WHEREAS, excessive reliance on overly punitive fines and fees can encourage law enforcement and corrections decisions to be made on grounds other than public safety while undermining public confidence in the integrity of the criminal justice system; and

WHEREAS, people are sometimes arrested for failure to pay fine-only misdemeanors;

Therefore Be It Resolved that the first funds collected from an offender should go to victim restitution so that it is prioritized over money for government entities;

. . . [T]hat fees collected from offenders should be used to cover court costs, supervision, and treatment;

. . . [T]hat when imposing fines and fees the offender's ability to pay should be taken into account as one factor and arrangements such as discharging financial obligations through payment plans and community service should be offered;

[*] *Excerpt from* American Legislative Exchange Council, RESOLUTION ON CRIMINAL JUSTICE FINES AND FEES, https://www.alec.org/model-policy/resolution-on-criminal-justice-fines-and-fees/ (2016).

. . . [T]hat individuals who have demonstrated exemplary conduct, met all obligations of community supervision and otherwise would be discharged should not be kept on supervision solely because they owe funds that they are not able to pay and instead these obligations should be converted into a civil debt;

. . . [T]hat all jurisdictions should be fully transparent when it comes to the types and amounts of fines and fees they impose, the mechanisms used and costs involved in collections, and how the money collected is spent and percentage of the municipal budget;

. . . [T]hat failure to pay a financial obligation should not be grounds for revoking a person's probation or parole if the person lacks sufficient earnings and assets to make such payments.

. . . [T]hat incarceration should only be used as a last resort for failure to pay a fine for a fine-only misdemeanor offense such as a traffic violation and only after the person has failed to respond to repeated efforts to contact them and make arrangements such as a payment plan for discharging the debt.

. . . [T]hat jurisdictions should review misdemeanors to identify those that involve conduct which should not be regulated by government or should only be subject to civil penalties, and therefore would no longer trigger arrest and incarceration upon failure to promptly pay the obligation.

Fines, Fees, and the Poverty Penalty (2017)[*]

Fair and Just Prosecution

Prosecutors have a number of avenues to advance criminal justice debt reforms, including advocacy as elected criminal justice system officials and immediate actions in the courtroom and through their office's policies and practices. Meaningful reform will require invoking all of these approaches.

Advocating for Reform

1. Avoid conflicts of interest by discontinuing and discouraging the use of fines and fees as a criminal justice or court revenue stream. Prosecutors, courts, public defenders, and other justice system actors should not use fines and fees as a way to support programs or generate revenue; instead, those functions should be funded through a city and/or state's general fund. Using fees and fines for revenue generation raises serious, and potentially constitutional, conflict of interest concerns.

[*] *Excerpt from* Fair and Just Prosecution, FINES, FEES, AND THE POVERTY PENALTY, https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief_Fines.Fees_.pdf (2017).

2. Support legislation and other reforms to outlaw drivers' license suspension for nonpayment. License suspension is a counter-productive practice that harms an individual's ability to maintain lawful employment, increases the likelihood of arrest for driving without a license, and decreases the probability they will be able to work to pay back criminal justice debt. States across the country have already enacted legislation outlawing license suspension to punish non-payment. DAs can use their leadership positions to support and propel these reform efforts.
3. Advocate for ability-to-pay determinations prior to the imposition of criminal justice-related fines and before incarceration for non-payment. Ability to pay determinations can also give guidance on "sliding scale" debts based on an individual's income, using day fines—based on an individual's daily wage—or community service when payment is not possible. Community service should always be remunerated at or above the local living wage.
4. Seek to limit the long-term effects of fines and fees. A single fine can grow exponentially with unfair interest rates, and non-payment can result in disenfranchisement. When fines are levied after an ability to pay determination, advocate for interest rates to be limited to fair rates and never above 10%. Except possibly in cases of willful non-payment by individuals who can easily afford to pay, individuals should never be disenfranchised for criminal justice debt and prosecutors can and should take a leadership role in any opposition to such disenfranchisement.
5. Help facilitate the resolution of outstanding payments. When individuals have outstanding charges across agencies and/or jurisdictions—such as court costs and speeding tickets—governments should make it easy to resolve all fines and fees at once. This can include going into the community with representatives from various agencies to help individuals obtain a single consolidated—and, if appropriate, reduced—payment.
6. Advocate for legal representation for indigent clients, even in misdemeanor cases. Particularly in cases where conviction could bring onerous financial obligations, and always when cases could result in imprisonment, prosecutors should ensure individuals have adequate counsel who can consider the long-term impacts of a plea or conviction.
7. Use the DA office's convening power to help promote system change. While individual and direct advocacy with legislators and justice system actors is powerful, DAs also possess the ability to convene stakeholders to consider these issues and craft concrete solutions. Many of these issues cut across organizational and jurisdictional boundaries; coordinating reforms among disparate groups is essential. DAs should work with other justice system leaders to convene a multi-stakeholder group to address this important and timely issue, if no such body exists.

Office Policies and Practices

8. Consider a defendant's ability to pay before taking positions in relevant court proceedings. Require line prosecutors to make indigency inquiries before seeking, or declining to object to, fines or fees.

9. Implement ability to pay determinations in diversion programs. For diversion programs to reduce the probability of re-offense, they must aid in rehabilitation; contributing to debt does not meet that goal. Consider establishing a "sliding scale" fee structure for diversion programs that need to self-fund, including increasing fees on high-income individuals to offset lost revenue from fee reductions and waivers for low-income individuals.
10. Implement alternatives to civil citations, including quality of life citations. Imposing fines on low-income or indigent individuals who cannot pay fails to deter future unwanted behavior, costs court and law enforcement resources, and fails to address the underlying causes of the conduct. An alternative approach can include developing a treatment or services plan in conversation with the individual, which may include evidence-based drug or mental health treatment, housing assistance, or assistance securing government benefits.
11. Do not prosecute non-payment, and oppose the revocation of drivers' licenses for nonpayment. Circulate written guidance discouraging prosecuting non-payment and failure to appear at payment-related hearings and direct line prosecutors to oppose revocation of driver's licenses as a response to non-payment of fines or fees.
12. Identify and seek to cancel outstanding warrants for non-payment of fines and fees. Enforcing these warrants is costly, and, if only related to non-payment, diverts valuable resources from advancing public safety.
13. Consider the impact of mandated fines and fees when making charging decisions. Where fines and fees are mandated by law, ensure prosecutors are intentional about which charges to file and whether the associated financial obligations and any collateral impacts are deserved and advance public safety in each case.
14. Do not fine family members, including parents, for offenses they did not commit. This practice has no deterrent effect and violates the principle that individuals should only be penalized for their own actions.
15. Develop training for staff on the impact of fines and fees and how to effectively inquire about ability to pay.
16. Track and analyze data and racial impact. Missing and incomplete data obscure the impact fines and fees have. Work with courts to track payment rates, demographics of (non-)payment, consequences imposed for non-payment, frequency of ability to pay determinations, usage of fine revenues, and approval and denial of indigency protections.
17. Track the costs associated with collections and enforcement processes. Offices should enact budgetary processes to track the true costs associated with collecting fines and fees. Mechanisms to do so can include activity-based costing, a budgeting procedure which more accurately allocates overhead and staff time based on what each activity—such as collecting unpaid fines—requires. Thirty-five jurisdictions should also consider the opportunity cost of enforcement practices; when prosecutors, court staff, and administrative staff are working on collections, what work is being delayed or otherwise ignored?

18. Evaluate the benefits of diversion from formal adjudication and waiving of fines and fees. Waiving or lowering financial obligations, providing alternative payment mechanisms, and eliminating criminal justice system involvement altogether may yield better outcomes than the status quo. Partner with researchers to identify whether, among other outcomes, reduced charges affect employment (and tax payment), dependency on government services, and future justice system involvement.

Confronting Criminal Justice Debt: A Guide for Policy Reform (2016)[*]

Criminal Justice Policy Program, Harvard Law School

Across the country, onerous fines and fees pose a fundamental challenge to a fair and effective criminal justice system. By disproportionately burdening poor people with financial sanctions, and by jailing people who lack the means to pay, many jurisdictions have created a two-tiered system of criminal justice. Unchecked, these policies drive mass incarceration. . . .

Though court debt is often justified as a means of shifting the costs of the criminal justice system to those who "use" that system, that justification is flawed: the legal system is a public good that benefits all members of the community and thus should be funded from general revenue. Moreover, funding the court system through monetary sanctions can create pressure to raise increasing revenue through the courts. When states and localities use courts to fill gaps in their budgets, this leads to perverse incentives and erodes public trust in the judicial system.

The financial and social costs associated with criminal justice debt have had a disparate impact on the poor and people of color. Several factors drive these disparities. Among other things, when minor violations, such as driving with an expired registration or having an open container of alcohol, are disproportionately enforced in Black or Latino communities, these concentrated encounters with law enforcement lead to racial disparities in the imposition of fees and fines. More broadly, structural factors that lead to racial disparities throughout the criminal justice system will generate uneven enforcement of fees and fines. And because race intersects with class, with Black and Latino families disproportionately facing poverty, fees and fines that impose special hardships on impoverished individuals and communities will reinforce racially unequal outcomes.

When protests erupted in Ferguson, Missouri, after a police officer shot and killed Michael Brown, the Department of Justice's investigation revealed troubling practices by

[*] *Excerpt from* Criminal Justice Policy Program, Harvard Law School, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM, http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf (2016).

local authorities. The Ferguson Report vividly described how the municipality used its court system to generate revenue in a way that disproportionately burdened African Americans. The imperative to raise revenue was pervasive: one local official asked the chief of police to increase ticketing for traffic and minor ordinance violations in response to "a substantial sales tax shortfall." At the same time, policing and court practices in that jurisdiction had a disparate impact on African Americans residents—not only were African Americans stopped and searched by police at a higher rate than other residents, but they were also more likely to be issued multiple citations, have their cases persist for longer, face more mandatory court appearances, and have warrants issued for failing to meet court-ordered obligations. African Americans were also more likely to be issued citations that involved a high degree of discretion by local law enforcement. Although 67% of Ferguson residents are Black, African Americans received 95% of the Manner of Walking in Roadway charges and 94% of Failure to Comply charges.

The Ferguson Report highlighted the way that policing practices and routine courtroom procedures led African Americans to face higher fines, more warrants for failing to pay criminal justice debt, and greater exposure to the criminal justice system, but these problems are not unique to Ferguson. A recent California study found "statistically significant racial and socioeconomic disparities," in traffic stops, license suspensions for failure to pay criminal justice debt, and arrests for driving with a suspended license. These disparities are reflected in practices around the country.

In addition to these profound consequences for the fairness of the legal system, policies for imposing and enforcing criminal justice debt often do not make financial sense. One of the reasons for the proliferation of criminal justice debt is the perception by many policymakers at all levels of government that financial sanctions are necessary to fund the criminal justice system. For reasons described in greater detail below, the dependence of courts and other government actors on criminal justice debt is itself part of the problem. It can distort governmental decision-making in individual cases by creating conflicts of interests when judges, police officers, or other criminal justice actors make decisions driven by revenue-raising considerations. This can also create a vicious cycle, where courts, jails, probation agencies, and others whose budgets draw from these revenue streams worry about the consequences of reducing the flow of court-generated revenue. Faced with these pressures, legislatures may resist policy changes that remove a major funding mechanism.

But the perceived benefits of relying on revenue generated from criminal defendants are often illusory. Most states do not collect data on criminal justice debt at all. If they do, they only look at the amount of revenue collected without measuring the cost of collection or the burdens on the justice system that follow from aggressive enforcement of criminal justice debt. As a result, even from a purely fiscal perspective, criminal justice debt may not provide jurisdictions with net economic benefits. Moreover, as a method of funding government, fines and fees act as a regressive tax, with those who can least afford to pay facing the greatest liabilities. And jailing people for non-payment of debt that they

are too poor to afford violates the Constitution, a consideration that has inherent weight and that also imposes yet another layer of financial costs: jurisdictions across the country have faced expensive lawsuits for jailing people who are unable to pay criminal justice debt.

Because a well-functioning justice system generates broad-based social benefits, funding that system should be prioritized through ordinary budgetary processes rather than reliance on financial obligations enforced by courts or police. Yet the perceived necessity of deriving revenue through criminal justice debt raises a cautionary note for reformers: solutions that eliminate real or perceived funding streams for important governmental functions will have to include viable fiscal alternatives. . . .

This guide is organized around four overarching areas of potential reform. For each area, it provides an overview of the issue as well as several reform strategies that might be implemented through legislation, court rules, or executive action. The four areas are:

- Conflicts of interest: One of the most unsettling revelations in the Justice Department's Ferguson investigation was the deep and pervasive conflicts of interest facing actors throughout that city's criminal justice system. Simply put, municipalities and courts used fees and fines, enforced by the coercive power of the criminal justice system, to secure government revenue. These financial incentives drove the system's approach to law enforcement. Such conflicts of interest are not unique to Ferguson. Throughout the country, courts and other government actors face pressure to bring revenue into their own operating budgets through the imposition and enforcement of criminal justice debt. These incentives distort outcomes and undermine the public's faith in the system. This guide outlines several approaches for eliminating those conflicts of interest.

- Poverty penalties and poverty traps: Criminal justice debt, and the elaborate enforcement machinery often used to collect it, can have spiraling consequences for the most economically marginalized individuals. In some instances, enforcement of these obligations has the paradoxical effect of constraining an individual's ability to earn a living, thus undercutting the person's ability to pay court costs while ensnaring her and her family in a cycle of poverty and indebtedness. Other policies attach cascading costs and penalties to the collection practices geared toward indigent defendants, creating a situation where the poor systematically pay more. This guide discusses how to identify policies that operate as poverty traps or penalties and proposes reforms that would reverse those effects.

- The ability-to-pay determination: Too often, courts impose financial obligations that are simply beyond a defendant's capacity to ever meet. Constitutional law prohibits jailing defendants for non-payment of debts they cannot afford, which means courts must make an inquiry into a person's ability to pay *before depriving them of liberty for non-payment*. Sound policy considerations counsel in favor of

robust procedures for conducting such determinations not only at the enforcement stage but also when financial obligations are imposed. This guide outlines the baseline constitutional requirements and describes several best practices for ensuring such determinations are efficient and fair.

- Transparency and accountability: All of the reform strategies outlined in this guide will benefit from robust transparency measures that allow policymakers, advocates, researchers, journalists, and individual criminal defendants to understand exactly how court debt operates. Transparency in this context means laws designed to ensure data collection by government actors about the functioning of court debt (including its racial impact), analysis and disclosure of system-wide practices, and opportunities for individuals to request and receive documents reflecting policies and practices relating to criminal justice debt. . . .

VII. ALTERNATIVE FINANCING AND ALTERNATIVE NORMS

Robert D. Ebel & Yamen Wang, *Using User Charges to Pay for Infrastructure Services by Type of U.S. Government*, in FINANCING INFRASTRUCTURE: WHO SHOULD PAY? (Richard Bird & Enid Slack, eds., 2017).

David L. Sjoquist, DIVERSIFYING MUNICIPAL REVENUE IN CONNECTICUT: REPORT PREPARED FOR THE CONNECTICUT TAX STUDY PANEL (2015).

Bridges Fund Management, BETTER OUTCOMES, BETTER VALUE: THE EVOLUTION OF SOCIAL IMPACT BONDS IN THE UK (2017).

Harvard Kennedy School Government Performance Lab, NEW YORK STATE PAY FOR SUCCESS PROJECT: EMPLOYMENT TO BREAK THE CYCLE OF RE-INCARCERATION (2017).

New York State, Center for Employment Opportunities, & Social Finance, INVESTING IN WHAT WORKS: "PAY FOR SUCCESS" IN NEW YORK STATE; INCREASING EMPLOYMENT AND IMPROVING PUBLIC SAFETY; DETAILED PROJECT SUMMARY (2014).

Tanina Rostain, Digital Tools to Increase Access to the Legal System (2018).

J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017).

Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017).

Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

Jeremy Bentham, *A Protest Against Law-Taxes Showing the Peculiar Mischeviousness of all such Impositions as Add to the Expense of Appeal to Justice* (First Printed in 1793, First Published in 1795).

Judith Resnik & Dennis Curtis, *A Jacket, Worn*, in REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

Using User Charges to Pay for Infrastructure Services by Type of U.S. Government (2017)[*]

Robert D. Ebel and Yamen Wang

. . . Twenty years ago, current user charges accounted for 17.7% of United States state and local general revenues from own-sources. That put it well behind the revenue importance of both the sales and gross receipts (24.8%) and property tax (22.5%) categories and (nearly) the same as the sum of the individual and corporate income tax (17.8%).

Today, current charges account for 21.1% of state/local own source general revenues—eclipsing the income taxes (18.6%), nearly on par with the property tax (21.2%) and closing in on the sales and gross receipts category (23.6%).

Looking ahead there are three reasons why this trend is likely to continue. The first is the "fiscal squeeze" as the relative revenue productivity of the former "big three" (income, sales, and property) are being eroded due to a combination of short-term-after-short-term direct discretionary tax base reductions and the long term effects of changing economic, demographic and institutional trends. Second, in contrast to, or maybe due to, the present citizen "anti-tax" mood, state and local policymakers have become more permissive to the enactment of local fees and charges. Third, the technology for employing new charges is improving particularly in the area of motor vehicle-related activities as revenue collection is facilitated—e.g., smart parking meters that allow governments to accurately monitor and report on the use of public spaces; GPS tracking of vehicle weights and distances driven; highway congestion pricing.

Clearly, for purposes of revenue productivity user charges and fees matter. In addition, user charges matter since they best fit the "benefit (matching) principle" that state and local revenue policy should be designed so that the policy outcome is both efficient and equitable. As [one author] advises, "whenever possible, charge." Why? Because of their market price-like *quid-pro-quo* character, charges serve as both a rationing mechanism and a long term public expenditure planning tool. With respect to rationing, there is, for example, evidence the greater the local reliance on user charges to finance government services leads to a reduction in municipal expenditures; and in the case of highway use, reduced congestion. For similar efficiency reasons, the planner will turn to user charges to ascertain citizen willingness-to-pay that, in turn, can guide decisions regarding (i) the type and quantity of public services to promote or cut back on; (ii) determination of the efficient price for a given service; and (iii) a methodology for estimating the economic benefits generated.

[*] *Excerpted from* Robert D. Ebel & Yamen Wang, *Using User Charges to Pay for Infrastructure Services by Type of U.S. Government*, *in* FINANCING INFRASTRUCTURE: WHO SHOULD PAY? (Richard Bird & Enid Slack, eds., 2017).

And, at the same time, there is the happy outcome that in the direct *quid-pro-quo* direct charge case, the test of equity is met—that is, if the charge is well implemented (*inter alia*, a case for earmarking), those who benefit from a flow of services are the same person or group of persons who pay the costs of the service. . . .

User Charges: Define and Measure

. . . [A] charge (and fee, the terms are used together here) is a price paid by an individual or group of people who choose to access a service or a facility.

. . . Accordingly, for purposes of using an intergovernmentally consistent set of data on how governments employ user charges for paying for the flow of publicly provided infrastructure services "user charges" refer to, and are measured by, the Census definition of *Current Charges:*

> Amounts received from the performance benefiting the person charged, and from sales of commodities and services except liquor store sales. Includes fees, assessments and other reimbursements for current services, rents and sales derived from commodities or service furnished. Current Charges exclude intergovernmental revenues, interdepartmental charges, license taxes (which relate to privileges granted by the government) and utility revenues.

Note that this definition encompasses three important features. The charges are (i) "own" revenues; (ii) part of a current/operating budget, and (iii) payments for a flow of governmentally provided infrastructure services. . . .

B. Current Charges in the State/Local General Revenue System (Table 1 . . .)

To start to lay out the role of current charges in infrastructure finance, Table 1 provides a two-decade perspective as to the quantitative importance of charges relative to total state and local general revenues as well as to the other major revenue categories. The table presents the US$ amounts and the ratio of current charges to total general revenues by both type of general revenue category and for three representative years (1993, 2002, and 2013). Right at the start, there are some interesting findings:

- For 2002 and 2013 total CC collections are greater than the sum of the collections from individual plus the corporate net income tax. . . . The income tax numbers further attest to the findings elsewhere that at the same time the current charges are increasing as a share of own source revenues, the corporate net income tax is disappearing from the state revenue scene: from a high of about 9.5% in 1997 to less than 5.0% in 2016.

- Moreover, over the period shown, total current charges have not only been increasing relative to Sales and Gross Receipts (the ratio of CC/Sales and Gross Receipts has increased from 71% in 1993 to nearly 90% in 2013), but also

surpassed the yield of the General Sales Tax. And, as of 2013, total current charge collections are approaching parity with the property tax.

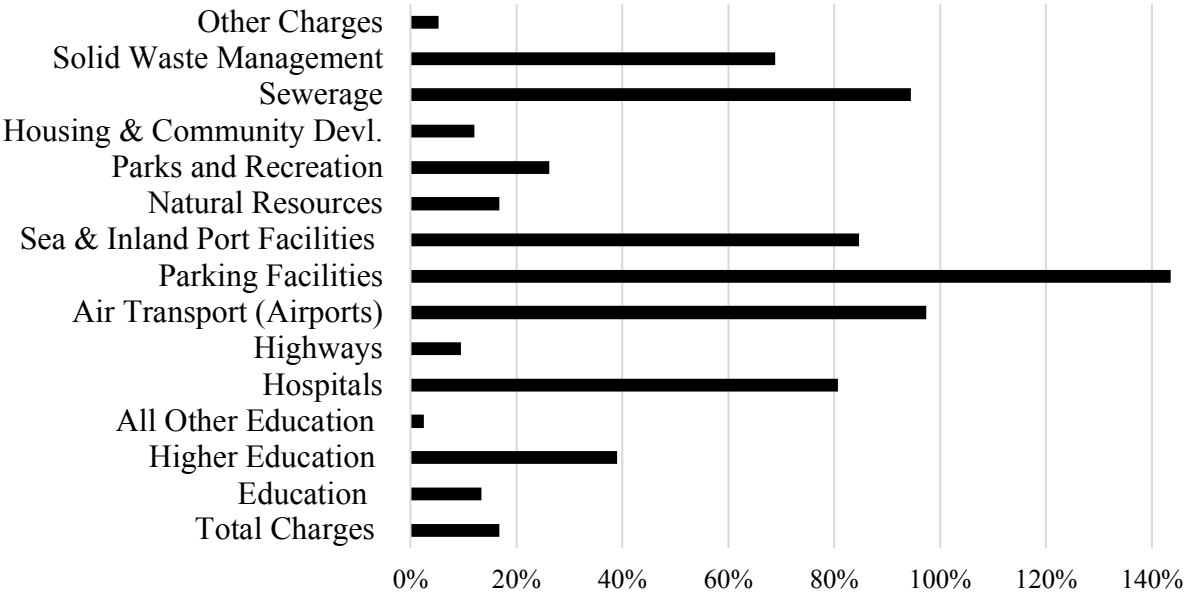
So much for the conventional public finance wisdom that the taxes on income, sales and gross receipts, and property make up the "big three" of state and local own source revenues. . . .

Table 1. State and Local Current Charges as Component of General Revenues, Selected Years

Type of Revenue	2013		2002		1993	
	$ m	% of General Revenue	$ m	% of General Revenue	$ m	% of General Revenue
General Revenue	2,690,427	100.00%	1,684,879	100.00%	1,041,567	100.00%
Intergovernmental from Federal	584,652	21.73%	360,546	21.40%	198,591	19.07%
General Own Source Revenue	2,105,775	78.27%	1,324,333	78.60%	842,977	80.93%
Taxes	1,455,499	54.10%	905,101	53.72%	594,300	57.06%
Property	455,442	16.93%	279,191	16.57%	189,743	18.22%
Sales & Gross Receipts	496,439	18.45%	324,123	19.24%	209,649	20.13%
General Sales	327,066	12.16%	222,987	13.23%	138,822	13.33%
Selective Sales	169,373	6.30%	101,136	6.00%	70,827	6.80%
Individual Income Tax	338,471	12.58%	202,832	12.04%	123,235	11.83%
Corporate Income Tax	53,039	1.97%	28,152	1.67%	26,417	2.54%
Motor Vehicle License	25,080	0.93%	16,935	1.01%	12,402	1.19%
Other Taxes	87,027	3.23%	34,087	2.02%	32,853	3.15%
Charges and Miscell. Revenue	650,276	24.17%	419,232	24.88%	248,677	23.88%
Current Charges	444,153	16.51%	253,189	15.03%	149,348	14.34%
Education	117,647	4.37%	72,291	4.29%	41,926	4.03%
Hospitals	129,820	4.83%	65,404	3.88%	41,140	3.95%
Highways	15,171	0.56%	8,196	0.49%	4,929	0.47%
Air Transport (Airports)	20,596	0.77%	12,331	0.73%	6,648	0.64%
Parking Facilities	2,734	0.10%	1,402	0.08%	1,002	0.10%
Sea & Inland Port Facilities	4,605	0.17%	2,685	0.16%	1,739	0.17%
Natural Resources	4,842	0.18%	3,001	0.18%	2,148	0.21%
Parks and Recreation	9,916	0.37%	7,021	0.42%	4,151	0.40%
Housing & Community Devl.	6,195	0.23%	4,296	0.25%	3,354	0.32%
Sewerage	50,689	1.88%	27,112	1.61%	15,998	1.54%
Solid Waste Management	16,843	0.63%	11,192	0.66%	7,303	0.70%
Other Charges	65,094	2.42%	38,258	2.27%	19,008	1.82%
Miscellaneous General Revenue	206,124	7.66%	166,043	9.85%	99,329	9.54%
Interest Earnings	50,837	1.89%	67,161	3.99%	50,806	4.88%
Special Assessments	7,154	0.27%	4,779	0.28%	2,664	0.26%
Sale of Property	3,685	0.14%	2,187	0.13%	842	0.08%
Other General Revenue	144,447	5.37%	91,916	5.46%	45,017	4.32%
Exhibit: Utility Revenue*	157,747		102,352		61,602	
Exhibit: Liquor Store Revenue*	8,903		5,065		3,641	
Exhibit: Insurance Trust Revenue*	562,791		14,295		163,937	

Source: U.S. Census Bureau, 2013 *Census of Governments: Finance*, *State and Local Government Finances* . . .

Chart 2. 2013 US State & Local Current Charges by Type of Infrastructure as Percentage of Current Expenditure



. . .

Diversifying Municipal Revenue in Connecticut:
Report Prepared for the Connecticut Tax Study Panel (2015)[*]

David L. Sjoquist

. . . This report considers revenue diversity among towns in Connecticut and provides an analysis of three policy options for increasing local revenue diversity: adoption of local sales taxes, adoption of local income taxes, and increases in fees and charges. Each of these could also reduce local government reliance on property taxes. There are other policies that could be adopted that would increase revenue diversity and/or reduce reliance on the property tax, for example, a state grant program for towns or a property tax circuit breaker. . . .

Towns in Connecticut are not allowed to use local sales or local income taxes, and are second to the last among all states in terms of their relative reliance on user charges and fees. The result is that local governments in Connecticut have the least diverse revenue structure of any state, and consequently rely relatively more heavily on property taxes than other states. In 2012, 88.0 percent of local government own source revenues in Connecticut were derived from property tax revenue (the highest percent of any state). Local

[*] *Excerpted from* David L. Sjoquist, DIVERSIFYING MUNICIPAL REVENUE IN CONNECTICUT: REPORT PREPARED FOR THE CONNECTICUT TAX STUDY PANEL (2015).

governments in Connecticut are second to last among all states in terms of their relative reliance on user charges and fees.

Other states allow local governments to adopt local option taxes. As of 2012, local governments in 34 states relied on sales taxes. The reliance on local sales taxes varies; local sales tax revenue as a share of local tax revenue ranged from 1.6 percent to 48.5 percent. In 2012, local income taxes were imposed in 12 states; local income tax revenue as a share of local tax revenue ranged from less than one percent to 33.3 percent. . . .

The principal reasons for adopting a local option tax or increasing charges and fees are that they will diversify the local revenue structure and can reduce the property tax burden. The Advisory Commission on Intergovernmental Relations (1988) outlined several arguments supporting or justifying local revenue diversification. Allowing use of alternative revenue sources would allow towns to better capture local revenue raising capacity, would reduce reliance on the property tax, and would collect revenue from tourists and commuters who impose costs on local governments but do not pay any property taxes to the local government. There are counter arguments, the principal one being that if a local government gains access to additional revenue options, it will increase revenue, and thus expenditures, beyond what citizens truly desire; however, the empirical evidence on this possibility is mixed. In addition, property tax revenues are less cyclical than sales and income tax revenues, and the property tax base is less geographically mobile than the bases for sales and income taxes. . . .

In addition to generating revenue that can be used to reduce property taxes, charges and fees can serve as signals of the cost of a public service, similar to prices for private goods. If charges vary with the amount of service consumed, individuals are expected to adjust their consumption of these services, relating the benefits they receive to what they pay. Charges thus act as a rationing device in the same way that prices ration goods and services in the private sector. In addition, charges can be used to reduce congestion when the demand for a public service exceeds capacity.

A major issue with charges is equity. One the one hand, for public services that do not involve distributional concerns, charges ensure that those who benefit from the public service pay for it. Based on the benefit principle of equity, this would be equitable. This is also relevant for services consumed by nonresidents, who might not pay taxes commensurate with the cost of providing those services. On the other hand, there are potential vertical equity issues that may arise. For many public services the user charges would constitute a larger percentage of income for lower income individuals and therefore may be regressive. The extent to which this is the case would vary with the nature of the public services.

There are charges or fees that do not vary with the use of the public service. For example, the fee for solid waste collection is generally a flat amount, independent of the amount of solid waste generated. Such a fee is not associated with the cost of providing the service. In this case, the fee is essentially equivalent to a flat per household tax. However,

some cities have adopted a fee structure that depends on the volume of solid waste that a household generates. . . .

Better Outcomes, Better Value
The Evolution of Social Impact Bonds in the UK (2017)[*]
Bridges Fund Management

. . . Traditionally, governments have contracted third-party service providers on a 'fee for service' basis—so commissioners prescribe and pay for a particular service that they believe will lead to a desired social outcome (or outcomes).

More recently, a number of governments have started to introduce elements of 'payment by results' or 'pay for success' when commissioning services—so providers only get paid in full if they deliver the desired social outcomes.

Social impact bonds (SIBs) are a tool to help impact-driven providers deliver these 'outcomes contracts', by giving them access to project financing and management support from socially-minded investors. For governments, this can broaden the pool of skilled providers and, potentially, increase the chances of the service being successful.

. . . At Bridges, we raised the world's first fund dedicated entirely to investing in SIB-funded outcomes contracts. Since 2012, we have directly invested in 17 of these contracts—almost half of the total commissioned by the UK Government to date.

We did so because we believed that a greater focus on outcomes would give providers the flexibility and the incentive to iterate constantly in pursuit of better performance. This, in turn, would stimulate more entrepreneurial solutions to some of our most intractable social problems—something we've been looking to achieve through our funds for more than a decade.

It's now seven years since the first SIB-funded outcomes contract was launched in the UK. During this time, the model has continued to evolve, and dozens more SIBs have been developed around the world. But while the concept has attracted lots of attention—both positive and negative—it's only now that we're starting to accumulate a body of data about whether this approach can actually work.

From a Bridges perspective: 2015 saw the first three of our SIB-backed programmes complete their original contracts. All three delivered positive social outcomes,

---

[*] *Excerpted from* Bridges Fund Management, BETTER OUTCOMES, BETTER VALUE: THE EVOLUTION OF SOCIAL IMPACT BONDS IN THE UK (2017), http://www.bridgesfundmanagement.com/wp-content/uploads/2017/08/Bridges-Better-Outcomes-Better-Value-2017-print.pdf.

helping disadvantaged children re-engage with school, gain new skills and qualifications, and develop greater empathy and resilience. Two of these programmes—both of which came in well ahead of their impact targets—have already been recommissioned for a second iteration (at a lower cost to Government).

In both cases, precisely because the programmes outperformed their outcome targets, investors achieved positive financial returns and used these to support follow-on SIBs.

More importantly, we're starting to see trends and patterns emerge. Based on what we've learned from these early contracts, we have come to believe that:

> 1. Outcomes contracts have considerable potential to help governments drive positive social change by improving performance, increasing efficiency and re-aligning incentives in existing service provision—not only by facilitating and de-risking innovative new services.
>
> 2. There are some key policy areas in the UK where outcomes contracts are already delivering better results—and where there is already strong support from central Government.
>
> 3. Outcomes contracts (whether SIB-funded or otherwise) should be designed to provide better value to commissioners than any available alternative. This means pricing them in such a way that unless the programme delivers demonstrably better results than the commissioner could get elsewhere, the return to investors should be zero. We think this Base Case Zero approach (as we call it) is essential in order for this model to succeed at scale.

. . . The UK government alone currently spends more than £230bn a year on what might loosely be termed 'human services', from healthcare to children's services to rehabilitation. About one-third of that total is delivered by third-party providers—but only a tiny proportion (roughly £3bn p/a) involves any kind of payments for outcomes.

Our experience to date suggests that introducing more outcomes-based payment mechanisms within these specific policy areas could help commissioners improve service delivery and get a better understanding of which approaches work best. Over time, this should help governments achieve better value for public money and, most significantly, better outcomes for some of the most vulnerable people in our society. That's an opportunity we cannot afford to ignore. . . .

Given their payment structure, outcomes contracts typically create a need for working capital to fund the provider's work. One way to finance this is via a social impact bond (SIB). SIBs are a form of aligned capital where investors' financial returns are linked directly to the provider's success in achieving positive social outcomes. This typically comes from social investors who share the commissioner's goals, understand the social

context and are willing to accept the associated risks—in a way that other sources of private financing may not. SIB investors can also offer providers hands-on management support (either directly or via specialist advisors) as providers bid for and deliver outcomes contracts, helping to build their organisational capacity. Critically, this capital and support is available to a wide variety of organisations, regardless of size or structure. This should mean that commissioners can choose from a much broader pool of providers than they would otherwise have been able to, while strengthening the local market—with a view to ensuring that these services are provided by those with the best solutions, not simply those with the deepest pockets. All of these factors should make these contracts more likely to succeed. So for commissioners, the potential value of this approach is not just about transferring financing risk; it's about improving outcomes, and ensuring that they only pay for the outcomes delivered (the so-called 'fidelity guarantee'). . . .

New York State Pay for Success Project:
Employment to Break the Cycle of Re-Incarceration (2017)[*]

Harvard Kennedy School
Government Performance Lab

The Government Performance Lab (GPL) provided pro bono technical assistance to help New York State (NYS) launch the Pay for Success (PFS) initiative in December 2013. This project is providing comprehensive job training services to 2,000 individuals at higher risk of recidivism over five and a half years.

The Challenge: In December 2013, NYS set out to address an issue that governments across the country are struggling with—high rates of recidivism amongst individuals exiting prison. In 2013, nearly 24,000 inmates were released from prison in NYS. More than half of these individuals were classified as higher risk and estimated to spend an average of 460 days back in prison or jail within the first five years after their release. High recidivism rates cost the state millions of dollars a year, demonstrating that more needs to be done to aid individuals transitioning out of incarceration.

The Project: The GPL worked with NYS and several project partners to develop a social impact bond (SIB) project to identify 2,000 incarcerated individuals at higher risk of recidivism exiting prison to community supervision in both New York City (NYC) and Rochester and connect them with comprehensive job training services. The intervention, provided by a nonprofit called the Center for Employment Opportunities (CEO), trains participants on life skills, provides them with work experience through subsidized transitional employment, and offers them job placement support to obtain and maintain

[*] Harvard Kennedy School Government Performance Lab, NEW YORK STATE PAY FOR SUCCESS PROJECT: EMPLOYMENT TO BREAK THE CYCLE OF RE-INCARCERATION (2017) ,https://govlab.hks.harvard.edu/files/siblab/files/nys_pfs_project_feature_0.pdf.

unsubsidized employment. The project is being evaluated using a randomized-control trial, the gold-standard of evaluation. Payable outcomes include increased employment, reduced recidivism, and engagement in transitional jobs.

Over 40 different private and philanthropic investors raised $13.5 million in funding to support the project. If the program is successful, meaning that public sector savings and social benefits are realized due to the intervention, then investors are repaid by NYS with a return on their investment to compensate them for the cost of their capital. NYS does not make any payment toward the project unless, when the treatment group is compared to the control group, recidivism is reduced by a minimum of 8 percent or employment is improved by a minimum of 5 percentage points.

Systems Transformation: The NYS project offers a case study in how governments can use SIBs as a transformative management tool that disciplines government to carefully plan all aspects of a project upfront and to sustain attention on the success of the project until completion. In particular, the project has:

1. Re-engineered the handoff between NYS and service provider to ensure individuals at higher risk for recidivating are the ones receiving these particular employment services. As part of the planning phase, NYS analyzed the size and historical rates of recidivism and employment for various populations in order to calibrate the target population for whom the program would be most effective. This process was largely informed by a 2012 MDRC study, which demonstrated that CEO is most successful for high risk individuals who were recently released. Using these analyses and CEO's eligibility preferences, NYS and partners then specified the criteria to identify the target population as they exit prison and set up a system to track key outcomes. NYS and CEO developed a referral mechanism to make sure that higher risk individuals are identified prior to their release and connected to the program by their PFS trained parole officer as soon as they exit prison. This referral process was designed to ensure that CEO was providing services to the appropriate target population—that the right people were receiving the right services at the right time.

2. Set up ongoing, frequent collaboration between project parties to use real-time data to solve referral and enrollment problems. As part of the project, research and field staff actively monitor key outcomes and review current data in order to improve program delivery. Project partners meet biweekly to track data such as the numbers of eligible individuals released from prison, connected to the program via meetings with their PFS parole officer and CEO recruitment specialists, and enrolled with CEO. If there are implementation challenges or targets that aren't being met, parties can flag them immediately, jointly develop solutions, and agree on course corrections according to a pre-agreed decision-making protocol that is transparent and inclusive of the various stakeholders. Due to this structure, even three years

into the project, stakeholders have been paying close attention to the project's implementation and have acted to devise and implement solutions in real-time.

3. Implemented a rigorous evaluation to determine the program's effectiveness and inform future funding decisions. As part of the evaluation design, NYS is referring a randomly selected subgroup of the target population to the program since sufficient funding is not available to serve the entire eligible population. This enables NYS to compare the results of those referred with the results of those that are not referred as part of a randomized evaluation. This rigorous evaluation may help NYS determine whether the program is effective in order to inform future funding decisions. By paying for the program only if it works, the government is shifting its spending from remedial services toward preventive services that work while better serving a higher risk population.

Investing in What Works: "Pay for Success" in New York State;
Increasing Employment and Improving Public Safety;
Detailed Project Summary (March 2014)[*]

New York State, Center for Employment Opportunities, & Social Finance

This document provides an overview of the first State-led Pay for Success and Social Impact "Bond" (SIB) project in the nation including:

- The rationale for choosing the Pay for Success model to address employment and recidivism
- The project's intervention and evidence of its ability to achieve social impact
- The metrics for evaluating the intervention's effectiveness
- The methodology used to calculate performance-based payments

The Appendices include the technical detail behind each of these components. Complete information can be found in the actual Pay for Success Intermediary Contract.

. . . Each year, nearly 700,000 individuals are released from prisons nationwide. Many of these formerly incarcerated individuals will continue to engage in criminal behavior and return to prison or jail ("recidivate"): two-thirds are rearrested and half return to prison within three years of their release. Some of these individuals are at higher risk of recidivating than others. Those that have more serious prior convictions (such as violent assault), fewer connections in the community (such as ties to family), and less support

[*] *Excerpted from* New York State, Center for Employment Opportunities, & Social Finance, INVESTING IN WHAT WORKS: "PAY FOR SUCCESS" IN NEW YORK STATE; INCREASING EMPLOYMENT AND IMPROVING PUBLIC SAFETY; DETAILED PROJECT SUMMARY (2014), https://govlab.hks.harvard.edu/files/siblab/files/nyspfsprojectsummary.pdf.

(such as a residence and job) upon their return are considered to be at higher risk of returning to prison or jail. . . .

Recognizing the importance of employment in reducing recidivism, strengthening families, stabilizing local communities and jumpstarting local economies, Governor Andrew M. Cuomo has led a paradigm shift in how NYS assists the formerly incarcerated and connects them to jobs. The resulting "Work For Success" initiative seeks to improve the process by which those who have served time in prison are trained and connected to businesses looking to hire. The initiative matches selected higher and lower risk individuals to the right employment program after incarceration. . . .

To complement the broader Work For Success initiative, focus efforts on delivering results for the hardest-to-serve formerly incarcerated individuals, and to ensure that NYS resources are *only expended* if results are achieved, the State has employed an innovative mechanism to contract for and finance recidivism and employment services for high-risk formerly incarcerated individuals: a "Pay for Success" ("PFS") contract funded with a Social Impact "Bond" ("SIB") . . . .

Announced in December 2013, the NYS PFS/SIB project ("the project") was the first state-led PFS/SIB project to launch in the United States and the largest in the world at the time of launch.

The five and a half year project will expand a comprehensive employment intervention to serve 2,000 formerly incarcerated individuals in NYC and Rochester with the goal of increasing their employment and thus reducing recidivism. . . .

The SIB-financed intervention (described in further detail in the "Intervention" section) previously underwent a rigorous, independent randomized control trial ("RCT") evaluation to determine its impacts on participants' rates of employment and recidivism. The evaluation was conducted by MDRC, a nonprofit, nonpartisan social and education policy research organization. The MDRC study found that CEO's program reduced recidivism by between 9 and 12 percent among all participants and by between 16 and 22 percent among those "recently released" or those who enrolled within three months after release from prison. The MDRC study also showed that CEO reduced days incarcerated by 30 percent for a high risk sub-population, or those individuals at high risk of recidivism (based on a risk index determined by age, number of prior convictions and other static factors). . . .

Digital Tools to Increase Access to the Legal System (2018)
Tanina Rostain

There are several types of digital tools that have emerged in the access-to-justice eco-system:

- software applications (or "apps") that give users tailored guidance about the law and create pleadings and documents;
- portals intended to create a digital infrastructure that knit digital and brick and mortar resources together;
- enhanced legal search capabilities that allow users to find legal resources easily (think Google search algorithms that bring up reliable legal resources in response to plain language queries);
- and data analytics and geo-mapping tools to help legal service providers assess legal needs and identify available resources to address them.

User-facing apps fall into three categories (note that the tools below were built by different organizations):

1. Apps to Increase the Effectiveness of Legal Service Providers
   The Virginia Legal Aid Society Eligibility System (https://applications.neotalogic.com/a/vlas-eligibility) helps users seeking legal help to determine if they are eligible for the organization's services. To date it has saved the organization tens of thousands of hours of intake phone time.

   The DC Affordable Law Firm Intake and Eligibility Questionnaire (https://applications.neotalogic.com/a/alf-intake) determines eligibility and collects intake information.

2. Self-Help Apps
   IMMI (https://www.immi.org/) allows users to determine whether they are eligible to stay in the United States under a variety of programs.
   JustFix (https://www.justfix.nyc/) allows NYC tenants to document and bring complaints about substandard housing conditions.

   Maryland Expungement (https://www.mdexpungement.com/) allows users to determine whether their criminal convictions are expungable and file for expungement.

   LawHelp.org's app (https://www.lawhelp.org/dc/resource/self-help-court-form-answer-in-a-residential?ref=9SnHF) allows a tenant to file an answer in an eviction case in D.C.

3. Apps for Non-Lawyer Service Providers or Volunteers
   The Risk Detector (https://applications.neotalogic.com/a/risk-detector) was built for use by social workers serving the home bound elderly. Loaded onto a tablet, it allows a social worker during a visit to conduct a legal health check to identify potential landlord-tenant, consumer debt, financial exploitation, or physical abuse problems and connect the client to legal services.

Improving Access to Justice in State Courts with Platform Technology

J.J. Prescott[*]

. . . Until a few years ago, state courts seemed stuck with an in-person, face-to-face model designed for complex disputes, even though, in practice, an enormous fraction of their cases (and overall workload) have few or none of the traditional hallmarks of complexity. When a court uses this ill-fitting approach, the average experience of a litigant "going to court" amounts to showing up at the beginning of the day—one usually dictated by the court—and waiting in long lines to see the official with the power to resolve the matter in question. Sometimes unlucky litigants are instructed to return another day to try again. But if a litigant manages to see the right person, the decisionmaker will typically consult a few papers for a few moments, ask a question or two, and then make a proposal or announce a judgment—i.e., once a hearing actually begins, it is over almost at once. The outcome of the issue is generally predictable for experienced players, as the decision is determined by standard pieces of information contained in the case file or provided by answers the litigant supplies to a set of boilerplate questions. All of this sounds very inefficient and frustrating for those litigants who actually make it to court. But more significant from an access-to-justice perspective are the millions of people every year who are unable or just choose not to spend a day in court, despite having questions, concerns, or objections, and who accordingly feel themselves effectively shut out of the system. This is particularly true for those facing outstanding warrants for unpaid fines and fees.

Reforms aimed at improving access to justice have taken many forms over the years, but most are off the mark for these "access-to-courthouse" challenges, which I will describe in greater detail below. Mitigating access hurdles by adding courthouses or decisionmakers is expensive and thus politically unrealistic, and other barriers limiting access seem inherent in the face-to-face model of dispute resolution (e.g., fear of public speaking). Moving beyond the face-to-face model of dispute resolution by reforming the way in which people "go to court," however, has to date received much less attention—basically, for want of an alternative model that might serve as a substitute. This is changing. Advancements in online platform technology have made it possible to reimagine "going to court" as occurring online, and courts in a handful of states have attempted to improve access in precisely this way. These courts have adopted online case resolution systems that

[*] *Excerpted from* J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017).

permit litigants with minor disputes to engage with prosecutors and judges and even private parties through an online "platform." Parties can access an adopting court using the platform anytime and anywhere, and communication, negotiation, and resolution can occur asynchronously over hours or days. Online platforms collect essential information efficiently and can be individualized for each type of case to improve litigant understanding and comfort.

There are many a priori reasons to believe that using platform technology to "open up" state courts will make using courts easier and faster for litigants, which in turn will make it much more likely that individuals will exercise their legal options in the first place. To date, however, there has been little rigorous empirical evidence to support this proposition. And even if adding an online platform as an access opportunity seems unlikely to make things worse, getting a handle on the potential magnitude of any improvements in access or efficiency is important. Policymakers and judges can use this information as they gauge the attractiveness of such innovation and can then weigh those benefits in light of implementation costs and other spending priorities as well as alternative access-to-justice reform proposals.

The goal of this Article is to examine the access consequences of introducing dispute resolution platform technology in state courts. An evaluation of a range of outcomes in tens of thousands of cases in a half-dozen representative state courts over a couple of years reveals substantial improvements on metrics that relate directly to access to justice and efficiency. I focus on case duration (i.e., the time it takes for a case to be closed or for all fines or fees to be paid), the percentage of fines and fees due that are paid at case closure, and the case default rate. There are many other measurable outcomes that an exhaustive analysis would incorporate, including the amount of effort and time it takes for a litigant to resolve a dispute and whether the resolution of the dispute is accurate or satisfactory. While I am unable to observe outcomes of this sort in my data, there are good reasons to believe that the outcomes I can analyze are valuable proxies for pivotal dimensions of access to justice (not to mention court efficiency). It is also true that there are other "softer" considerations a comprehensive assessment of access-to-justice reforms ought to include. But the evidence I offer in this Article should nonetheless nudge policymakers toward adopting platform technology, at least for minor cases, even while they remain open-minded to advocates who contend for better access to attorneys and greater availability of materials furnishing legal guidance. . . .

II. Platform Technology

Platform technology refers to technology that provides the base on which other processes can be built and applied. A courthouse is a platform, although we often use what amounts to an equivalent term in this context—a forum. We can elect to resolve (or not resolve) all sorts of disputes in a courthouse and devise all sorts of processes to arrive at socially acceptable resolutions of those disputes. If the goal is to end a dispute or facilitate an agreement, a courthouse serves as a platform by bringing all of the necessary parties to

the same physical location so they may efficiently and effectively exchange arguments, evidence, and information and agree to a particular outcome or resort to what is hopefully an objective third-party determination. Legal process aims to ensure that all of these activities are efficient in terms of time and resources and that they are likely to lead on average to an objectively accurate outcome or at least an outcome that society views as fair. A platform and its associated procedures are optimized in part by taking into account the features of the other. For instance, courtrooms are physically designed with adversarial or inquisitorial procedures in mind, and governing procedures (e.g., the order in which evidence is presented) likewise take into account that parties will be together in the same place and at the same time.

In the court context, therefore, online platform technology is just technology that attempts to accomplish what courthouses seek to achieve but that happens to operate online. It would be a mistake to describe platform technology in this context as creating an "online court," a term that connotes a narrower idea. One can imagine an online court as technology that tries to import as many features of a traditional face-to-face proceeding as possible to an online setting. A mirroring approach, however, would not take full advantage of online technology. For instance, courthouses naturally direct everyone to be in the same physical room at the same time because communication between parties arriving at different times and with long lags would be extremely inefficient. The same is not true in an online setting because it is less costly and usually faster for people to communicate and interact asynchronously: compare scheduling a telephone call or a meeting a month away (which might need to be rescheduled and could be suspended if a necessary party is absent or a key contingency does not occur) with communicating by email or text messaging, which may happen over a longer span of time, and which allows people to respond to requests on their own time and without other parties being forced to wait or to coordinate on yet another future date.

As a general matter, a court's use of online platform technology means that litigants, lawyers, law enforcement, prosecutors, judges, and other court personnel or relevant parties can communicate, share, and resolve cases in a virtual space rather than in a physical space. Every other feature of a specific implemented technology is a design choice, one that is ultimately linked to the aspirations of the court and the parties. In theory, communication between the relevant parties can occur in real time or asynchronously, by text, voice, or video. The platform can allow or forbid (or encourage or discourage) the exchange of electronic versions of documents, videos, recordings, data, or any other evidence deemed useful. There are no physical limitations on the types of matters handled or the order in which issues are addressed or how parties participate. Once all legal constraints are integrated, an online platform should be designed and deployed to achieve whatever society aims to accomplish with its dispute resolution resources, a list that presumably includes fairness, accuracy, and efficiency, as well as making sure that parties and the public perceive the platform as performing well on these metrics.

In 2014, a few state courts in Michigan began to implement a particular type of platform technology—Matterhorn—as a means of improving access to justice for its users and increasing their efficiency in resolving cases. Matterhorn is a web application, meaning that it is web-based software that users access through a website. It allows litigants to communicate with law enforcement, prosecutors, judges, and decisionmakers online to resolve a live legal matter, and thus Matterhorn satisfies the definition of online platform technology given above. The adoption of Matterhorn by different courts in different communities and at different times presents an opportunity for careful empirical study of the consequence of using the technology on a range of access-oriented outcomes. Before I relate the data, the empirical strategy, and the study's results and their implications, however, a brief description of how Matterhorn actually works for a typical case—for this research, a traffic case—is essential.

Litigants who have a civil citation (e.g., traffic ticket) and who wish to use their state court's online platform to communicate with a prosecutor, a city attorney, or a judge about their case typically begin at the court's website. Individuals search for their case by entering identifying information—e.g., a driver's license number. Matterhorn uses this data to search court databases for active cases that pertain to the individual. If the search is successful, the platform applies eligibility criteria to these matters to determine which of them, if any, are eligible for online resolution. If one or more cases is found to be eligible, Matterhorn presents the litigant in question with choices. At an abstract level, these options include doing nothing—thereby retaining the option of going to court in person to resolve the matter—and seeking to engage with prosecutors and judges online with the goal of arriving at a mutually satisfactory outcome.

If a litigant decides to continue using the online platform, Matterhorn equips the individual with instructions, information, and documents specific to the case, and then collects any responses and submissions the litigant supplies. Matterhorn is configurable, and so requests can be for any information or documents a decisionmaker may view as useful to resolving the case. In all instances to date, Matterhorn asks litigants to explain in writing their reasons for using the platform (i.e., the nature of their substantive or procedural goal) and to defend their request with valid reasons and evidence. Once the litigant submits the request, Matterhorn forwards the request directly to the appropriate decisionmaker given the case type and any material facts—e.g., a prosecutor or a judge. Next the decisionmaker evaluates the litigant's submissions and any other available and admissible data at the decisionmaker's convenience to make a determination about the case, which might be a denial, a proposal, or a request for additional information. When appropriate, Matterhorn notifies the litigant of the decision, and if the decisionmaker has made an offer or another request, the platform asks the litigant to respond within a few days. A litigant can resolve the case by accepting the offer and complying with any requirements (e.g., payment). If the litigant declines the offer—or accepts it but does not comply—or ignores it, the system automatically rescinds the offer and restores the status quo ante.

The premise underlying the empirical research laid out in this Article is that platform technology has the potential to improve access to justice by dramatically reducing the costs of accessing courthouses and, in particular, the decisionmakers who traditionally do their work at courthouses. As platform technology, Matterhorn seeks to do this by allowing litigants to communicate and negotiate with decisionmakers directly online and asynchronously in a manner that is convenient for everyone. A hypothetical comparison of how the resolution of a traffic ticket might proceed with and without access to an online platform is useful to understand the potential tradeoffs involved and to identify potential metrics for assessing improvements in access.

Imagine a driver receives a traffic ticket, and is unhappy about it. The police officer issuing the ticket informs the potential litigant that he has the right to make an appointment at the state courthouse to contest the ticket before a judge or to meet with a prosecutor for an informal hearing. When the litigant calls the courthouse, he discovers that any appointments are weeks away and are only available during business hours on weekdays. The "appointments" consist of showing up at 9:00 a.m. and waiting in a queue with others who are similarly situated, a process that takes hours because although each litigant meets individually with a prosecutor or a judge for only a few minutes, many dozens or hundreds show up on each available day. The litigant is frustrated with these options. He remains unhappy about his ticket, but he is not confident that anything will change if he spends hours at the courthouse. He decides his best course of action might be just to grumble and pay the fine, while remaining annoyed at the courts and law enforcement, and feeling like the bureaucracy somehow ensured that any right to a day in court was an empty one.

Now assume instead that the officer also informs the driver that the court in question uses online platform technology, and that a request and/or questions can be handled through this system. When the litigant gets home from work and gets his children to bed, he hops online and locates his ticket. He answers the questions, explains his concerns and asks questions about the ticket, requests a lower charge, and clicks submit, spending less than fifteen minutes on it. Four days later, he receives a response from one of the court's judges, conveying to him an offer of a reduced charge, based on his driving record and the recommendation of the prosecutor, who reviewed the case during the process. The judge writes:

> Thank you for using [our online platform] to resolve your matter. Based on your driving record, the court has determined you would be an ideal candidate to have your infraction amended. As a result, you would not receive any points on your driving record. Please continue to practice safe and courteous driving at all times,

and then the judge adds a few more sentences answering the specific questions the litigant had appended to his request. Not only did the litigant's legal situation improve, but the litigant also interacted with a judge in under a week, and so feels heard and perceives the system to be responsive. As a consequence, he accepts the judge's offer, and he

immediately complies, allowing the court to close the case and collect any payment owed, eliminating any chance that the litigant defaults by putting off dealing with his ticket.

Alternatively, imagine instead that the judge responds in four days rejecting the litigant's request, explaining her reasoning:

> Thank you for your request and explanation. Please understand when in an unfamiliar area it is very important to look for the speed limits. They are always located at a speed limit change and often near major intersections. Speed limits are enforced for everyone's safety. Slow down and drive carefully!,

but also answers the litigant's questions in the process. The judge then reminds the driver that he can still contest his ticket or seek an in-person meeting with a prosecutor or a judge, if he wishes. Despite the undesirable outcome, the litigant understands the basis for his citation much better, and has already had a prosecutor and a judge evaluate the dispute and decide against him. While he still has the right to go to the courthouse, the benefits of doing so are much smaller in his mind now, as he feels he has already managed to be heard by the key decisionmakers. He wishes he could do something about the ticket but grudgingly acknowledges that he was able to make his case and that the system was responsive. Accordingly, he decides simply to pay the fine while he is online using the court's online payment option. If he instead decides to go to the courthouse in person, maybe because he is unable to pay the entire amount he owes on the ticket, he may discover a shorter line to meet with a prosecutor or a judge given that many others are also using the online platform. If so, he may be more likely to stick it out and take care of his issue properly. Either way, better access will be evident in shorter durations, a higher likelihood of fines being paid in full, and lower default rates. . . .

III. Data and Empirical Analysis

. . . This rough cut at the data reveals that average case duration drops considerably following the adoption of platform technology for those litigants who use it—from approximately fifty days . . . before Matterhorn to just fourteen days after Matterhorn's implementation . . . . Moreover, this decline in duration extends beyond those disputes in which litigants actually use the platform: adopting courts experience a substantial drop in the time it takes to close all cases—even non-Matterhorn cases . . . —from approximately fifty days prelaunch to thirty-four days after launch. Another interesting phenomenon worth observing is that no matter how long it generally took for a court to close cases before Matterhorn came online, there seems to be significantly less variation in duration times across courts for Matterhorn cases once a request is made . . . . Indeed, across courts, postrequest durations for Matterhorn cases have remarkably similar average times to closure. Therefore, at least according to these data, litigants who use Matterhorn to address their legal matters face an average case resolution speed that is independent of their court's previous timeliness in resolving its cases. Evidence that platform technology may succeed in decreasing intercourt variability in average processing time, resulting in more consistent and uniform treatment across state courts, may be of independent social value. . . .

Platform technology appears to meaningfully reduce the time to closure, but from averages alone, one cannot discern whether *all* cases are resolved faster or whether just some fraction are resolved faster, with the remainder unaffected or perhaps taking longer than previously to close. . . . [M]any of Matterhorn's duration-reducing benefits *are* concentrated in a subset of cases, presumably those involving litigants who opt to accept an offer made by a court within a few days of their using the platform to make a request for relief. . . . By forty or fifty days after the filing date, litigants using Matterhorn but with their cases still unresolved are concluding their cases at a rate that is on average much closer to—although still higher than—the closure rate for those with open cases of similar duration in the prelaunch period. By contrast, litigants who abstain from Matterhorn or who do not have access to Matterhorn appear to resolve their cases more slowly and steadily. . . . This consistent separation implies that while there may be litigants whose cases resolve more slowly after Matterhorn's adoption (perhaps including cases handled *through* Matterhorn), the increase for these cases is more than offset by cases that resolve more quickly post-Matterhorn. . . .

Some of these disputes, of course, are never resolved. The data indicate that less than 2% of cases heard through Matterhorn end in default, compared to approximately 20% of cases using traditional in-court dispute resolution procedures. Additionally, because 90% of Matterhorn cases resolve within one month (as opposed to only 30% of prelaunch cases), it would be much easier for a court that is using Matterhorn to intervene in potentially problematic cases after only thirty days because there would be many fewer outstanding cases. To illustrate, if all litigants used Matterhorn, judges would be able to conclude after just a month that the 10% of still-open cases had a 20% chance of defaulting. Absent Matterhorn, after thirty days, judges are looking at 70% of their cases still open, and yet almost 30% of these would be expected to default. With platform technology, courts can home in on at-risk cases earlier in the process, when judges have more statutory flexibility in how they respond and are better able to cost effectively manage the resolution of these disputes. . . .

Conclusion

This Article makes the *empirical* case that platform technology presents an important opportunity for policymakers who wish to open up America's courts so that citizens can make the most of what these institutions have to offer. There are plenty of reasons to believe that platform technology can make resolving minor cases in courts easier, faster, and better, and yet rigorous evidence on the access-to-justice consequences of platform technology is wanting. I address this need in this Article by studying the effects of implementing such technology in eight state courts that collectively resolve tens of thousands of cases in a year. I find compelling empirical evidence that by embracing online platform technology, courts can sharply reduce case duration, improve litigant satisfaction, and curtail litigant default rates. For most legal matters in our state courts, the principal barrier to accessing justice is limited access to our courthouses. While there are several benefits to improving access to high-quality legal representation and developing self-help

resources, the evidence I present in this Article supports the idea that reform targeting the somewhat humdrum transaction costs of using everyday courthouses would go a very long way to making our courts more open, responsive, efficient, and effective—and to ensuring that citizens perceive them as such. When the issue is framed in this way, it perhaps should not be surprising that online technology—often a central driver of reducing costs in other domains—may also prove to be a veritable fount of access-to-justice innovation.

Toward an Optimal Bail System[*]

Crystal S. Yang

. . . In light of impending and rapid reform, how should bail judges decide how to make pre-trial release decisions? Which defendants should they release and which should they detain? And how should policymakers evaluate the efficacy of proposed reforms, such as the use of alternatives like electronic monitoring? In this Article, I argue that a cost-benefit framework can inform institutional actors and policymakers about how to design a bail system that moves closer towards maximizing social welfare. Specifically, I argue that current bail practices fail to take into account the private and social *costs* of pre-trial detention—notably, the loss of freedom to defendants, the collateral consequences to defendants and their family members, and the administrative costs to the state. Instead, bail practices primarily reflect a concern with certain *benefits* of pre-trial detention, namely, preventing flight and new crimes if defendants are released. Indeed, current bail practices focus almost exclusively on treating pre-trial detention as a solution to the risks of pre-trial flight and new crime, while categorically ignoring the ways in which pre-trial detention may impose both private costs to individual defendants and social costs on other members of society, with the consequence that the bail system is potentially generating massive losses to social welfare. In contrast, a cost-benefit framework has tremendous potential in improving social welfare by explicitly analyzing these real trade-offs associated with pre-trial detention, largely missing from the current debate.

. . . Today, the bail system in most jurisdictions has three main objectives: (1) to release as many defendants as possible before trial to ensure that there is no infliction of punishment prior to conviction, while (2) minimizing pre-trial flight, and (3) protecting the community from danger. Notably, these objectives of the bail system would naturally arise from a standard, utilitarian social welfare function. For example, releasing defendants at the pre-trial stage increases social welfare by avoiding the imposition of substantial restrictions on liberty and the potential harms incurred in jail. In addition, fewer defendants are at risk of falsely pleading guilty and potentially losing their jobs or homes either in the short- or long-term. Similarly, preventing pre-trial flight increases social welfare. Pre-trial flight may lower the welfare of victims who want to see their offenders punished by the state, may lead to increased court expenditures used to apprehend fugitives, and may

[*] *Excerpted from* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017).

increase crime by reducing deterrence to the extent that some defendants abscond and are never punished. Finally, preventing new crime through incapacitation also increases social welfare because new crimes impose hefty costs on victims and other members of the community. Thus, a cost-benefit approach is particularly appropriate in the pre-trial context because bail judges are already instructed by statute to balance competing and measurable trade-offs.

. . . [Given the traditional objectives of bail systems], the costs of pre-trial detention include private costs to defendants, such as the loss of liberty and the loss of future earnings, as well as externalities imposed on families and members of the community. The benefits of pre-trial detention include the prevention of new crime and flight through incapacitation, as well as general deterrence benefits.. . . . Recent empirical work, including my own, estimates the causal impact of pre-trial detention on a variety of important outcomes, such as labor supply, receipt of public benefits, and future crime. This work suggests that pre-trial detention imposes large private and social costs. Pre-trial detention causes defendants to plead guilty (perhaps erroneously), increases future crime after case disposition, reduces formal employment, and reduces the take-up of employment-related benefits, like Unemployment Insurance (UI) and the Earned Income Tax Credit (EITC) up to four years after arrest. In particular, my recent research with Will Dobbie and Jacob Goldin suggests that pre-trial detention reduces formal labor market attachment through the stigma of a criminal conviction following a guilty plea, which subsequently reduces eligibility and take-up of government benefits tied to formal employment. Yet this work also documents that pre-trial detention provides social benefits through the incapacitation of defendants, leading to decreases in both pre-trial crime and missed court appearances. As a result, policymakers cannot justifiably draw sharp welfare conclusions about the optimality of the current bail system without a consideration of both the costs and benefits of pre-trial detention, highlighting the need for a cost-benefit framework.

Importantly, I do not claim that the existing evidence captures all of the relevant costs and benefits. For example, there exists limited empirical evidence on how to quantify the loss of liberty imposed by pre-trial detention. Nor does there exist any quantitative evidence on the effects of pre-trial detention on deterrence more generally. In addition, I do not discount the possibility that some costs and benefits may be difficult to quantify, such as trust in, and legitimacy of, legal institutions. Nevertheless, I argue that a cost-benefit framework is important for two main reasons. First, it highlights the need for considering both costs and benefits of detention, many of which are overlooked, and potentially spurs further research that fills our current gaps in knowledge. Second, incorporating the current empirical research into a cost-benefit framework already provides information to policymakers. Indeed, I conduct a partial cost-benefit analysis that incorporates the best available evidence on both the costs and benefits of detention, finding that on the margin, pre-trial detention imposes far larger costs than benefits. As a result, one can begin to quantify how large potential unmeasured benefits have to be in order to justify the current state of detention, a form of "break-even" analysis advocated by scholars in other contexts.

Following this cost-benefit approach, . . . I describe how a welfare-maximizing social planner decides whether to release or detain a defendant by comparing the benefits of detention against the costs of detention. This framework illustrates the first-order importance of accounting for both costs and benefits when designing a bail system, rather than focusing solely on the benefits of detention or the "risk" of defendants. I demonstrate that in certain situations, the optimal bail decision results in the detention of high-risk defendants, or defendants who face a high risk of pre-trial misconduct. However, I also show that, depending on the relationship between the costs and benefits of pre-trial detention, it may be optimal to detain low-risk defendants while releasing high-risk defendants, contrary to the recommendations of recent policy reforms to the bail system. Specifically, I allow for the very real possibility that defendants vary not only based on "risk" but also on "harm." For example, the private costs of pre-trial detention may be much larger for marginalized defendants who lose their jobs and income as a result of detention compared to defendants who are able to retain their jobs and financial support. Thus, detention on the basis of "risk" alone may generate socially suboptimal outcomes.

[One issue is] that all judges are already achieving socially optimal bail decisions, in which case my conceptual framework would provide little practical value. After all, some may argue that judges are already engaged in weighing competing and measurable trade-offs, which are embedded in statutory directives to minimize the harms of detention prior to conviction while preserving the integrity of the court system and protecting the public. I demonstrate empirically that this is unlikely to be true. Specifically, I test for whether judges are deviating from the same social optimum by comparing pre-trial detention decisions *across* judges who are randomly assigned bail cases. The idea here is straightforward: If all bail judges decide whether to detain a defendant or release a defendant using the same social welfare function and with the same information, then two judges who are assigned identical defendants should reach the same conclusion about whether to detain or release those defendants. But any large and significant differences in detention rates across these two judges suggest that these bail judges are not maximizing the same objective social welfare function and/or that they have different information or beliefs about costs and benefits.

To implement this test, I use unique data linking over 400,000 defendants to bail judges in two large urban counties with vast jail systems: Philadelphia and Miami-Dade. I describe how in these jurisdictions, defendants are quasi-randomly assigned to bail judges, allowing for a test of deviations from the social optimum by comparing release rates across judges within the same court. I then show that there are large and systematic differences in bail decisions across judges within the same court, due to judge-specific preferences rather than differences in case composition. These significant judge-specific differences emerge in pre-trial release rates, the assignment of money bail, and in racial gaps in release, with the vast majority of judges being more likely to release white defendants relative to black defendants. These results indicate that the current state of discretionary bail determination leads to highly variable and inconsistent decisions, highlighting the potential for an objective cost-benefit framework to guide decision-making and reduce variability. Indeed,

cost-benefit analysis is beginning to receive attention in the pre-trial justice arena, with some jurisdictions considering the use of cost-benefit analysis in deciding which defendants to detain or release before trial.

[In short], the application of the cost-benefit framework is not only useful in guiding pre-trial release decisions, but can also be used more broadly to assess the welfare consequences of other bail practices and much-discussed bail reforms. I begin by considering how a policymaker should assess the use of money bail, the most predominant bail system in the United States. For example, assessing the current use of money bail requires weighing the benefits of money bail, such as providing financial incentives to defendants to return to court and abide by all release conditions, against the costs. I then turn to an assessment of electronic monitoring as an intermediate alternative to detention, arguing that while the empirical evidence to date is mixed and speculative, there are reasons to believe that more extensive use of electronic monitoring is welfare-enhancing. Indeed, recent technological advances in electronic monitoring suggest that it may reduce pre-trial flight and crime at lower private and social cost than pre-trial detention.

Finally, I consider the recent interest in, and proliferation of, risk-assessment tools used to predict the likelihood that an individual defendant will engage in pre-trial misconduct. Most notably, as of June 2015, over thirty cities and states have adopted the Public Safety Assessment (PSA) created by the Laura and John Arnold Foundation. While these tools can arguably improve predictive accuracy in bail setting and conversely reduce judge bias and inconsistency, I argue that they are one-sided, focusing solely on the benefits of pre-trial detention and the goal of ensuring public safety. As one organization has noted, these "algorithms privilege a view of justice based on estimating the 'risk' posed by the offender." In doing so, these risk-assessment tools may recommend pre-trial detention for high-risk defendants, despite the very real possibility that risky defendants may also be those who are most adversely affected by pre-trial detention. As my framework will illustrate, if certain high-risk defendants are also the most adversely affected by a stay in jail, it may be welfare-decreasing to detain these defendants, potentially undermining these tools' stated purpose of reducing unnecessary harm associated with pre-trial detention. Instead, I argue that jurisdictions interested in the use of evidence-based practices should test and develop "net-benefit" assessment tools, using data to predict not only which defendants are most at risk upon release, but also which defendants will be most negatively affected by a stay in jail before trial. . . .

Graduating Economic Sanctions According to Ability to Pay (2017)[*]

Beth A. Colgan

. . . Mounting evidence shows that criminal justice systems are widely employing myriad forms of economic sanctions—fines, surcharges, fees, and restitution—often assessing unmanageable sanctions on people who have no meaningful ability to pay and then imposing further punishment for the failure to do so. As the national scope of these practices has come to light, an increasing and bipartisan array of constituents have called for a possible reform: the graduation of economic sanctions according to a defendant's ability to pay. Graduation would constitute a major shift in jurisdictions where there is no mechanism to consider a defendant's financial condition, as well as in jurisdictions where judges may consider capacity to pay but are afforded little guidance on how to do so.

Neither the problems created by highly punitive practices related to economic sanctions nor the prospect of graduation according to ability to pay as a remedy are new. Tariff-fines, which are set at a specified amount or range for each offense, have long served as the primary form of economic sanction used in the United States. Tariff-fines are inherently regressive, having a greater effect on the financial condition of a person of limited means than on a person of wealth. Concerns that the use of tariff-fines were unfairly punitive for people with financial instability, similar to those expressed today, garnered attention in the late 1980s when the ripple effect of tough-on-crime legislation left jurisdictions across the United States with a burgeoning mass incarceration and mass probation crisis. In that landscape, a push began for the development of intermediate sanctions that would reside between prison on one end of the punitive spectrum and simple probation on the other. Economic sanctions, understood as being "unambiguously punitive," could serve that intermediate role. The tariff-fine design, however, contributed to the problem of mass incarceration in two ways. First, many judges imposed fines for all defendants, regardless of financial condition, at the low-end of the sentencing range to ensure a greater number of defendants would have some capacity to pay. By depressing the amount of tariff-fines overall, it "constricted the range of offenses for which judges viewed a fine as an appropriate sanction," thereby pushing judges to select incarceration at sentencing for a wider array of offenses. Second, in cases where either tariff-fines or other forms of punishment were available, the perception that a given defendant had a limited ability to pay could push judges to opt for a sentence of incarceration or probation.

Researchers and lawmakers in the late 1980s looked to the use of "day-fines," an economic sanction mechanism used in several European and Latin American countries, as a possible solution to both the need for an intermediate sanction and to problems associated with the regressive qualities of tariff-fines. The day-fine model involved a two-step process. First, criminal offenses were assigned a specific penalty unit or range of penalty

[*] *Excerpted from* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

units that increased with crime severity and were set without any consideration of a defendant's ability to pay. Second, the court would establish the defendant's adjusted daily income, in which income was adjusted downward to account for personal and familial living expenses. The final day-fine amount was calculated by multiplying the penalty units by adjusted daily income. By setting penalty units according to crime seriousness, day-fines attended to the desire for offender accountability and deterrence. At the same time, day-fines were understood to be more equitable because they accounted for the defendant's finances. In addition, day-fines offered the possibilities of improving the administration of court systems overburdened by ineffective collections processes and reducing the use of incarceration. . . .

Appendix: Day-Fines Project Overviews

The following provides a brief overview of the structures of each pilot project during the American day-fines experiment.

A. Staten Island, New York

Staten Island pilot project planners anticipated that the use of day-fines would ultimately expand to felony cases, but chose to initiate the project in Staten Island's limited jurisdiction court in which the court had jurisdiction over misdemeanor offenses for which tariff-fines were a primary form of punishment. In Staten Island, judges were free to employ day-fines in any defendant's case, and though day-fines were seen as a priority in most cases, judges had authority to combine day-fines with other forms of punishment, including rehabilitative services and incarceration. It appears that all forms of economic sanctions, including restitution and surcharges, were incorporated into the day-fines amount, so that the court imposed a single economic sanction. Judges were, however, prevented from imposing full day-fines on wealthier defendants due to pre-existing statutory maximum caps. For purposes of assessing the effect of these caps, court personnel calculated and documented the day-fine amount, and then imposed what would be the lower statutory maximum sentence. Staten Island's planners also employed two modes of collections methods during the pilot: One set of day-fines defendants received the court's standard collection practices, and a second group received enhanced collection services, which included payment reminders and more robust communication with debtors during the collections process.

A decision to use VERA Institute researchers to conduct financial screening of defendants may have inadvertently contributed to the demise of the program. That design meant that when the pilot project ended, a staffing gap was created in the misdemeanor court. . . .

B. Maricopa County, Arizona

The Maricopa County pilot project allowed day-fines for probation-eligible felony offenses so long as defendants did not have significant supervision or treatment needs that

could not be accommodated through the day-fines model. Day-fines were imposed in combination with simple probation, where the probation terms were limited to remaining crime-free and paying the day-fine, and which terminated upon full payment. In theory, day-fines imposed in this program were subject to statutory caps, however, the caps were high enough that it appears they did not affect the court's ability to impose day-fines in any case.

Maricopa County's project planners were sensitive to the way economic sanctions imposed in addition to the day-fines amount would undermine the value of graduating the day-fine to ability to pay, and so chose to include all economic sanctions—including restitution, surcharges, and fees—into a single package from which monies would be distributed to satisfy various sanctions mandated by the state, with any leftover monies going to support the day-fines program. Pre-existing mandatory minimum sentencing requirements in Arizona's code, however, prevented the full employment of this model, and meant that some defendants were disqualified where mandatory restitution would be too high to be accommodated within the day-fines amount. While this limited the use of day-fines as a sentencing option, it allowed planners to test the imposition of day-fines under the established calculation mechanism and the distribution of a single package of economic sanctions to different funds.

In addition, the Maricopa County day-fines experiment involved the use of supportive collections methods, which were incorporated into the simple probation imposed with the day-fine. These enhanced methods were designed to provide clear instructions regarding payment plans, payment reminders, and payment methods, such as pre-addressed envelopes that made payment straightforward. Probation officers also sent delinquency letters and reached out to defendants by phone or in person when payments were overdue.

The Maricopa County pilot project's success at increasing collection rates, decreasing probation expenditures, and reducing recidivism, led to the continuation of the project for several years. By the mid-2000s, however, Arizona's increased use of mandatory fines and surcharges, particularly in drug and DUI cases, as well as a statute mandating full restitution awards, exacerbated difficulties in incorporating all economic sanctions within the day-fines amount. That, combined with pressure on lawmakers to appear tough-on-crime, and periodic staffing changes that created a barrier to full institutionalization of the day-fines method, ultimately led to the end of Maricopa County's use of day-fines. Today, however, Arizona is seeing renewed pressure to create a system for graduating economic sanctions according to ability to pay.

C. Bridgeport, Connecticut

The Bridgeport pilot project employed day-fines in misdemeanor and low-level felony cases. Though the project was hamstrung by statutory restrictions that precluded combining day-fines with probation sentences, defendants were otherwise eligible for day-fines sentences unless the court believed the defendant failed to provide accurate income

data needed for the day-fine calculation. Existing records are unclear as to whether economic sanctions such as surcharges and fees were incorporated into the day-fines amount, but Bridgeport planners excluded restitution awards. Connecticut law mandated statutory maximum fines, but the caps were sufficiently high that there is no indication that its courts had to reduce calculated day-fines to fit within those parameters. Further, prior to implementing the pilot projects, Bridgeport had essentially no meaningful system of collections, so part of the pilot included development of basic collections practices. Despite improved collections rates during the pilot period, Bridgeport abandoned the project due to a series of technological problems related to the computer systems used to track day-fines amounts, the need to engage in complicated court procedures brought on by complexities in Connecticut law, and the rotation of the judge trained to use day-fines to another court. None of these problems, however, were inherent to the day-fines model. . . .

D. Polk County, Iowa

Like Bridgeport, the Polk County pilot project made both aggravated misdemeanors and low-level felonies day-fines eligible. . . . With an increased emphasis on both getting tougher on crime and increasing the availability of economic sanctions, it is no wonder that the day-fines experiment fell by the wayside.

E. Coos, Josephine, Malheur, and Marion Counties, Oregon

Oregon used day-fines for misdemeanors and low-level felonies. . . . [D]esign flaws in Oregon's model for calculating ability to pay and its decision to impose ungraduated sanctions in addition to the day-fines amount led to increases in total economic sanctions imposed despite high rates of poverty that should have resulted in decreased sanctions. Therefore, the day-fines model was abandoned in favor of a preexisting statutory model for calculating ability to pay that allowed judges greater flexibility in graduating economic sanctions for people of limited means.

F. Milwaukee, Wisconsin

Milwaukee employed its pilot project in municipal court cases with at least one non-traffic municipal violation. . . .

The Milwaukee day-fines experiment provides a prime example of how myopia regarding the desire for revenue generation can impede reform. Milwaukee's municipal court judges were initially enthusiastic about the day-fines pilot project in part because it was seen as a cost-savings mechanism given the expense the municipality was incurring incarcerating people who had no meaningful ability to pay economic sanctions. While the use of day-fines did result in improved collections overall, the $30 mandatory minimum fine caused artificial inflation of day-fines in 36% of cases, leading to default rates that echoed the preexisting tariff-fines system. Because the statutory maximum cap was also triggered in 22% of cases, revenue generation dropped, something that "was unwelcome news in a jurisdiction that was having budget difficulties at the time of the experiment."

Therefore, apparently focusing primarily and perhaps exclusively on the revenue side of the ledger—and not the cost savings that could be gained by avoiding jail expenditures, arrest warrants, court appearances, and more if sanctions imposed on the lowest income defendants were made manageable—Milwaukee abandoned the project at the conclusion of the twelve week pilot period.

G. Ventura County, California

In the early 1990s, inspired by European models as well as the Staten Island and Maricopa County projects, the California State Assembly set out to create a day-fines pilot project because, in their view, "fine punishment should be proportionate to the severity of the offense but equally impact individuals with differing financial resources." The pilot project was intended to apply to misdemeanors. Assembly members chose to eliminate mandatory minimum fines, directed that mandatory penalty assessments be incorporated within the day-fines amount, and capped day-fines at a maximum of $10,000. After passing the day-fines legislation, however, it took over a year to find a county willing to take on the project, and then only after the legislation was amended to increase a guarantee of revenue generation. Even so, when Ventura County signed on to serve as the pilot site in 1994, it faced a requirement—unique among the day-fines jurisdictions—to remit at least as much in revenue from economic sanctions to the state as it had in the prior year. Therefore, even the guaranteed revenue amount did not provide much protection against an overall loss of funds. Consequently, even though Ventura County planners were aware of the promising results of the Staten Island and Maricopa County pilots, revenue generation concerns "significantly inhibited the entire project." Ultimately, the project planners abandoned development of the day-fines model after a newly elected judge who would have overseen most of the day-fines cases pushed back against the use of day-fines. . . .

The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge:* Three Factors in Search of a Theory of Value (1976)[*]

Jerry L. Mashaw

. . . This section attempts, first, to articulate the limits of [an] utilitarian approach, . . . for evaluating . . . procedures, and second, to indicate the strengths and weaknesses of three alternative theories—individual dignity, equality, and tradition. These theories, at the level of abstraction here presented, require little critical justification: they are widely held, respond to strong currents in the philosophic literature concerning law, politics, and ethics,

[*] *Excerpted from* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

and are supported either implicitly or explicitly by the Supreme Court's due process jurisprudence.

Utility theory suggests that the purpose of decisional procedures—like that of social action generally—is to maximize social welfare. Indeed, the three-factor analysis enunciated in [the Supreme Court's approach to procedural due process in *Mathews v.*] *Eldridge* appears to be a type of utilitarian, social welfare function. That function first takes into account the social value at stake in a legitimate private claim; it discounts that value by the probability that it will be preserved through the available administrative procedures, and it then subtracts from that discounted value the social cost of introducing additional procedures. When combined with the institutional posture of judicial self-restraint, utility theory can be said to yield the following plausible decision-rule: "Void procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational."

The utilitarian calculus is not, however, without difficulties. The *Eldridge* Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions. No attention is paid to "process values" that might inhere in oral proceedings or to the demoralization costs that may result from the grant-withdrawal-grant-withdrawal sequence to which claimants like Eldridge are subjected. Perhaps more important, as the Court seeks to make sense of a calculus in which accuracy is the sole goal of procedure, it tends erroneously to characterize disability hearings as concerned almost exclusively with medical impairment and thus concludes that such hearings involve only medical evidence, whose reliability would be little enhanced by oral procedure. As applied by the *Eldridge* Court the utilitarian calculus tends, as cost-benefit analyses typically do, to "dwarf soft variables" and to ignore complexities and ambiguities.

The problem with a utilitarian calculus is not merely that the Court may define the relevant costs and benefits too narrowly. However broadly conceived, the calculus asks unanswerable questions. For example, what is the social value, and the social cost, of continuing disability payments until after an oral hearing for persons initially determined to be ineligible? Answers to those questions require a technique for measuring the social value and social cost of government income transfers, but no such technique exists. Even if such formidable tasks of social accounting could be accomplished, the effectiveness of oral hearings in forestalling the losses that result from erroneous terminations would remain uncertain. In the face of these pervasive indeterminacies the *Eldridge* Court was forced to retreat to a presumption of constitutionality.

Finally, it is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions. The due process clause is one of those Bill of Rights protections meant to insure individual liberty in the face of contrary collective action. Therefore, a collective legislative or administrative decision about procedure, one arguably

reflecting the intensity of the contending social values and representing an optimum position from the contemporary social perspective, cannot answer the constitutional question of whether due process has been accorded. A balancing analysis that would have the Court merely re-determine the question of social utility is similarly inadequate. There is no reason to believe that the Court has superior competence or legitimacy as a utilitarian balancer except as it performs its peculiar institutional role of insuring that libertarian values are considered in the calculus of decision.

Several alternative perspectives on the values served by due process pervade the Court's jurisprudence and may provide a principled basis for due process analysis. These perspectives can usually be incorporated into a broadly defined utilitarian formula and are therefore not necessarily anti-utilitarian. But they are best treated separately because they tend to generate inquiries that are different from a strictly utilitarian approach. . . .

The increasingly secular, scientific, and collectivist character of the modern American state reinforces our propensity to define fairness in the formal, and apparently neutral language of social utility. Assertions of "natural" or "inalienable" rights seem, by contrast, somewhat embarrassing. Their ancestry, and therefore their moral force, are increasingly uncertain. Moreover, their role in the history of the due process clause makes us apprehensive about their eventual reach. It takes no peculiar acuity to see that the tension in procedural due process cases is the same as that in the now discredited substantive due process jurisprudence—a tension between the efficacy of the state and the individual's right to freedom from coercion or socially imposed disadvantage.

Yet the popular moral presupposition of individual dignity, and its political counterpart, self-determination, persist. State coercion must be legitimized, not only by acceptable substantive policies, but also by political processes that respond to a democratic morality's demand for participation in decisions affecting individual and group interests. At the level of individual administrative decisions this demand appears in both the layman's and the lawyer's language as the right to a "hearing" or "to be heard," normally meaning orally and in person. To accord an individual less when his property or status is at stake requires justification, not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.

The obvious difficulty with a dignitary theory of procedural due process lies in defining operational limits on the procedural claims it fosters. In its purest form the theory would suggest that decisions affecting individual interests should be made only through procedures acceptable to the person affected. This purely subjective standard of procedural due process cannot be adopted: an individual's claim to a "nonalienating" procedure is not ranked ahead of all other social values.

The available techniques for limiting the procedural claims elicited by the dignitary theory, however, either appear arbitrary or render the theory wholly inoperative. One technique is to curtail the class of substantive claims in which individuals can be said to have a right to what they consider an acceptable procedure. The "life, liberty, or property" language of the due process clause suggests such a limitation, but experience with this classification of interests has been disappointing. Any standard premised simply on pre-existing legal rights renders a claimant's quest for due process, as such, either unnecessary or hopeless. Another technique for confining the dignitary theory is to define "nonalienating" procedure as any procedure that is formulated democratically. The troublesome effect of this limitation is that no procedures that are legislatively authorized can be said to encroach on individual dignity.

Notwithstanding its difficulties, the dignitary theory of due process might have contributed significantly to the *Eldridge* analysis. The questions of procedural "acceptability" which the theory poses may initially seem vacuous or at best intuitive, but they suggest a broader sensitivity than the utilitarian factor analysis to the nature of governmental decisions. Whereas the utilitarian approach seems to require an estimate of the quantitative value of the claim, the dignitary approach suggests that the Court develop a qualitative appraisal of the type of administrative decision involved. While the disability decision in *Eldridge* may be narrowly characterized as a decision about the receipt of money payments, it may also be considered from various qualitative perspectives which seem pertinent in view of the general structure of the American income support system.

That system suggests that a disability decision is a judgment of considerable social significance, and one that the claimant should rightly perceive as having a substantial moral content. The major cash income-support programs determine eligibility, not only on the basis of simple insufficiency of income, but also, or exclusively, on the basis of a series of excuses for partial or total nonparticipation in the work force: agedness, childhood, family responsibility, injury, disability. A grant under any of these programs is an official, if sometimes grudging, stamp of approval of the claimant's status as a partially disabled worker or non-worker. It proclaims, in effect, that those who obtain it have encountered one of the politically legitimate hazards to self-sufficiency in a market economy. The recipients, therefore, are entitled to society's support. Conversely, the denial of an income-maintenance claim implies that the claim is socially illegitimate, and the claimant, however impecunious, is not excused from normal work force status.

These moral and status dimensions of the disability decision indicate that there is more at stake in disability claims than temporary loss of income. They also tend to put the disability decision in a framework that leads away from the superficial conclusion that disability decisions are a routine matter of evaluating medical evidence. Decisions with substantial "moral worth" connotations are generally expected to be highly individualized and attentive to subjective evidence. The adjudication of such issues on the basis of documents submitted largely by third parties and by adjudicators who have

never confronted the claimant seems inappropriate. Instead, a court approaching an analysis of the disability claims process from the dignitary perspective might emphasize those aspects of disability decisions that focus on a particular claimant's vocational characteristics, his unique response to his medical condition, and the ultimate predictive judgment of whether the claimant should be able to work.

. . . Notions of equality can nevertheless significantly inform the evaluation of any administrative process. One question we might ask is whether an investigative procedure is designed in a fashion that systematically excludes or undervalues evidence that would tend to support the position of a particular class of parties. If so, those parties might have a plausible claim that the procedure treated them unequally. Similarly, in a large-scale inquisitorial process involving many adjudicators, the question that should be posed is whether like cases receive like attention and like evidentiary development so that the influence of such arbitrary factors as location are minimized. In order to take such equality issues into account, we need only to broaden our due process horizons to include elements of procedural fairness beyond those traditionally associated with adversary proceedings. These two inquiries might have been pursued fruitfully in *Eldridge*. First, is the state agency system of decision making, which is based on documents, particularly disadvantageous for certain classes of claimants? There is some tentative evidence that it is. Cases such as *Eldridge* involving muscular or skeletal disorders, neurological problems, and multiple impairments, including psychological overlays, are widely believed to be both particularly difficult, due to the subjectivity of the evidence, and particularly prone to be reversed after oral hearing.

Second, does the inquisitorial process at the state agency level tend to treat like cases alike? . . . And if consistency is not feasible under this system, perhaps the more compelling standard for evaluating the system is the dignitary value of individualized judgment, which . . . implies claimant participation. . . .

Judicial reasoning, including reasoning about procedural due process, is frequently and self-consciously based on custom or precedent. In part, reliance on tradition or "authority" is a court's institutional defense against illegitimacy in a political democracy. But tradition serves other values, not the least of which are predictability and economy of effort. More importantly, the inherently conservative technique of analogy to custom and precedent seems essential to the evolutionary development and the preservation of the legal system. Traditional procedures are legitimate not only because they represent a set of continuous expectations, but because the body politic has survived their use.

The use of tradition as a guide to fundamental fairness is vulnerable, of course, to objection. Since social and economic forces are dynamic, the processes and structures that proved functional in one period will not necessarily serve effectively in the next. Indeed, evolutionary development may as often end in the extinction of a species as in

adaptation and survival. For this reason alone, tradition can serve only as a partial guide to judgment.

Furthermore, it may be argued that reasoning by analogy from traditional procedures does not actually provide a perspective on the values served by due process. Rather, it is a decisional technique that requires a specification of the purposes of procedural rules merely in order that the decision maker may choose from among a range of authorities or customs the particular authority or custom most analogous to the procedures being evaluated.

This objection to tradition as a theory of justification is weighty, but not devastating. What is asserted by an organic or evolutionary theory is that *the purposes of legal rules cannot be fully known.* Put more cogently, while procedural rules, like other legal rules, should presumably contribute to the maintenance of an effective social order, we cannot expect to know precisely how they do so and what the long-term effects of changes or revisions might be. Our constitutional stance should therefore be preservative and incremental, building carefully, by analogy, upon traditional modes of operation. So viewed, the justification "we have always done it that way" is not so much a retreat from reasoned and purposive decision making as a profound acknowledgment of the limits of instrumental rationality.

Viewed from a traditionalist's perspective, the Supreme Court's opinion in *Eldridge* may be said to rely on the traditional proposition that property interests may be divested temporarily without hearing, provided a subsequent opportunity for contest is afforded. *Goldberg v. Kelly* is deemed an exceptional case, from which *Eldridge* is distinguished. . . .

The preceding discussion has emphasized the way that explicit attention to a range of values underlying due process of law might have led the *Eldridge* Court down analytic paths different from those that appear in Justice Powell's opinion. The discussion has largely ignored, however, arguments that would justify the result that the Court reached in terms of the alternative value theories here advanced. Those arguments are now set forth.

First, focus on the dignitary aspects of the disability decision can hardly compel the conclusion that an oral hearing is a constitutional necessity prior to the termination of benefits when a full hearing is available later. Knowledge that an oral hearing will be available at some point should certainly lessen disaffection and alienation. Indeed, Eldridge seemed secure in the knowledge that a just procedure was available. His desire to avoid taking a corrective appeal should not blind us to the support of dignitary values that the de novo appeal provides.

Second, arguments premised on equality do not necessarily carry the day for the proponent of prior hearings. The Social Security Administration's attempt to routinize and make consistent hundreds of thousands of decisions in a nationwide income-

maintenance program can be criticized both for its failures in its own terms and for its tendency to ignore the way that disability decisions impinge upon perceptions of individual moral worth. On balance, however, the program that Congress enacted contains criteria that suggest a desire for both consistency and individualization. No adjudicatory process can avoid tradeoffs between the pursuit of one or the other of these goals. Thus, a procedural structure incorporating (1) decisions by a single state agency based on a documentary record and subject to hierarchical quality review, followed by (2) appeal to de novo oral proceedings before independent administrative law judges, is hardly an irrational approach to the necessary compromise between consistency and individualization.

Explicit and systematic attention to the values served by a demand for due process nevertheless remains highly informative in *Eldridge* and in general. The use of analogy to traditional procedures might have helped rationalize and systematize a concern for the "desperation" of claimants that seems as impoverished in *Eldridge* as it seems profligate in *Goldberg;* and the absence in *Eldridge* of traditionalist, dignitary, or egalitarian considerations regarding the disability adjudication process permitted the Court to overlook questions of both fact and value-questions that, on reflection, seem important. The structure provided by the Court's three factors is an inadequate guide for analysis because its neutrality leaves it empty of suggestive value perspectives.

Furthermore, an attempt by the Court to articulate a set of values that informs due process decision making might provide it with an acceptable judicial posture from which to review administrative procedures. The *Goldberg* decision's approach to prescribing due process—specification of the attributes of adjudicatory hearings by analogy to judicial trial—makes the Court resemble an administrative engineer with an outdated professional education. It is at once intrusive and ineffectual. Retreating from this stance, the *Eldridge* Court relies on the administrator's good faith—an equally troublesome posture in a political system that depends heavily on judicial review for the protection of counter-majoritarian values.

The path to a more appropriate and successful judicial role may lie in giving greater attention to the elaboration of the due process implications of the values that have been discussed. If the Court provided a structure of values within which procedures would be reviewed, it could then demand that administrators justify their processes in terms of the degree to which they support the elaborated value structure. The Court would have to be satisfied that the administrator had carefully considered the effects of his chosen procedures on the relevant constitutional values and had made reasonable judgments concerning those effects.

A decision that an administrator had not met that standard would not result in the prescription of a particular adjudicatory technique as a constitutional, and thereafter virtually immutable, necessity; but rather in a remand to the administrator. In meeting the Court's objections, the administrator (or legislature) might properly choose between specific amendment and a complete overhaul of the administrative process. Perhaps more

importantly, under a due process approach that emphasized value rather than technique, neither the administrator in constructing and justifying his processes, nor the Court in reviewing them, would be limited to the increasingly sterile discussion of whether this or that particular aspect of trial-type procedure is absolutely essential to due process of law.

A Protest Against Law-Taxes (First Printed in 1793, First Published in 1795)
Jeremy Bentham*

Taxes on law-proceedings constitute in many, and perhaps in all nations, a part of the resources of the state. They do so in Great Britain: they do so in Ireland. In Great Britain, an extension of them is to be found among the latest productions of the budget: in Ireland, a further extension of them is among the measures of the day. . . .

It is a well-known parliamentary saying, that he who reprobates a tax ought to have a better in his hand. . . A juster condition never was imposed. I fulfil it at the first word. My better tax is—any other that can be named.

The people, when considered with a view to the manner in which they are affected by a tax of this description, may be distinguished into two classes: those who in each instance of requisition have wherewithal to pay, and those who have not: to the former, we shall find it more grievous than any other kind of tax, to the latter a still more cruel grievance . . . .

Taxes upon law-proceedings fall upon a man just at the time when the likelihood of his wanting that ability is at the utmost. When a man sees more or less of his property unjustly withholden from him, then is the time taken to call upon him for an extraordinary contribution. When the back of the innocent has been worn raw by the yoke of the oppressor, then is the time which the appointed guardians of innocence have thus pitched upon for loading him with an extra ordinary burthen. Most taxes are, as all taxes ought to be, taxes upon affluence: it is the characteristic property of this to be a tax upon distress.

A tax on bread, though a tax on consumption, would hardly be reckoned a good tax; bread being reckoned in most countries where it is used, among the necessaries of life. A tax on bread, however, would not be near so bad a tax as one on law-proceedings: A man who pays to a tax on bread, may, indeed, by reason of such payment, be unable to get so much bread as he wants, but he will always get some bread, and in proportion as he pays more and more to the tax, he will get more and more bread. Of a tax upon justice, the effect may be, that after he has paid the tax, he may, without getting justice by the payment, lose

* *Excerpted from* Jeremy Bentham, *A Protest Against Law-Taxes Showing the Peculiar Mischeviousness of all such Impositions as Add to the Expense of Appeal to Justice*, http://oll.libertyfund.org/titles/603#lf0276_front_001.

bread by it: bread, the whole quantity on which he depended for the subsistence of himself and his family for the season, may, as well as any thing else, be the very thing for which he is obliged to apply to justice. Were a three-penny stamp to be put upon every three-penny loaf, a man who had but three-penny to spend in bread, could no longer indeed get a three-penny loaf, but an obliging baker could cut him out the half of one. A tax on justice admits of no such retrenchment. The most obliging stationer could not cut a man out half a *latitat* nor half a *declaration*. Half justice, where it is to be had, is better than no justice: but without buying the whole weight of paper, there is no getting a grain of justice.

. . . To conclude—Either I am much mistaken, or it has been proved—that a law tax is the worst of all taxes, actual or possible:—that for the most part it is a denial of justice, that at the best, it is a tax upon distress:—that it lays the burthen, not where there is most, but where there is least, benefit: —that it co-operates with every injury, and with every crime:—that the persons on whom it bears hardest, are those on whom a burthen of any kind lies heaviest, and that they compose the great majority of the people:—that so far from being a check, it is an encouragement to litigation: and that it operates in direct breach of Magna Charta, that venerable monument, commonly regarded as the foundation of English liberty. . . .

A Jacket, Worn[*]

Judith Resnik & Dennis Curtis

In 2004, we were asked to speak about courthouse architecture at a conference in Minnesota that was convened by the Eighth Circuit, encompassing the federal courts of seven states, including Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. We drove through Grand Marais, 110 miles north of Duluth, and came upon the building. Drawn to the structure by its own self-importance ("a majestic building on a hill") that could have meant it was a courthouse, a bank, or an insurance company, we presented ourselves to a staff person, who in turn introduced himself as a probation officer.

Explaining our interest in courthouses and their iconography, we asked if we might look around. When we inquired about what if any) icons of justice were displayed, he did not hesitate to bring us to the courtroom (fig. 227) on the second floor, a modestly proportioned room with a judge's bench, flags, and computers that can be glimpsed in the photograph. The probation officer directed our attention to a wall near the public benches. There hung a memorial plaque (fig. 228) in tribute to a local lawyer, James A. Sommerness, who had practiced law as a public defender for more than twenty years in Cook County.

[*] *Excerpted from* Judith Resnik & Dennis Curtis, *A Jacket, Worn*, in REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTRROOMS (2011).

FIGURE 227 Courtroom, Cook County Courthouse, Grand Marais, Minnesota.
Photographers: Judith Resnik and Dennis E. Curtis, 2003. Photograph reproduced courtesy of the Cook County Court Administration, Sixth Judicial District, State of Minnesota.

In 1997 as a testament to Sommerness's contributions, a memorial service was held for him in the courtroom. A judge presided in what he described to be "about as formal a setting as Cook County" afforded. The event, transcribed as if a legal proceeding ("In the Matter of a Memorial Service Honoring James A. Sommerness, Attorney and Counselor"), is not only a testament to Sommerness but also to a courthouse providing a gathering place for diverse segments of the community. The judge reassured the audience that, despite the courthouse's deliberately imposing facade, the local practice was not to be "overly formal." Advising the assembled group to feel at home ("we certainly don't want anybody to think that they should be intimidated from speaking"), the judge noted that Sommerness had "probably appeared in this courtroom thousands of times."

FIGURE 228 James A. Sommerness Memorial Award (detail), Cook County Courthouse, Grand Marais, Minnesota.
Photographer: Glenn Gilyard, 2006. Photograph reproduced with the permission of Richard Gilyard and courtesy of the Cook County Court Administration, Sixth Judicial District, State of Minnesota.

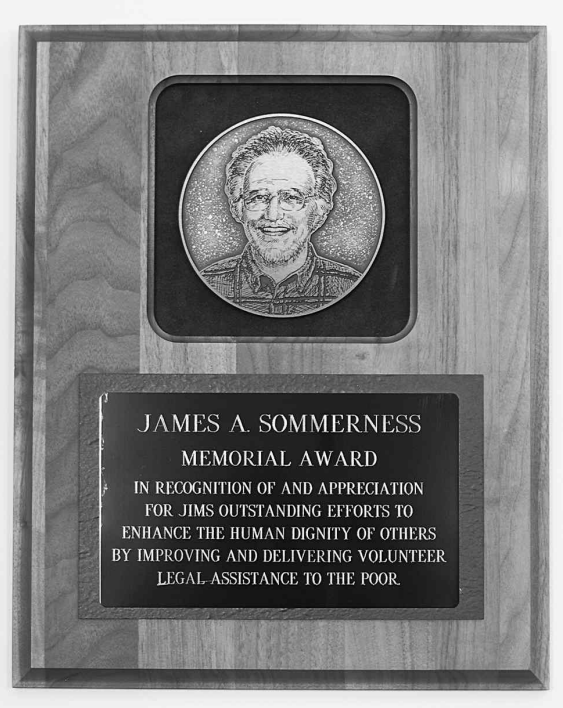


FIGURE 229 James A. Sommerness Memorial Award, Cook County Courthouse, Grand Marais, Minnesota.
Photographer: Glenn Gilyard, 2006. Photograph reproduced with the permission of Richard Gilyard and courtesy of the Cook County Court Administration, Sixth Judicial District, State of Minnesota.

Inviting participants to comment, the jurist further opined that to celebrate the work of Sommerness was what in Yiddish is called "a Mitzvah, a Mitzvah being a good thing, a thing that we should do as a community." Many people offered details about Sommerness's work. As one judge explained, Sommerness combined "being a top-notch advocate" with "professional kindness." What they described reflects the words on the plaque—Sommerness's personal commitment to the "human dignity of others," expressed through his work in "improving and delivering volunteer legal assistance to the poor." Next to the plaque was a proudly framed corduroy jacket, plainly well worn, shown in figure 229 . . . . Sommerness had been described as a lawyer steeped in the early common law ("familiar with the names of Bracton, Littleton, Coke . . . and Blackstone"), but his sartorial attire was far afield from the formality of English courtroom silks. He wore turtlenecks and the

corduroy jacket to court. This display is the one instance we have located in a courthouse that aims specifically to mark the problem of "legal assistance to the poor," in need of resources in order to seek justice.