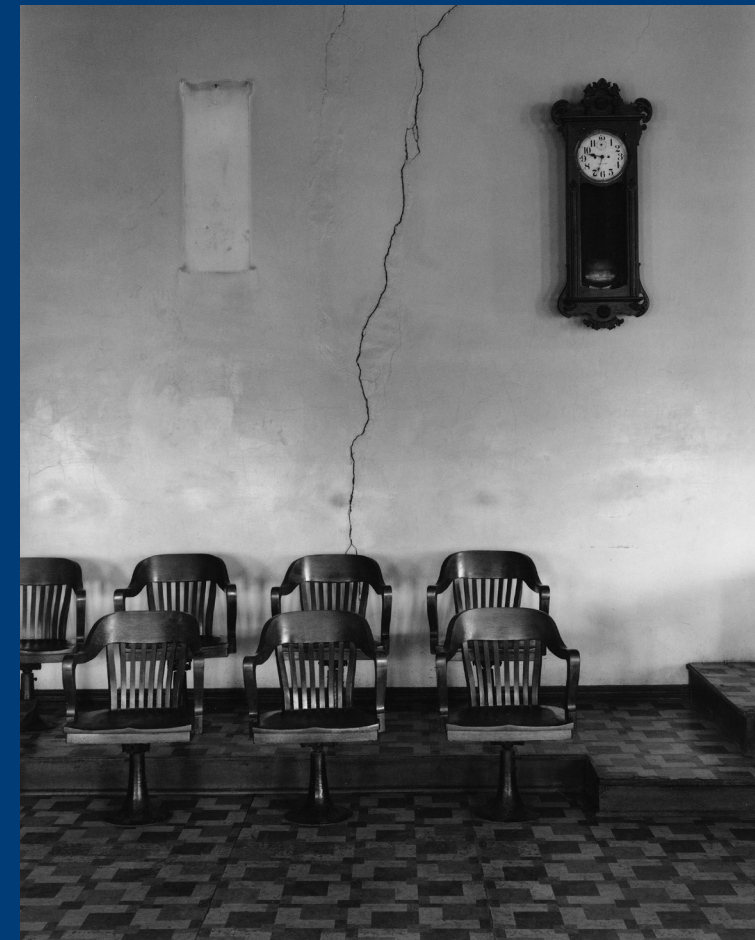


# WHO PAYS? FINES, FEES, BAIL, AND THE COST OF COURTS

Twenty-First Annual Liman Colloquium  
April 5 & 6, 2018



©William Clift Crack, Jury Chairs, Warren County Courthouse, Warrenton, Missouri, 1974-1976

**The Arthur Liman Center for Public Interest Law**

co-sponsored by

The Class Action Litigation Fund

The Robert H. Preiskel & Leon Silverman Fund

Yale Law School

21<sup>st</sup> Annual Liman Colloquium

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April 2018

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*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 21<sup>st</sup> 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.

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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

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**Address to the 85<sup>th</sup> 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

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\* *Excerpted from* Hon. Nathan L. Hecht, Chief Justice, Supreme Court of Texas, Address to the 85<sup>th</sup> 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

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\* *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 40<sup>th</sup> anniversary to its 50<sup>th</sup>, 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. . . .

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### **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

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\* *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.

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### **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,

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\* 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

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\* *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 the Washington 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. . . .

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### **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.

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\* *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).

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### **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.” . . .

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**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.

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\* 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. . . .

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**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

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\* *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 Americans 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.

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\* 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.

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### **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."

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\* *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.

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**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,

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\* *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).

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**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

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\* *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. . . .

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**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

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\* *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,<sup>106</sup> 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

Outcome	Average for Those Released	Estimated Effect of Pretrial Detention		
		No Controls	Limited Controls	Preferred Specification
Conviction	0.557	0.236** (0.001)	0.266** (0.002)	0.140** (0.002)
Guilty plea	0.528	0.240** (0.002)	0.264** (0.002)	0.133** (0.002)
Received jail sentence	0.402	0.348** (0.002)	0.317** (0.002)	0.172** (0.002)
Jail sentence stays		18.0** (0.10)	15.85** (0.10)	8.67** (0.12)
Received probation		-0.167** (0.001)	-0.125** (0.001)	-0.076** (0.001)
Probation days		-57.5** (0.45)	-41.2** (0.46)	-25.3** (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. . . .

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**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

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\* *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.

<b>Risk Factor</b>	<b>Weights</b>
<b>Failure to Appear (maximum total weight = 7 points)</b>	
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
<b>New Criminal Activity (maximum weight = 13 points)</b>	
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
<b>New Violent Criminal Activity (maximum total weight = 7 points)</b>	
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

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\* *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 11<sup>th</sup> 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.

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\* *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.*

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\* 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 (9<sup>th</sup> 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. ...

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\* *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 (9<sup>th</sup> 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 States. 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. . . .

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#### 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).

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**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

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\* *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.

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**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. . . .

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**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

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\* *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).

finer 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.

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### **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

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\* *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.

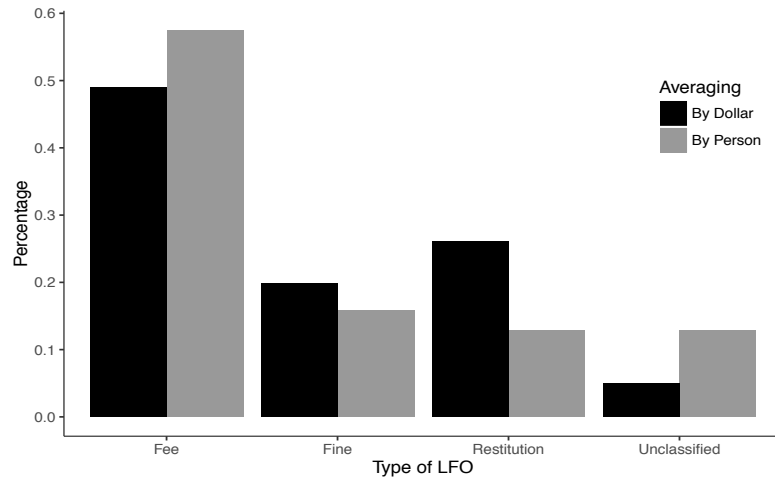
Policies like Alabama's, which distinguish among offenders on the basis of wealth, may also pay insufficient attention to indigency. Although less-wealthy individuals are not a suspect class, conditioning the restoration of the right to vote on LFOs without evaluating whether someone is truly unable 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. . . .

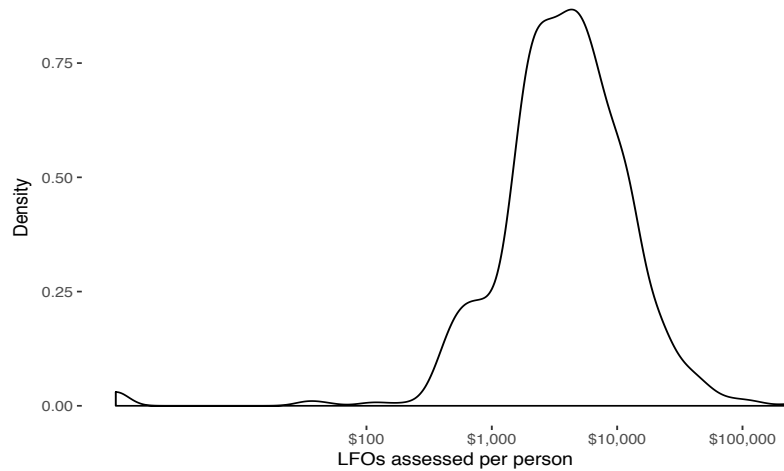
[Figure 1]



... 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.

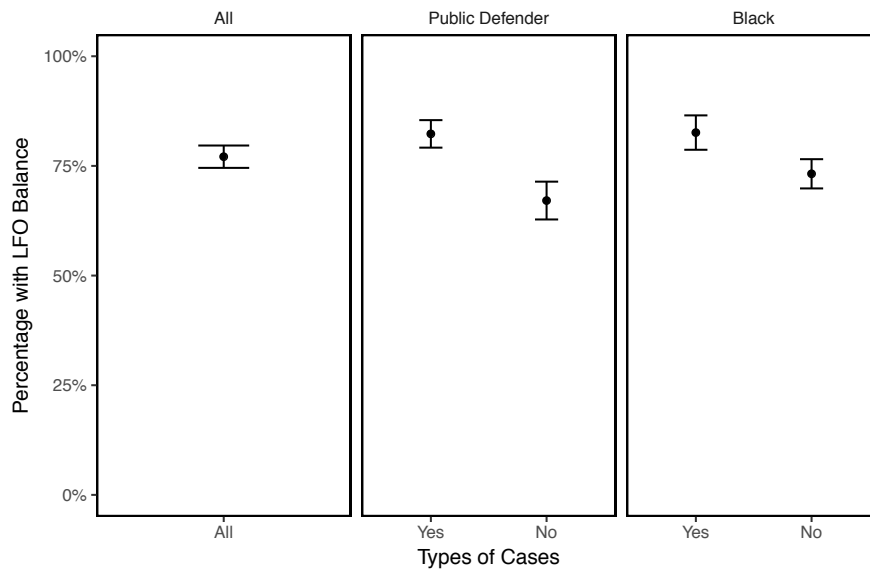
It is hard to understand how burdensome these fees might be without understanding the total amount of LFOs assessed. Figure 2 shows a kernel density plot of the total amount of criminal LFOs assessed to individuals who have completed their maximum sentence. We log-scale the x-axis because of the considerable right-skew, in which a few ex-felons are assessed more than \$100,000 over all of their cases. ... [The 25<sup>th</sup>, 50<sup>th</sup> and 75<sup>th</sup>] 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.

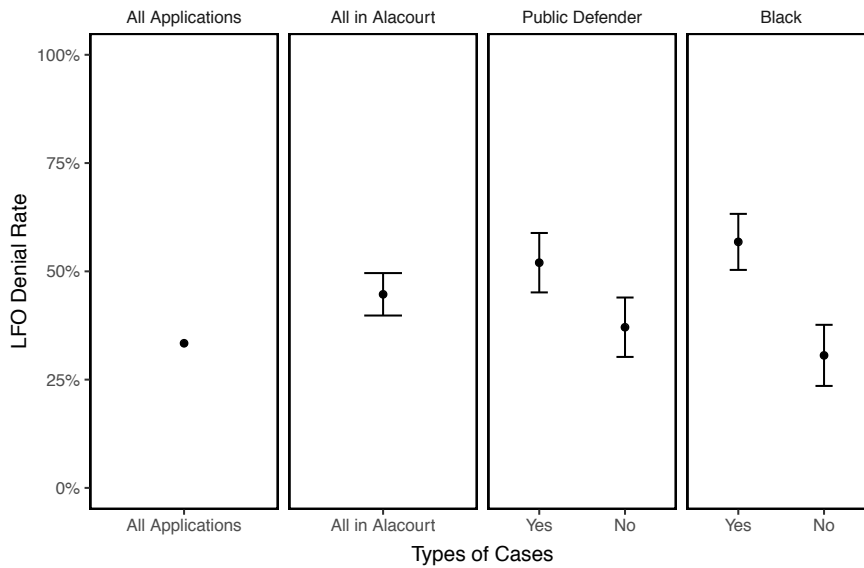
Many laws that have a disparate impact on the poor also are likely to have a disparate racial impact because of the strong link between race and wealth in America. . . .

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).

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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.

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**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. . . .

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\* 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. . . .

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**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.

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**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) O'Donnell'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 impecuniness 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. . . .

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**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. . . .

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**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. . . .

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### **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

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\* *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. . . .

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**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]he 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. . . .

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**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.

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\* 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. . . .

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## **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).

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Criminal Justice Policy Program, Harvard Law School, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM (2016).

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### **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

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\* *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](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.

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**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

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\* *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](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.

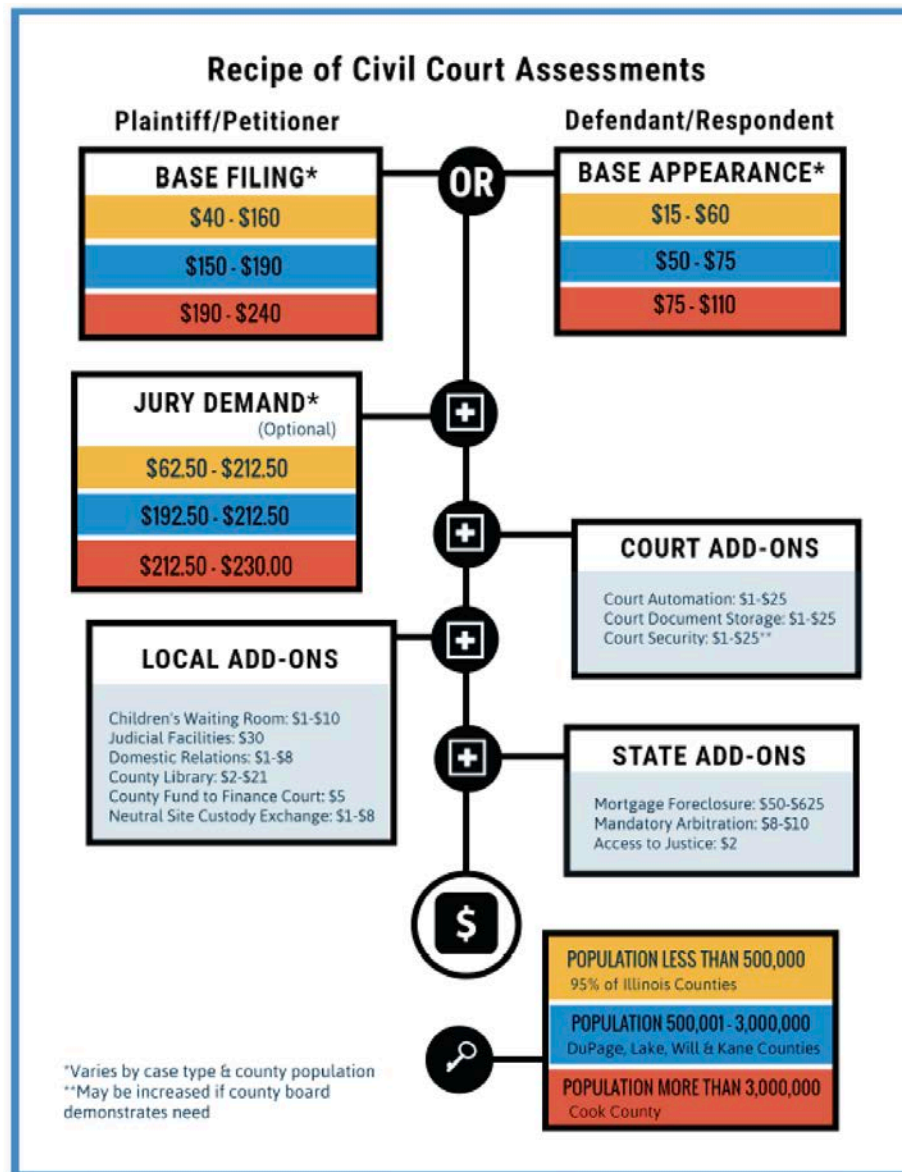
It should be noted that most fees are collected twice in each civil case, once from the plaintiff/petitioner and once from the defendant/respondent if he or she chooses to participate.

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 county 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.

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**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.

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\* 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](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.

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**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;

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\* *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.

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### **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.

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\* *Excerpt from* Fair and Just Prosecution, *FINES, FEES, AND THE POVERTY PENALTY*, [https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief\\_Fines.Fees\\_.pdf](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.

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**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

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\* *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. . . .

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## 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).

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**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.

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\* 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.

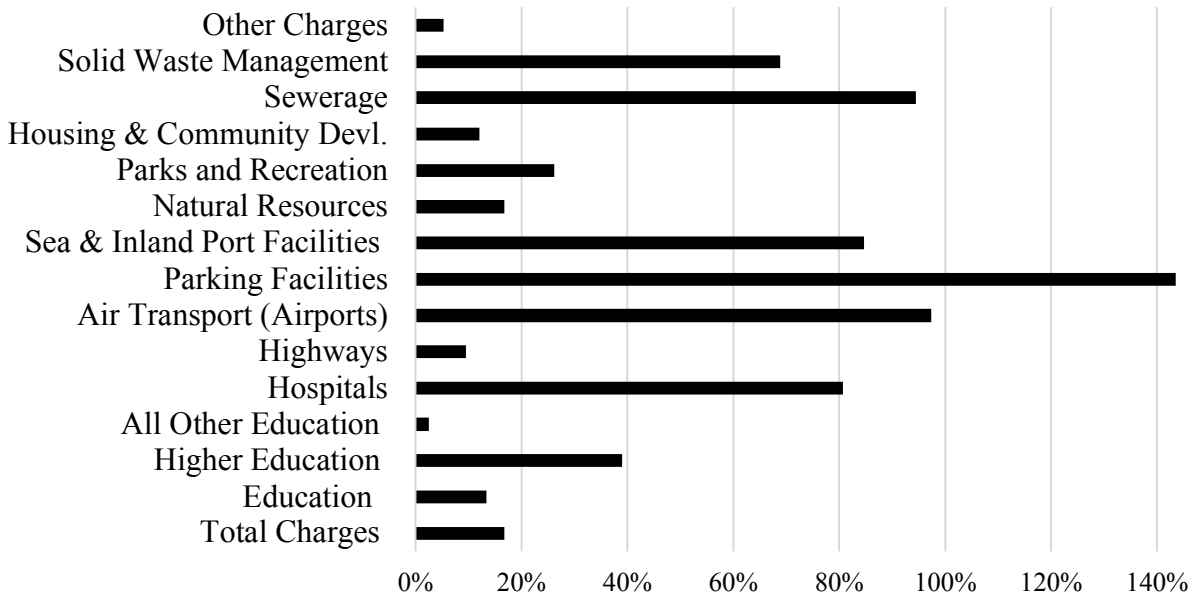
So much for the conventional public finance wisdom that the taxes on income, sales and gross receipts, and property make up the “big three” of state and local own source revenues. . . .

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
<b>General Revenue</b>	2,690,427	100.00%	1,684,879	100.00%	1,041,567	100.00%
<i>Intergovernmental from Federal</i>	584,652	21.73%	360,546	21.40%	198,591	19.07%
<i>General Own Source Revenue</i>	2,105,775	78.27%	1,324,333	78.60%	842,977	80.93%
<i>Taxes</i>	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%
<i>Charges and Miscell. Revenue</i>	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. On 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. . . .

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**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,

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\* *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'). . . .

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**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

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\* 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](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.

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**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

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\* *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 ecosystem:

- 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.

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**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

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\* *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.

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### **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

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\* *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

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\* *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.

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### **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,

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\* 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.

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**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 necessities 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

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\* 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](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. . . .

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### **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.

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\* *Excerpted from* Judith Resnik & Dennis Curtis, *A Jacket, Worn*, in *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (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.

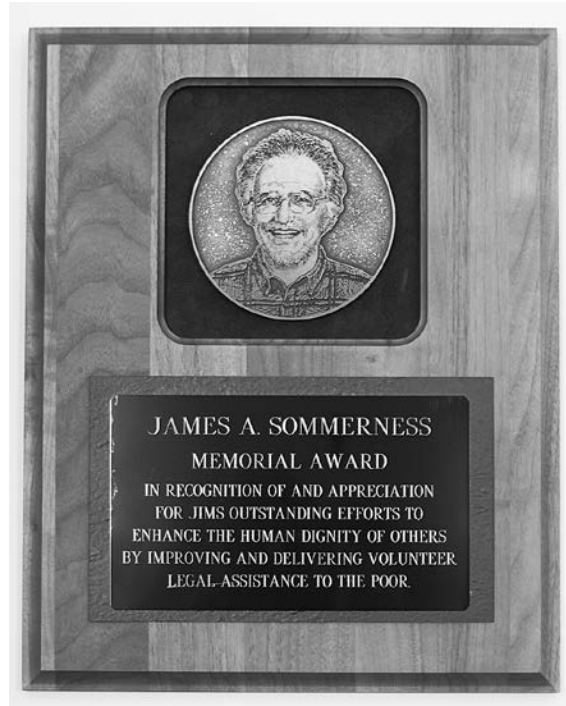


FIGURE 229 James A. Sommerness Memorial Award, Cook County Courthouse, Grand Marais, Minnesota. Photographer: Glenn Gilyard, 2006. Photograph reproduced with the permission of Richard Gilyard and courtesy of the Cook County Court Administration, Sixth Judicial District, State of Minnesota.

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.

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